



REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL NO.1 OF 2010

(Appeal arising from BGM CM CR. NO.1263 of 2009)

CHRISPINUS WAFULA MASIBO.....APPELLANT

~VRS~

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant was convicted by Bungoma Senior Resident Magistrate of two counts of robbery with violence contrary to section 296 (2) of the Penal Code and sentenced to death. He appealed in this court against both conviction and sentence.

Mr. Makali argued the eight grounds of appeal which he lumped up together in two limbs: Lack of identification and court shifting the burden of proof to the Appellant. It was the submission of the Appellant's counsel that the two complainants did not identify the Appellant and neither did the other witnesses.

The state conceded to the appeal on the same grounds advanced by the Appellant. I have perused the evidence of PW1 and PW2 who are the complainants herein. None of them said he identified the assailants. Each of them narrated how they were attacked by a gunman wearing a black T-shirt and another person. PW1 fled from his shop and left his assailants picking items therein. PW2 said he was also attacked by a gunman and another person. He was robbed of several items from the shop including twelve mobile phones, cash money and batteries. PW2 attended a parade after some suspects were arrested. He said he was not able to identify anyone. PW2 testified that he saw one of the parade members wearing the red sweater that the witness had seen the gunman wearing at the time of the robbery. PW3 did not identify the people who robbed PW1 and PW2 of their properties. Neither did PW4 and PW5 identify anyone. PW5 stated in his evidence in chief:

“I did not identify any of the criminals because it was dark.”

PW6 was the investigating officer. He testified that the Appellant reported to him that he had been robbed of his motorcycle by men who had hired him to ferry them from Bungoma town to Sang'alo. PW6 interrogated the Appellant and was not satisfied with his explanation. A report had been made by PW1 and PW2 of robbery of a motorbike. PW6 treated the Appellant as a suspect in the robbery case. The accused repeated the same story in his defence that he was arrested when he went to report that he had been robbed of his motorbike by people who posed as customers.

We have evaluated the evidence of the six (6) prosecution witnesses. We find not an iota of evidence

on identification. The red sweater the Appellant wore was produced as an exhibit. There was no identifying mark on the sweater alleged to have been worn by the gunman during the incident. The trial magistrate had no evidence of identification before him. The court relied on PW6 evidence which was also based on suspicion.

Identification is crucial in a case of robbery with violence. In absence of positive identification, the magistrate had no option but to acquit the Appellant. It was wrong for the magistrate to fault the Appellant for reporting the robbery at Bungoma instead of at Sang'alo. The accused said in his defence that he was hired from Bungoma to take his assailants to Sang'alo market which is about three kilometres from Bungoma. He could have reported at any one of the two stations.

It was wrong for the trial magistrate to shift the burden of proof to the Appellant. In his judgment the court said that the defence of the Appellant was fraught and filled with gaps. Further that, the Appellant never explained how he was gagged with his vest in the forest and why he did not expel the vest from his mouth. The magistrate also castigated the defence that the Appellant's hands and legs were tied together using a rope. The court said the length of the rope was not adequate to tie both the legs and the hands. I agree with the defence that this shifting of the burden of proof to the appellant was misguided and contrary to procedure.

Mr. Makali referred this court to the case of **Mbugua Kariuki -vrs- Republic where it was held:**

“In a criminal case, the onus of proof is upon the prosecution to prove the accused guilty beyond reasonable doubt; and if the defence raises an issue such as provocation, alibi or self-defence the prosecution must negate the defence beyond reasonable doubt and the accused assumed no onus in respect of such defence.”

We are in agreement with the findings of Justice Miller (as he then was) on that issue. The prosecution solely bears the burden of proof in criminal cases save for a few exceptions where the burden may shift.

It is our finding that the two counts of robbery with violence were not proved beyond any reasonable doubt against the Appellant. The trial magistrate erred both in law and infact in convicting the Appellant of charges which were not supported by evidence.

It was also incorrect to impose a death sentence in both counts. The right thing was to impose sentence on the first count and hold in abeyance the sentence in the second count. One cannot be sentenced to death twice in the same case. The sentence on the second count was based on the wrong principle.

We therefore allow the appeal by quashing the conviction and setting aside the sentences in both counts. The Appellant is hereby set at liberty unless otherwise lawfully held.

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D. A. ONYANCHA
JUDGE

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F. N. MUCHEMI
JUDGE

Judgment dated and delivered in open court on the 31st day of May 2010 in the presence of the Appellant, the State Counsel Mr. Ogoti.

F. N. MUCHEMI
JUDGE