



**REPUBLIC OF KENYA.**

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

**CRIMINAL APPEAL NO. 49 OF 2014.**

**BETWEEN**

**SWALEY MUHAYA LUBANGA ::::::::::: APPELLANT.**

**AND**

**REPUBLIC ::::::::::: RESPONDENT.**

*(An appeal from the conviction and sentence of Hon. J. Ong'ondo – P.M. in Kakamega Chief Magistrate's Court Criminal Case No. 2026 of 2012 delivered on 15<sup>th</sup> April, 2014.)*

**J U D G M E N T.**

1. PW1 was a passenger aboard a motor cycle on the night of 5<sup>th</sup> July, 2012 when she was accosted by some robbers who stole her mobile phone, demanded for her Mpesa PIN number and transferred Ksh. 2,500/= to a third party. She was injured in the process. She was in the company of PW2, the motor cycle rider who was taking her home. He was robbed of his motor cycle.
2. In the course of investigations, the appellant and 2 others were arrested and charged with two counts of robbery with violence contrary to section 296 (2) of the Penal Code.
3. The particulars of the first count were that on the 5<sup>th</sup> day of July, 2012 at Shibuli sub location, Botsotso North location in Kakamega Central District within Kakamega County, jointly while armed with dangerous weapons namely pangas and crude weapons robbed Jerita Wesonga Matseshe of her mobile phone make vodafone, a pair of shoes, one kilogram of sugar, one loaf of bread, a bunch of keys, cash money Ksh. 2,800/=, all valued at Ksh. 10,000/= and immediately before the time of such robbery used actual violence to the said Jerita Wesonga Matseshe.
4. The particulars of the 2<sup>nd</sup> count read that on the 5<sup>th</sup> day of July, 2012 at Shibuli sub location, Botsotso North location in Kakamega Central District within Kakamega County, jointly while armed with dangerous weapons namely pangas and crude weapons robbed Thomas Mugavana Sakwa of his mobile phone make motorolla CII7, motor cycle registration number KMCS 696Z make commuter P2, all valued at Ksh. 168,000/= and immediately after the time of such robbery used actual violence to the said Thomas Mugavana Sakwa.
5. The case went through a full trial in the lower court after which the learned trial magistrate acquitted the 1<sup>st</sup> and 2<sup>nd</sup> accused persons. She convicted the appellant, Swaleh Muhaya on both counts and sentenced him to death as by law provided.
6. The appellant being dissatisfied with the said conviction and sentence filed a petition of appeal on

29<sup>th</sup> April, 2014, raising the grounds of appeal which we have summarized here below:-

- i. *The occurrence book entry showing the report that was made by PW1 was not produced in court;*
- ii. *The prosecution evidence was full of contradictions;*
- iii. *The Investigating Officer informed the court that the appellant's co-accused's implicated him in the commission of the offence;*
- iv. *The trial magistrate should not have relied on the evidence of PW2 who said he knew the appellant and still attended an identification parade;*
- v. *No documents of proof of PW1 and PW2's ownership of their lost goods were produced in court;*
- vi. *The Doctor who attended to PW1 and PW2 was not called as a witness;*
- vii. *The appellant's defence was rejected for no good reason.*

### **The appellant's submissions**

7. At the hearing of the appeal, the appellant relied on his written submissions highlighted here below:-
  - i. The learned trial Magistrate erred in law and fact in convicting the appellant when the evidence on record was very malicious, discredited, fabricated and lacked probative value. The trial court did not consider that PW1 and PW2 said that there was an identification parade conducted, a fact which was denied by the Investigating Officer;
  - ii. The appellant was not found in possession of stolen goods. Although it was alleged that some goods were found in the house he was occupying, the goods were never brought to court as exhibits;
  - iii. It was alleged that money was sent to his wife through PW1's phone but the said phone or recipient of the said money was never arrested nor investigated to verify if PW1 was telling the truth;
  - iv. It was alleged that a phone call was made to a District Officer (DO) concerning his arrest but the said DO was never called to give evidence. The link to the Kakamega case was not shown as his arrest was as a result of cases at Kericho;
  - v. The learned trial magistrate did not consider his defence which was cogent and sufficient enough to exonerate him from any wrongdoing ; and
  - vi. The complainants could have been mistaken about his identity as they did not give a description of his voice, stature or the clothes he was wearing when the offence was committed.

