



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

Criminal Appeal 23 & 24 of 2003

(Appeal from the original conviction and sentence by the Senior Resident Magistrate at Vihiga in criminal case No. 2020 of 2000 (Mr. F.K. Kinyanjui, SRM))

FRANCIS MAKALA OKUTE

EZEKIEL OKIYA SAMO.....APPELLANTS

VERSUS

REPUBLIC RESPONDENT

J U D G M E N T

Francis Makala Okutu (the 1st Appellant) and Ezekiel Okiya Samo (the 2nd Appellant) were the 1st and 2nd accused in the criminal case No. 2020 of 2000 which was heard by the Senior Resident Magistrate at Vihiga, F.K. Kinyanjui Esq., who on 27.1.2003 convicted them of Robbery with violence contrary to section 296(1) of the Penal Code with which they had been charged. The particulars of the charge were that the two appellants and one Issack Ocheru Atichi who has since died;

“on the 2nd day of November 2000 at around 2.30 a.m. at Elukala village, Eshilandumba sub location, South West Bunyore in Vihiga District within the Western

Province, jointly with others not before the court and being armed with dangerous weapons to wit pangas, axes, and rungas robbed Susan Achayo Nyawiri of one television set, one motor vehicle battery, one radio make sanyo, one thermos flask, one wrist watch make oris, one greese gun and cash Kshs. 7000/-, all valued at Kshs. 24,650/- and at or immediately before or immediately after the time of such robbery wounded the said Susan Achayo Nyawiri.”

The trial magistrate after convicting the appellants and listening to their mitigation sentenced each one of them to a term of imprisonment for a period of seven years and six strokes of the cane as corporal punishment.

Aggrieved by the conviction and sentence the first and second appellants lodged appeals challenging the decision of the trial court. In his appeal, the first appellant in summary submitted that the trial court erred in relying on contradictory and uncorroborated evidence, and in admitting medical evidence without the maker being called, and in failing to consider the defence of the appellant.

In his petition of appeal, the second appellant put forward grounds of appeal that were almost identical to those of the first appellant.

I have carefully perused the record of appeal and evidence adduced in the lower court and the judgment of the learned trial magistrate together with the petitions of appeal. The record shows that the complainant Susan Lydia Achayo (PW1) was sleeping in her house in South West Bunyore location on the night of 2nd November 2000. She was in her bedroom. Her daughter, Helen Atieno (PW2) a high school pupil was sleeping in the dining room area. The only other person in the house was a little child of 3 years. At around midnight, PW1 woke up when she had dogs barking and running back and forth at the gate. She peeped through the window and saw a group of people in the compound. They were carrying pangas, rungas, metal bars, crowbars and other weapons. They headed towards a posho- mill in the compound. She realized they were thieves or robbers whereupon she started screaming. Her daughter (PW2) also woke up and joined her in screaming. The gang was not deterred. They entered the house after breaking the back door. PW2 hid under the dinning table. The gang ordered PW1 to sit down. They flashed torches at her. They demanded shs. 80,000/- They rummaged the house looking for cash. They found shs. 7000/- which was kept under a table cloth and took it. They took an oris watch from the side table in the bedroom of PW1 as well as car keys, TV (Samsung), posho- mill door keys, sanyo battery, thermos flask, all valued at shs. 24,600/- They hit PW1 on the back side, waist and shoulders. PW1 could not recognize them well, she said, but she saw one of the gangsters was wearing a green and red T shirt. But it was the T-shirt rather than the appearance the gangster that she saw. She said in court that he was the 1st accused (i.e. 1st Appellant). PW2 also saw one of the gangsters wearing the red and white striped T shirt but did not appear to observe his features and appearance.

That night, Administration Police Constable David Dundo (PW3) was on duty patrolling the area in company of Assistant Chief. He heard the screams of PW1 and PW2. He and the Assistant Chief headed to and entered the compound of PW1 where they found many people. PW3 shot three times in the air. PW1 saw the robbers start running away after this. They dropped the items they had stolen from PW1. The first appellant was however arrested at the scene. He led PW3 and the Assistant chief to the house of the 2nd appellant the same night. It was in the vicinity. Nothing was found in his house. He had locked it with a padlock from outside and entered through the window ostensibly with the object of giving the false impression that there was nobody in the house. When PW3 threatened him, he threw the key through the window and PW3 opened the door from outside and arrested him.

The stolen items were recovered except the oris watch and the cash (shs. 7000/-). PW1 was treated for the injuries at Maseno Mission Hospital by Dr. Mulemba. The latter's colleague who was familiar with his handwriting and signature produced the P3 as exhibit 8 which had been filled in on 4.11.2000 by Dr. Mulemba. The latter had classified the tenderness on the back and abdomen of PW1 and her lower limb as harm. The investigating officer was not called to testify. The appellants were put on their defence.

In his unsworn statement, the first appellant stated that he was in his house sleeping on 2.11.2000 when the police came and arrested him. He alleged that he did not know the 2nd appellant although he led PW3 and the Assistant Chief to his (2nd appellant's) house. He made no comment about having been arrested at the scene.

The 2nd Appellant alleged in his unsworn statement that he did not know the 1st Appellant. He said he was in his house when he heard dogs barking following which the police went and arrested him. He made no allusion that his house was locked from outside nor did he state that he had thrown the key to PW3 through the window and that the latter opened the door and arrested him. Dorcas Khemeya the mother of the 1st Appellant told the trial magistrate in cross examination that the second appellant and her son went to school together and that they know each other.

In his judgment, the trial magistrate made a finding that the appellants were members of the gang of robbers that broke into PW1's house, injured her and stole her property on the night of 2nd November 2000. This finding was sound. The first appellant was arrested at the scene. His and the second appellant's allegation that they did not know each other was contradicted by the 1st Appellant's mother

who confirmed that they knew each other and in fact went to school together. Although the evidence of the 1st appellant in leading the police to the 2nd appellant was accomplice evidence in the circumstances of this case, it could not but be true. The appellant was caught hiding soon after the robbery. He had locked himself in his house from the outside. The defence put up by the appellants was a sham. The trial court was justified in rejecting that defences. It was also justified in the finding that the appellants were guilty of the offence. The conviction of both appellants was supported by cogent evidence that established the commission of the offence beyond any reasonable doubt. The ingredients of the offence robbery under section 296(1) were proved. I observe however that the appellants ought to have been charged under section 296(2) of the Penal Code as all the ingredients of the offence under that section were there.

The appeals by the appellants on conviction are devoid of any merit. As regards sentence, the corporal punishment is set aside. In the result, the convictions are upheld and sentences are varied so that each of the two appellants shall serve a term of imprisonment for a period of seven years without corporal punishment. It is so ordered.

Dated at Kakamega this 4th day of March 2005

G.B.M. KARIUKI

J U D G E