



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CRIMINAL APPEAL NO. 65 OF 2007**

*(Appeal against conviction and sentence from the Judgment of [MR. E. O. OBAGA, SRM) dated 28th March 2007*

*in the Chief Magistrate's Court Kakamega in Criminal Case No.2188 of 2004)*

**KENNEDY**

**OCHIENG.....APPELLANT**

**V E R S U S**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

The appellant, Kennedy Ochieng, was charged together with others (who were however acquitted) with eight (8) counts of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on the night of the 12th and 13th August 2004 at Lusui village, Ivonda sub-location in Kakamega South District, the appellant, jointly with others not before the court, while armed with dangerous weapons namely pangas, rungas, and machetes robbed Chrisandus Mutsotso, Henry Khayati, Eugene Geoffrey Pala, Rose Eboso, Julia Masitsa, Nelson Iddah, Grace Iminza and Pannes Esendi (hereinafter referred to as the complainants) of cash of various amounts and other items, including mobile phones, and other personal belongings of various values and at or immediately before or immediately after the time of such robbery wounded the said complainants. When the appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. The prosecution called a total of nine witnesses in a bid to establish its case against the appellant. The appellant adduced sworn testimony in his defence. He denied the charge that he had been involved in the spate of robberies that he was charged. He explained that he was a victim of mistaken identity. After evaluating the evidence adduced by both the prosecution and the defence, the trial magistrate found that the prosecution had established one of the charges (Count III) to the required standard of proof beyond any reasonable doubt. The appellant was as, a consequence, convicted as charged. He was sentenced to death as is mandatorily provided by law. The appellant was aggrieved by his conviction and sentence. He has duly appealed to this court.

In his petition of appeal, the appellant raised several grounds of appeal challenging the decision of the trial magistrate to convict him. He was aggrieved that his fundamental rights as guaranteed by the former Constitution under **Section 77(2)** of the **Constitution** was infringed in that he was detained for a period of more than fourteen days before he was arraigned before the court. He faulted the trial magistrate for

relying on circumstantial evidence to secure his conviction when such evidence did not support the charge. The appellant was aggrieved that the trial magistrate had relied on contradictory evidence from the prosecution witnesses which did not support the charge. He faulted the trial magistrate for convicting him on the charge of robbery in the absence of the evidence from the arresting officer. He took issue with the fact that the trial magistrate had failed to consider the totality of the evidence adduced and therefore reached the erroneous conclusion that the prosecution had established the charge to the required standard of proof beyond any reasonable doubt. In the premises therefore, the appellant urged the court to allow the appeal, quash the conviction and set aside the sentence.

Before giving reasons for our decision, we will endeavour to set out the brief facts of this case. On the night of the 12<sup>th</sup> and 13<sup>th</sup> August 2004, a gang of robbers invaded the residents of Ivonda sub-location, Iguhu Location of Kakamega South District. The said gang of robbers terrorized several residents of the village. Their modus operandi was simple; they broke into the houses of the targeted villagers, robbed them and used them to entice their neighbours to open doors for them. In the course of the night, the said gang robbed several villagers of their valuables which included cash and mobile phones. The residents who were robbed included PW1 Grace Iminza, PW2 Rose Eboso, PW3 Juliana Muzinza, PW4 Ida Nelson, and PW5 Eugene Godfrey Pala. The said residents (complainants) narrated how on the particular night, a gang of robbers numbering more than six, broke into their houses, terrorized them, and robbed them of their valuables. The complainants testified that they were unable to identify the appellant as being among the gang which robbed them. Some of the complainants told the court that they identified some of the co-accused of the appellant in the lower court who were charged with the appellant but were acquitted by the trial magistrate due to lack of sufficient evidence.

