REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUSIA

CRA NO.24 OF 2010

(From original BSA PM CR. NO.1431 of 2009)

CALEB ODUOR :: APPELLANT

~VRS~

REPUBLIC :: RESPONDENT

JUDGMENT

The Appellant Caleb Oduor was convicted of the offence of attempted robbery with violence contrary to section 297 (2) of the Penal Code and sentenced to death. He was aggrieved by the said judgment and appealed against it.

In his petition of appeal the Appellant relies on the grounds that there was no positive identification; the ingredients of the offence were not proved; the evidence was contradictory; that his alibi defence was not considered and that he did not understand the language used.

The state opposed the appeal arguing that identification was positive and that the offence was proved beyond any reasonable doubt.

The appeal in this case was taken by Busia Principal Magistrate on 29/09/2009. The court record shows that there was a court interpreter one Mr. Okoiti who read and explained the charge to the Appellant in Kiswahili language. For the court to use Kiswahili language, the presiding magistrate must have inquired into the issue of what language the Appellant understood well. The record speaks for itself and there is nothing to suggest that the accused did not understand Kiswahili. The case was heard by a different magistrate who chose to use Kiswahili as the language of the court. He had an interpreter present in court during all court hearings. All the witnesses testified in Kiswahili. The appellant did not raise the issue of not understanding the language. I find no basis for the accused's contention that the proceedings were conducted in a language he did not understand and disregard it accordingly.

On the issue of contradictions, PW1 said he was cut with a panga on the left hand. PW2 and PW3 also said in their evidence in chief that PW1 was injured on the left arm. PW3 later said that it was the right hand. This was a little mix-up which does not affect the prosecution's evidence. PW4 the investigating officer and PW5 the Clinical Officer confirmed it was the left hand which had multiple cuts. PW5 testified that PW1 had a fracture on the forearm in addition to the cuts. He produced the P.3

form on behalf of his colleague who had been transferred to another station. This was in order since the two clinical officers had worked together.

All other witnesses except PW2 said that the incident took place on 9th April 2009 between 3.00 to 4.00 a.m. PW2 gave the date as the 9th April 2008 which I believe was a clerical or topographical error for the year. The record is very clear that the offence was allegedly committed in 2009 and the Appellant arrested the same year. The first hearing took place on 23/10/2009. The error on the date is a minor contradiction which does not weaken the prosecution's case.

The facts of the case are that on the night of 9th April 2009 between 3.00 to 4.00 p.m the complainant, PW1 was a sleep in his house with his wife PW2. PW1 suddenly woke up and saw two strangers near his bed. He woke up and struggled with them pushing both out of the house. PW1 said he recognized the Appellant who cut him with a panga on the left hand. One of the assailants stood outside the house. All the three men left the premises. PW1 was taken to Busia District Hospital where he was admitted for two days. The matter was reported to the police. The Appellant was arrested five (5) months later and charged with the offence.

On identification, PW1 said that his attackers wore mavins on the head. The Appellant whom he recognized was dressed in a black coat and a mavin on his head. He was armed with a panga and held a torch. PW2 also said she recognized the Appellant. The two witnesses said they knew the Appellant before the incident. PW1 had worked with the appellant in Check Inn Club. PW1 was the manager of the club and said he was the one who employed the Appellant. The witnesses were inside the house asleep. The place must have been dark because none of the two witnesses said that there was any source of light in the house. PW1 did not tell the court what light aided him to see the Appellant in order to recognize him as the person he knew before the incident. PW1 said that the suspects ***"never spoke at any one time."*** This means that there could not have been voice identification. PW2 said that when the Appellant was arrested, PW1 told her that he used to work with the Appellant. She continued to say that she did not know the Appellant before the incident and adds:

"I had seen the suspects because the bedroom lights were on."

It ought to be noted that PW2 talked in plural that she saw the ***"suspects"*** clearly. However, PW2 did not describe the 2nd suspect but only the Appellant of whom she said:

"The suspect had long hair and has now shaved it."

If she saw both of them clearly, PW2 ought to have described each of them in her testimony. Why did she chose to only describe the Appellant whom her husband told her that he knew him before the incident?

