



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

CRA NO.44 OF 2005

(Appeal originating from original BSA PM CR. NO.1250 of 2003)

IBRAHIM OMONDI OKUMU.....APPELLANT

~VRS~

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant was convicted of the offence of attempted robbery contrary to section 297 (2) of the Penal Code by Busia Principal Magistrate and sentenced to death. Being dissatisfied with the judgment, he appealed in this court.

The grounds of appeal are that there was no positive identification and that all the ingredients of the offence were not proved. The Appellant filed written submissions in which he argued the grounds of appeal.

The state opposed the appeal on grounds that the accused was arrested immediately after the robbery by police officers who were on patrol. The chain of events in the chase and arrest were not broken ruling out any possibility of a mistake.

The facts of the case are that on 26/07/2004 around 1.00 a.m, the complainant and his friend PW2 were walking home from a bar in Busia Town. On reaching Ujamii Estate junction, they parted with each going his way. PW1 was attacked by four men about two (2) minutes later. He called for help and PW3 heard. PW2 went to the scene with police officers (PW4 and PW6) who were on patrol. They found the four men struggling with the complainant. On spotting the police, the attackers who were armed with

whips, pangas and rungas ran away. They were chased by the police officers but scattered to different directions. The accused was arrested as he tried to hide in a kiosk. He was armed with a bicycle tyre tube which he had used to try and strangle the complainant.

The Appellant raised several issues which we shall deal with. The first one concerns the weapons the attackers were armed with. He argued that the charge sheet indicates that the attackers were armed with pangas and iron bars while the complainant said they were armed with pangas, rungas and whips. The charge sheet leaves out rungas and whips. The attackers were four in number and each may have been armed with a different weapon. All the three weapons mentioned by the complainant are dangerous weapons. So are the two in the charge sheet. The fact that the charge sheet left out rungas and whips is not fatal to the case. Pangas are included in the charge sheet and also mentioned by PW1 in evidence. One weapon suffices for purposes of being armed with a dangerous weapon. As PW1 testified on the weapons, he was very clear that the Appellant had a bicycle tube which he put around PW1's neck to strangle him. PW1 did not say that the Appellant was armed with a panga, a rungu or a whip. He may or may not have been armed with any of the three weapons. What matters is that the appellant was in the company of three men who were armed and that the four men were out to execute a common purpose.

The Appellant argued that there was no independent witness. PW2 was an independent witness. He had just parted with PW1 when two minutes later, he heard him call for help. PW4 and PW6 who were on patrol duties went with him and at a distance, saw PW1 struggling with the attackers. PW4 and PW6 were also independent witnesses who also played the role of arresting the Appellant. It is not a requirement in law that there be an independent witness in a case of this nature. One witness whom the court finds credible suffices provided that the court warns itself as required by the law.

The Appellant said that the investigating officer did not testify. PW5 testified as the investigating officer who took over from P.C. Msandu who was on leave at the time the witness testified. He said that he took over the police investigation file and the exhibit. We find this to be in order. No miscarriage of justice was occasioned by failure of P.C. Msandu to testify. We are in agreement with the trial magistrate that the Appellant was arrested by PW4 and PW6 in connection with this case and not any other offence on the material night.

PW1, PW4 and PW6 found the complainant struggling with the attackers who were armed. The Appellant had put the bicycle tube round the complainant's neck. The trial court found the chronology of events such that it would have led to robbery with violence had the witnesses not come to PW1's rescue. The act of the Appellant and his accomplices culminates into an attempt to rob PW1 of his property. The Appellant was rightly charged and convicted of the offence of attempted robbery with violence.

On identification, the Appellant questioned the source of the electric light. PW6 in cross-examination said that there was electric light from the Ministry of Works office which lighted the scene. The Appellant was chased by both PW4 and PW6 and arrested at a kiosk as he tried to hide there. It was clear from the evidence of the witnesses that they never lost sight of the Appellant. It is not possible that there was mistaken identity. In the circumstances, there was no need of holding an identification parade.

The Appellant in defence said that at the time of the incident and arrest, he was already in Busia police station cells having been arrested the same evening for another offence. This defence was dislodged by the evidence of the arresting officers PW4 and PW6. Both testified on how they arrested the Appellant for the offence in this case. The trial court did not believe the alibi of the Appellant. We find that the trial court satisfied itself correctly that all the ingredients of the offence had been proved. The appeal is hereby dismissed for lack of merit. We accordingly uphold the conviction and sentence.

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D. A. ONYANCHA
JUDGE

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F. N. MUCHEMI
JUDGE

Judgment dated and delivered in open court in the presence of the Appellant and the state counsel Mr Okeyo on the 28th day of June 2011.

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D. A. ONYANCHA
JUDGE