



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUSIA (K)

CRIMINAL APPEAL NO.11B OF 2004

Consolidated with CRA NO.9 of 2004 & CRA NO.107 of 2003

(Appeal from original BSA SRM CR. No.928 of 2000)

BENSON WANYAMA OKELLO.....1ST APPELLANT

FRANCIS JUMA ORONJO.....2ND APPELLANT

THOMAS OGUSINI WANDERA.....3RD APPELLANT

~VRS~

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellants Benson Wanyama Okello, Francis Juma Oronjo and Thomas Ogusini Wandera were convicted by Busia Senior Resident Magistrate of six (6) counts of robbery with violence contrary to section 296 (2) of the Penal Code and sentenced to death in each of the counts. This appeal is against both conviction and sentence.

The grounds of appeal may be summarized as follows:

- a) That the Appellants were not afforded an interpreter and that the language used by the court was not indicated.**
- b) That there was no positive identification.**
- c) That there was no sufficient evidence to support the convictions.**

d) That the burden of proof was shifted to the defence and that their alibi defences were ignored.

The appeal was opposed by the state. Mr. Okeyo submitted that the prosecution proved the case beyond any reasonable doubt. Identification was positive and that recoveries were made from the Appellants which items the complainants identified as part of the stolen property. The court relied on the principle of recent possession doctrine to convict the 1st and 2nd Appellants.

Precisely, the evidence of the prosecution is that in the night of 7th July 2000, there were several robberies at Bukiri Market where shop goods, cash and other household items were stolen. Some of the complainants were shopkeepers sleeping in the rear of their shops while others were at their respective homes near the shops. The Appellants were arrested as suspects the following day. The 1st Appellant led to the arrest of the 2nd and 3rd Appellants. Some shop goods and clothings were recovered from the 1st and 2nd Appellants.

PW6 was the first to be attacked at his home around 11.00 p.m and robbed of his property. His hands were tied with a rope and was escorted to house of PW3 where robbery also took place. PW3 and his son were also tied with ropes on the hands and escorted to Bukiri under guard of the gangsters.

PW1 who is the complainant in count II said he was attacked by about 20 men wearing police jungle jackets and berets. He recognized the 1st Appellant whom he knew before the incident. It was him who gave the name of 1st Appellant to the police. He later identified the Appellant at a parade held at Sio Port Police Station.

PW2 the complainant in count VI testified that he was attacked by about 20 men wearing jungle jackets and berets. They were armed with pangas, rungas and axes. Three entered the shop and robbed him of cash Ksh.12,000/= and shop goods. He recognized the 2nd Appellant whom he knew before the incident. Later, he participated in an identification parade at Sio Port, he picked the 2nd Appellant as one of the people who robbed him at the material night.

PW3 the complainant in count I was attacked at his home and robbed of cash and other goods. The witness and his son were taken captive by their assailants and taken to Bukiri Market where several shopkeepers were robbed of cash and shop goods. He identified 1st Appellant who hails from his sub-location. At a parade at Sio Port Police Station, PW3 identified the 1st Appellant.

PW4 the complainant in count III was robbed of his cash Ksh.6000/= and beddings. He was beaten until he became unconscious and did not recognize any of his assailants. One bed sheet was later recovered by police.

PW5 was the watchman at a petrol station at Bukiri Market. He was on duty at the time the robberies were taking place. He saw the robbers pass and going towards the shop flashing torches. He did not identify anyone. Later, he recovered an axe at one of the premises of the robbery. He made a report at Sio Port Police Station.

PW6 was not a complainant in any count although he testified that he was attacked and robbed in his home at the material night. He did not recognize any of his assailants.

PW7 the complainant in count IV recognized accused 3 and 4 as she was attacked by several men armed with various weapons and flashing torches around. She was aided by light from a lantern she had lit before she opened the door. The lamp was put off by her assailants when they entered the house.

PW8 was the officer who visited the scene while PW9 received report about the robberies from the watchman at a nearby petrol station. PW8 was assisted by the Assistant Chief to arrest the 1st Appellant. As he went to the scene, PW8 did not have the names of any suspects. It is the Assistant Chief who was not called as a witness who led PW8 to arrest the 1st Appellant. The Assistant Chief would have

shed light on what led him to treat the 1st Appellant as a suspect. Did he get his name from one of the complainants? PW8 did not explain what led the Assistant Chief to cause the arrest of the 1st Appellant. In their evidence PW8 and PW9 did not say that any names of the suspects were given to them by any of the complainants. As much as PW1, PW2, PW3 and PW7 said they identified the Appellants, none of them gave their names to the police.

