



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 178 & 182 OF 2012

(Consolidated Appeals)

SAMSON MUTESHI 1ST APPELLANT

PATRICK LUMUMBA MATWANGA 2ND APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(Appeals against conviction and sentence arising from the decision of [S. M. SHITUBI, C.M.] delivered on 24.7.12 from the original Criminal Case No.1874 of 2010 in the Chief Magistrate's Court at Kakamega)

J U D G M E N T

The appellants were charged with two counts of the offence of robbery with violence contrary to **section 296(2)** of the Penal Code. In the first count the particulars of the offence are that the appellants *on the 8.10.2010 in Kakamega South District within Western Province jointly with others not before court being armed with dangerous weapons, namely pangas and Rungus robbed F I S KShs.2,000/= and immediately after the time of such robbery, killed the said F I S.*

On the second count the particulars are that the appellants *on the 8.10.2010 in Kakamega South District within Western Province jointly with others not before court being armed with dangerous weapons, namely pangas and Rungus robbed M M of her cash KShs.3,000/= and immediately after the time of such robbery, threatened to use actual violence against the said the said M M.*

The appellants were convicted and sentenced to suffer death. The 1st appellant's (SAMSON) grounds of appeal are that the sentence is inhuman and degrading, the identification was unclear, the prosecution evidence was not corroborated, the prosecution witnesses were dishonest, no exhibit was produced and the appellant was not accorded the benefit of doubt. The appellant filed written submissions and contends that PW2 and PW3 did not witness the robbery incident. PW1, did not participate in identification parade and the identification was not clear. There is no evidence that the police were looking for him, the conditions were not conducive for identification. The appellant was arrested after a period of three months. The first report did not give his names and yet the complainant alleged to have been his neighbor. The arrest was not based on the identification by the witnesses.

Mr. Kundu, counsel for the 2nd appellant relied on his written submissions. Counsel contends that the case was not proved beyond reasonable doubt. PW1 did not attend the identification parade yet she alleged that she identified the appellant during the trial. PW2 testified that he did not see the appellant

and he did not identify him. The trial magistrate made an error by concluding that PW3 had positively identified the appellant. The evidence only showed that PW5 alleged to have identified the appellant. This was evidence of a single witness which ought to have been evaluated carefully and the court ought to have warned itself. The appellant was arrested on 20.1.2011 yet the incident occurred in October 2010. The mode of arrest was not connected to the identification. The appellant was charged in court the 21.1.2011 but the evidence of PW1, PW2 and PW5 show that they were called to attend an identification parade on the 19.1.2011. At that time the appellant had not been arrested but the witnesses already had information about an identification parade.

Mr. Orinda, State Counsel, opposed the appeals. The ingredients of robbery were proved. There was sufficient light which enabled the witnesses to see the appellants whose faces were not covered. The identification was not by one witness. It was indeed recognition as the appellants are village mates of the complainants. The identification parade did not prejudice the identification by recognition, the description was given immediately.

The record of the trial court shows that 11 witnesses testified for the prosecution. A summary of the prosecution evidence is that **PW1 M M** testified that on the 8.10.2010 at 8.00 p.m. she was in her house with her husband and children taking dinner. Two people entered inside through the rear door armed with pangas and wearing marvin caps. Her husband inquired from the intruders and he was told that they had been sent to kill him. The robbers asked for money and they were given KShs.5,000/=. They started cutting PW1's husband. PW1 started crying and together with her children and robbers also assaulted her and her children. Her husband died because of the injuries and the robbers left. It is her evidence that there was a land dispute involving her husband and a neighbor by the name JOSPHAT. She further testified that she identified the robbers but did not give their names as she feared for her life.

PW2 K I S was a standard seven student at Shrine Primary School and a son of PW1. On the material day he was at home when robbers entered their house. He met one of them wearing a black jacket. PW2 was in another house when he heard the commotion and went out. The lights were on and he identified the 1st appellant who comes from the village. The appellant demanded to be given the mobile phone PW2 had and PW2 retreated. The appellant was armed with a panga and cut PW2 on the right side of the head. The appellant then switched off the lights. PW2 later went to his parents' house and saw his father having been cut all over the body. PW2 called the area assistant chief. PW2 later on the 20.1.2011 participated in an identification parade and identified the 1st appellant. PW2 had known the 1st appellant for many years.

PW3 D S is also a son to PW1 and was a primary school student. He testified that on the 8.10.2010 at about 9.00 p.m. he heard screams from his father's house and he decided to go and check. He was held and had his hands tied as torches were flashed. He was able to recognize the 1st appellant whom he had known for some time. PW3 was then pushed to a ditch. It is his evidence that the robbery lasted for two hours. He managed to escape and the robbers ran after him but did not manage to catch him. It is his evidence that it was the 1st appellant who tied his hands. PW3 did not participate in an identification parade. **PW4 P A** testified that on the 8.10.2010 he heard about the incident and went to the scene. He was aware of the land dispute and there was a succession cause pending in court.

