

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Criminal Appeal 91 of 2009

BARNABAS OTUNDU BALE.....APPELLANT

VERSUS

REPUBLIC.....ACCUSED

JUDGEMENT

The Appellant was charged with Robbery contrary to **section 296 (1)** of the Penal Code. He was also charged with handling stolen property contrary to **Section 322 (2)** of the Penal Code. He was acquitted of the two counts but was convicted of assault contrary to **section 251** of the Penal Code and was sentenced to serve two years imprisonment.

Being dissatisfied with the conviction, the appellant filed this appeal. The three grounds of appeal can be summarized as that the prosecution case was not proved beyond reasonable doubt. The appellant further submitted that the alleged stolen items were not found in his possession.

Mr. Karuri, learned State Counsel opposed the appeal. He submitted that the complainant, PW1, knew the appellant and recognized him as he struggled with him. There was moonlight during the incident and PW1 informed PW2 that it was the appellant who had attacked him. PW5 also identified the appellant using torch light.

The prosecution case was that on 21st September, 2007 at about 10.00 p.m. PW1, **Joseph Shisia Waswa** was driving motor vehicle KAC 347A, Nissan Sunny heading home when the vehicle developed mechanical problem and stopped. While checking the vehicle three people emerged and attacked him with a sharp object. They took Shs.3000 from him, Mobile phone, leather wallet, ATM card, ID Card and his voter's card. The complainant managed to identify the appellant as there was moonlight.

PW2, **JAMES SAUKANDA** was the Assistant Chief for Mung'ang'a Sub-location. He was informed about the incident and went to the scene where he found PW1 had been attacked. PW1 informed him that the appellant was one of the attackers. PW3, **Ibrahim Bakari** was a village elder. He was given the appellant's name by the complainant and he arrested the appellant. Nothing was recovered from the appellant.

PW5, **JACKSON NABWIRE** was heading home that night and heard someone screaming for help. He went to the scene and saw the complainant. He saw three people pulling the complainant. He saw the appellant near the car. He had a torch. He knew the appellant.

The appellant in his defence stated that he was also a victim having been robbed that night. He was coming from Nairobi. He reported the matter to the area Assistant Chief and while at his office the complainant came. He was told to go to the A.P. Camp to report and while there, he was arrested on 23rd September, 2007. He was charged on 3rd October, 2007.

From the prosecution evidence, nothing was recovered from the appellant. The trial court was therefore correct in finding that the alternative charge of handling stolen property was not proved. The trial court found that the complainant was assaulted and the charge of Robbery was not proved.

The evidence of PW1 is that when he was attacked he fell down and started making noise. It was about 10.00 p.m. and there was moonlight. PW5 also heard the screams and went to the scene. He saw the appellant with two other people.

The only issue is whether the appellant was positively identified. The complainant's testimony is that he struggled with the appellant. He knew the appellant. PW5 also knew the appellant and he saw him at the scene. It is my finding that the appellant was positively identified. The appellant states that he was arrested after he had gone to report a robbery incident at the A.P. Camp. Unfortunately no police officer testified during the trial. It is not established how the appellant was arrested. However, the prosecution evidence did establish that the complainant was assaulted at night and the appellant was identified as one of the attackers. Two witnesses identified the appellant. The appeal with regard to the conviction has no merit and is disallowed.

The appellant was sentenced to serve two years imprisonment. The offence of assault causing actual bodily harm under **Section 251** carries a maximum punishment of five years imprisonment. I note that the appellant is a first offender.

In his mitigation, the appellant stated that he had twelve children who depend on him. The report by the probation officer confirmed that the appellant has twelve children and one was in form one.

From the circumstances of the case and the mitigation by the appellant before the trial court, I do find that the period the appellant has served is enough punishment. He was sentenced on 2nd April, 2009. He has served almost seven months imprisonment. I will reduce the sentence from Two (2) years to seven (7) months imprisonment with effect from 2nd April, 2009. It is so ordered.

Delivered, dated and signed at Kakamega this 21ST day of October, 2009.

SAID J. CHITEMBWE

J U D G E