



REPUBLIC OF KENYA
High Court at Kakamega
Criminal Appeal 28 of 2012

BEN MACHIO MWALA----- APPELLANT

V E R S U S

REPUBLIC ----- RESPONDENT

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

Court at Butali in Criminal Case No. 373 of 2011 [S. N. OBUYA, SRM])

J U D G M E N T

The Appellant, **BEN MACHIO MWALA** was charged Robbery with violence contrary to Section 296 (2) of the Penal Code.

The particulars of the offence are that on the 28th June 2011 at Kamuchisu village, Burudu Sub-location, West Kabras Location in Kakamega North District within Western Province jointly with others not before court while armed with a Rifle and pangas robbed JOSEPH SENJEKHO SHANGALA one solar lamp valued at Kshs.700, twenty tins of dry maize valued at Kshs.2,400, three tins of dry beans valued at Kshs.550 all total valued at Kshs.4,650 and cash money Kshs.40,000/= the property of the said JOSEPH SENJEKHO SHANGALA.

The appellant pleaded not guilty. After a full trial, the appellant was convicted and sentenced to death. The appellant was aggrieved by the conviction and sentence and appealed to this court.

The grounds of appeal can be summarized as follows;

- The first report was not produced.
- The evidence of identification was flawed.
- The Identification parade was prejudicial.
- The trial court relied on the evidence of a single witness.
- The Prosecution case was not proved beyond reasonable doubt.

During the hearing of the appeal, the appellant made oral submissions which essentially reiterated his

grounds of appeal.

Mr. Orinda appeared for the state. Mr. Orinda supported the conviction and submitted that two witnesses testified that they knew the appellant and also knew his voice.

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 the complainant, PW1, **JOSEPH SENJEKHO SHANGALA** and his wife PW2, **RUTH KHALECHE SHANGALA** were in their house when at about 8.45 p.m. they heard a voice outside. When the complainant asked who was out there a voice replied that it was a customer who wanted to buy maize. When the complainant opened the door, he was accosted by a gang of about eight (8) people who were armed with a gun, torches, pangas and rungas.

The complainant was robbed of Kshs.40,000/=, 20 tins of maize, three tins of beans and the solar lamp which the complainant was using. The assailants fled after locking the door of the house from outside.

The complainant's wife screamed for help. Neighbours and the village elder came to the scene but found the assailants had already fled. The complainant gave the name of the appellant as one of the assailants. The complainant reported the robbery to the Assistant Chief and to Malava Police Station.

The appellant was later arrested by members of public and escorted to the Police Station. **PW3, PC NICHOLAS NDIRANGO** after investigations had the appellant charged.

The appellant in his defence gave sworn evidence. No witnesses were called. The appellant's case is that on 30.6.11 at about 2.00 p.m. he was arrested by four vigilantes who tied him up with ropes and escorted him to the A.P Camp. The appellant was then escorted to Malava Police Station where he recorded a statement. The complainant and his wife came to the police station and an identification parade was carried out. The complainant identified him. The appellant further stated that the complainant knew him as he was a relative. The appellant was subsequently charged.

The appellant was convicted by the trial magistrate on the basis of evidence of recognition adduced by the complainant and his wife (PW1 & PW2). PW1 and PW2 gave a corroborative account of evidence on how they were attacked and robbed of their aforesaid properties. Each of the two witnesses testified that the appellant was known to them. Each of the two witnesses also pointed out that they could see their attackers clearly with the aid of the solar lamp that they had lit in their house and with the torch light from the torches that the assailants had carried.

The complainant described the light from the solar lamp as very bright. The complainant was able to describe the appellant's mode of dress at the material time as black clothes and jacket. The complainant also described a scar on the appellant's upper lip as a defining mark and also stated he knew the appellant as they came from the same area. The complainant described the appellant as the one who pushed him and held him by the neck and pointed the gun at his chest. The encounter described between the complainant and the appellant was therefore close. The complainant gave the full name of the appellant to the neighbours who responded to the distress call and to the police.

The complainant's wife (PW2) also described the appellant as a neighbor and an in-law. She described the way the appellant was dressed, stating that the appellant wore uniform jacket, boots and cap but his face was not covered. She described the appellant as the one who carried the gun, a torch and a whip. She further testified that the appellant is the one who spoke to her and demanded money and threatened to kill the complainant. According to PW2, she even knew the appellant's voice. The evidence of complainant and his wife (PW1 & PW2) is corroborative and leaves no doubt that the robbery took place. Their evidence of recognition is clear. They both gave detailed evidence describing the appellant as a neighbour who was known to them. We find the light from the solar lamp and the torches as described by the witnesses enabled them to clearly see the appellant during the robbery.

As stated in the case of ***ANJONI AND ANOR. V R. [1980] KLR*** “***a case of recognition, not identification, is more satisfactory, more assuring, and more reliable than that of identification of a stranger because it depends with the personal knowledge of the assailant in one form or the other.***”

The complainant produced a receipt to confirm that he owned the solar lamp. He also produced statements from West Kenya Sugar Company to show that he had been paid Kshs.74,800/= for harvested cane. The complainant explained that he had used some of the money and was remaining with Kshs.40,000/= at the time of the robbery.

The evidence of PW3, the Investigating Officer confirmed that the report of robbery was made at the police station and investigations carried out. Although the Investigating Officer carried out a search at the house of the appellant, nothing was recovered there. The Investigating Officer also visited the complainant’s house. The Investigating Officer’s evidence also shows that the complainant and the appellants’ homes are about two kilometers apart. This further corroborated the evidence of the complainant and his wife (PW1 & PW2) that they come from the same area with the appellant.

The statement of defence by the appellant dwells on the fact of his arrest. The appellant faulted the identification parade carried out whereby he was identified by the complainant and his wife as these were people who knew him. The defence therefore conceded that the complainant and the wife were people who knew him.

We observe from the evidence on record that the officer who carried out the identification parade did not testify. Probably the Prosecution appreciated the futility of the calling of such evidence when the parties knew each other. However, the carrying out of the parade was not prejudicial to the appellant as the evidence of the parade was of no value to the prosecution case.

The appellant during cross-examination stated that he had no dispute with the complainant’s family. Indeed even the complainant’s wife (PW2) had stated in her evidence that they had no grudge with the appellant. There seems to be no reason why the complainant would give false evidence against the appellant.

On the issue of the first report, the record shows at the end of the complainant’s evidence that the first report was read out to the appellant and that his name appeared there as one of the attackers.

The appellant in his submissions during the appeal stated that he had a witness who was not facilitated to attend court. The record however shows that after S.211 CPC was explained to the appellant, he stated that he had no witness to call. The appellant complained at the close of the defence case that he had no witness to call. That ground of appeal therefore has no merit.

The defence offered by the appellant is therefore not convincing in view of the overwhelming prosecution evidence.

We are satisfied that the prosecution case against the appellant was proved beyond any reasonable doubt. Consequently, we uphold the conviction. The appeal has no merits and is dismissed.

Judgment delivered, dated and signed at Kakamega on the 17th day of October, 2012

S. J. CHITEMBWE
J U D G E

B. THURANIRA JADEN
J U D G E