



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUSIA

CRA NO.73 OF 2006

(Appeal from original BSA PM CR. No.906/2004)

MOSES OKELLO MULEKA.....APPELLANT

~VRS~

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant Moses Okello Muleka was charged and convicted with the offence of robbery with violence contrary to section 296 (2) of the Penal Code and sentenced to death. He then lodged this appeal against the conviction.

In his petition of appeal the Appellant contends that the case as not proved as required by the law. The procedure of tendering the exhibits by the prosecutor was wrong and that the burden of proof was shifted to him. The Appellant stated that the magistrate denied him the opportunity to cross-examine his co-accused.

The state did not oppose the appeal on grounds that there was no evidence to connect the Appellant with the offence of robbery. The Appellant only benefited from the property stolen by his father.

We have perused the evidence on record. PW1 testified that he was a worker in a wholesale shop at Busia. On the material day he was robbed of cash Ksh.316,700/= which he was taking to the bank. He identified Francis Oduori Muleka as one of his assailants. Francis was the 1st accused in the trial while the Appellant was the 2nd accused. PW1 did not mention the Appellant herein in connection with the robbery.

The other witnesses did not witness the incident. PW5 is the police officer who received the robbery report at Busia Police Station. He was only given the name of Francis Muleka as a suspect. He arrested Francis on 24/04/2004 which was five (5) days after the robbery. PW5 visited the home of Francis Muleka at Mundika in the course of his investigations. He recovered cash Ksh.4,100/= from the person of Francis and Ksh.1000/= from his house.

There were receipts of a few items bought by the Appellant in the home. The Appellant was the son of Francis Muleka. PW5 charged the Appellant with the offence jointly with his father Francis. However, there was no evidence to connect the Appellant with the robbery. There is no witness who said he/she saw the Appellant at the material time. Nothing connected to the robbery was recovered from the Appellant.

The Appellant denied the offence. He presented an alibi in respect of the material date. The trial court convicted the Appellant on the basis that he had purchased several items using money suspected to be part of the stolen cash and kept the items in his sister's house.

The magistrate did not consider that there was no evidence of identification or direct recent possession regarding the recovery from the Appellant. The offence of robbery with violence is a serious one and the trial magistrate should have satisfied himself that all ingredients were proved beyond reasonable doubt. In this case, there was not an iota of evidence to connect the appellant with the offence. The conviction was therefore unsafe.

We find the appeal merited and allow it accordingly. The conviction is hereby quashed and sentence set aside. The appellant is hereby set at liberty unless otherwise lawfully held.

.....

D. A. ONYANCHA
JUDGE

.....

F. N. MUCHEMI
JUDGE

Judgment dated and delivered in open court this 8th day of June 2011 in the presence of appellant and state counsel.

.....

D. A. ONYANCHA
JUDGE