The appellant prayed for his appeal to be allowed.

### **The respondent's submissions**

8. Mr. Owenga, learned counsel for the respondent submitted that PW1 properly identified the appellant who commanded PW1 to take them to her house. The appellant ordered PW1 to ask her children to open the door. PW1's son opened the door and switched on electric lights. This enabled PW1 to see the appellant well. PW1 said that she was attacked and treated in hospital. A P3 form was produced in court as exhibit 3. PW2 corroborated the evidence of PW1 when he stated that PW1 was beaten by attackers who included the appellant. The attackers were armed with a rungu, a Somali sword and a metal bar. Mr. Omwenga also submitted that PW2 told the court that PW1 told the attackers that she had a TV set and a DVD in her house. PW2 confirmed that electric lights were on and that enabled him to identify the appellant. PW2 told PW1 that he had identified the appellant. At a later date, PW2 identified the appellant in an identification parade. PW7 produced medical evidence showing that PW1 and PW2 were treated after the attack. PW5 adduced evidence of recoveries that were made in the appellant's house. The evidence of PW1 was corroborated by that of PW2. The medical evidence was proof of the attack on them by the appellant.

### **The duty of the first appellate court**

9. As the first appellate court, we are duty bound to analyze and re-evaluate the evidence tendered in the trial court and reach our own conclusion, only remembering that we neither saw nor heard the witnesses.
10. In the case of **Ngui Vs. Republic [1984] KLR 729**, the Court of Appeal stated thus on the duty of the first appellate court:-

***“The first appellate court must reconsider the evidence, evaluate it itself and draw its own conclusions in order to satisfy itself that there is no failure of justice. It is not sufficient for it to merely scrutinize the evidence to see if there was some evidence to support the trial court’s findings and conclusions.”***

11. We will therefore evaluate and analyze the evidence tendered before the trial court and come to our own conclusion.

### **The Prosecution’s case**

12. PW1, Jerita Wesonga Mazeshe adduced evidence that on 5<sup>th</sup> April, 2012 at about 7.00 p.m., she was heading home to Shivakala aboard a motor cycle whose rider was Thomas Mukabane Sakwa, PW2. When they reached Shivakala, she got off the motor cycle at a feeder road as there was a hole on the road. She was to board the motor cycle again after walking past the bad section. After she alighted, a torch was beamed at where they were and three people approached them. They identified themselves as police officers and demanded to know where they were going. One of them was wearing a jungle jacket, the other had adorned a black coat and the third one had a jacket on.
13. It was PW1's evidence that the said persons had a sharp object with a shaft that looked like a gun. They took PW1’s kikoi, untied her ribbon and blindfolded her. PW1 and PW2, were led to an area where PW1 was beaten on her left leg, she was stepped on and kicked on the chest and face. They asked her what she did for a living to which she responded that she was a teacher. They told her that she must have been paid. They demanded for money from PW1 who did not have any. They asked if she had money in her phone, which she responded to in the affirmative. They asked for her Mpesa PIN number and started discussing on whether to send the money to “Bush, Mama or Baba”. They asked PW1 if she had a laptop, TV and DVD at her home. She told them she had a TV and a DVD player.
14. The assailants commanded PW1 to lead them to her home so that they could get the items. She asked them what had happened to PW2, they removed her blindfold and she saw PW2 lying face down. PW1 was blindfolded again. As they walked along, PW1 and PW2 would be pushed into the bush each time a vehicle passed by. PW2 who was not blindfolded led the assailants to PW1’s home. On reaching there, the assailants locked her son and worker in their houses.
15. PW1 asked her other children to open the door to her house. Her son, Ian Mugo opened the door and switched on the lights. With the aid of the light, she identified the appellant who was wearing a coat. She saw his face clearly. She was not able to identify the others. The assailants pushed her inside the house and two of them got in. After a while she heard the sound of a whistle being blown and the assailants ran away. She saw one Emmanuel approach with PW2 who said that he had identified the appellant. PW2 and the Emmanuel decided to look for the appellant to see if they could recover the motor cycle. They returned to PW1’s house at 3.00 a.m. and told her that they had not recovered the motor cycle. They informed her that they had gone to Matsayi Administration Police Camp (AP Camp) and to the appellant’s place but did not find him. In the morning, PW1 went to Matsayi AP camp where she was referred to hospital. She was treated at Makunga Health Centre. She identified her treatment booklet marked as MFI-P1a. She later on went to Nala hospital for treatment. She was issued with a P3 form which was marked MFI-P3.
16. PW1 testified that she went to Makunga Police Station where she reported that she had identified

