



REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRA NO.121 OF 2010
Consolidated with CRA No.122 of 2010

(Appeal arising from BGM CM CR. NO.1564 of 2009)

STEPHEN SIFUNA KWATA.....1ST APPELLANT
GODFREY JUMA MUKARA.....2ND APPELLANT

~VRS~

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellants Stephen Sifuna Kwata and Godfrey Juma Mukara were convicted by Bungoma Senior Resident magistrate of robbery with violence contrary to section 296 (2) of the Penal Code and sentenced to death. Each of the Appellant filed separate appeals which were consolidated.

The Appellant put forward similar ground raising the following issues:

- a) ***lack of positive identification;***
- b) ***lack of sufficient evidence;***
- c) ***failure to consider alibi defence;***
- d) ***language used not understood.***

The state opposed the appeal. Mr. Ogoti submitted that the complainant identified the Appellants positively. The first Appellant used to transport goods for complainant regularly. On the material day they differed on payment. The 2nd Appellant joined in the scuffle to help his friend. There were street lights which enabled PW1 to see his assailants and recognize them. The judgment addressed the issue of recognition and all other ingredients sufficiently.

The issue of language was raised by the 2nd Appellant. He said he was not comfortable with the language used. It is assumed he meant that he did not understand the language well and therefore did not understand the proceedings. On perusing the court record of 1/10/2009 when the plea was taken I note that the court inquired from the Appellants which language they understood. The 1st Appellant replied that ***“I understand Kiswahili very well”***. The 2nd Appellant said the same thing. The charge and all its elements were read in Kiswahili language. The Appellants pleaded not guilty to the charge. All the witnesses (except PW3) testified in Kiswahili. For PW3 a police officer, the court did not indicate what language the witness used. Assuming he may have used English language, there was an interpreter in court who should have interpreted English to Kiswahili. We find no basis in the allegation by the 2nd Appellant. The proceedings of the court are clear that he understood the proceedings.

On identification, PW1 said he knew the first Appellant by appearance. The complainant used to transport

the 1st Appellant alcohol for sale. On that day, PW1 was hired by the 1st Appellant and his friend for the same kind of transporting goods. PW1 took the two men up to Mwanda area. The parties differed on payment of the transport charges. The 1st Appellant gave PW1 a fake Ksh.1000/= note which the witness refused to take. The 1st Appellant hit the complainant on the head using a piece of sugarcane. The 2nd Appellant joined in to assault PW1 until he fell down and lost consciousness. PW1 was robbed of his motor cycle make TVS Star Engine No.OF5K81470472. Later PW1 was assisted by good Samaritans to go for treatment to Bungoma District Hospital.

It was PW1 who later identified the 1st Appellant to the police who arrested him. The 1st Appellant led to the arrest of the 2nd Appellant.

PW2 testified that he is the one who had given PW1 the motorcycle of his employer on the material day. He learnt later that PW1 had been robbed of the bike. When the first Appellant was arrested, he led police to arrest the 2nd Appellant. The motorbike was recovered from the house of one Mandefu with the help of the 2nd Appellant. The number plate had been removed as PW3 confirmed. The exhibit was photographed and released to the owner after recovery. PW4 assisted in taking the complainant to hospital where he was admitted. The doctor PW6 classified the injuries as harm.

The evidence of PW1 on identification of the first Appellant was loud and clear. He helped police to arrest the Appellant. PW1 was very honest when he said he did not know the 2nd Appellant before the incident. He called the 2nd Appellant "**the friend**" of the 1st Appellant. It is the first Appellant who assisted police to arrest his friend. The 2nd Appellant helped to recover the motorbike which was positively identified. PW1 was with the Appellants for quite a while. He drove them outside Bungoma town to Mwanda. The parties negotiated the bike charges and disagreed. All this time, PW1 had the opportunity to see and talk with the 2nd Appellant. During the incident there was electric light at the scene. PW7 is the officer who conducted the parade. He testified that PW1 identified the 2nd Appellant as one of the two men who attacked him. As for the first Appellant, a parade was not necessary. PW1 knew the first Appellant and had dealt with him in business of transport before the incident. The trial magistrate was correct to find that recognition for the first Appellant was positive. The recovery of the motorbike with the assistance of the 2nd Appellant and PW1's identification during the parade directly connect the 2nd Appellant with the offence.

We find that the recognition and identification in respect of the Appellants were positive. The circumstances were conducive to positive identification.

The Appellants used force on the complainant. PW6 found several injuries all over the body including cut wounds. The assailants were two in number. These ingredients supported by positive identification are adequate evidence to sustain a conviction in a case of robbery with violence.

The magistrate considered the alibi defences of the Appellants and rejected them as untrue.

We find that the appeal has no merit. We uphold the conviction and the sentence.

D. A. ONYANCHA
JUDGE

F. N. MUCHEMI
JUDGE

Judgment dated and delivered on the 20th day of July, 2011 in the presence of the Appellants and the state counsel Mr. Ogoti.

F. N. MUCHEMI
JUDGE