



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CRIMINAL APPEAL NO. 117 OF 2009

ELKANA KHAMASI SIMONYA ALIAS PANGA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an Appeal from the conviction and sentence of Hon. N. Shiundu (Senior Resident Magistrate) in Eldoret CMC.R. No. 598 of 2009 delivered on the 22nd July 2009)

JUDGMENT

ELKANA KHAMASI SIMONYA ALIAS PANGA (herein, the appellant) appeared before the Senior Resident Magistrate at Eldoret charged with robbery with violence contrary to S. 296 (2) of the Penal Code, in that on the 4th September 2008 at Kipkaren Trading Centre in Lugari District Western Province, jointly with others not before Court while armed with offensive weapons namely knives, robbed David Onyino Otuchi cash Ksh. 3,415/-, a kilogram of sugar, 100gm of tea leaves and a national identity card all valued at Ksh. 3,500/- and at or immediately before or immediately after the time of such robbery used actual violence to the said David Onyino Otuchi.

The appellant denied the offence and in the trial that followed, the prosecution called a total of five (5) witnesses who testified to the effect that on the material date at about 4.30 p.m., the complainant **DAVID ONYINO (PW 1)**, was at Kipkaren Market when he saw two people standing. He entered a shop and purchased sugar and tea leaves. He met a neighbour Mohammed Bashir (PW 3) while exiting the shop. He found a group of four people, one of whom called him from behind. He was punched by one person. It was then that he saw and identified the appellant. The appellant was the person who assaulted him. His neighbour (PW 3) did not find out what was happening but was in the process chased away by the group of four. His (complainant's) pockets were ransacked while being assaulted. He managed to escape by running away and reporting the matter to a village elder Japheth Onyango (PW 2). He was escorted to his home by the village elder and on the following day went to Lumakanda sub-district Hospital for treatment. He lost five teeth in the incident. He also lost a kilogram of sugar, tea-leaves and an identification card. These items were stolen from him. The village elder, **JAPHETH ONYANGO OYARE (PW 2)**, confirmed that the complainant went to his house at 8.00 p.m. While bleeding with clothes soaked in blood. The complainant alleged that he had been attacked by a group of people who included the appellant and that his money and shopping had been stolen. The village elder escorted the complainant to his home and advised him to report to the police. He (village elder) indicated that the appellant was a person known to him.

MOHAMED BASHIR (PW 3), confirmed that he met the complainant on the material date and time. He was ahead of the complainant when he heard him screaming and on looking behind found that he had

been attacked by a group of four people who included the appellant. He (PW 3) could not rescue the complainant as two of the assailants had knives. He feared and ran away to call the complainant's wife. The two later found the complainant having been injured.

P.C EDWARD ROTICH (PW 4) of Lumakanda Police Station received the necessary report on the 5th September 2008. He was informed by the complainant that the appellant was one of the assailants. He noted that the complainant had been injured on the face and neck, had blood stained clothes and one of his teeth was knocked off.

On 22nd January 2009, P.C Rotich learnt that the appellant had been arrested over a different matter. He summoned the complainant who identified the appellant.

JULIUS MASHETI (PW 5), a clinical officer at Lugari District Hospital examined the complainant and confirmed that he suffered injuries on the material date. The injuries were about thirteen (13) hours old and his view was that they were caused by a blunt object. He filed and signed the necessary P3 form on 15th September 2008.

The appellant was placed on his defence on the basis of the foregoing evidence by the prosecution. In his defence, he denied the offence and stated that on the 18th January 2009 he was asleep at his home when he heard people knocking at the door. These people said that they were policemen. They kicked open the door and asked him to accompany them. They entered the house of a neighbour and arrested other people. He was taken to Lumakanda police while the other suspects were released.

After considering the appellant's defence together with the evidence in support of the prosecution case, the learned trial Magistrate arrived at the following conclusion:-

“From the evidence of PW 1 and PW 3, it was a question of recognizing the accused. Not identifying him. He was a person well known to them and there was electric light nearby. The P3 form was produced in evidence by PW 5. The complainant was injured. The evidence by the prosecution witness is consistent and corroborated that the accused, together with others not before the Court while armed with dangerous weapons namely iron rods and knives, attacked the complainant and robbed him. They also used actual violence on his body. The defence by the accused is not believable and it does not shake the prosecution's case. I find the prosecution has proved its case against the accused beyond any reasonable doubt and accordingly convict him of the offence charged under S. 215 CPC.”

Being dissatisfied with the conviction and the resultant sentence, the appellant preferred the present appeal on the basis of the grounds contained in his petition of appeal filed herein on 28th July 2009.