the appellant during the robbery. She was referred to CID Kakamega. She was requested to go to Safaricom and get a copy of her Mpesa statement. It indicated that one Sylvia Ambuvi was the recipient of the Ksh.2,500/ that was transferred from her Mpesa account by her assailants. The Mpesa statement was marked MFI-P2. On 27<sup>th</sup> September, 2012 she was told to go to Kakamega Police station with PW2.

17. On cross-examination by the appellant, PW1 said that she knew him very well. She told the police that he was someone she met on her way to and from school. She identified him and knew him as Swaleh. The distance between their homes is 5 km. She informed the court that she had lived in that community since 1993. She reiterated that lighting was by way of electric light. She stated that both her and PW2 had identified the appellant and that is why PW2 and Emmanuel went to his home on the material night but did not find him.
18. PW2, Thomas Mukavale Sakwa is PW1's brother-in-law. He testified that he knows the appellant as Swaleh, they used to meet often at Makunga and during their school days they would play football together. It was his evidence that he has known the appellant since he was young. PW2 testified that on 5<sup>th</sup> July, 2012, he was with PW1 aboard his motor cycle. They were going home. At a junction, she got off the motor cycle as the road was bad. She was to board the motor cycle after walking past the bad section of the road. As PW1 alighted, PW2 saw some people approach them with a torch. One took the ignition keys and put off the motor cycle engine. One had a rungu and another metal rod that looked like a gun, the 3<sup>rd</sup> one had a somali sword. He was tied on his back with a sisal rope. PW1 was blindfolded with a ribbon she had. One of them held PW1, the other held him and the third one pushed the motor cycle along. The assailants took PW2's phone as well as PW1's. They demanded for PW1's PIN number and conversed on whether to send (money) to Mzee, Bush or the girl. They then said the money had been spent.
19. PW2 was injured on his left hand, head and legs where he was hit with a metal rod. They then cut PW1's kikoi and tied his hands with it. They took away his motor cycle. They demanded to know what PW1 had in her house and beat her up. She told them that she had a TV set and a DVD. On reaching PW1's house she tried to warn her children not to open the door but they hit her hard on her abdomen. She fainted and they dragged her along. When she came to, they ordered her to ask her children to open the door. A child switched on electric lights. The whole place became lit up and PW2 identified the appellant who had a 3 foot metal rod with what appeared like pliers at the end.
20. PW2 testified that once electric lights were switched on, there was light at the gate to PW1's compound, inside and outside her house. PW1's son's house also had security lights on the outside. PW2 informed the court that the whole home was lit up. The appellant who was wearing a jungle jacket remained outside as the rest entered the house. PW2 was made to sit down with his hands tied. He managed to escape to Titus Odhiambo's house in order to get help. PW3 untied his hands and agreed to accompany him. As they approached PW1's house the assailants fled. On ownership of the motorcycle, PW2 informed the court that the motor cycle was his and he was still paying for it in instalments. He identified an agreement in court marked MFI-P4 for the motorcycle. PW2 told PW3 that he had identified the appellant. PW2 and PW3 went to an AP camp where they reported. PW2 later reported to Makunga Police Station. He was treated at Makunga and identified his treatment record as MFI-P5 and P3 form as MFI-P6.
21. On 27<sup>th</sup> September, 2013, PW2 attended an identification parade at Kakamega Police Station. He identified the appellant, whom he knew before. On cross examination by the appellant, PW2 said that he knew him by one name and added that the appellant was at Isoka School while PW2 was in another school. They used to play football and he knew the appellant's home well.
22. PW3, Emmanuel Omwaka Odhiambo testified that on the night of 5<sup>th</sup> and 6<sup>th</sup> July, 2012, he was asleep at his house. At 1.00 a.m., he heard a voice calling him which he identified as that of PW2.

