



REPUBLIC OF KENYA

High Court at Kakamega

Criminal Appeal 127 of 2008

FRED OKELLO ----- APPELLANT

V E R S U S

REPUBLIC ----- RESPONDENT

(Appeal against both conviction and sentence of the Chief Magistrate's

Court at Kakamega in Criminal Case No. 2041 of 2007 [H. I. ONG'UDI, CM])

J U D G M E N T

The Appellant, **FRED AKELLO** was charged with the offence of robbery contrary to Section 296 (2) of the Penal Code.

The particulars of the offence were that:-

“on the 25th day of May 2007 at Iweterere village, hianda Sub-location, South Kabras Location in Kakamega District within the Western Province, jointly with others not before court, while armed with dangerous weapons namely pangas and rungus robbed ERASTUS OYUKA two mattresses, one torch and cash Kshs.2,000/= all to the value of Kshs.4,230 and at the time of such robbery used actual violence to the said ERASTUS OYUKA.”

After a full trial, the appellant was convicted and sentenced to death. The appellant was aggrieved by the conviction and appealed to this court.

The appellant raised several grounds of appeal which can be summarized as follows:-

- The circumstances of the offence were not favourable for positive identification.
- Crucial prosecution witnesses were not called to testify.
- The evidence adduced by the prosecution witnesses was inconsistent and contradictory.
- There was no pre-trial disclosure of the evidence of prosecution witnesses.
- The appellant's defence of alibi was not considered.

The appellant relied on written submissions which essentially expound on the grounds of appeal.

Mr. Orinda, the State Counsel opposed the appeal. He submitted that the evidence of identification was reliable and that the conviction was safe.

This being a first appeal, it is the duty of this court to re-evaluate the evidence and draw its own conclusions (*see OKENO V R. [1972] EA 32*).

The case for the prosecution was that on 25.5.07 at about 2.00 a.m., the complainant ERASTUS LUKAS INGUTYA was in his house sleeping. The complainant was with his wife MIRRIAM RASTO LUCHUSHI (PW2) and their two year old child. There was a bang on the window. A group of about eight people entered the house. A torch was flashed on the complainant. The assailants who were armed with pangas and rungu attacked the complainant and cut him on the neck, the palm of the right hand and the left thumb. The complainant jumped out of bed and struggled with the intruders. The complainant jumped on one of the intruders and a struggle ensued. In the process the torch the intruder was holding fell down. The torch started rolling on the floor. According to the complainant the torchlight enabled him to see the appellant who was standing at the door. The appellant had a panga and a rungu and hit the complainant on the forehead with the rungu. The complainant fell down outside the house. The complainant found four other attackers outside. The complainant ran for his dear life while screaming for help. The complainant was arrested by a neighbour who gave him something to wear. The complainant and the neighbour returned to the scene. They found the attackers had left. The complainant's wooden box was broken and Kshs.2,000/= stolen from therein. A mattress and a torch were also missing from the house.

The complainant was taken to hospital where he was admitted for about two weeks. A P3 form was issued.

The case was reported at Malava Police Station. The appellant who was named by the complainant as one of the robbers was arrested by the village elder who was accompanied by some youths. After investigations, the appellant was charged with the present offence.

The appellant in his defence gave sworn evidence. He did not call any witnesses. He stated that on 27.5.07 at about 6.00 p.m. he was at home when he was arrested by the Chief and the village elder who tied up his hands. He was escorted to the Police Station where he remained in custody for 15 days before he was arraigned in court. The appellant denied the charge and stated that the prosecution witnesses were from one family. He also stated that the weapons used in the commission of the offence were not produced as exhibits.

It is quite clear from the judgment of the trial magistrate that the appellant was convicted on the basis of the evidence of recognition adduced by PW1 and PW2. The evidence of the complainant (PW1) shows that he was struggling with a group of not less than six assailants. The complainant described the torch that one of the assailants had as the one that enabled him to see the appellant who was standing at the door. According to the complainant, he jumped out of bed and fell on one of the assailants and the torch fell down. The complainant pushed the said assailant to the sitting room. The torch was rolling on the floor and it is then that the complainant saw the appellant at the door and jumped at him. The appellant who was armed with a rungu and a panga hit the complainant on the forehead with the rungu. The complainant and the appellant then fell on the outside of the house. The complainant saw four more appellants outside before he (complainant) fled from the scene.

Although the complainant described the appellant as someone he knew as a distant neighbour, the circumstances of the identification were difficult. The offence took place at night. The source of light that enabled the complainant to see was from a torch that was rolling on the floor. With the complainant standing at the door, it does not come out clearly from the evidence how the light illuminated the face of a standing person. The distance between the torch and where the appellant was standing was not described in the evidence of the complainant. There is also no evidence in regard to the intensity of the light.

PW2, the complainant's wife who was with him at the material time testified that she saw eight assailants. PW2's evidence was that a torch shone on the appellant and she was able to see him. PW2

testified that she knew the appellant by appearance. The evidence of PW2 failed to state which torch she was referring to. The intensity of the light was also not described. The evidence of identification by PW2 was also in difficult circumstance.

Although the evidence of both PW1 and PW2 established the fact of robbery, their evidence on identification was not free from the risk of error.

The other witnesses who testified were PW3, **WILLIAM MOSE BUNESI**, the village elder who assisted in arresting the appellant and the evidence of PW4, **IP KARANJA WAINAINA**, the Investigating Officer. The evidence of these two witnesses is however on the formal aspects of the case and is of no probative value.

PW5, **JAPHETH MALOBA**, the Clinical Officer testified on the injuries sustained by the complainant. There is no doubt that the complainant was injured.

The appellant's evidence during the defence case dwelt on his arrest. He denied the offence. The prosecution failed to prove their case beyond reasonable doubt. The conviction is not safe.

Consequently, we quash the conviction and set aside the sentence. The appellant is at liberty unless otherwise lawfully held.

Judgment delivered, dated and signed at Kakamega on the 24th day of October, 2012

S. J. CHITEMBWE
J U D G E

B. THURANIRA JADEN
J U D G E