



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUSIA

CRA NO.54 OF 2010

*(From original BSA PM CR. No.952 of 2008)*

GEORGE OYEINGO

BARASA.....APPELLANT

~VRS~

REPUBLIC.....RESPONDENT

### JUDGMENT

The Appellant George Onyiengo Barasa was convicted by Busia Principal Magistrate of the offence of robbery with violence contrary to section 296(2) of the Penal Code and sentenced to death. He lodged this appeal against both conviction and sentence.

Mr. Shitsama for the Appellant argued the grounds of appeal which may be summarized as follows:

- a) *Lack of sufficient evidence;*
- b) *Contradictory evidence;*
- c) *Failure of positive identification;*
- d) *Failure to consider the alibi defence.*

The state opposed the appeal. Mr. Okeyo submitted that the Appellant was positively identified by PW1 and PW4 in two parades which were properly constituted.

The facts of the case is that PW2 the driver and PW1 the conductor of Public Service Vehicle registration number KBC 260 B Nissan Shark was on hire by the Appellant to transport passengers from Sabatia to Mumias. At Mumias the witnesses were attacked and robbed by some of the passengers led by the Appellant. The two were beaten up and abandoned in the bush. The vehicle had not been recovered at the time the trial took place. PW1 and PW4 later identified the Appellant in a parade.

PW1 testified that the Appellant approached him to hire the vehicle on 14/08/2008. He paid a deposit of Ksh.3,000/= cash to clear the balance of Ksh.5,000/= the following day on completion of the job. On 15/08/2008 the Appellant, the driver and the conductor met at Mudete Market and picked passengers at Mudete Tea Factory. The Appellants sat at the front next to the driver. He directed the vehicle carrying eight people including the driver and the conductor to Mumias Sugar Factory, then to Ejinja Junction. This is the place where the conductor was attacked by two young men sitted in the rear of the vehicle. The Appellant pushed the driver out of the vehicle and took over the driving wheel for the next two hours. PW1 was beaten up and drugs administered on him which made him unconscious. The witness found himself in the bush the following day. He was robbed of cash Ksh.6,000/=. He later identified the Appellant at a parade at Busia Police Station.

PW2 testified on how he drove the vehicle hired by the Appellant from Mudete to Mumias. From Mumias Sugar Factory, he drove to Mayoni where one passenger alighted. The person came round the vehicle to the driver's door. He bundled and tied the driver on the seat. Another person drove the car for about 4 hours. PW2 was beaten and forced to take a concoction which made him unconscious. He was rescued by members of the public the following day from inside a plantation. PW2 was locked in the police cells when he heard a familiar voice of one of the people who had attacked him. He notified the police and that particular person turned out to be the Appellant. PW2 was released and the Appellant left under interrogation.

PW3 was the owner of the vehicle and he did not witness the incident. PW4 was a conductor at Mudete Bus Stage. He was approached by three men including the Appellant. They wanted to hire a vehicle. He introduced them to PW1 and they negotiated the charges. It was later that PW4 learnt that the vehicle of PW1 had been stolen. PW4 went to Busia Police Station on 07/10/2008 where he identified the Appellant in a parade as one of the three men he introduced to PW1.

PW5 was the parade officer. He testified on how he conducted two parades where pW1 identified the Appellant. No one was identified in the second parade.

PW6 is the officer who picked the Appellant from Kakamega Police station and took him to Busia where the parades were held and charges preferred against the Appellant.

PW7 conducted the parade where PW2 identified the Appellant. PW8 examined PW1 and found that he had injuries on the face, eyes, head and his right ear lobe had been severed. He assessed the injuries as grievous harm.

The Appellant in his defence testified that he was arrested from his rural home in Matayos, Busia District by officers who had come looking for his brother Dan on two occasions when the officers failed to get his brother, they arrested the Appellant. As for the parade, the Appellant said that some witnesses had seen him at the police station before the parade. He denies committing the offence. He said he was in Nairobi on the material day where he works and resides.

On the issue of identification, we shall first consider the issue of the parade. Mr. Shitsama argued that the parade was not conducted in accordance with the law for two reasons.

- a) That the parade did not have the required number of members.**
- b) That the witnesses had seen the Appellant before the parade.**

The Police Standing Orders contained in Cap.46, Laws of Kenya provide that the minimum number of members of the parade shall be eight (8) and maximum ten (10). PW5 and PW7 were the parade officers in respect of the parade where PW1 and PW4 identified the Appellant. In their testimony, each of them said that they used eight members of the parade and asked the Appellant which position he wished to stand. He chose to stand in different positions during the two parades. The parade forms which we have

perused shows that each parade had eight members excluding the Appellant. This is the minimum number required. PW4 said in cross-examination that the parade had 15 people. The witness may not have counted the number of the members. This is a minor discrepancy which was dislodged by the evidence of the parade officer through his testimony and the documentary evidence tendered.