- He requested PW3 to open the door and untie him as he had been tied up by thugs on the way home in the company of PW1. PW3 cut the ropes with a knife. PW2 informed him that the thugs were still at PW1's house. They headed to PW1's house while screaming but did not find the assailants. PW2 informed PW3 that his motor cycle had been kept somewhere. They went to the scene with PW1's son but found nothing. PW2 told PW3 that he had identified the appellant, Swaleh son of Bush.
23. They reported the incident at Ematsayi Police Station that night. They went to the appellant's home, knocked on the door to his house and 2 women opened the door. They said that the appellant had left at 4.00 p.m. for Kakamega with another man. They went to the appellant's father's house but the appellant was not there. As they were about to leave, the appellant's wife's phone started ringing persistently but she kept on disconnecting the call. A Police Officer who was with them told her to receive the call and put it on loud speaker. The person on the phone asked if anyone had gone there looking for a motor cycle. The appellant's wife did not respond.
24. PW4, Administration Police Sergeant Edward Atila from Emasatsi Police Post received a report on 6th July, 2012 at 12.30 a.m. about a robbery where PW2 was robbed of his motor cycle and that the robbers had gone to rob the home of PW1. PW2 reported that he had identified the appellant. They went to the appellant's house and woke up his mother and his wives. They said that the appellant had gone to Kakamega. They looked for the motor cycle but did not find it. He testified that PW2 had been injured on the left side of his face which had bruises and was swollen.
25. PW6, Corporal Winrose Chebet Bise adduced evidence that there was a spate of robberies in Kericho which she was instructed to investigate by a senior officer. In the course of investigations, she received information about two men at Grasslands Kericho who said that they worked with SBI road construction, but did not appear to go to work. It was not known where they went to at night. On 19<sup>th</sup> September, 2012, PW6 in the company of PW5 and other Police Officers raided the appellant's house and arrested him and another man. They recovered several goods but none of them is related to this case.
26. PW7, Wycliffe Wasichere, a Clinical Officer attached to Mumias District hospital filled PW2's P3 form on 9<sup>th</sup> July, 2012. He had been treated at Makunga Health Centre on 6<sup>th</sup> July, 2012. PW2 said that he had been injured on 5<sup>th</sup> July, 2012, by three people whom he could identify. PW2 was ill looking. On the same day, he treated PW1. She had also been treated at Makunga Health Centre on 6<sup>th</sup> July, 2012. She had bruises on her face and on her left leg. The injuries had been inflicted by a blunt object. PW7 produced the P3 form marked MFI-P6 as exhibit 6 and the one marked MFI-P3 as exhibit 3, PW7 also produced treatment records marked MFI-P5 as exhibit 5 a and b.
27. Acting Inspector Samuel Kimutai testified as PW8, as confirmed from the handwritten proceedings (not as PW3 in the typed proceedings). He testified that he was stationed at CID Kakamega doing investigation duties. On 25<sup>th</sup> September, 2012, he was informed by the DCIO, Paul Wambugu, that 2 suspects had been arrested in Kericho. He made arrangements for the suspects to be brought to Kakamega for a case where PW2 and PW3 were the complainants. On cross examination by the appellant, PW8 informed the court that PW2 gave the appellant's name as Swaleh.