The grounds were amended with the leave of the Court on 26th May 2011.

In essence, the appellant complains that he was convicted and sentenced on the basis of the prosecution's uncorroborated and contradictory evidence. That, the learned trial Magistrate relied on the evidence of a single witness without regard to the circumstances under which the alleged identification or recognition was made and further that the language used in the proceeding was not indicated in the record. The appellant contends that his defence was disregarded by the learned trial Magistrate and so were the chain of events leading to his arrest.

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

MR. OLUOCH, learned Senior Deputy Prosecution Counsel (SDPC) represented and opposed the appeal on behalf of the respondent.

In his submissions, the learned Prosecution Counsel contended that the appellant was seen and recognized

by PW1 as corroborated by PW 3. PW 1 had a torch which enabled him recognize the appellant while PW 3 relied on electric lights near the scene. Further, PW 1 mentioned the name of the appellant at the first available opportunity. PW 4 was also given the name by PW 1.

The learned Prosecution Counsel went on to contend that the identification of the appellant was watertight as this was a case of recognition and that there was adequate light and adequate opportunity to provide favourable conditions for positive identification. For all these reasons, the learned Prosecution Counsel contended that the appeal lacked merit and should be dismissed.

In response to the respondent's submissions, the appellant contended that he was arrested three months after the offence but not after a week and that he was arrested for an offence of theft and not robbery. Further, the complainant saw him at the police station and mentioned him. He (complainant) did not state the duration of the offence which occurred in the night.

We have considered the submissions by both sides and being mindful of our obligation as the first appellate Court, we have already revisited the evidence adduced at the trial bearing in mind that the trial Court had the advantage of seeing and hearing the witnesses.

Having done so, we are satisfied that the evidence by the prosecution was sufficient in establishing the necessary ingredients of the offence of robbery with violence contrary to S. 296 (2) of the Penal Code. Indeed, the complainant was attacked by a group of four or more people carrying iron-bars and knives who assaulted and injured him prior to taking away his property. The incident was witnessed by the complainant's neighbour Bashir (PW 3).

The appellant did not dispute the occurrence of the offence. His position was that he was not in the group of people who committed the offence. He indicated that at the time of his arrest, he was not aware of the charges leveled against him. Police officers went to his house and arrested him. Other people were also arrested and released but he was taken to Lumakanda Police Station.

In this appeal, the appellant indicated that he was arrested for the offence of theft but not robbery with violence. He did not however indicate why he had to be arrested for whatever offence.

Be that as it may, the obligation to prove the case against the appellant lay with the prosecution. There was no burden placed on the appellant to prove his innocence.

Having proved beyond reasonable doubt that the offence of robbery with violence was committed against the complainant by a group of people, the prosecution was next required to prove beyond reasonable doubt that the appellant was positively identified as having been in that group of offenders.

The offence occurred in the hours of darkness i.e. at about 7.30 p.m. This provided unfavourable conditions for identification of the offenders whether by recognition or otherwise. However, the complainant indicated that he had a spotlight or torch which enabled him see and recognize the offenders whom he had previously known.

Bashir (PW 3) indicated that electric bulbs near the scene of the offence provided light which enabled him to see and identify the assailants.

We would therefore hold that, although the offence occurred in the hours of darkness, the complainant's spotlight and the electric lights near the scene provided favourable conditions for the identification of the assailants or any one of them.

We also hold and agree that since it was evident that the complainant and indeed Bashir (PW 3) had previously known the assailants, their identification of the said assailants was by recognition which in most cases is more reliable as compared to mere identification of a stranger.

Both the complainant (PW 1) and Bashir (PW 3) indicated that the appellant was a person known to

them. He was not a stranger to them. They positively and corroboratively indicated that he was one of the assailants. His name was provided by the complainant to the village elder (PW 2) and to the Investigating Officer (PW 4).

The village elder was the first person that the complainant came into contact with immediately after the offence. The investigation officer said that the appellant's name was provided to the police when the complainant reported the incident.

Significantly, the appellant did not dispute even once that he was previously known to the complainant and Bashir (PW 3).

From the foregoing, we have no doubt in our minds and agree with the learned trial Magistrate that the evidence of identification by the complainant and Bashir (PW 3) was reliable and cogent in proving beyond reasonable doubt that the appellant was positively identified in favourable circumstances as being part of the group of people who attacked and robbed the complainant on that material date and time. Consequently, we find no merit in this appeal which must and is hereby dismissed.

J. R. KARANJA
JUDGE

A. MSHILA
JUDGE

[Delivered and signed this 24TH day of November 2011]