



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

Criminal Appeal 193 of 2003

PETER MUSONGA OTANGO 1ST APPELLANT

HENRY MUSONYE LINGOTSO2ND APPELLANT

REPUBLIC..... RESPONDENT

J U D G E M E N T

The two appellants were charged with five counts of Robbery contrary to **section 296 (1)** of the Penal Code. The co-accused persons were acquitted by the trial court.

In count one the particulars of the offence were that –

On the night of 18th and 19th of October 2001 at Shibale village, Nucleus sub-location, Nabongo location in Butere/Mumias District within the Western Province, the appellants robbed SHAKILLA MUSA of one video deck make Samsung S/NO.6 R FN 400580N, one remote control, one radio cassette make Sony S/NO.5810153 and cash KShs.100/= all valued at KShs.26,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said SHAKILLA MUSA.

In count II the particulars of the offence were that –

On the night of 18th and 19th of October 2001 at Shibale village, Nucleus sub-location, Nabongo location in Butere/Mumias District within the Western Province, the appellants robbed FATUMA OBARE of cash KShs.1000/= and at or immediately after the time of such robbery threatened to use actual violence to the said FATUMA OBARE.

In count III the particulars of the offence were that –

On the night of 18th and 19th of October 2001 at Shibale village, Nucleus sub-location, Nabongo location in Butere/Mumias District within the Western Province, the appellants MESHACK ALUBE JAIRO of cash KShs.1,225/= and one wallet and at or immediately before after the time of such robbery threatened to use actual violence to the said MESHACK ALUBE JAIRO.

In count IV the particulars of the offence were that –

On the night of 18th and 19th of October 2001 at Shibale village, Nucleus sub-location, Nabongo location in Butere/Mumias District within the Western Province, the appellants robbed ESTHER SUMBA of cash KShs.300/= and at or immediately before or immediately after the time of such

robbery threatened to use actual violence to the said ESTHER SUMBA

In count V the particulars of the offence were that –

On the night of 18th and 19th of October 2001 at Shibale village, Nucleus sub-location, Nabongo location in Butere/Mumias District within the Western Province, the appellants robbed MARY NYAKOA of cash KShs.500/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said MARY NYAKOA.

The appellants were also charged with handling stolen property contrary to **section 322 (2)** of the Penal Code and personating as a police officers contrary to **section 105** of the Penal Code.

The appellants were convicted of each of the five counts of Robbery and sentence to between 5 and 6 years imprisonment with two strokes of the cane in each count. Being dissatisfied with the conviction, the appellants preferred this appeal.

The 1st appellant, Peter Musonga Otengo was the 1st accused before the trial court. His petition of Appeal contains 11 grounds. These grounds can be summarized as follows.-

- i) The prosecution witnesses alleged to have all been attacked on the same day and there was high chance of biasness.**
- ii) The alleged offences were committed at night and there was no eye witness.**
- iii) The prosecution did not prove its case beyond reasonable doubt on identification.**
- iv) The source of light allegedly used to identify the appellants was not satisfactory.**
- v) The investigating officer did not testify.**
- vi) Prosecution evidence was based on hearsay and was full of contradictions.**
- vii) Appellant's mitigation was not considered.**
- viii) Those found with the exhibits were released.**

Further to the above grounds of Appeal, the 1st appellant added

that he was just arrested on the road and taken to the police station. He further submitted that all the complainants were in the same compound yet they didn't come out and that the landlord did not prove that the appellant was staying at her house.

The second appellant, Henry Musonye Lingotso was the 4th accused. He listed seven grounds of Appeal. These can be summarized as follows:-

- i) No identification parade was conducted to clear doubt on the identity of the assailants.**
- ii) The essential witness, the investigating officer did not testify.**
- iii) The trial magistrate also heard other cases involving the appellant namely Criminal Case Nos.482/2002, 483/2000 and 1053/2001 yet the appellant requested to have some of the cases transferred.**
- iv) No exhibits were found on his possession.**

- v) ***Evidence on identification was by a single witness.***
- vi) ***There was insufficient light to enable identification of attackers.***
- vii) ***Conviction was base on hearsay.***

Apart from the above grounds, the 2nd appellant further contended that there was no proof that he had paid the landlord KShs.600/= and that he was not arrested in the house.

Mr. Karuri, learned State Counsel opposed the appeals. He submitted that all the complainants positively identified the appellants and that there was no need of an identification parade. The stolen items were recovered from where the appellants were staying and the 1st appellant did confirm that they had rented the house. The appellants' respective defences were considered by the trial court.

The most crucial issue for determination is whether the appellants were positively identified by the complainants and whether the prosecution proved its case beyond reasonable doubt against the appellants.

