



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUSIA

CRA NO.29 OF 2008

(Appeal from original BSA PM CR. NO.1389 of 2006)

BENSON NGONO MBEJA *Alias*

MONDAY.....APPELLANT

~VRS~

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant Benson Ngono Mbenja *alias* Monday was convicted by Busia Principal Magistrate of the offence of robbery with violence contrary to section 296 (2) of the Penal Code as read with section 295 of the same Act. He was sentenced to suffer death in the manner authorized by the law.

In his petition of appeal, the Appellant faults the evidence on record arguing that it did not prove the charge against him to the standards required in criminal cases. In particular, he contends that positive identification was not established and that the key witnesses contradicted themselves.

The State Counsel Mr. Okeyo conceded to the appeal on grounds that there was no positive identification.

We shall briefly highlight the evidence on identification. PW1 said he was found in his house sleeping. The robbers entered his room flashing torches. He was ordered to surrender and was cut with a panga before his hands were tied together with a rope. PW1 said he recognized the Appellant who held a torch with his neck against the chest as he tied PW2's hands. PW1 said he knew the robber as "**Monday**". PW1 reported the matter to Bumala Police Station. The Appellant was arrested and it was at that juncture that PW1 came to know the full names of the Appellant. PW1 testified that he had hired the Appellant

the week before the incident to construct a house for him. PW1 had paid the appellant Ksh.1000/= but the job was left incomplete. The robbers were in the house for about 30 minutes.

PW2 the wife of PW1 said she identified the Appellant when he placed his torch on the neck against his chest.

PW3 was the daughter of PW1. She said that she identified the Appellant through his voice.

PW1 and PW2 did not give the distances between them and the Appellant when they separately identified him. There was no light in the house or in PW1's bedroom when the attack took place. Both witnesses say that the source of light which aided them was the torch of the appellant which he placed on the neck/chest. If a torch is placed on the chest supported by the chin and shoulder in a horizontal way, it will light the front or back depending on its position. The torch is likely to light a level below the neck or shoulder of the person holding the torch. The torch cannot possibly light the face of the person holding it because the face is on a higher level. Neither can it light the body of the person holding it. It would have to be the face of another person in the direction where the torch faces. It follows that it was not possible for the witnesses to see the Appellant aided by the torch held by him. PW3 said she identified the Appellant by his voice when he said: "**sisi ni polisi**" (we are policemen). PW2 said that the Appellant worked for her husband for only one day and abandoned the job. The prosecution did not adduce evidence to show that PW3 had talked at length or at all with the Appellant on that day in order to get familiar with the Appellant's voice. There was no voice identification test parade done by the police when the Appellant was arrested.

PW4 aged 12 years is the son of PW1. He said there was no light in the house. Yet he said he saw the Appellant who used to do repair work of their house. The robbery took place around 3.00 a.m and it was dark. PW4 continued to say: "**I did not see or identify the faces of the robbers.**" How come that PW4 only saw the Appellant in a house where there was no light and did not see the other robbers. We find PW4's evidence contradictory and unreliable.

PW5 said that the accused was arrested by members of Community Policing. None of the people who arrested him were called to testify to enlighten the court on the circumstances of arrest. The accused said he was arrested the following day at Bumala while digging a trench and later charged with the offence. PW5 did not conduct any investigations to find out whether the Appellant whom he received under arrest from other people was connected with the offence. Neither did PW5 tell the court who reported the matter at the station and whether the names of the suspects were given to the police.

It is our finding that the conditions were not conducive for positive identification and that the evidence of the key witnesses was not reliable. There were no investigations conducted in this case by the police. The omission of key witnesses like the arresting community policing members and the officer who received the first report do not work in favour of the prosecution's case. It was wrong for the trial magistrate to find that the conditions for recognition of the appellant were favourable and that the offence was proved beyond any reasonable doubt. The prosecution's case had a lot of gaps and the accused ought to have been given the benefits of the doubt.

We find the conviction unsafe. We hereby quash it and set aside the sentence. The Appellant is therefore set at liberty unless otherwise lawfully held.

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D. A. ONYANCHA

F. N. MUCHEMI

JUDGE

JUDGE

Judgment dated and delivered on the 9th day of June 2011 in the presence of the Appellant and the State counsel Mr Okeyo.

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D. A. ONYANCHA
JUDGE