



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

**CRIMINAL APPEAL NO. 60 & 61 OF 2013**

**(CONSOLIDATED)**

*(Appeals against both conviction and sentence of the Chief Magistrate's Court at Kakamega in Criminal Case No. 1727 of 2012 [S. M. SHITUBI, CM] delivered on 28th March, 2013)*

**NAHASHON SHIKHUNYI ..... 1ST APPELLANT**

**AGGREY ALULU ..... 2ND APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

The two appeals were consolidated and heard together as they arose from the same trial before the subordinate court. The 1st appellant Nahashon Shikunyi, was the 2nd accused while the 2nd appellant Aggrey Alulu was the 1st accused at the trial.

The appellants were jointly charged with two counts of robbery with violence contrary to **Section 296 (2)** and attempted robbery contrary to Section 297 (2) of the Penal Code. The particulars of count I were that on the 12th August, 2012 at Busilwa village, Kakamega South District, within Kakamega County, jointly with another not before court while armed with dangerous weapons namely iron bars and rungus robbed Elizabeth Shiemi a sum of Kshs.5,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Elizabeth Shiemi. The particulars of count II were that on the same day and place while armed with dangerous weapons namely iron bars and rungus attempted to rob Lydia Shiemi and immediately before or immediately after the time of the attempted robbery used actual violence to the said Lydia Shiemi.

They denied the charges. After a full trial, they were convicted of robbery with violence, but acquitted of attempted robbery. They were sentenced to suffer death. Being dissatisfied with the decision of the trial court, they have now appealed to this court. The appeal by Nahashon Shikunyi (1<sup>st</sup> appellant) was filed by S. B. A Mukabwa & Co. advocates. The appeal by Aggrey Alulu (2<sup>nd</sup> appellant) was filed in person. In both appeals, written submissions were filed.

At the hearing of the appeal, Mr. Mukabwa represented both appellants. Counsel submitted that the learned trial magistrate shifted the burden of proof to the appellants which was not acceptable in law. Counsel argued that an accused person was only required to offer an explanation but not to prove his innocence. Counsel relied on the case of **Okale Oketh -vs- Republic [1965] EA 555**. Counsel emphasized that there was no evidence to prove that Kshs.5,000/= was stolen from PW1. Counsel also

argued that the death sentence imposed was unconstitutional as it violated of **Article 26** of the **Kenya Constitution 2010**. With regard to the appeal by the 2<sup>nd</sup> appellant, counsel argued that there were contradictions on how the jacket was picked. In addition, the jacket was not positively identified. .

Mr. Oroni, learned Prosecution Counsel submitted that one of the appellants was arrested at the scene. The recovery of the jacket also led to the arrest of the 1st accused who is the 2<sup>nd</sup> appellant. In counsel's view, the evidence tendered by the prosecution at the trial was adequate to discharge the burden of proof and was truthful. Counsel supported both the conviction and sentence.

The prosecution case is in summary that on the 12th August 2012, in the evening, PW1 Elizabeth Shiemi Amwoka arrived home from a funeral. On arrival, she met her daughter PW3 Lillian Shiemi as well her son Nixon Amwoka. Lillian prepared super and they ate together. At around 9.00 p.m., PW1 left to go to sleep in the main house. Nixon Amwoka PW4, proceeded to his small house nearby. Lillian PW3 remained behind to close the kitchen door. There was light from the solar panels.

As PW1 was proceeding to her house, she met three people at the corridor. She recognized one of them as the 1st appellant. The 1st appellant hit her with a piece of metal and she fell down unconscious. On screams from PW3 and 4, neighbours came. PW4 went to assist his mother and found the 1st appellant at the scene. They struggled and he restrained him with the help of PW2 Richard Makutu Nandi, who had come to the scene. The assailants also attacked PW3 injuring her forearm.

When PW1 came to her senses, she asked PW3 to go to her handbag which was in the bedroom and check for the money therein which was Kshs.5,000/=. The said Kshs.5000/= was found to be missing.

Both PW1 and PW3 were taken to hospital for treatment. PW1 was admitted in hospital for 1½ weeks. The appellants were later arrested and charged.

When put on their defences, each of the appellants gave sworn testimony. They denied committing the offences. The 1st appellant stated that he was a boyfriend of PW3, Lillian. She had invited him home the previous night and also insisted that he goes there that night because her mother had travelled. He was surprised to meet her mother there. The mother got annoyed when she met him. That was the reason why they framed him with the charges. He stated that it was Nixon who hit him with a rod. He denied committing any robbery. The 2<sup>nd</sup> appellant stated that he had an assault case in which a relative of the assistant chief was the suspect. That was why the assistant chief instigated his arrest.

