



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL CASE NO.53 OF 2006

RICHARD OKINYANGA.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

[From original BSA PM Criminal Case No.212 of 2005]

J U D G E M E N T

The Appellant Joseph Isaac Okinyang' 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. Being dissatisfied with both the conviction and sentence, the Appellant lodged this appeal.

In his petition, the Appellant states that there was no evidence to support positive identification. That there were several contradictions among the key witnesses which resulted in an unsafe conviction.

The State Counsel, Mr. Okeyo opposed the appeal. He submitted that the Appellant was positively identified by the light from a lantern inside the house and a torch-light, as he was counting the money. That PW1 spent a lot of time with the Appellant and had the opportunity to see him and recognize him positively.

The complainant, PW1, testified that on the 12.08.2004 around 8.00 p.m. she was in her home with her children. She was leaving the kitchen to enter the main house when she was followed by three gangsters who attacked her before robbing her of her property. She was hit with a panga on the head and ordered to lie down. She gave cash Ksh.3700/= on demand and her Sony Radio was taken. The Appellant was dressed in black regalia and was wearing a cap. PW1 was escorted to the house of her co-wife and ordered to knock the door calling her co-wife to open. The co-wife refused to open the door and the gangsters left with PW1. She was released after threats of rape.

PW3 was the co-wife of PW1. She testified that PW1 went to her house accompanied by the strangers. PW3 on request by PW1 declined to open the door because she was suspicious there was a problem. She further said, she identified the Appellant by his voice. PW3 further said that she led the police to the house of the Appellant. The Appellant was absent and the house was locked.

PW2, the son of PW1, testified of how they were attacked in their home by thugs. His mother PW1, was assaulted before being robbed of her cash and radio. PW2 said there was light from a lantern in the house. Aided by that light, PW2 was able to see and recognize the Appellant who is his uncle.

PW4 was a daughter to PW1 and was present during the incident. She was pushed under the seat with her sister. That the lamp was smashed by the thugs after they entered the house. That one of the attackers flashed his torch for the Appellant to see the money given to him by PW1. That with the aid of that light, PW4 saw the Appellant whom he knew before the incident. That one of the gangsters was armed with firearm.

PW5, P.C. Edward Wanjala of Adungosi Police Station said that his colleague received the report of the robbery on 13.07.2004 from PW3. PW5 arrested the Appellant on 25.01.2005 but did not recover any of the stolen property of PW1. That police took his bicycle repair toolbox.

PW6 was the Clinical Officer who examined PW1. She said she had injuries caused by both blunt and sharp objects. The accused denied the offence. He testified that he was in his house on 25.01.2005 and that he was arrested from his house and charged with the offence. The reason for the arrest was that he had a fracas with PW3's child who was grazing cows on his land.

The evidence on record is that the incident took place at around 8.30 p.m in the evening. The key witnesses said there was a lamp which was on. PW4 said that the lamp was smashed by the thugs when they came in. PW4 also said that she and her siblings were ordered to lie down under the seat. PW1 was ordered to lie on the floor too. While lying under the seat, PW2 and PW4 testified on the events which followed. They said they heard the thugs demand money from PW1 and saw PW1 hand over cash Ksh3,700/= to the thugs. PW2 said:

“My mother removed the bag from the cupboard and gave them the money cash Ksh.3,700/=”

PW4 said:

“I saw them kick her (PW1) as one used a panga on her. She gave them Ksh.3700/=. One went to the box, opened it and took two sets of table clothes. They also took the radio Make Sony from the table.”

It is our considered opinion that it is highly unlikely that the two witnesses could see all those things which they vividly described while they lay under the seat. A person lying under a seat may not see the top of a table in the same room. PW4 said he saw the radio being removed from the table. The distance between the table and the seat was not given in evidence. However, we find it highly improbable that PW2 and PW4 could observe all what they said while under a seat.

