



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL APPEALS NOS. 237, 242 & 233 OF 2012
CONSOLIDATED

*(An Appeal against both conviction and sentence of the Chief
Magistrate’s court at Kakamega in criminal case No. 968 of 2011*

[S. M. SHITUB, CM] dated 2nd October, 2012)

1. FRANCIS OKECH ONGOKO
2. ALFRED WANYAMA WETEME
APPELLANTS
3. DANIEL MUTHIKE WACHIRA

VERSUS

REPUBLIC
.....RESPONDENT

J U D G M E N T

The three Appeals were consolidated and heard together as they arose from the same trial in the subordinate court.

The appellants were charged with others in the subordinate court with robbery with violence contrary to **Section 296 (2)** of Penal Code. The particulars of the offence were that on 3rd February 2011 at Lubao area, Kamiri Location in East Kakamega District within Western province while armed with two pairs of hand cuffs robbed Boaz Malanda Amala of Kshs.500,000/= and one mobile phone, make Motorola all valued at Kshs.502,300/= and during such robbery used actual violence against the said Boaz Malanda Amala.

The 2nd and 3rd appellants were charged with others with a second count of being in possession of public stores contrary to **section 324 (2)** of the Penal Code. The particulars of the offence were that on the same day at Chavakali market in Vihiga District within Western Province had in their possession public stores names, 2 pairs of hand cuffs, one police beret with badge, one Administration Police

lanyard, one Administration Police belt, one Administration police jungle jacket, one Administration Police jungle trouser and one Administration police shirt which were reasonably suspected to have been stolen or unlawfully obtained.

They denied the charges. After a full trial, the 2nd and 3rd appellants and co-accused were acquitted of the count II. The three appellants were however convicted on count I. They were sentenced to suffer death as provided by law.

Being dissatisfied with the decision of the trial court, they have appealed to this court against both conviction and sentence. The 1st and 3rd appellants, that is Francis Ongoko Okech and Daniel Muthike Wachira were on appeal represented by Chitwa & Co. Advocates. The 2nd appellant pursued his appeal in person. Written submissions were filed for all three appellants.

At the hearing of the appeal, learned counsel for the 1st and 3rd appellants Mr. Chitwa, relied on the written submissions filed. Counsel added that the investigating officer stated that a report had been made at Kakamega Police Station on a day which was not the date of the offence. In counsel's view, that was a serious contradiction in the prosecution evidence.

The 2nd appellant also relied on written submissions. He added that the charge sheet stated that the robbers were in possession of handcuffs and nothing more. In his view, handcuffs could not be weapons. He further stated that the complainant was described with a different name in the evidence. He also complained that he was arrested on 10th February, 2011 and brought to court on 14th July, 2011 in violation to his Constitutional rights. He denied having been arrested at Butali. He stated that Traffic Police Officers who were near the scene of the incident and one Mr. Limitsi were not called to testify. This applied to the Assistant chief who was also not called. In his view, these were important witnesses, whom the prosecution should have called.

Learned Prosecuting Counsel, Mr. Oroni, supported both the conviction and sentence. In counsel's view, identification was proper and positive.

In reply to the submissions of the Prosecuting Counsel, Mr. Chitwa submitted that the 3rd appellant was merely identified in court.

The facts of the prosecution case are in brief that on 3rd February 2011 at 9.30 a.m. the complainant, PW1 Boaz Mulanda, came to Kakamega town. He proceeded to Equity Bank Ltd. Branch at 2.00 p.m. and withdrew Kshs.500,000/= from teller No. 13 and put the same in an envelope. As he was leaving the bank, he met an old man called Limitsi. They walked together and parted outside Mama Watoto shop. He then boarded a vehicle home and alighted near Lubao market. After walking for about 1 km, a white vehicle passed him. This happened near the home of Judith Muhonja, PW2.

The vehicle then turned and came back. On reaching him, the driver lowered his window glass and the person on the front passenger seat showed the complainant what looked like a police radio and said they were looking for him. When PW1 went to talk to this person, two other men suddenly emerged and told him that he was withdrawing a lot of money to spoil other people's children. One of the two picked the envelope and handed it over to the person seating at the front passengers seat. They then handcuffed him and put him in the vehicle, took his ATM card, Identity Card and payment voucher. He was forced to lie down between the driver and passenger's seat facing down. One of the people in the vehicle sat on him. They drove the vehicle, stopped at a petrol station and fuelled with Kshs.1000 and proceeded on. They made phone calls and he could hear them say that they wanted to go back and take some people. They threatened to finish him but later they removed the handcuffs, blindfolded him with a sweater and threw him out of the vehicle and he ran into the nearby sugarcane. He met schoolchildren who assisted him.

