

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

(CORAM: MAJANJA J.)

CRIMINAL APPEAL NO. 02 OF 2015

BETWEEN

BENSON KEYA WATAKO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. L.M. Nafula delivered on 30th December, 2014 at the Mumias Senior Principal Magistrate's Court in Criminal Case No. 418 of 2013)

JUDGMENT

1. The appellant, **BENSON KEYA WATAKO**, is charged with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)** the particulars of the charge were that on 1st June, 2013 at about 9.00pm at Shianda Shopping Centre, Lubinu Sub-Location of Mumias District with Kakamega County, he jointly with another not before the court armed with a panga robbed **SCOVIA ADIKA SAYA** one mobile phone make Nokia C3205 valued at Kshs.5900/= and during the of robbery used actual violence on the said **SCOVIA ADIKA SAYA**.

2. The appellant was tried and convicted and sentenced to death. He now appeals against conviction and sentence. He has raised the issue that he was not identified, that the prosecution did not prove that the stolen phone belonged to the complainant and that he had been framed. The State counters that the prosecution through the witnesses proved the offence against the appellant.

3. The key witness in this case against the appellant, Scovia Adika Saya (PW 1) recalled that on 1st June, 2013 at 9.00pm she was working as a bar maid so she decided to leave work. As she was going home, she was confronted by two people. One of them grabbed her neck and demanded her cell phone. She refused to give it to him and the engaged in a struggle and as the person who took her phone was leaving, she pushed him into a nearby pit. He also pulled her into the pit and they continued to struggle while she screamed for help attracting people from nearby. As people came, the lights at a nearby clinic were switched on and she was able to see the appellant who also had a panga.

4. One of the people who responded to the screams was Nelly Adero Wesonga (PW 3). She heard screams. She went towards the screams and upon arrival, she saw a man and woman struggling who then fell into a pit behind a clinic. The woman told her that the man had attempted to rob her of her phone. PW 3 knew the appellant as he was from the area.

5. As members of the public gathered, they look the appellant to Shianda Police Patrol Base at about 10.00PM where they were received by PC Maulidi Mbaraka (PW 2) who re-arrested the appellant and recorded statements. He also issued PW 1 with the P3 form.

6. When put on his defence, the appellant, in his sworn testimony, told the court that on 1st June 2013 at 9.00pm, he was at home with his wife and children when he heard a knock on his door. Policemen came in and arrested him on allegations of robbery which he knew nothing about.

7. The testimony of PW 1 is clear that she was attacked by two people and one of them took her cell phone but before he could run away, they engaged in a struggle causing both of them to fall into a pit where PW 3 found them. Both PW 1 and PW 3 confirmed that the light at the nearby doctor's clinic was switched on and since PW 3 knew the appellant, she was able to recognize him. Further, the chain of even from the struggle to the time of arrest was not broken leaving no doubt that the appellant is the one who assaulted PW 1 and attempted to steal the phone. In view of the clear and credible evidence of the prosecution witnesses, I reject the appellant's alibi defence.

8. I am satisfied that the appellant attempted to take the appellant's phone and in light of the circumstances, I quash the conviction of robbery with violence and the death sentence. I however and convict the appellant of attempted robbery with violence contrary to **section 297(2)** of the **Penal Code**. I consequently sentence him to **ten (10) years imprisonment**.

DATED and DELIVERED at KAKAMEGA this 5th day of April 2018.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Ng'etich, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.