



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO.118 OF 2003

ABDU MOSES

WABIANGA.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

J U D G E M E N T

The Appellant, Abdu Moses Wabianga, was originally charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. He was also in a second count charged with the offence of being unlawfully in Kenya contrary to Section 13(2) of the Immigration Act, Cap 172 of the Laws of Kenya. He was convicted on both counts and sentenced to death on the count of robbery and to a fine of Kshs3000/= or in default 3 months imprisonment in respect of the second count.

The summary of facts is as follows:-

That in the night of 8.7.2001 at 11.00 p.m the complainant PW1 was sleeping in his house in the presence of his wife Violet Nasila PW4. When the dogs barked and the complainant opened the door to check that was happening, he was accosted by four people. The attackers assaulted him by slapping and kicking him. He was then pushed to the floor as the intruders entered his house. Soon they demanded for Kshs.100,000/= from complainant's wife while the complainant was still held down by one of the robbers. The robbers then pinned him on the floor by placing the sofa set on him.

When the complainant's wife declared that they had no money, the robbers went out of the house. The complainant then raised alarm as his wife assisted him out of the sofa set. Soon neighbours came to assist

them.

Soon thereafter the complainant realized that the robbers had broken into his canteen situated next to the living house and had stolen quenchers, sodas and cigarettes. He discovered that the robbers had stolen a seagull sewing machine head, a pair of shoes and 500/=.

It is in complainant's evidence also that the robbers carried torches which they directed at the complainant. He stated that using the torch light he was able to see that one of the robbers carried a gun. In the morning following the robbery, the complainant reported the incident to Wabukonyi Police Post. Soon information came in that some of his stolen items had been recovered and that some suspects had been arrested. The complainant went to the chief's camp at Naitiri and saw two suspects. He then saw his sewing machine-head and shoes which he both identified. Even the bag carrying the two items, he identified as his. He was also shown four torches, a toy gun and metal bar said to have been found with the suspects.

PW2 Leoneda Mukoya Mbita is a resident of Naitiri in the same locality as the complainant Michael Wafula Wafubwa. At about the same time on 8.7.2001 which was 11 p.m she was sleeping in her house. She suddenly saw a flashlight at her window. People from outside told her to open her door which she did, thinking they were policemen. When she realized the people were not the police she suddenly shut the door screaming for help. The people ran away. Soon PW1 came and stated that he had been attacked and robbed, probably by the same group of people. They went to the clan elder's house and reported the incident. She got to know of the items stolen from the complainant.

The next day a report came out that some people had been arrested for the robbery and had been found with some of the stolen items. PW2 then asserted that she had seen the appellant when the thieves went to her house and further claimed that the appellant was carrying a metal rod. She said she identified him using a light from a lantern which was on. She also claimed that the sewing machine head was hers and that her daughter, PW5, used to keep it in the house of the complainant. She produced its purchase receipt and identified the machine head.

The village elder, Richard Makhanu gave evidence as PW3. He testified that on 9.7.2001 about 9.00 a.m he was heading to Assistant Chief's home when he heard screams from members of the public claiming that thieves had ran into a maize plantation. Soon after, two suspects were flushed out. One of them was the appellant. The two carried a bag Exh 3 which carried a seagull sewing machine head, a wooden toy-gun, four torches, a pair of white shoes and a metal rod – Exh 1-6. PW3 went on to say that the suspects were arrested by the members of the public and taken to the Assistant chief's camp at Naitiri. Later complainant and PW2 and her daughter went there and identified the items as those stolen during the robbery the night before. Appellant was then taken to Bungoma Police Station after which the witnesses recorded their evidence statements.

PW4, Paul Nalianya, was one of the witnesses who responded to alarms that suspected thieves had entered a maize plantation in the morning of 9.7.2001. He said that he was present and saw appellant and another, flushed out of the maize plantation. He witnessed the items being carried by them as the sewing machine head, shoes, a toy-gun and a metal rod. He saw the complainant and another identify the items as having been stolen the night before. He learnt the two suspects were Ugandans.

PW5 Violent Nasila was the daughter of PW2. She said she is a tailor and was sleeping during the night of 8.7.2007. She said that she at 11 p.m, heard people ask her mother to open the door because they were police. She got afraid and began screaming which made the people run away. Soon neighbours answered the screams. PW1 arrived first and stated he had been robbed. They informed the clan elder. In the

morning the appellant and another were found with stolen items, were arrested and taken to Naitiri Assistant Chief's Camp. She and her mother identified the items found with the suspects as those stolen the night before.