The children gave him the vehicle registration number as KBK 317A. In the sweater, he found his ATM card. The children took him to the Assistant chief of Eluche sub-location. He was given Kshs.100/= for fare to Kakamega police station.

PW2, Judith Muhonja saw the complainant being forced into the vehicle near her house. She was 50 metres away. She reported the incident to the complainant's wife. They left together and on the road met another woman, PW3, Priscilla Nechesa who said that she had seen the vehicle which dropped the complainant and the vehicle that trailed him and drove off. PW2 and the wife of the complainant went to report the incident at Kakamega police station. As they were reporting the incident, the complainant PW1 arrived. The complainant was taken to hospital and treated. A P3 form was filled.

The appellants were arrested later at various places. The first to be arrested was Samuel Netsi Sibili (4th accused) who was acquitted. All the appellants were arrested on information given by Samuel Netsi Sibili and through him talking to them on his phone. The 3rd appellant was found in a lodging at Chavakali. He was sleeping there and had parked the vehicle which had been used in the robbery. It was a hired car. It had a registration Number which was not genuine. A number of items were found in the vehicle. These items were alleged to be police or Administration Police Officer's items. None belonged to the complainant.

The appellants were then charged in court.

When put on their defences, each gave a sworn statement. They were convicted and sentenced. They have now appealed to this court.

This being a first appeal, we are duty bound to re-evaluate all the evidence on record and come to our own conclusions and inferences. See the case of **Okeno vs Republic [1972] EA 32.**

The conviction of the appellants is predicated on the evidence of an accomplice and visual identification. The accomplice Samuel Netsi Sibili contacted all of them on his mobile phone and they were thus traced, arrested and charged. He was acquitted.

Evidence of an accomplice, perse, without more cannot be the basis for convicting an accused person in a criminal case. There has to be additional independent evidence to support that evidence. The accomplice herein denied the charges and was acquitted. He is the one who was alleged to have contacted all the appellants on the phone. Their conversation was not recorded, nor was it disclosed to the court. The mobile telephone numbers used were not given. The police, who were present during the conversations did not say exactly that was discussed between the accomplice and the appellants. In our view, the fact that the accomplice denied the offences, and stated that he was arrested because of a disagreement over a girlfriend, means that there is no connection between the arrest of the appellants and the offence for which they were convicted.

With regard to visual identification, the incident clearly occurred during daytime. It was 3.00 p.m. There is no indication that there was any impediment to visibility. However, in our view, the circumstances of the incident were such that identification was difficult. A trial court has to take caution before convicting on the evidence of identification which is alleged to be mistaken. In this regard, we rely on the case of **Nzaro -vs- Republic [1991] KLR 70** where the Court of Appeal stated -

“Whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken the judge must warn himself of the special need for caution before convicting the accused person in reliance on the correctness or the identification or identifications.”

The attack on the complainant was sudden. He did not describe any of the appellants to either the school children or the Assistant Chief or the police soon after the incident. The appellants were arrested on the basis of information given by an accused person who was acquitted. Though an identification parade was conducted, since there was no prior description given of any of the appellants, the evidential value of that identification parade was very much diminished. There could be a real danger of mistaken identity. There could be a real possibility that the appellants were seen by the identifying witnesses before the parade. We are of the view that the identification of the appellants is not free from the

possibility of error.

With regard to the 3rd appellant, Daniel Muthike Wachira, he was arrested at Arms Hotel, Chavakali. His vehicle was said to have fake registration numbers. It was said to contain items which could be used for robberies. It was said to contain official police items. However, as the learned trial magistrate rightly pointed out, the description of the items recovered and the way they were recovered, according to the police record was wanting. There was no inventory recorded which showed which item was recovered, where and by whom and in what state. The handing over of those items was also not given. He was acquitted on the charge of being in possession of those items. The recovered items, including the motor vehicle cannot therefore be a basis for connecting him to the present offence.

In conclusion, we find that the three appeals have merits. We allow the appeals, quash the convictions and set aside the sentences. We order that each of the three appellants be released forthwith unless otherwise lawfully held.

Dated, signed and delivered at Kakamega this 29th day of January, 2014

S. J. CHITEMBWE

J U D G E

GEORGE DULU

J U D G E