



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**CRIMINAL APPEAL 35 OF 2006**

***(APPEAL FROM CONVICTION AND SENTENCE OF [MS. S. SHITUBI, SRM] IN BUNGOMA  
SENIOR RESIDENT MAGISTRATE'S COURT BUNGOMA, IN CRIMINAL CASE NO.169 OF  
2005)***

**EDWARD KIMAWACHI SIKALO.....APPELLANT**

**V E R S U S**

**REPUBLIC.....RESPONDENT**

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

The appellant was convicted for the offence of attempted robbery with violence contrary to **section 297 (2)** of the Penal Code. He was then sentenced to death.

In his appeal, he has submitted that the evidence tendered by the prosecution was full of contradictions, and was thus unable to sustain a conviction.

He also submitted that the prosecution had failed to prove the charge against him to the standard of proof required by law.

Finally, he complained that the investigating officer did not give evidence at the trial.

**PW1, EDWARD LUSWETI**, was the complainant. On the night of 14<sup>th</sup> March 2005 he was in his house, asleep. He was with his wife, (PW2).

At 12.00 midnight, he heard a bhang on his main door, after which people entered the house. The people had torches.

The said people hit the bedroom door, but they failed to gain entry.

PW1 called out to his employee (PW3), who was in a room adjacent to PW1's bedroom.

When PW1 refused to open the door to his bedroom, some robbers went round, and reached his bedroom window. They then demanded money from PW2. They broke the window pane and flashed

torches at PW1 and PW2.

When PW2 said that there was no money inside the house, PW1 heard PW3 saying that he (PW3) would die with one of the robbers. PW1 heard a commotion, and then the thugs at the bedroom window took to their heels.

PW1 did not identify any of the attackers.

**PW2, JOY LUSWETI**, corroborated the evidence of PW1 in every material particular.

She too, did not identify any of the attackers.

**PW3, SILAS SIMIYU MAYABILA**, is a brother to PW1. He also used to assist his brother with the work in the shamba.

On the material night, PW3 was asleep inside PW1's house. His bedroom was adjacent to that used by PW1 and PW2. At 12.05 a.m. PW3 heard the main door to the house break. He saw about 2 torches being flashed by the thugs who entered the house.

PW3 saw the thugs go to the bedroom of PW1, and knock on it. PW1 screamed, calling out to PW3.

When PW1 did not open his bedroom door, some of the thugs went round to the window of PW1's bedroom. Then one of the thugs went to the bedroom where PW3 was. He ordered PW3 to sit down.

As the thug had a torch, PW3 noticed that he had a cane and a panga. PW3 decided to confront the said thug. PW3 had a torch and a panga. He chased after the thug and hit him with the panga.

PW3 said that he hit the thug on his shoulder, causing him to fall. However, the thug quickly picked himself up and escaped. PW3 continued to pursue him, but without success.

It was the evidence of PW3 that he did identify the thug whom he hit with a panga, as the appellant herein. PW3 was able to identify him with the help of light from the moon.

Having identified the appellant, who was their neighbour, PW3 went on to sleep at the home of Samuel Namasaka, a neighbour. PW3 feared to return home, as he thought that he could have run into some of the other thugs.

At 5.00 a.m., PW3 returned home and told PW1 that he had recognized the appellant, as one of the thugs.

After PW1 reported the incident to the police, PW3 says that he (PW3) identified the appellant in a parade.

**PW4, APC ALBERT KHAEMBA**, was an administration police officer attached to the District Commissioner's Office, Bungoma. Prior to that, and at the time of the incident, he was attached to the District Officer's office, Sirisia.

On 16<sup>th</sup> March 2003, he was asleep, when at 2.00 a.m., a colleague woke him up. Village elders and the complainant had brought a suspect in a robbery at Namwela.

PW4 interviewed the suspect and the people who had brought him. PW4 ascertained that PW1 had chased after the suspect, and had hit him on the right shoulder.

PW4 saw the injury on the suspect's right shoulder. He was thus satisfied that the suspect was involved in the robbery. He then arrested the suspect, who is the appellant herein.

Having re-evaluated the evidence on record, we are satisfied that there was an attempted robbery with violence at the home of PW1 and PW2. There were at least 2 robbers, and they were armed with dangerous or offensive weapons or instruments, namely a panga and a cane. Also, the robbers used actual violence on the main door to the complainant's house. They did so, by smashing down the door.

However, neither the complainant nor his wife identified any of the robbers. It was only PW3 who said that he recognized the appellant as one of the robbers. He was aided in identifying the appellant by moonlight.

In order for the witness to have had the benefit of light from the moon, the intruder must have been outside the house. It therefore follows that it was at the stage when PW3 was chasing after the intruder.

In our understanding, when PW3 was pursuing the intruder, the said intruder must have had his back to the witness. We say so because we cannot understand how else the intruder could have been running away from PW3. In those circumstances, it is not clear how the appellant was recognized.

In so saying, we have not lost sight of the fact that PW3 hit the intruder on the shoulder, using a panga. We also did note that when PW4 re-arrested the appellant, the latter had a swelling on his right shoulder. The fact that PW3 had hit the intruder on his shoulder, and that the appellant had a swelling on his right shoulder when PW4 re-arrested him, suggest that the appellant was the intruder that PW3 had hit.

Given the fact that PW1 was in the company of the village elders when they took the appellant to PW4, who re-arrested him, explains why the appellant was arrested. PW3 had already told PW1 that he had recognized the appellant as one of the robbers. PW3 had also told PW1 that he had cut the appellant on the shoulder.

In his defence, the appellant denied having been arrested by villages and the complainant. He said that he was arrested at 10.00 a.m., whilst he was at home, washing clothes. He said that the charges against him were strange. But he did not tell the court about where he was at, or what he was doing at about 12.00 midnight on 14<sup>th</sup> March 2005.

He also did not explain to the court how he got the swelling on his shoulder.

Notwithstanding the failure by the appellant to state exactly where he was at 12.00 midnight, on 14<sup>th</sup> March 2005, and also the failure to indicate how he got the swelling on his shoulder, those did not by themselves substitute the obligation on the prosecution, to prove its case against him.

Those failures may imply that the evidence of the prosecution was not tested by the defence. However, the said untested evidence must still be sufficient to prove the prosecution case beyond any reasonable doubt.

It must be recalled that an accused person is entitled to say absolutely nothing, if he so chooses. Even in such instances, unless the case against him was proved beyond any reasonable doubt, the accused person would be entitled to an acquittal.

In this case, the learned trial magistrate correctly cautioned himself about the danger of founding a conviction on the evidence of a single identifying witness.

We however, are not satisfied that the identification in the prevailing circumstances was free from the possibility of error. Accordingly, although reluctantly, we hold that it would be unsafe to uphold the conviction. It is therefore quashed, and the sentence is set aside. The appellant should be set at liberty unless he is otherwise lawfully held.

***Dated, Signed and Delivered at Bungoma, this 18<sup>th</sup> day of February 2009***

**A. MBOGHOLI MSAGHA**

**FRED A. OCHIENG**

**JUDGE**

**JUDGE**