### **The defence case**

28. The appellant gave a sworn statement in his defence to the effect that he is a businessman who moved to Kericho in April, 2012 from Shiveye sub-location, Namatsai location, Eshikone village. His cousin Vitalis Shikoli, invited him to Kericho and told him that jackets are on demand and the said town would be a better place for business. On 19<sup>th</sup> September, 2012, while in Kericho in his rental house, he heard a knock on the door. Police Officers said they were looking for Rasta. All the houses were searched and his personal and business items were all taken. The Police told him

that he was required for a robbery incident in Kakamega. On cross examination, the appellant admitted that he knows PW1 who lives in North Wanga while he lives in Kakamega District.

### **Determination of the appeal**

29. The issues that call for determination are:-

1. If the appellant was positively identified as one of the robbers;
  2. If the two counts of robbery with violence were proved beyond reasonable doubt.
30. The evidence on record indicates that both PW1 and PW2 were accosted in a dark place at which time they were unable to identify their assailants. PW1 was robbed of her mobile phone and Ksh. 2,500/= was transferred from her cell phone to a woman by the name Sylvia Ambuvi. PW2 was robbed of his motor cycle and a phone. In the process of the robbery both PW1 and PW2 were injured. The robbers' appetite for more loot made them command PW1 to take them to her home after making enquiries of what she had in her house.
31. On reaching PW1's house, she tried to warn her children not to open the door. One of her children Anthony, opened the door to his house. The robbers pushed him back into the house and locked the door from the outside. PW1 was ordered to tell the children to open the door to her house. Her son Ian Mugoi, opened the door and switched on the lights. At that juncture, PW1 identified the appellant. She saw his face clearly. Two of the other robbers entered the house, as they tried to remove the T.V., PW1 decided to look at them. They hit the fluorescent tube light. It was PW1's evidence that the robbers were armed with an object that looked like a gun, it was a sharp object with a shaft. PW1 was treated of the injuries she had sustained and was issued with a P3 form which was produced in court.
32. It was the evidence of PW1 that the appellant was not a stranger. She knew him before and that his home was at Matsayi. On cross examination by the appellant, she informed the court that she informed the Police that the appellant was someone that she met on her way to and from school. Her home is 5 km from the appellant's. She had lived in that neighbourhood since the year 1993. PW2 corroborated PW1's evidence in all material particulars regarding the robbery. He was robbed of his motor cycle and phone on the night of the incident. He was injured in the process. His P3 form was produced in evidence. It was his evidence that he identified the appellant when they reached PW1's house. This was after PW1's child switched on electric lights and the whole place became lit up. PW2 explained that there was light at the gate and both inside and outside PW1's house. He saw that the appellant was wearing a jungle jacket and was carrying a 3 foot metal rod which appeared like pliers at the end. PW2 informed the Administration Police Officer he reported to that he knew the appellant. They went to the appellant's house the same night but did not find him.
33. PW2 explained when cross examined that he knew the appellant by one name, he knew him since he was young and the school he went to. PW2 and the appellant used to play football together. PW2 knew the appellant's home very well. The evidence of PW3 corroborated that of PW2 that he went to PW3's house to seek assistance after he escaped from the robbers. We note that Emmanuel Odhiambo is one and the same person referred to as Titus Odhiambo by PW2. PW3 testified that PW2 told him that one of the robbers was Swaleh son of Bush, the appellant. PW2 and PW3 reported the incident to Ematsayi Police Station on the same night proceeded to the appellant's house but did not find him.
34. It was the evidence of PW4 that he received a robbery report from PW2 who told him that he had identified the appellant as one of the robbers. He was not found at home that night when they went there. Analysis of the foregoing indicates the appellant was identified by way of recognition as he was known to both PW1 and PW2 by the name Swaleh. PW2 knew the appellant since childhood. PW1 had seen the appellant very many times in the community in which she had lived since the year 1993. In the case of **Terekali & Another vs. R. (1952) EACA 259**, it was held

that:-

***“Evidence of first report by the complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statement may be gauged and provides a safeguard against later embellishment or made up case. Truth will always come out in a first statement taken from a witness at a time when recollection is very fresh and there has been no time for consultation with others .....*”**

35. In the present case, PW2 at the first opportunity reported to PW4 an Administration Police Sergeant that one of his assailants was the appellant. He told the same to PW3. PW1 in her statement recorded with the police on 6<sup>th</sup> July, 2012 mentioned the appellant’s name as one of her assailants.