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 bearing in mind that we did not see the witnesses testify. See the case of ***Njoroge -vs- Republic [1987] KLR 19*** wherein the Court of Appeal stated at page 2 as follows -

***“As this court has constantly explained, it is the duty of the 1st appellate court to remember that the parties before the court are entitled as well on the questions of fact as on the questions of law to demand a decision of the court of first appeal, and the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowances in this respect.”***

We will start by addressing the Constitutionality of the death sentence. Counsel for the appellants has urged us to find that the death sentence imposed on the appellant was unconstitutional. He relied on Article 26 of the Constitution.

Article 26 of the Constitution provides as follows –

**26 (1) Every person has a right to life.**

**(2) The life of a person begins at inception.**

**(3) A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law.**

**(4) Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.**

In our view, a proper reading of the above Constitutional provisions will lead to the conclusion that the death penalty was not outlawed by the Constitution of Kenya 2010. Sub-Article (3) clearly provides that the Constitution or other written law may permit intentional deprivation of a person's life. The Penal Code under Section 296 (2) provides for death penalty. Such provision was allowed by the Constitution. The death penalty is therefore not unconstitutional. Sub-Article (4) provides for instances where the life of a foetus in the womb of the mother may be terminated. Such termination of life is also not unconstitutional. To conclude we find that the death sentence imposed herein is not unconstitutional.

We have re-evaluated the evidence on record. We will start with the 2<sup>nd</sup> appellant. The conviction of the 2<sup>nd</sup> appellant is grounded on the allegation that his jacket was found at the scene of the incident. It was not based on identification by eye witnesses. The evidence on record however does not prove or establish that the said jacket was owned or belonged to the 2<sup>nd</sup> appellant. There is also no conclusive or convincing evidence describing where and how the jacket was found. The 2<sup>nd</sup> appellant cannot consequently be convicted or connected to the offences herein due to the alleged ownership of the jacket whose identity or ownership was not established by cogent evidence. We will therefore allow his appeal.

The conviction of the 1<sup>st</sup> appellant was grounded on identification and the circumstances of his arrest. He admitted in his defence that he was at the scene at the time of the incident and that he was restrained until independent witnesses arrived. He explained that he had visited his girlfriend, PW3, which annoyed the mother PW1, prompting the brother of his girlfriend PW4, to fight him and hit him with a metallic object.

The 1<sup>st</sup> appellant was therefore at the scene at the time of the alleged incident. The issue is whether his description of the incident or the prosecution version was the true position. Though the appellant stated that he was injured by PW4, the evidence on record clearly shows that it was PW1 who was seriously injured. The appellant does not give any indication as to how the complainant PW1, was seriously injured in the incident. We think that the defence of the appellant was an afterthought.

However, was the offence of robbery with violence proved? The definition of robbery with violence is contained in Section 296 (2) of the Penal Code. It is clear from the definition that something belonging to the complainant must be proved to have been taken by the robber to establish the offence of robbery. The allegation herein is that Kshs.5,000/= was robbed. The handbag from which the money was robbed was in the bedroom. There is no evidence that the 1<sup>st</sup> appellant entered the bedroom. There is no evidence that PW1 put Kshs.5,000/= in that handbag. The handbag was not produced in court.

Having re-evaluated the evidence on record, we are of the view that Kshs.5,000/= was not robbed from PW1 by any of the assailants. Even assuming that there was such money in the handbag, one cannot say that the absence of that money was caused by the 1<sup>st</sup> appellant or any other assailants.

With the evidence on record, we find that the offence of robbery with violence was not proved. However, there is cogent evidence that PW1 was injured. She had to be hospitalized for 1½ weeks. The evidence also shows that she was hit with a metal bar by the appellant. That in our view established the lesser offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code. We will therefore quash the conviction of the 1<sup>st</sup> appellant for the offence of robbery with violence, and substitute a conviction for assault causing actual bodily harm contrary to Section 251 of the Penal Code and sentence him accordingly.

In conclusion, we allow the appeal of the 2<sup>nd</sup> appellant, quash the conviction and set aside the sentence imposed. We order that the 2<sup>nd</sup> appellant be released forthwith unless otherwise lawfully held.

As for the 1st appellant, Nahashon, we quash the conviction for robbery with violence and set aside the sentence imposed. We however substitute therein a conviction for the offence of assault causing actual bodily harm contrary to **Section 251** of the Penal Code. We order that he serves a sentence of three (3) years imprisonment from the date on which he was sentenced by the trial court. Orders accordingly.

*Dated, signed and delivered this 11<sup>th</sup> day of February, 2014*

**SAID J. CHITEMBWE**

**GEORGE DULU**

**JUDGE**

**JUDGE**