This raises doubt on whether the witnesses positively identified their assailants. Had they done so, they would not have withheld their names from the police. Most of the complainants were attacked by about 20 men who were all dressed in police jungle uniform. It was at night between 11.00 p.m and 2.00 a.m. All were assaulted and injured and others had their hands tied with ropes. The attackers had torches which they flashed at the victims. PW1 said he flashed his torch at the 1st Appellant and recognized him. The attackers were many and had more than one torch. Is it possible then that PW1 with his one torch would have seen and identified his attacker? PW1 went on to say that there was moonlight outside and that there was a lantern inside the shop. It is important to note that the mention of these light sources only came out during cross-examination by the 1st Appellant. Similarly, PW2 said he recognized the 2nd Appellant without giving the source of the light which aided him. It is in cross-examination that PW2 said that the light was from his torch. The witness also said that his assailants were about 20 and had torches which they flashed around.

PW3 said he identified the 1st Appellant as he counted the money PW3 gave him. He saw him with light from his torch and that of an accomplice. PW3 did not describe his position as he watched the Appellant count money and neither did he give the distance between him and the Appellant. The period PW3 observed the Appellant was not indicated.

It is our considered opinion that the conditions for identification were difficult and circumstances not conducive for positive identification. We disagree with the judgment of the trial court that the Appellants were positively identified and that the evidence of recognition was sufficient. The magistrate also found that the complainants identified the Appellants because of the clothes they wore. This was not possible in the circumstances given the fact that 20 men wore the same police jungle uniform. None of the complainants singled out the Appellants from the twenty men by describing their clothing and appearances. The court also stated that PW1's evidence was corroborated by that of PW2. Yet, the two witnesses testified on different counts. The issue of corroboration does not arise. The trial court's failure to analyse and critically examine the evidence of identification. The court therefore reached a wrong finding.

The Appellants were known to the complainants. The identification parades were therefore unnecessary and served no useful purpose.

The Clinical Officer PW10 only examined and confirmed injuries on the complainants in count I and count II. There was no medical evidence to back up the charges in counts III, IV, V and VI. The conviction of the appellants of the offences of robbery with violence contrary to section 296 (2) of the Penal Code in counts III, IV, V and VI was wrongful. All the necessary ingredients of the offence were not proved.

On the recoveries of the stolen items, PW8 gave a list of shop goods and other items recovered from the houses of the 1st and 2nd Appellants one day after the robbery. The 1st Appellant said that the four (4) items recovered from him were his own for household use. The 2nd Appellant said that some items belonged to him while the shop goods were not his. The total items recovered from the two Appellants were 32 most of them small packs and quantities of shop goods. The two Appellants did not give a reasonable explanation as to their possession. The items were recovered only one day after the robbery. This was recent possession and the relevant doctrine is applicable subject to the court being satisfied on other facts and in compliance with the law.

The Appellants contended that the constitutional requirement on language was not satisfied by the court. The plea was taken on the 17/07/2000. The record indicated that the charge was read and explained in Kiswahili language. There was no indication whether or not the Appellant understood that language. It

must go on record that the court inquires into the issue and that the accused person indicates that he understands the language. Section 77 of the Constitution imposes a duty on the court to comply with the law. The non-compliance renders the proceedings a nullity. Throughout the proceedings, the court did not indicate what language the witnesses used to testify. The record does not indicate whether the Appellants were accorded an interpreter during the plea and during the hearing. It is the constitutional right of the accused to be accorded an interpreter. It is our finding that the trial court failed to comply with sections 77 of the Constitution and section 198 of the Criminal Procedure Code. This renders the proceedings herein a nullity.

For this reason and notwithstanding our finding on other issues in this judgment, we hereby declare these proceedings a nullity for all intents and purposes. The convictions and sentences are hereby set aside. It is important to register our finding that the trial court was wrong in sentencing the Appellants to death in all the six counts. The correct thing would have been to impose sentence on one count and suspend the sentences in the other counts.

The Appellants were charged in court on 17/07/2000 with the trial coming to an end three years later (on 09/05/2003). This appeal was filed in 2004 and has taken about six (6) years to be disposed of. It would therefore not be in the interests of justice to order a retrial in this case. We therefore set at liberty the three Appellants herein unless otherwise lawfully held.

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D. A. ONYANCHA

JUDGE

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F. N. MUCHEMI

JUDGE

Judgment dated and delivered on the 11 th day of July 2011 in open court and in the presence of the Appellants and the State Counsel Mr Okeyo.

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D. A. ONYANCHA

JUDGE