It was also argued that the accused had been seen by the witnesses before the parade. On perusal of the evidence, I find that it was only PW2 the driver of the vehicle who saw the Appellant at the police station where he was also remanded as a suspect. The appellant admitted this fact in cross-examination as he gave his defence. PW2 did not participate in the parade. The allegation by the Appellant that other witnesses saw him was dismissed by the trial court as untrue. We agree with him for the reason that no parade was affected. It is only PW1 and PW4 who took part in the parade. These witnesses had not seen the Appellant before the parade. The appellant did not raise such an allegation.

The other contention was that the witnesses never gave description of the Appellant to the police before the parade was done. This allegation is contrary to what PW1 said in cross-examination:

***“I described the accused person to the police when I reported.”***

PW4 only said that in his statement, he did not describe the Appellant. The police may have used the description given by PW1 in sourcing the members of the parade. PW5 and PW7 said in their evidence that they chose parade members with similar appearances. These appearances must have been based from the description given by the identifying witnesses.

We find that the two parades were conducted in accordance with the law. PW1 was the conductor of the vehicle registration number KBC 260 B which was robbed of his driver PW2. On the 14/08/2008 around noon, PW4 a conductor at Mudete stage introduced the Appellant to PW1 for purpose of hiring the vehicle for use on 15/08/08. Negotiations on the hire charge took about 30 minutes. It was in broad day light. A deposit of Ksh.3,000/= was paid on that day. PW2, the driver was present during the negotiations. The following day, PW1 and PW2 went with the vehicle as agreed to Mudete stage. They met the Appellant and three passengers who boarded the vehicle. Others were picked at Chavakali and Khayega. The agreement was that the passengers would be ferried to Mumias and the balance of the hire charges Ksh.5000/= was to be paid at the end of the journey. PW1 and PW4 spent several hours with the Appellant on 15/08/2008. They traveled to Mumias Sugar Co. Ltd and then to Mayoni where the robbery took place. This was a distance of over 50 kilometres. The Appellant sat at the front with PW2. The Appellant commandeered the vehicle for about two hours before PW1 became unconscious due to beatings and drugging. PW4 said he became unconscious four (4) hours after the journey started.

In our view PW1 and PW2 spent a lot of time culminating into several hours with the Appellant. It was during the day. PW4 had the opportunity to talk with the Appellant in broad daylight on 14/08/2008 before he introduced him to PW1. This case is distinguishable from others where the attack and robbery is done suddenly by armed gangs who may scare their victims before the act of robbery. Such circumstances would make identification difficulty. If the robbery takes place at night, similar problems may arise. The identification herein was favoured by daylight unlike most robberies which take place at night. This is a case of two identifying witnesses where parades were held. The circumstances were such that there was no possibility of mistaken identity or error on the part of PW1 and PW4. The trial magistrate took all these factors into consideration and came to the conclusion that the Appellant was positively identified. We also reach the same finding that the conditions were conducive to positive identification.

The Appellant's counsel raised the issue of where the incident took place. PW1 called it Ejinja Junction while PW2 said it was at Mayoni. These witnesses were from another area and may not have been familiar with the names of small villages and markets away from home. This does not affect the case of the prosecution. It is a negligible contradiction if at all.

The Appellant contended that since the arresting officer and the investigating officer did not testify, the

case of the prosecution could not stand. It is on record that the Appellant was arrested by police officers from Kakamega, most probably for another offence. Police at Busia needed the appellant for the offence of robbery with violence. PW6, a police officer was sent to collect the Appellant from Kakamega and take him to Busia where investigations in this case were done. I find no missing link in this case. The evidence of PW6 and the parade officers (PW5 and PW7) forms the link required in a criminal case. The Court of Appeal has held that the failure of an arresting officer and an investigating officer to testify is not fatal to the prosecution's case.

The trial magistrate considered the alibi of the Appellant that he was in Nairobi on the material day. In view of the overwhelming evidence of the prosecution on identity, the alibi defence was dislodged. We find that this was a correct finding by the trial court. It is not true, therefore, that the alibi was wished away.

On the issue of Kakamega Police at first looking for the brother of the appellant one Dan and later arresting the Appellant, the trial court dismissed this line of defence as untenable. As we have already explained, the accused may have been arrested for another offence at Kakamega while Busia Police still needed him for another offence. The fact that the Appellant was transferred from Kakamega to Busia does not cast any doubt on the fact that he was a suspect in this case.

PW8 the Clinical Officer confirmed that PW1 was maimed during the incident. His ear lobe was severed with a knife. The Appellant and his accomplices were armed with knives at the time of the attack which are dangerous weapons. The vehicle was never recovered. It is our finding that all the ingredients of the offence were proved and that the conviction was based on cogent evidence. We find no merit in this appeal and dismiss it accordingly. The conviction and sentence are hereby upheld.

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**D. A. ONYANCHA**  
**JUDGE**

**F. N. MUCHEMI**  
**JUDGE**

Judgment dated and delivered on 28<sup>th</sup> day of June in open court in the presence of the Appellant, the State counsel Mr. Okeyo and Mr. Chitsama Adv.

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**D. A. ONYANCHA**  
**JUDGE**