



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 208 OF 2009

KAKUKO MAHINDIAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the conviction and sentence of Hon. H. M. Nyaga (Senior Resident Magistrate)

in Kabarnet SRM.CR. No. 933 of 2008 delivered on the 25th November 2009)

JUDGMENT

On the 6th January 2009, the appellant, **KAKUKO MAHINDI**, appeared before the Senior Resident Magistrate at Kabarnet charged with the offence of robbery with violence contrary to S. 296 (2) of the Penal Code. It was alleged that on the 7th February 2008 at Chemoi Location Baringo District, jointly with others not before Court, while armed with AK 47 rifles robbed Mark Chebii Kiptoo of his ten (10) cows and thirty six (36) goats, all valued at Kshs. 380,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Mark Chebii Kiptoo.

On pleading not guilty, the appellant was tried, convicted and sentenced to death on the basis of the evidence which we will now consider as is expected of us as a first Appellate Court. In so doing, we will bear in mind that the trial Court had the advantage of seeing and hearing the witnesses (see, **OKENO VS. REPUBLIC (1972) EA 32**).

In brief, the prosecution case was that on the material date at about 6.00 a.m., the complainant **MARK CHEBII KIPTOO (PW 1)**, was at his home when he heard screams. He ventured outside his house and saw a group of seven men heading towards his animal pen. Three of the men had guns. They opened the animal pen and drove away ten cows and thirty six goats. He stealthily followed them behind and it was

then that he spotted the appellant among the group of men. The appellant had a gun. He (PW 1) screamed for help and with the help of neighbours pursued the robbers but in vain. In the process, gunshots rent the air and the bodies of three villagers shot dead by the robbers were found. Matter was reported to the police.

P.C ALEXANDER WAMBUA (PW 4), was at the time based at Loruk Police Station, Baringo North. He received the necessary report from the complainant on the material date at 9.00 a.m. Two spent cartridges and a pair of Pokot traditional shoes (*Akala*) were handed over to him. Thereafter, in the company of the complainant and others he mounted a search for the suspects and in the process the appellant was found at Nginyang Market and arrested.

The “*Akala*” shoes were allegedly worn by the appellant on the 9th December (sic) 2008 but left behind while he and others raided a village at Kaginate, Baringo North. **JACKSON CHEMJOR (PW 2)** and **ISAIAH KOECH (PW 3)** saw him wearing the shoes when they heard gunshots as they grazed cows nearby.

In his defence, the appellant denied the offence and contended that he was not at the scene neither did he have a gun. He urged the Court to acquit him and further contended that the prosecution witnesses lied.

The learned trial Magistrate considered all the foregoing evidence and convicted the appellant.

But, being dissatisfied with the conviction and the sentence, the appellant preferred the present appeal on the basis of the grounds contained in the amended petition filed herein on 13th October 2010.

The grounds are complaints that the learned trial Magistrate relied on the evidence of identification by a single witness in difficult circumstances and also failed to consider the discrepancies between the charge sheet and the evidence adduced by the prosecution witnesses. Further, the learned trial Magistrate failed to consider that the prosecution did not avail crucial witnesses such as the complainant’s employee and the Investigating Officer.

The appellant also complains that his defence was rejected without cogent reasons.

At the hearing of the appeal, the appellant represented himself and relied on his written submissions in support of his case.

The respondent was represented by the learned Senior Deputy Prosecution Counsel, **MR. OLUOCH**, who opposed the appeal and submitted that the appellant was seen and identified by the complainant who had previously known him even by name. Further, the conditions for identification were favourable and that the learned trial Magistrate was alive to the danger of convicting on the basis of identification by a single witness.

The learned Prosecution Counsel contended that the appeal lacks merit and ought to be dismissed.

Having reviewed the evidence and considering submissions by both the appellant and the respondent, we

have no doubt that the occurrence of the offence was proved and was in any event, undisputed. The complainant's evidence was sufficient in establishing the offence.

Jackson (PW 2) and Isaiah (PW 3) more or less referred to a similar offence committed on a different date and at a different place. There was no serious attempt by the prosecution to show any nexus between the two offences. In the premises, it cannot be said that Jackson (PW 2) and Isaiah (PW 3) witnessed the offence which was committed against the complainant. If indeed the appellant was seen wearing "Akala" shoes then it was not on the day that the complainant (PW 1) was robbed by a group of seven (7) people. The evidence of PW 2 and PW 3 was of no use in linking the appellant to the offence committed against the complainant.

If anything, the prosecution should have thought of preferring similar offences against the appellant but involving PW 2 and PW 3.

Be that as it may, the identification of the appellant as having been one of those who robbed the complainant of his livestock was the crucial point for determination.

Even though the offence occurred at day break, at about 6.00 a.m., we are not satisfied that the evidence of the identification of the appellant was cogent and watertight.

The sole identifying witness was the complainant. He had just woken up when the robbers struck. He could not have been in his full element at the time. He said that he went outside his house after being attracted by the screams of his children. It was then that he saw seven men proceed to his animal pen and drive away his livestock. He did not specifically say that he was able to identify the seven men at the time. He indicated that the only time that he saw and identified the appellant was when he followed the raiders as they left his compound. He said that the appellant was wearing a "shuka" and a shirt and was armed with a gun. He screamed for help and his neighbours arrived. They all went in pursuit of the raiders and in the process heard gun shots.

Immediately thereafter, they found the bodies of three villagers who had been shot dead by the raiders. The raiders could not be traced by the complainant and his team. The complainant then reported the matter to the police.

It is notable that although the complainant alluded to having recognized the appellant, he did not mention the fact during examination in chief. He only stated as much during cross-examination when he said that the appellant's name was Kakuko and that he normally saw him at the local trading centre. The complainant also said that the raiders looked like Pokots from their dressing and that the appellant was also a Pokot.

None of the complainant's neighbours were called to testify and at least show that the complainant had mentioned to them that the appellant was one of the raiders. Also, no mention of the appellant was made to the police by the complainant when he reported the incident.

P.C Wambua (PW 4) was the recipient of the report. He said that it was the complainant's employee who said that he knew the raiders. The said employee was not called to testify and establish that the appellant was one of the raiders that he knew.

The evidence by P.C Wambua clearly shows that the appellant was not at all mentioned by the complainant. This strongly implied that the complainant did not recognize any of the raiders and that his alleged recognition of the appellant was false if not mistaken.

There was strong suggestion that the complainant's identification of the appellant was mere dock identification based on the fact that the person in the dock was a Pokot and it was a group of Pokot men who raided the complainant's homestead and stole his livestock. In the circumstances, we hold that the evidence of identification adduced against the appellant was insufficient, unreliable and not free from the possibility of error or mistake. It cannot therefore be said that the appellant was positively identified as one of those who robbed the complainant. His conviction by the learned trial Magistrate was not based on sound evidence.

In the end result, we allow the appeal by quashing the conviction and setting aside the sentence. The appellant be set at liberty unless otherwise lawfully held.

F. AZANGALALA

JUDGE

J. R. KARANJA

JUDGE

[Delivered and signed this 2nd day of June 2011]