



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CRIMINAL APPEAL NO. 50 OF 2013
(Consolidated with Cr. Appeal No. 46 of 2013)

DAN AMUNGA OKETCH.....APPELLANT

VERSUS.

REPUBLIC.....RESPONDENT

JUDGMENT.

[1]. **DAN AMUNGA OKETCH** (the 1st Appellant) and **JOHN MACHARIA** (the 2nd Appellant) were convicted on a charge of robbery with violence C/Sec. 296(2) of the Penal Code and sentenced to serve 20 years imprisonment. The charge stated that on 19th November 2012 at **KIMILILI** Township in **KIMILILI** within **BUNGOMA** County, jointly robbed **REUBEN KARIUKI** of Kshs.7,000/= and immediately before or after the time of such robbery they assaulted him. The appellants denied the charge.

[2]. **REUBEN KARIUKI MWANGI** (PW1) had left his place of work on 19/11/2012 at about 11.30p.m. and as he reached a very dark entry, he heard two men saying they would kill someone that night. Pw1 suddenly felt a blow on his left eye while the other person strangled him, then they took away Kshs.7,000/= from him and fled. A struggle ensued and a watchman who was in his company rescued him and together they ran after the assailants – (identified as A1) who removed his shirt and dropped it, while the other (identified as Accused 2) dropped a shoe and a hat. A mentally challenged woman showed them where A1 had run to and he was apprehended.

The 2nd appellant was apprehended by boda boda operators.

[3]. On cross examination Pw1 stated that the 1st appellant had a red T-shirt, while the 2nd appellant had a shirt and a mavin and he saw them as they approached him from the front.

[4]. **ELIAS WANJALA SIMIYU** (Pw2) confirmed that he had escorted Pw1 on his way home when he heard movements of people and on rushing back he found 2 people struggle to put Pw1 down. He intervened and people fled off. He was able to see them as there was full moonlight. Both Pw1 and Pw2 raised an alarm and members of the public rushed to their aid. The witness was categorical that the 1st appellant had a red T-shirt while the 2nd appellant had a shirt marvin and safari boots, he identified the shoe and hat in court.

[5]. **OSCAR MAKOKHA** (Pw3) the Clinical officer who examined the Pw1 found that he had soft tissue injury on the face with a swollen eye and a bruised face. He also had soft tissue injuries on the abdomen and jaw. The degree of injury was assessed as harm.

[6]. **PC. DANIEL MAVEA** (PW4) was on patrol duties within KCB Area of KIMILILI township along with other Police officers when they noticed that a crowd had gathered and was screaming “shikeni yeye”. They rushed to the scene and found Pw1 who said he had been robbed of Kshs.7,000/= while on his way home, and that he had positively identified his attackers.

[7]. The police officers mounted a search and caught the 1st appellants who appeared drunk and had no shirt. They also recovered a shoe and a hat, and later that night they apprehended the 2nd appellant.

[8]. The 1st appellant in his unsworn defence stated that while at his home on 19/11/2012 at about 9.30p.m. he got out of the house to go to the toilet. When he came out he found two police officers who arrested him.

[9] The 2nd appellant also said that while he was at home come on the material date, a police officer went there accompanied by a neighbor, and arrested him.

[10] In her Judgment the trial magistrate found that the evidence established the ingredients required to prove a charge of robbery with violence as the assailants were in the company of more than one person and although they were not armed, they used violence to rob the victim.

[11] She was satisfied that the appellants were properly identified as they were well known to Pw1 and he also recognized their voices in the darkness. The trial magistrate also stated that “the place was well lit because its in the township centre and complainant says there was moonlight”.

[12] She also noted that in many submissions at the close of defence case, the defence counsel said that Pw1 had been paid some compensation, and wondered why such offence would have been made if the appellants were not guilty consequently their defences were rejected.

[13] The appellants contested the findings on grounds that the trial magistrate failed to appreciate that this was a case of mistaken identity, and infact the opportunity for identification was not well established as the court was not given a description of light intensity of the moon. Further that the attack was sudden under circumstances which were not conducive for proper identification.

[14] It is also argued that the attackers infact got out of the complainant’s sight and it would not follow that the persons subsequently arrested them the same over who attacked him.

[15] In the hearing of the appeal, **MR. OMUKANDA** submitted on behalf of the appellants that the offence took place at night in a dark place, so the question of there being light to enable positive identification was misplaced.

[16] He also wonders how Pw2 was able to identify the assailants yet he says he was ahead of Pw1 and only turned when he noticed there was a struggle. It is his contention that although Pw1 and Pw2 alluded to moonlight, there was no description as to its intensity nor did Pw4 who claimed that the place was well lit describe the intensity of the lights.

[17] In opposing the appeal, **MR. AKELLO** submitted on behalf of the state that there was sufficient light for the complainants to identify the appellants and although Pw2 referred to light, the investigating officer who rushed to the scene shortly after the incident said there was light from **ESTONIA CLUB** so although the place of attack was dark, the witnesses were able to see and identify the attackers as they fled in the place where there was light.

[18] **MR. AKELLO** also argued that it emerged in the cause of trial that there were efforts by the appellants’ parents to settle the matter which bespoke of persons with a guilty mind.

[19] I think the major issue determination is whether the appellants were properly identified. It was the prosecutions’ case that as PW1 got into a dark place, he heard two men speaking – saying they would kill

someone. At no point in his evidence did the witnesses say that he recognized those voices, and the trial magistrate erred in arriving such conclusion which was not supported by any evidence. As regards the source of light, both Pw1 and Pw2 said there was a full moon, but Pw1 did not say he was able to identify the people at the time of attack, and there was a full moon. It is also significant that the moment he got into the dark entry Pw1 was punched in the right eye, so when did he get to see the attackers?

[20] It would appear that at the place where the attack took place it was dark – that was the evidence of Pw1. How Pw2 was able to see the people who were attacking, Pw1 was behind him, and who fled off the moment he went to intervene is not comprehensible. He did not say they ran past him, so the logical conclusion or inference is that they ran away from them – meaning what they saw was their backs and the backs of their heads – surely that could not be described as adequate opportunity for identification.

[21] The attack was suddenly, it was in the dark, it ended just as it began, and I am not satisfied that there was adequate opportunity for identification.

[22] As for the police officer who claimed that the place was well lit with light from the nearby **ESTONIA CLUB**. It must be borne in mind that (a) he was not an eye witness to the attack (b) his evidence completely contradicts that of the victim who said the attack took place as he got into a dark entry (c) Neither Pw1 nor Pw2 who were the eye witnesses even alluded to the source of lights as being electricity from a nearby club and that evidence in my view is a manufactured tale.

[24] The upshot is that the evidence as presented to the trial court did not adequately support the charge and the conviction was unsafe. Consequently the conviction is quashed and the sentence is set aside. Both appellants shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this **14th** day of **July**, 2017 at **Bungoma**.

H. A. OMONDI

JUDGE