36. As regards the issue of identification by recognition, it was very well settled in the case of **Anjoni & Others vs. Republic [1980] KLR 57** where the court held thus:-

***“..... recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or other.”***

37. We have said enough to show that we are satisfied beyond a shadow of doubt that the appellant was well known to both PW1 and PW2 and that he was recognized by the said witnesses at PW1’s house with the aid of electric light. The issue of mistaken identity does not arise.

38. On the appellants other grounds of appeal, we find that the proceedings of the trial court do not show that the appellant requested for the Occurrence Book (OB) containing the report made by PW1 at the Police Station and that he was denied that opportunity.

39. We do not find any contradictions in the evidence of prosecution witnesses. The appellant was convicted on the independent evidence of PW1 and PW2 and not on accomplice evidence as he alleges. Although PW2 attended an identification parade, that was superfluous as the appellant was known by PW2 since his childhood. In any event, no identification parade forms were produced in this case.

40. On the issue of the non production of receipts by PW1 and PW2 to show ownership of their lost goods, we note that complainants can only produce such receipts if they have retained the same after purchase of goods. Failure by PW1 and PW2 to produce receipts of ownership does not vitiate the fact that they were the owners of the goods that they were robbed of. Non production of the said receipts did not prejudice the appellant in any manner.

41. The P3 forms for PW1 and PW2 were filled and produced by PW7 and not by the Doctor who examined them. It is clear from the evidence of PW7 that he filled the P3 forms based on information contained in their treatment notes from Makunga Health Centre. Section 77 (1) of the Evidence Act allows documents under the hand of a medical practitioner to be used in evidence. The appellant did not object to the production of the treatment notes and P3 forms by PW7.

42. On the submission that evidence was not called by the prosecution about the money that was sent to Sylvia Ambuvi through Mpesa by the robbers, it was PW1’s evidence that she spoke on phone to Sylvia who said that she was a wife to Vitalis, the 1<sup>st</sup> accused (in the lower court). Sylvia was therefore a non-compellable witness for the prosecution. She was not competent to testify as a prosecution witness and give evidence against her husband in the trial before the lower court. This would have contravened the provisions of section 127 (3) of the Evidence Act.

43. It is our considered opinion that the appellant’s defence was rightly rejected in view of the overwhelming evidence adduced by the prosecution.

44. The items that were recovered in the appellant's house at Kericho were not related to this case. The calling of the District Officer mentioned in PW6's evidence would have been of no relevance in this case.
45. We find that the charge of robbery with violence contrary to section 296 (2) of the Penal Code was proved beyond reasonable doubt. The appellant was in the company of two others when they committed the offence, they were armed with crude weapons, namely, an iron bar and a somali sword. The robbers used violence against PW1 and PW2 in execution of the robbery.
46. We therefore uphold the conviction and the death sentence meted out to the appellant in both counts.
47. The death sentence in count II will be held in abeyance. The appeal is hereby dismissed.
48. The appellant has 14 days right of appeal.

It is so ordered

**DELIVERED, DATED and SIGNED** in open court at **KAKAMEGA** on this **9<sup>TH</sup>** day of **MARCH, 2016**.

**RUTH N. SITATI**

**NJOKI MWANGI.**

**JUDGE**

**JUDGE.**

**In the presence of**

Appellant present in person.

Mr. Ngetich for the Respondent.

Mr. Anunda - Court Assistant.