



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Criminal Appeal 120 of 2003

HENRY MUSONYE LINGOTSO APPELLANT
V E R S U S
REPUBLIC RESPONDENT

J U D G E M E N T

The appellant was charged with two counts of Robbery with violence contrary to **section 296 (2)** of the Penal Code. He was also charged with escape from lawful custody contrary to **section 123** of the Penal Code. He was convicted of simple robbery and sentenced to serve seven (7) years imprisonment. He preferred this appeal on the grounds that:-

- I) *The prosecution case was not proved beyond reasonable doubt***
- II) *No identification parade was done***
- III) *Prosecution evidence had contradictions***
- IV) *He was in Nairobi when the alleged robbery took place***
- V) *The defence was not considered.***

The appellant further submitted that the alleged robbers said they were police officers and left their identity card. The identity card left with the complainant was not his. He went to Nairobi and when he came to his home he found the house broken into and on inquiry at Mumias Police Station he was arrested.

Mr. Karuri, learned State Counsel opposed the appeal. He submitted that the appellant was positively identified. PW1 identified the appellant who stayed in the house for 30 minutes. He had lit a lamp. Stolen items were recovered from appellant's house. PW6 also identified the appellant. the appellant was arrested the following day after the robbery. Further appellant escaped from lawful custody and was later arrested.

From the prosecution evidence, **PW1, BETTY NANZALA's** testimony is that on the night of 17th and 18th January, 2002 she was at her home with children of her sister. At midnight two people knocked the door claiming to be policemen. She had lit a lamp. She identified both the two people. One was tall and the other one was short who is the

accused.

PW3 AMINA WEKESA OGOLLA was also robbed that night of 17th and 18th January, 2002 at midnight. She lit a lamp. The robbers left an identity card telling her that she would use it to collect her goods at the police station. The identification card was of one **Sylerious Mulae Lubendo**. She identified the appellant as one of the robbers who robbed her that night. **PW6, MBWANA OKINDA** was with PW3. He heard the robbers saying they were police officers. He saw the appellant taking 5 bed sheets, a torch and one handbag. There was a lamp in the house.

PW2, LEONARD WABUYELO heard from a lady at Ekeru that she had seen some of the stolen items. He organized with police officers and gave the lady some money to buy the stolen items. The appellant was arrested and led the police to his house where some of the stolen items were found. The appellant led the police to one Ramadhan Swaleh Lumbango where more stolen items were recovered. PW2 was with the police and when returning from arresting Ramadhan the appellant jumped into the river. It was at night and the police didn't pursue the appellant.

PW8, P.C. JOSEPH KIPTALA also went to arrest the said Ramadhan and on their way back saw the appellant jumping into river Lusumu with handcuffs on. It was at 10.00 p.m. and decided not to follow him.

From the prosecution evidence and the grounds of appeal, the only issue is whether the appellant was positively identified. PW1 testified that she had lit a lamp and identified the appellant. Similarly PW3 had her lamp on and identified the appellant. In both instances at PW1 and PW3's homes, the witnesses stated that the robbers stayed for about 30 minutes. There was ample time to identify the appellant.

PWIV, MBWANA OKINDA was with PW3 and corroborated her evidence that she put on the lamp and that the robbers left identify card. The robbers had torches and the appellant flashed himself on the face with a torch for the victims to see that he was a police officer. Salim Mbwana who is a son of PW3 managed to identify the appellant. He saw the two robbers who had torches and they took another torch that was in his house. PW7 confirmed that his mother lit a lamp and he was able to see the appellant. he identified some of the stolen items to be those stolen from his home.

On the issue of Count III, escape from lawful custody, PW2 testified that he was present when the police went to arrest one Ramadhan Swaleh Lumbanga while returning at night they were to cross a river and he saw the appellant jumping into the river. This evidence is corroborated by that of **PW8, P.C. JOSIAH KIPTALA** who saw appellant jumping into river Lusumu while handicapped. Similarly, **PW9, P.C. RICHARD SHIKAMI** went with PW8 to arrest Ramadhan on 19th January 2002 at night. On reaching a foot-bridge the appellant jumped into the river.

PW10, PC ZADICK ASHIOKO was also with his fellow police officers when the appellant jumped into the river. He managed to arrest the appellant after he had escaped on 23rd May, 2002 at Mumias. The handcuffs were not recovered.

The appellant was arrested on 19th January, 2002 and this was one day after the robberies. Some of the stolen items were found in his house. He led police officers to Ramadhan's house where more stolen items were recovered. The

appellant's contentions that the Identity Card left by the "police officers" during the robberies cannot hold as it was just a trick to make the victims believe that they were indeed police officers. There was no need to indicate the number of the handcuffs that the appellant ran away with when he jumped into the river. The alibi defence was not corroborated by any other witness.

In the end I do find that his appeal lacks merit and the same is dismissed.

Delivered, Dated and Signed at Kakamega this 3rd day of December, 2009

SAID J. CHITEMBWE

J U D G E