



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUSIA

CRA NO.20 OF 2010

(Appeal arising from original BSA PM CR. No. 843 of 2009)

TIMOTHY OUMA MASIGAAPPELLANT

~VRS~

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant Timothy Ouma Masiga was convicted by Busia Senior Resident Magistrate of the offence of robbery with violence contrary to section 296 (2) of the Penal Code and was sentenced to death. Being aggrieved by both conviction and sentence, the Appellant lodged this appeal.

The grounds in support of the appeal were threefold:

- a) that the conviction was based on contradictory and insufficient evidence;**
- b) that the identification parade was not held in accordance to the laid down rules;**
- c) that it was not clear how and why the Appellant was arrested.**

The State Counsel Mr. Okeyo conceded to the appeal. He submitted that the Appellant was arrested on suspicion that he may have planned the robbery after being hired as boda boda taxi operator to drop the complainants at a destination near where the robbery took place. The complainants had seen the Appellant before the incident and yet they picked him from the identification parade which wrong. The state submitted that the conviction was not safe.

PW1 said he was hired by two men to take them to Matayos from Busia town. He got one Victor to escort him. They were four people on the bike. On arrival at Matayos in a certain home compound, PW1 dropped his customers who entered one of the three houses in that compound. Six (6) minutes later, PW1 turned his motor bike with lights on to face the gate and the road where he was going. At that juncture, two men came from the side of the gate and confronted PW1 and Victor (PW3). They robbed them of the motorbike valued at Ksh.78,000/=. The matter was reported at Busia Police Station. The 1st accused was found under arrest at Busia Police Station at the time PW1 went to report. The appellant was arrested by PW1 a few days later at Nasianda in Bungoma. PW1 said that someone told him that the man who robbed him at Matayos was in the area. PW1 was later shown the man and he arrested him with the assistance of members of the public. PW1 identified the Appellant as one of the two men who had hired him on the material day to take him to Matayos.

During cross-examination, PW1 said that he was not sure that the man who hired him was one of the robbers. PW1 also said that he did not see or identify the clothes the Appellant wore when he hired him. In re-examination, PW1 contradicted himself by saying he identified the Appellant by the clothes he wore during the robbery. The said clothes were never described. PW1 further said that he identified the Appellant through scars on his forehead. These were indeed a host of contradictions.

PW3 accompanied PW1 from Busia to Matayos to take his customers. He said that the customers entered a house and a short while later two men came from the road. They entered the compound and robbed PW1 of his motorbike. PW3 was clear that the men who committed the robbery were different from the ones who had hired PW1 to ferry them on his motor bike. He said: ***“I did not see the passenger among those who robbed Omuse.”*** PW1 and PW3 were clear in their evidence that the Appellant was one of the passengers whom they ferried from Busia to Matayos. The appellant was arrested at Nasianda in Bungoma District through the assistance of a person who was not called as a witness. We agree with the State Counsel that the Appellant was arrested on mere suspicion that he may have planned the robbery after he was dropped by PW1 at his home. There was no evidence to connect the Appellant with the robbery. The stolen property was not recovered from the Appellant.

The identification parade ought not to have been conducted in respect of the Appellant who had been seen by the two witnesses earlier (PW1 & PW3). The court erred when it described the parade as a properly concluded parade. PW1 had taken part in arresting the Appellant while PW3 had seen the Appellant before the parade. The parade was therefore worthless and serves no useful purpose.

It is our finding that the conviction of the Appellant was not safe having been based on contradictory and insufficient evidence and with a parade conducted against the laid down rules. For this reason, the appeal must succeed. The conviction is hereby quashed and sentence set aside. 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 on the 28th day of June 2011 in open court in the presence of the Appellant and the State counsel Mr. Okeyo.

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D. A. ONYANCHA
JUDGE