PW6, No.38538 Corp. Gideon Maruti of Bungoma CID office got a report of the arrest and the appellant and another. He went to Naitiri AP Camp and collected the suspects and later charged them at Bungoma. He collected the items and kept them and later produced them as exhibits. The appellant's companion was taken to Kitale where he was wanted for other offences.

In his defence the appellant said he was Ugandan. He said he was a businessman in Kenya in agricultural produce. He denied this charge of robbery. He said he had delivered 6 bags of beans to one Moses Chenani. That he on 9.7.2001, went to Naitiri to be paid the purchase money. That while waiting to be paid he learnt of the robbery which had taken place there the night before. He and another person wanted to see Moses Chenani and were crossing the road when vigilantes suddenly arrested them and took them to Naitiri Chief's Camp after being beaten. That after when he could not bribe the APs he was taken to Bungoma by them and charged with this offence which he did not commit.

The Honourable Trial Magistrate considered the evidence against the appellant. He concluded that the appellant was found hiding in the maize plantation the next morning after the robbery. He believed the evidence that the appellant was found with a bag carrying the items stolen the night before during the robbery. He believed also that the bag was carrying four torches most likely used during the robbery. He felt that the evidence of recent possession although circumstantial, was present and was overwhelming since the appellant did not give a reasonable explanation of his innocence. He did not believe the veracity of appellant's explanation. He believed that if appellant was indeed a businessman as he claimed, he would have produced documents showing legitimacy of his trade. He found the defence hollow and without hallmarks of truth. He accordingly convicted the appellant of the robbery charge as well as that of being in Kenya unlawfully. He gave a sentence of death as well as of a fine or imprisonment for the second offence.

We have carefully and independently considered the evidence against the appellant. We observe that there was no evidence of positive identification by the complainant and other prosecution witnesses, of the appellant. We are of the view that neither the complainant, PW1 nor his neighbor PW2, really properly saw the face of the robbers. This was admitted by both witnesses although PW2 tried to change his first testimony to say that he saw and identified the appellant. That did not improve her credibility

We therefore observe that the Honourable trial Magistrate was entitled to finally rely on circumstantial evidence of recent possession to arrive at a conviction.

There is sufficient evidence that the appellant and another were in the morning of 9.7.2001 seen running into a maize plantation carrying some bag. Because a robbery had been reported in the area, the two persons were suspected and pursued. When they were flushed out of the maize plantation, the appellant was found with the bag carrying the items later identified as those stolen during the robbery the night before. The bag also was found carrying four torches and a metal rod. The two were taken to the Assistant chief's APs Camp where PW1, PW2 and PW5 identified the stolen items as theirs. We have ourselves as the appellate court after a careful consideration, believed the above facts to be true.

In the above circumstances it behooved upon the appellant to give a reasonable probable explanation showing that his possession of those items was innocent. He failed to give such explanation, choosing to

avoid saying anything concerning the possession. We are conscious of the fact that the burden to give such explanation arose from the fact that appellant was found in possession of items which had been recently stolen in a robbery. Common sense demanded that he explains how such items were found in his possession. Otherwise the reasonable conclusion would be that he was the one who stole the items during the reported robbery.

Having failed to give a reasonable explanation showing his innocence, the failure gave the trial court no other reasonable finding except to conclude that appellant was the thief or among the thieves who robbed the complainant.

We accordingly find that the Honourable trial Magistrate's conviction was proper and sound. We find it safe to be left standing.

We observe that the trial court convicted on both counts of robbery with violence and that of being in Kenya unlawfully. It is our view that having found sufficient evidence to convict on the capital offence, he need not have found it necessary to pronounce a sentence in respect of the second minor offence. It is unfortunate that he did so and that the appellant already has served the sentence.

In the circumstances we proceed to dismiss this appeal for the reasons discussed above. We note that the appellant had given his mitigation which the trial magistrate appears to have considered before pronouncing the sentence of death.

Dated and delivered at Bungoma this 30TH day of May 2011,

F.N. MUCHEMI

JUDGE.

D.A. ONYANCHA

JUDGE.