



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL APPEAL 100 OF 2011

JOHN KAKULA LOMBASIO..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from the conviction and sentence of the Senior Resident Magistrate's Court at Kakamega in Criminal Case No. 1556 of 2010 [R. NYAKUNDI CM])

JUDGMENT

The appellant, **JOHN KAKULA LOMBASIO** was charged and convicted of the offence of the Robbery with Violence contrary to Section 296 (2) of the Penal Code.

The particulars of the offence was that on the night between 13th and 14th day of August 2010 at Ivonda village, Iguhu Location in Kakamega East District within Western Province, jointly being armed with danderous weapons namely – pangas, swords, runqus, torches and whips robbed FELIX LIYAYI LIJODI of Mobile phones make – Z.T.E. 912F, DSTV, NOKIA, Wallet, cash Kshs.5,500/=, all valued at Kshs.27,942/=, and at the time of such robbery used personal violence to the said FELIX LIYAYI LIJODI.

The appellant pleaded not guilty before the lower court. After a full trial, the appellant was found guilty, convicted and sentenced to death.

The appellant was aggrieved by the conviction and sentence and appealed to this court on the following grounds:

- The trial magistrate erred in relying on purported evidence of recognition adduced by PW2 and PW3.
- No exhibits were recovered from the appellant.
- Crucial witnesses were not called.
- Contradictions in the evidence of PW2 & PW3.
- Trial magistrate rejecting the defence case.
- Lack of interpretation in language understood by the appellant.

- Charge Sheet was defective.
- The prosecution evidence was insufficient.

The facts of the prosecution case were that on the 14.8.2010 at about 5.00 a.m., the complainant, PW2 FELIX LIYAYI LIJOODI and his wife, PW3, MAURINE ESESI LIJOODI arrived at Duka moja stage in Kakamega town having arrived from Nairobi. They hired two motor cycles to ferry them to their homestead.

They met a group of five people on the way who introduced themselves as police officers. The appellant who was a clan elder was identified as amongst the group.

The complainant and his wife were attacked and robbed of their Mobile phones, wallet containing Kshs.5,000/=, a torch and other assorted items. The complainant was cut on the left hand and fell down. The matter was reported to the police. Investigations commenced. The complainant was issued with a P3 form and treated at Vihiga hospital.

After investigations, the four assailants were arrested and charged. After the trial the others were acquitted for lack of sufficient evidence on identification. The appellant who was known to the victims as a clan elder was convicted and sentenced to death.

In his defence the appellant gave sworn evidence. He stated that he had gone to Isuhu stage to wait for his son who had telephoned him from Nairobi. While at the stage, he was accosted by people who identified themselves as police officers. He was hijacked by the said group which also attacked the complainants herein. That he (the appellant) escaped when the complainant was being attacked. However, the appellant was identified as one of the attackers and was arrested and charged.

This being the first appeal, it is the duty of this court to re-evaluate and to re-consider the evidence adduced before the trial magistrate's court so as to reach its own independent determination whether or not to uphold the conviction of the appellant. In reaching its decision, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any determination regarding the demeanour of the witnesses (*see Okeno v Republic [1972] EA 32*).

We have considered the grounds of appeal and the submissions by the appellant and by Mr. Orinda, the State Counsel. The State conceded to the appeal.

Having considered and re-evaluated the evidence adduced before the trial court, there is no doubt that the complainant was robbed of his properties. There is no doubt also that the appellant was known to the complainant and the wife (PW3) and the two boda-boda operators, PW4 ERICK SHITAKWA and PW5, VINCENT MUKASA.

The evidence of these witnesses was that of recognition. There was sufficient light from the two motor cycles at the scene.

The evidence of PW1, CHARLES LEPAR MRIJO, the Clinical Officer confirmed that the complainant was injured on the left arm. The P3 form and the treatment notes were produced as exhibits.

The appellant did not deny that he was at the scene where the offence took place. What the appellant has contended was that he was also a victim of the same robbers who hijacked him and went on to attack the complainant in his presence. It is clear from the evidence of the appellant and that of the prosecution witnesses that the appellant is a village elder. However, there is no evidence of the investigations carried out before the appellant was charged. The two police officers who testified in the trial before the lower court were PW6, IP. ADRIAN KWILO who carried out the Identification Parades and PW4, PC. RAYMOND LIMO whose evidence is that his investigations involved the recording of statements. There is no evidence to explain the arrest and the subsequent charging of the appellant.

The defence raised doubts on the Prosecution case. The conviction was therefore not safe. Consequently, we quash the conviction and set aside the sentence. The appellant is at liberty unless otherwise lawfully held.

It is so ordered.

Judgment delivered at Kakamega on the 20th day of September, 2012

S. J. CHITEMBWE

J U D G E

B. THURANIRA JADEN

J U D G E