It is in evidence that the lamp was smashed immediately the attackers entered the house. As PW2 and PW4 lay under the seat, there was no light, yet PW1 and PW2 said they used light from the lantern. PW4 said he saw the Appellant with the aid of the light from the torch of an accomplice. These are two people in one place looking at the Appellant, yet the source of light was different for each one of them. The thugs were three, yet by a very interesting coincidence, PW1, PW2 and PW4 only recognized the Appellant whom they all knew before the incident.

The strength of the light was not given in evidence for the court to analyze whether it possibly aided in positive recognition of the Appellant. None of the witnesses inside the house identified the Appellant by his voice. Yet they said he spoke as the incident took place. PW3 said she was in her house and heard the Appellant speak from outside and was able to identify him by his voice. PW3 did not say the words spoken by the appellant or the language used by him. PW1 said that some of the assailants spoke in Kiganda while the others spoke in Kiswahili. The language used by the Appellant in particular was not given by any of the witness.

PW3 is the one who reported the matter to the police in the morning of the 13th August 2004. She had not set her eyes on any of the assailants since she did not open the door of her house for them. In her evidence in chief, she said:

“Police asked who we had in mind as a suspect. I told them that I had identified one voice. We then went to the house of the accused.....The sub-chief broke the door.....”

The evidence of PW3 is an indication that she did not know who attacked her co-wife when she reported the matter to the police. PW5 confirmed that no name of any suspect was given to the police at the time of reporting. It was not until he visited the scene the following day (13/08/2004) after 12.30 p.m that he interrogated the witnesses. If the witnesses PW1, PW2, PW3 and PW4 had recognized the Appellant, they would have given his name to the police in the morning of 12th and 13th August 2004 if not earlier.

The accused in his defence denied running away from home after the incident. He called one defence witness DW2, the Chief of Amerkwai Location where the incident took place. DW2 testified that the incident was reported to her on 12.08.2004 around 9.00 p.m. She got police officers to visit the scene with her later. The scene was about 200 metres from her house. DW2 talked to the complainant who said that she did not know who attacked her. The court in its judgment rejected the defence as incredible and chose to believe the prosecution witnesses that they recognized the Appellant whom they knew before the incident. The magistrate did not analyze the circumstances in which the Appellant was identified. We find that the conditions were not conducive for positive identifications as analyzed in this judgment.

DW2 said the Appellant is her brother-in-law. The accused is a cousin to the husband of PW1 and PW2. All the parties involved are relatives. There was therefore no independent witness in this case. PW1, her co-wife PW3 and their children. PW2 and PW4 were the key witnesses.

The offence took place on 12.08.2004. PW3 said the Appellant fled from home for two weeks. PW1 said the Appellant fled from home and was not traced till five (5) months later when he was arrested. The Appellant and witnesses are close neighbours. It would be expected that the witnesses would know when the Appellant returned home. When he was arrested on 25.01.2005 the reason was because he had threatened to beat the child of PW2 who was grazing cows on his land. PW5 the arresting officer confirmed this in his evidence. A conclusion may be rightly made from the circumstances that the Appellant was living in his house peacefully and in freedom before the issue of the child and the cows arose. PW5 said he was tipped to arrest the accused by the father of the child who is the husband of PW1 and PW3. We pose the question; why was the Appellant not arrested earlier before the child, land and cows issue arose. The Appellant was arrested five (5) months after the incident. PW3 contradicted PW1's evidence that the Appellant was in hiding all that time.

PW1 and PW2 said the Appellant was wearing a cap while PW4 who was in the same house at the material time said the Appellant did not wear a cap. The witnesses also differed in the attire of the Appellant. None of the property stolen from PW1 was recovered from the Appellant.

It is our finding that the magistrate failed to fully analyze the evidence on identification and therefore reached a wrong finding. The contradictions in the evidence were also not addressed leading to an unsafe conviction. We find the appeal should succeed. The conviction is hereby quashed and the 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 on the 6th day of **June** 2011 in the presence of Appellant and State Counsel.

D.A. ONYANCHA
JUDGE.