It is apparent that the appellant was convicted by the trial magistrate essentially on the evidence relating to the circumstances of his arrest. According to PW6 Edwin Bulemi Luvega and PW7 John Shivachi Amalemba, when the residents of the village were made aware that robbery was in progress in the area, they mobilized themselves and waited for the gang to arrive at the homestead of PW7. PW7 testified that he counted the members of the gang and realized that they were seven. At that time, PW7 had already left his house and was hiding behind a fence near his house. According to PW6, the villagers who had mobilized themselves raised alarm. The gang of robbers scattered. They were flushed out. Two of them were lynched. They died at the scene from the beating that they sustained. At about sunrise, the villagers accosted the appellant. They suspected him of being a member of the gang of robbers because he was allegedly found armed with a panga. However, none of the property which were robbed from the complainants was recovered in possession of the appellant. The real reason why the villagers suspected the appellant appears to be ethnic profiling. The appellant is from the Luo community while the village attacked by the robbers is predominantly occupied, if not exclusively, by members of the Luhya community. The trial magistrate did not believe the defence of the appellant because he held that it was impossible that the appellant could at that time of the morning be walking the long distance from Lusui village to Mbale. The trial magistrate further held thus;

*“There is evidence on record that soon after the robbery the thugs fled into two groups, one to Lusui market and another which took cover in the thickets. The thicket was surrounded until sunrise when three people among them the accused were flushed out. Two were lynched and the accused was saved by police who arrived when the thugs had been flushed out.”*

In his defence, the appellant testified that he was accosted by a crowd as he was walking on foot along the Kakamega – Kisumu road. He saw two people being beaten by the mob. He walked past the scene but was stopped by some two men from the mob. He was beaten and accused of being among the suspected robbers. It was his defence that he was a victim of mistaken identity.

This is a first appeal. As the first appellate court, this court is mandated to re-consider and to re-evaluate the evidence adduced before the trial magistrate’s court so as to reach its own independent determination whether or not to uphold the conviction of the appellant. In reaching such decision, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any determination regarding the demeanour of the witnesses. (see **Okeno vs Republic [1972] EA 32**). The issue for determination by this court on the appeal is whether, on re-evaluation of the

evidence, the prosecution established its case against the appellant to the required standard of proof beyond any reasonable doubt.

As stated earlier in this judgment, the appellant was convicted based essentially on the circumstances of his arrest. None of the complainants who testified in court identified the appellant during the course of the robbery. None of the stolen property was recovered in the possession of the appellant. It was apparent that the appellant was convicted on the basis of circumstantial evidence i.e. because he was found at the scene where the robbers are alleged to have fled into, then he was most probably a member of the gang of robbers. As was held by the Court of Appeal in **Sawe vs Republic [2003] KLR 264** at page 372:

*“In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. It is a burden, which never shifts to the party accused.”*

In the present appeal, it was clear that the chain of circumstances relied by the trial magistrate cannot establish, by circumstantial evidence, that the appellant was a member of the gang of robbers that terrorized the villagers of Ivonda sub-location on the particular night. The witnesses who testified for the prosecution were not able to explain or describe the size of the thicket. They did not tell the court how certain they were that they had completely surrounded the thicket so that no one could escape from it during the particular night. It was impossible for the court to conclusively determine that the appellant was not indeed, as he claimed walking from Lusui village to Mbale. It was apparent that the trial magistrate shifted the burden of proof to the appellant by relying on the evidence that he had adduced in his defence to support the prosecution case so that circumstantial evidence could be applied to convict the appellant. The defence offered by the appellant raises reasonable doubt – in fact it gives a reasonable explanation why he was at the particular place at the particular time when he was accosted by the frenzied mob who wanted to lynch him on suspicion that he was one of the robber.

Taking into consideration the totality of the evidence adduced, this court is unable, with certainty, to reach the conclusion that the conviction of the appellant is beyond reproach. There are many holes in the prosecution’s case which cannot establish the serious charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt. The appeal filed by the appellant has merit. It is hereby allowed. The conviction of the appellant is quashed. The sentence is set aside. The appellant is ordered set at liberty and released forthwith from prison unless otherwise lawfully held. It is so ordered.

**DELIVERED and DATED at KAKAMEGA this 7<sup>th</sup> day of December 2011**

**L. KIMARU**  
**J U D G E**

**B. THURANIRA JADEN**  
**J U D G E**