PW1, Shakila Musa was at her home on the night of 18th and 19th October, 2001 at about 11.00 p.m. Two people entered her house after they had alleged to be Administration police officers from Matungu. They were in civilian clothes. She managed to identify the two persons as accused No.1 and No.4 who are the 1st and 2nd appellant. The 1st Appellant had a helmet and a whip. They had a torch. There was a lamp that was on all the time but was later put off by the 2nd appellant.

PW2, Moses Lumbasi was also in his house on the same night within the same compound with PW1. He opened the door as he was told that Administration Police were on an operation. Two people entered his house and he identified them as the two appellants. There was light from a lamp in the house. They stayed for about 10 minutes. The house was a single room. During cross-examination by the 2nd appellant PW2 stated that the 2nd appellant had a helmet.

PW3, Esther Sumba Bendete was also a victim of the robbers that material night. She too identified the two appellants. The 2nd appellant had a whip and a torch. She lit a lamp and the attackers were flashing their torch. According to her, the 1st appellant stood at the door while the 2nd appellant was searching her house and they stayed for about 15 minutes.

PW5, Fatuma Makokha was in her house with two children namely Clement and Moses. Two people claiming to be police officers went to her house and she opened for them. She saw the 1st appellant holding a pistol. The 2nd appellant had a yellow dust coat and a cap. Another person by the name Meshack Aluse came to her rescue but was made to sit down. She gave them KShs.1000/=. She identified the attackers using their torch. The cap the 2nd appellant was wearing was a helmet for Mumias Sugar Company Ltd. (MSC LTD.) Her evidence is corroborated by that of Meshack Aluse (PW6) who saw first appellant with a pistol who said was a police officer. PW8 Clement Kelly went with the 2nd appellant to PW7's house where they were given KShs.500/=. Similarly PW7, Mary Nyakoa saw the 2nd appellant when he went to here house with PW8. There was light on. The 2nd appellant had a blue helmet. PW8 also identified both appellant. he was reading with one Ibrahim in PW5's house who is his mother. He testified that there was light in the house. 1st appellant was wearing a coat and a cap.

PW9 also testified that he was a victim of the robbers that night. He identified the appellants with the help of his solar bulb that was on. The 1st appellant had a pistol and the 2nd appellant had a torch and a cane. They took about 10 minutes.

PW11 P.C. Kennedy Osando with the assistance of an informer arrested the 1st appellant who took them to Green View Estate and some of the stolen items were recovered. The 2nd appellant was arrested later.

PW14, Rehema Ongomo testified that she had rented two rooms to the appellants and another person who was the 3rd accused before the trial court. She was the 2nd appellant's wife.

The appellants were put on their defence. The first appellant testified on how he was arrested in October 2001 while he had gone to visit a friend at Lukoye. The 2nd appellant testified that he is a businessman. On 23/5/2002 he went to Kakamega Town. The following morning he returned to Mumias Town where he found his house had been broken into and he was told it was the police who had broken his house. He went to the police station and he was arrested as he had no identity card.

From the prosecution evidence, no identification parade was done. However, all the complainants were able to identify the appellants when testifying. There were four accused persons before the trial court. The complainants were able to identify the 1st and 4th accused persons as the people who robbed them. These are the two appellants. The attackers had a torch and the complainants had lamps that were on during the robbery. PW9, Michael Onyango Mukenyo had a solar bulb on and was able to identify the robbers. I am satisfied that the identification of the appellants by the complainants is reliable. The robbers took quite some time and the victims were staying in the same compound. The complainants were able to describe how the appellants were dressed. The robbers were not violent and this enabled the complainants to freely talk to them.

On the 1st appellant's other ground of Appeal, I do not find that the witnesses were biased against him as they had not known him before. The source of light was the torch, lamps and solar bulb. Since the robbers took sometime, it was possible for the victims to identify their attackers using these sources of light. The testimony of PW11 relates to how the investigations were done. I do not see any prejudice on the appellant even if the investigating officer did not testify. All the witnesses testified that there were two robbers who posed as police officers. They had a photograph of someone in army uniform which they showed their victim. The trial court's decision that the two robbers were the two appellants was proper and the fact that those who were found with the exhibits were released does not disprove the act of robbery by the appellants.

The 2nd appellant is contending that the trial magistrate also heard other criminal cases involving him. I do not think that fact influenced the trial magistrate in arriving at his decision. The mitigation by both appellants were considered by the trial court when passing the sentence.

In the end, I find that this appeal has no merit and the same is dismissed.

Delivered, Dated and Signed at Kakamega 24th this day of September, 2009

SAID J. CHITEMBWE

J U D G E