



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CRIMINAL APPEAL 13 OF 2009

CALISTUS OUMA OMA YA.....APPELLANT

~VRS~

REPUBLIC.....RESPONDENT

*(Appeal from the conviction and sentence by the Principal Magistrate Hon. A. O. Osodo in Busia court
in cr. case no.2246 of 2006)*

JUDGMENT

The Appellant was jointly charged with two others but was alone convicted of robbery with violence contrary to section 296 (2) of the Penal Code and sentenced to death. The particulars of the charge were that on 17/6/2006 at Lunga sub-location in Nasewa location in Busia District of the Western Province they jointly with other not before the court robbed Christopher Wandera (PW1) of cash Ksh.20,000/= and at or immediately before or immediately after such robbery wounded the said PW1.

The prosecution evidence on which the Appellant was convicted was that on 17/6/2006 at about 11.15 p.m. PW1 woke and went out with a torch to check on his cattle boma in the compound. He was flashing the torch. The light fell on people standing next to the cattle boma. In front of them was the Appellant whom he recognized. They come from the same village. He asked the Appellant what he was doing in the compound. Immediately, the Appellant held him and wrestled him on the ground where he was set upon by being cut using pangas and beaten using sticks. The attackers did not utter a word. PW1 screamed but was immediately struck on the mouth. He pleaded with the attackers to spare his life, telling them that he had Ksh.20,000/= in the house which they could take. Some of the attackers went into the house and took the money. PW1 screamed and neighbours came. The attackers took off on seeing the neighbours. PW2 Emmanuel Oduor Wandera is PW1's son. He was woken up by the noise of his father crying for help. He opened the door and flashed his torch. His father was being cut by three people. Two were strangers but he recognized the third one. He was a villager, the Appellant. The attackers charged at him but he rushed back to the house and locked the door. The attackers locked the door from outside. It was neighbours who opened for him and he found PW1 severely injured. They chased the attackers who had run through PW1's sugarcane farm. In the chase they recovered a pair of light blue slippers (exhibit 4) which were said to belong to the Appellant. PW1 was taken to Busia District Hospital and transferred to Mukumu Mission Hospital where he was admitted for a month. He had suffered serious cuts on the head, body and limbs. His right index finger was amputated as a result. P3 (exhibit 1) indicated he had suffered "maim". The Appellant was arrested and PW1 told police that he was one of his attackers.

The Appellant gave sworn defence in which he denied that he was in the attack. He did not call witnesses.

The Appellant's Petition of Appeal basically challenged the prosecution evidence regarding

recognition. It is the responsibility of this court to reconsider and reevaluate the entire evidence and be able to reach its own independent conclusion on whether the Appellant was convicted on sufficient evidence, while appreciating that it was the trial court that had the advantage of seeing and hearing the witnesses (**Okeno v. Republic [1972] EA 32**).

There was no dispute that PW1 and PW2 knew the Appellant who came from the same village. PW1 testified that he had a three-cells torch whose light he used to recognize the Appellant. On recognizing he asked him (the Appellant) what he was doing in the home. This was before the attackers confronted him.

It is notable that PW1 immediately told the police that the Appellant was in the attack. PW3 George Owino Olendo was one of the neighbours who responded to the screams by PW1 that night. Like PW1 and PW2, he stated that they recovered the pair of sandals (exhibit – 4). These witnesses told court that they knew the sandals to belong to the Appellant. The Appellant denied that he attacked PW1, but said nothing about the sandals. He did not deny that they were his. The question would be why his sandals were found next to the scene of attack.

The trial court considered this evidence. It cited the decision in **R. v. Turnbull [1976] 3 ALL ER 549** in which it was observed as follows at page 552:

“recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

The court was alive to the fact a witness may be honest but mistaken in a case depended on identification and/or recognition. It then proceeded as follows:

“In the present case, apart from the evidence of recognition of A1 by PW2, there is also circumstantial evidence against him. The prosecution witnesses have concurred that the slippers which were left behind by the fleeing robbers belonged to the 1st accused person. He did not challenge this evidence. He failed to explain how his known slippers were found at the scene of the crime.”

We have independently review the entire evidence as recorded. We find no reason to depart from the finding by the trial court. We find that the Appellant was convicted on over-whelming evidence.

On sentence, we are alive to the fact that death penalty is the ultimate punishment for the offence of robbery with violence under section 296 (2) of the Penal Code. Where there are sufficient mitigating circumstances, however, the accused could receive a lesser punishment. In this case, the Appellant was in a group of people who were armed with pangas and sticks. They attacked PW1 and severely cut him all over the body, before taking his Ksh.20,000/= which was not recovered. The Appellant was, however, a first offender who stated that he had a family and pleaded for mercy. We are of the view that death penalty was, in the circumstances, manifestly harsh and excessive. We set it aside and in its place ask that the Appellant serves 20 years in jail. To that extend, the appeal is allowed.

Dated, signed and delivered at Bungoma this 17th day of July 2012.

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L. KIMARU

A. O. MUCHELULE

JUDGE

JUDGE