REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 259 OF 2011

(Appeal against both conviction and sentence of the Chief Magistrate's

Court at Kakamega in Criminal Case no. 1344 of 2010

[R. NYAKUNDI, CM] dated 16th January, 2012)

JULIUS OTIENO SUNGA …... APPELLANT

VERSUS

REPUBLIC …...…………………………………..…………. RESPONDENT

JUDGMENT

The appellant was charged in the subordinate court with robbery with violence contrary to **Section 296 (2)** of the Penal Code. The particulars of the offence were that on 7th July, 2010 at Museno area in Kakamega District within Western Province jointly with others not before court while armed with dangerous weapons namely homemade gun and crude weapons robbed Hillary Luchitio Afwayi cash kshs.4,000/=, one Motorola mobile phone make T117 and several chargers all valued at Kshs.30,000/= and at the time of such robbery used actual violence to the said Hillary Luchitio Afwayi.

He denied the charge. After a full trial, he was convicted of the offence. He was sentenced to serve imprisonment for 10 years. This sentence was not the death penalty provided under the Penal Code. The learned magistrate applied the provisions of **Article 26 (2)** of the **Constitution of Kenya 2010** on the right to life in sentencing the appellant.

Being dissatisfied with the decision of the trial court, the appellant has appealed to this court raising nine grounds of appeal. The appellant also filed supplementary grounds of appeal.

At the hearing of the appeal, in addition to reliance of the grounds of appeal, the appellant submitted that the vigilante group and the Assistant Chief who reported the incident to the Police Station, were not called to testify. Secondly, that the ownership of the alleged weapons was not established. He also submitted that the trial court did not take into account the defence case in arriving at its final decision. He lastly stated that the complainants were a husband and wife who had implicated him without good reason.

The learned Prosecuting Counsel Ms Opiyo, submitted that no violations of Constitutional rights of the appellant were committed. Counsel submitted that the appellant was represented by counsel at the trial, who should have explained to him his rights. Counsel also stated that the prosecution had a right to choose which witnesses to call in support of their case.

In brief, the prosecution case is that PW1, Hilary Afwayi, who was the complainant, was at his kiosk at

Museno at 7.00 p.m. Suddenly a man, who was wearing a mask and holding a rifle appeared. Within a short period, three other masked men emerged. The appellant hit the complainant with a hammer and injured him. He screamed but they went ahead and searched his pockets and ransacked his kiosk and took the items listed in the charge sheet. There was security light in the compound.

They then asked him to open the gate to his house. He sensed that they might rape his wife and daughter and started screaming. Though they roughed him up, he managed to hold onto one of the assailants who was the appellant. The others escaped.

The wife of PW1 who testified as PW2 Emily Owallo witnessed the struggle. A neighbour, PW3 Isaac Mucheso was the first to arrive at the scene. He saw the struggle and found the appellant having been restrained by the complainant. The police were then called. They came, arrested the appellant and recovered a hammer and a homemade gun as well as a mask.

Thereafter, PW1 went for medical treatment. A P3 form was later filled and produced in court. The homemade gun and a hammer were also produced in court by PW5, the Investigating Officer.

In his defence, the appellant gave sworn testimony. He stated that he was robbed by a gang of people on the material night. Later, he went to a house of one Victoria Sitati, DW2 at Sigalagala and asked for help to find his way to the Police Station. He was given guidance by Victoria DW2. On the way to the Police Station, he met two vigilante groups. The second vigilante group included the complainant who claimed that he had robbed him. That was the reason he was arrested and implicated in this case. DW2, Victoria testified that the appellant went to her house at 8.45 p.m. and asked for the way to the police station. He informed her that he had been robbed of cash and a mobile phone. There was tin lamp in the house. She showed him the direction that would lead him out of her compound. On the following day at 9.00 a.m., she heard that the complainant had been robbed.

Faced with the above evidence, the learned trial magistrate found that the prosecution had proved its case against the appellant beyond any reasonable doubt. The court thus convicted the appellant and sentenced him. Therefrom arose this appeal.

This is a first appeal. As a first appellate court, I am duty bound to re-evaluate all the evidence on record and come to my own conclusions and inferences, taking into account that I did not have the opportunity to see witnesses testify to determine their demeanour. See the case of **Okeno -vs- Republic [1972] EA 32**.

The appellant put up a defence of alibi. It is trite that the burden is always on the prosecution to prove an accused person guilty beyond any reasonable doubt. That burden never shifts to the accused even in cases of a defence of alibi. See the case of **Leonard Aniseth -vs- Republic [1963] EA 206**.

In the present case, the appellant was restrained by the complainant who was PW1. He was restrained at the scene. PW1 was found by PW2 his wife and PW3 a neighbour, restraining the appellant at the scene. Though the appellant claims to have been elsewhere on the fateful night, and also that he was the victim o f a robbery himself, in my view that was an afterthought. The learned magistrate weighed the evidence of the prosecution and defence carefully. He stated thus in the judgment -

"The testimony by DW2 mention of two vigilante groups and yet she was not part of the group mentioned by the accused. How did she obtain information that accused had met the vigilante groups and conceded that he was a victim of circumstances. She was not at the scene when the accused was ordered to sit down on the ground. Yet she graphically laid before court that piece of information. This served to be record grimace at the investigations and indistinct stage. That accused ever confessed to have been kidnapped on the night of 7.7.2010 (sic). It all appears to have been an afterthought to assist the accused escape from being suspected with the robbery at the time of the complaint."

In my view, the evidence of the prosecution case was straight forward and clear. The appellant was restrained at the scene of robbery. There was no possibility of mistaken identity or mistaken arrest. It

cannot be said that the appellant was elsewhere as he alleged. I agree with the learned trial magistrate that the defence of the appellant and his witness DW2 was an afterthought. It did not create any doubt in the clear and straightforward prosecution evidence connecting the appellant with the offence.

The offence of robbery with violence under Section 296 (2) of the Penal Code is committed when the offender is either armed with any dangerous or offensive weapon or instrument; or is in the company with one or more other person or persons; or if at or immediately before or immediately after the time of robbery wounds, beats, strikes or uses any other personal violence to any person.

It was established that the appellant was in the company of other three persons. It was established that violence was used on PW1, the complainant and that he was injured. It was established that the listed stolen items were taken by the robbers. The toy gun and a hammer used in the circumstances of this case would make any reasonable man or woman consider them to be offensive instruments. In my view, the offence of robbery with violence was established. The appellant was one of the robbers.

The sentence for the offence under **Section 296 (2)** of the Penal Code, is death. The learned trial magistrate applied the provisions of **Article 26 (2)** of the Constitution of Kenya 2010, to avoid handing down a death penalty and imposing a sentence of imprisonment for a period of 10 years.

The learned Prosecuting Counsel has not asked for imposition of the death penalty or enhancement of sentence. I will be hesitant to disturb the sentence imposed by the learned trial magistrate since the State has not challenged the sentence, and since also the appellant has not been cautioned on the possibility of enhancing the sentence. I will maintain the sentence imposed by the learned trial magistrate.

In the result, I find no merits in this appeal. I dismiss the appeal and uphold both the conviction and the sentence of the trial court.

Dated and delivered this 6th day of March, 2014

George Dulu

J U D G E