PW3 said that he was in his house opposite that of the complainant when he heard PW1 scream. He tried to open the door but it was locked from outside. He peeped and saw two men leaving PW1's house and one standing outside. PW3 said he recognized the Appellant as he was leaving PW1's house with the aid of security lights which were on. Like PW2 he said:

"He had long hair but now it has been shaved out."

The uniformity between the witnesses (PW1, PW2 and PW3) of the Appellant's physical appearance and the weapon he was carrying raises some curiosity. The witnesses say the appellant and his colleagues wore mavins on their heads. Was it then possible to see the long hair with a head gear on? Even with security lights on, PW3 did not describe how the other two suspects looked like. It appears all of them only saw and identified the Appellant among the three men. There is an interesting coincidence that two of the three witnesses knew the appellant before the incident. The description of the Appellant's manner of dressing by PW1 and PW2 and that of the long hair by PW2 and PW3 gives an impression of rehearsed evidence.

PW4 said that after the incident the Appellant fled from his home. PW4 never said whether he went to the home of the Appellant and missed him. On cross-examination, PW4 confirmed that he never visited the home of the Appellant. He said:

"I was not able to visit your home as you returned to show us where you stay."

PW4 could not explain why he never went looking for the accused in his home for the five (5) months period that the Appellant is said to have fled his home. It also appears that PW4 did not bother to do any investigations in this case. He said on cross-examination:

"I believed what the complainant told me. I do not know what you do for a living."

The Appellant was said to own a bakery in the area where PW3 used to buy snacks (mandazi). PW4 should have investigated into this aspect because it is important and relevant to this case. Assuming that the Appellant fled from home, it was important to find out who was left operating his bakery or whether it was closed for that period? PW1 who said knew the Appellant well before the incident did not testify to the effect that the Appellant fled from home for several months.

The Appellant in his defence only gave an account of how he was arrested on 13/09/2009. He did not say where he was on the material night. The burden of proof is on the prosecution to prove the guilt of the accused. The Appellant has no obligation to fill in the gaps in the prosecution's case. As such, he had no obligation to explain his whereabouts in the material night. He cannot be condemned for this omission as the trial magistrate tried to do in the judgment.

The magistrate found that recognition was positive. The court did not evaluate the evidence of the witnesses on identification. The source of light was not given in the case of PW1. The intensity of the light in the case of PW2 and PW3 was not described. Neither was the distance between PW3's house and that of PW1. From the evidence of PW4, it appears that the name of the suspect was not given to him when the incident was reported. If it was, he would have arrested the Appellant or made an attempt by going to his home. The excuse PW4 gave for not visiting the home of the Appellant for that long period is that nothing was stolen from PW1. This does not make sense where PW4 had a duty to arrest the suspects. Even as PW4 testified in court, he had no idea where the Appellant lived.

We find that the offence took place at night and the conditions were not conducive for positive identification. The trial court failed to inquire into the issue of positive identification.

The Appellant was charged with attempted robbery with violence. There was no evidence from PW1 that his assailants attempted to rob him of any property. The thugs broke into the house and entered while he was asleep. They did not disturb PW1 and his wife until they woke up on their own until PW1 confronted the two men, they had not attacked him. No evidence of demand of any property was adduced. In a case of ***"attempt"*** there must be proof of an overt act which involved execution of part of the act in a crime. The complainant was injured in his struggle with the assailants. The injury alone and the fact that one of the assailants was armed does not make the offence one of attempted robbery with violence. Had the Appellant been properly identified, he ought to have been charged with a lesser offence of burglary contrary to section 304 of the Penal Code. The evidence on record does not disclose an offence under section 297 (1) of the Penal Code.

We find that the prosecution failed to prove the ingredients of the offence of attempted robbery with violence against the Appellant. We quash the conviction and set aside the sentence. The Appellant is set at liberty unless otherwise lawfully held.

D. A. ONYANCHA **F. N. MUCHEMI**
JUDGE **JUDGE**

Judgment delivered this 26th day of october 2011 in the presence of the Appellant and the state counsel

Mr. Okeyo.

JUDGE