



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA**

Criminal Appeal 70 & 75 of 2006

**SAULO SHIKUTWA.....1ST APPELLANT
BENJAMIN GEOFFREY.....2ND APPELLANT**

V E R S U S

REPUBLIC..... RESPONDENT

J U D G E M E N T

The Appellants were charged with two counts of robbery with violence contrary to Section 296 (2) of the Penal Code. They were convicted by the trial court and preferred this appeal.

Mr. Musiega, Counsel for the 1st Appellant submitted that the charge sheet was defective. It was amended twice without being counter-signed and the appellants were not informed about the amendments. Counsel further submitted that the ingredients of robbery with violence were not established. The two appellants were jointly charged yet the word joint was not used to show common intention. The conditions for identification were not conducive and no names were given to the police. Finally, that the 1st appellant's alibi defence was ignored although the court acknowledged that the appellant was arrested at Kakamega Provincial Hospital while undergoing treatment.

Mr. Karuri, learned State Counsel conceded the appeal and submitted that the case was not proved beyond reasonable doubt. The identification was not positive and complaints never reported to the police.

The prosecution case was that on 4/8/2004 at about 9.00 p.m., PW1, Valeria Nakachi was with PW3, Praxides Nakachi coming from Nairobi. They alighted at Makokha stage. On their way home two young men emerged and said they knew them and would escort them. Shortly, the young men robbed them after they had reached near a stream. On reaching home they informed their parents who informed the area assistant chief the following day. They gave their parents the name of Benjamin and Saulo.

PW2, Naftali Mulinya was the Assistant Chief and on 18th September, 2004 at 7.00 a.m. he was informed that some two ladies had been robbed. He went with Administration Police officers and arrested the 1st accused (Saulo Shikutwa) who had a pair of shoes belonging to the ladies. He did his investigations and arrested the first appellant at Kakamega Provincial Hospital.

PW4 filled in the P3 Form for PW1. PW5, PC Rashid Haisen on 18/9/2004 at 4.30 p.m. received the 2nd accused (Benjamin Godfrey) from Administration police officers. He put him on the cells and was later charged him with the offence. PW6, PC Ali Odawa was attached to Kakamega police station. Investigations were done by the Assistant Chief and found where stolen shoes were. He arrested Saulo (third Accused) and charged three accused with the offence.

The main issue for determination is whether the appellants were positively identified. The robbery occurred past 9.00 p.m. The complainants were heading home. Two young men emerged and escorted them and when they reached near the river they robbed them. It is not established for how long the complainants walked with the robbers. Was it a road or a small path? It is also not established whether the complainants were talking with the two young men. At what point in time did they identify them and whether there was light on the way.

PW2 in his evidence did not state who gave him the information about the robbery. He did not mention the complainant's parents. It seems he is the one who did the investigations.

In the end, we do concur with the learned State Counsel that the case was not proved beyond reasonable doubt. PW2 does not state whether he was given the appellants' names before he sprung up with his investigations.

In the end, we find the appeal has merit and the same is allowed. The Appellants shall be set at liberty unless otherwise lawfully held.

FLORENCE MUCHEMI

J U D G E

SAID J. CHITEMBWE

J U D G E

Delivered, Dated and Countersigned at Kakamega, this 24th day of March, 2010.

ISAAC LENAOLA

J U D G E