



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO. 120 OF 2010

RICHARD BOSIRE OKUMU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case number 532 of 2009 of the Chief Magistrate's Court

at Kisumu –Mr. Ezra Awino Esq.)

Coram

Aroni, Chemitei – JJ

Mr. Meroka for state

Court clerk Ochollah / Omollo

Appellant in person

JUDGEMENT

The appellant was on 13th November 2009 charged with the offence of Robbery with violence contrary to Section 296 (2) of the Penal Code:- The particulars of the offence were that:-

“On the 29th October 2009 at about 4:00 a.m. at Patel Flats Estates in Kisumu District within Nyanza province jointly with another not before court while armed with offensive weapon namely a knife, robbed Kennedy Owino Otieno of his motor cycle make T. V. S. Star – Engine number AF 54919163, a mobile phone make Nokia A 5550, a driving license and cash Kshs. 1,200 all totaling to Kshs. 93,700 and at or immediately after the time of such robbery used actual violence to the said Kennedy Owino Otieno”

The appellant on appeal has set out five (5) grounds namely:-

(1) That the learned trial magistrate erred in law and facts by convicting him with a single

evidence without any support or circumstantial evidence.

(2) That the learned trial magistrate erred in both law and facts in not examining fully the complainant to tell court the direction of light that enable him to identify me.

(3) That the learned trial magistrate erred in both law and facts by not admitting that complainant didn't lead to his arrest since he claimed to have known me before.

(4) That the learned trial magistrate failed to put into his consideration the fact that there was no testimony availed from the member of public weaken my alibi-defence that the appellant was taken to Police Post by his employee over lost money.

(5) That the learned trial magistrate erred in both law and facts in failing to consider the appellant's alibi defence which was strong enough to secure acquitting.

The facts briefly of this case are that on 29th October 2009 at around 3:00 a.m. – (Though the typed proceedings read 3:00 p.m. the original hand written notes read 3:00 a.m.) the complainant was sent by his employer to collect a visitor at the bus stage. On the way he met the appellant whom he knew. The appellant requested the complainant to drop him at Obunga junction for a fare of Kshs. 100/=.

On the way the complainant alleged that the appellant pulled his knife and slit his neck. He couldn't shout as his throat had been injured. He was taken to Russia Hospital and had an emergency surgery. He said that he knew very well the appellant who went by the name **Mukisii** and they did taxi business together. On cross examined he was emphatic that he knew the appellant very well.

PW2 **Faith Adhiambo Oganya** was actually the employer of the complainant. The visitor who was to be picked at the stage was hers. After waiting for the complainant for a long time he got a call of the attack from an anonymous person at around 10:00 a.m. he later learned from the complainant that the person who attacked the complainant was the "Mukisii" the appellant. PW2 didn't know the appellant.

PW3 was the investigating officer. He recorded statement from PW2 and later issued P3 form to PW1. He also picked the appellant from Obunga Police Post.

PW4 who was based at Obunga Police Post received the appellant, after being brought in by members of the public. Apparently PW4 had a motor bike which had been driven by the appellant. Both PW4 and the appellant knew each other.

PW5 produced the P3 form and which had been filled by one **Dr. Omollo**. The injury sustained by the complainant was classified as maim.

We have gone through the trials magistrate judgment and the subsequent sentencing of the appellant. We agree with the trial magistrate finding that this was a case of a single witness identifying the appellant. In his evidence the complainant stated: **"On the way I met the accused who I knew at Patel flats. The accused stopped me. I asked him where his motor bike was, he told that his bike had problem, he requested me to drop him at Obunga junction for Kshs. 100/=..."**

He continued further **"The accused is the one in the dock. We knew one another and we were doing taxi business together and he went by the name "Mukisii".**

On cross examination he said:-

“I know you very well and I knew you as “Mukisii”. We always parked together at the base at bus stage. It’s a lie that you do not know the charge, you are the one who robbed. I have been at the stage for two (2) years. I had been seeing you for three months and there is a time you disappeared”.

From the above evidence its clear that both the appellant and the complainant operated taxi business or *boda boda*. They knew each other well including the appellant’s nick name “Mukisii”. Its also worthy to note that the complainant reported to the police and his colleagues the next day. It therefore implies that it never took the complainant a longer period?.

PW2 also confirmed that although the complainant was at the theater and could not talk much, he nevertheless told him what had happened and who had done it. The other point that is important is the testimony of PW4. He stated that **“ I have known you for one year, you have worked for me and drove my motor bike and there was loss and I had to search your house.....”**

Apart from some alleged loss which the said witness said, that may not be relevant in this case, what is critical though is that the appellant occasionally did have the motor bike. This buttresses the evidence of the complainant that he knew the appellant as they were both having motor bike and that is why on the material day, on inquiry by the complainant, the appellant stated that his motor bike had a problem.

We are further alive to the judgment of the Court of Appeal in the case of **FRANCIS KARIUKI NJIRU & OTHERS =vs= REPUBLIC, Criminal Appeal No. 6 [2001] (UR)** where the law stated:-

“The law on identification is well settled and this court has from time to time said that the evidence relating to identification must be scrutinized carefully and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered. (See R =vs= Turbull [1976] 63 Criminal Appeal R. 132) Among the factors the court is required to consider is which the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all.....”

In the present case, the appellant was fully recognized and identified by the complainant. The report was made immediately to the police and to PW2. On this ground therefore the trial court is not faulted at all and the court indeed forewarned itself.

On the defence of alibi its worthy to reproduce the appellant’s evidence thus **“I come from Chavakali. I drive motor bike. I was in the house and I went to be shaved in Kinyozi and my boss came asking for his money. We went to police and he caused my arrest and then to court with robbery”**

In the case of **SEKITOLEKO =vs= Uganda [1967] E.A.** it was said about the defence of alibi

“(i) as a general rule of law the burden on the prosecution of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else. (R =vs= Johnson [1961] 3 ALL ER 969 applied; Leonard Aniseth =vs= Republic [1963]E. A. 206 followed)

(ii) The burden of proving an alibi doesn’t lie on the prisoner and the trial magistrate had

misdirected himself”

In the current appeal, we find no defence of alibi. To our understanding the appellant simply stated where he was at the time of the offence. In fact by admitting that “**I drive motor bike**”, it buttressed the complainant’s case.

The upshot of it is that the appeal fails. However in the interest of justice and in line with Section 324 of the Criminal Procedure Code we are according this opportunity to the appellant to mitigate prior to us delivering the relevant conviction.

Dated, signed and delivered at Kisumu this 1st of November 2011.

**ALI-ARONI
JUDGE**

**H. K. CHEMITEI
JUDGE**

In the presence of:

.....**for State**

.....**Appellant in person**

HKC/ao