PW5 D I was with her parents taking supper at home on the 8.10.2010 at about 8.00 p.m. She was 14 years old. Robbers entered the house with torches and she was held by the hand. There was a hurricane lamp inside her parents' house. She saw three men who informed them that they had been sent to kill her father. PW1 took money to the robbers. She saw the 2nd appellant who flashed a torch asking PW1 whether she had identified him. The 2nd appellant started cutting her father. The robbers later left the scene. PW5 later attended an identification parade and identified the 2nd appellant. It is her evidence that the robbers were communicating in Luhya language and claimed that her father had taken someone's land.

PW6 was **PIUS SHIPANDA** who is the assistant chief of Shiseso Sub-location. He got a phone call that night from PW2 and in turn informed the police. He went to the scene and the victims informed them

that they had identified the suspects. The 1st appellant was arrested and taken to Malaika police patrol base. PW6 went to the 1st appellant's house that same night but he was not in his house. The 1st appellant was arrested later. **PW7 CPL DAVID KIPROTICH** was based at the Malaika police station. He was called by PW6 at about 10.00 p.m. He went to the scene and found one victim already dead. PW2 informed them that he had identified the 1st appellant and they went to the 1st appellant's house and found his door locked. The 1st appellant later went to Kakamega police station and he was arrested. **DR JEREMIAH IMBUTHIA** testified as PW8. He produced the post mortem report for the body of **F S** who died during the robbery.

PW9 CI WAINAINA was based at the Western Province police headquarters. On the 20.1.2011 he conducted identification parade for both appellants. **PW2 K** identified the 1st appellant while **D (PW5)** identified the 2nd appellant. PW1 was to participate in the parade but she declined fearing for her life. **PW10 SGT. MAURICE AMWAYI** investigated the case. He visited the scene the same evening of 8.10.2010 at about 11.30 p.m. He found one of the victims already dead. He went to hospital where PW2 had been hospitalized. PW2 mentioned the name of the 1st appellant. PW5 also informed him that she had identified the 2nd appellant. He organized the parade conducted by PW9 and he appellants were identified. His investigations showed that there was a land dispute and it was the cause of the attack. He later charged the appellants with the offence. He produced the Occurrence Book No.8 of 8th October 2010 which had been made by the area assistant chief (PW6). According to the OB the chief reported through the phone that K had informed him that they had been attacked by unknown people. It is his further evidence that PW5 gave the description of the attackers and that she had identified one physically as there was a lamp. The 1st appellant was arrested on the 9.10.2010 and the parade was conducted on the 20.1.2011. The 2nd appellant was arrested later by the Administration Police officers together with one **JOSPHAT MWORE** who had been mentioned by PW1. **PW11 FRANCIS WASIKE** was a Clinical officer at the Kakamega General Hospital. He produced the P3 form for PW2.

The appellants were put on their defence. The 1st appellant **SAMSOM MUTESHI TOM** testified that on the 9.10.2010 at about 6.00 a.m. while riding his motorbike he took his brother to Shامusingu Primary School to sell his milk. His brother later told him to be taken to Shimanyiro. While at Shimanyiro the assistant chief of Shiseso sub-location called his brother and asked for the appellant's phone. His brother informed the assistant chief that the phone was charging but he was with the appellant. The chief informed his brother that he was wanted and the appellant decided to go and meet the chief. He met the chief on the road near a river together with two police officers. The appellant was arrested and handcuffed. He was taken to Malaika police patrol base. He was interrogated about the robbery which he did not know and later taken to Kakamega police station. He was later taken to court on the 11.10.2010 where the charges were read. He denied that he committed the offence.

The 2nd appellant, **PATRICK LUMUMBA MATUNGA** also gave sworn evidence. He testified that on the 19.1.2011 he was at home and left in the evening to see his brother in-law Josphat Omwore at Shisele. He went to see his in-law who works in the Lands office because he wanted to process a title deed. That evening he slept at his in-law's place. The next morning on 20.1.2011 he left together with his brother in-law and boarded a motorbike heading to Khayega. When they reached Mukumu Girls' Primary School, they found members of the public and APs. One person cried out "killer" "killer" and they were attacked. The APs rescued them and took them to the school. He later learnt that the person who was shouting "killer" was one **JAMUHURI** who was in court when he was testifying. They were later taken to Khayega AP camp and then to Kakamega police station. At the police station a parade was conducted and the witnesses had seen them at the OB office located upstairs at the station. He thought that they wanted to arrest **JOSPHAT MWORE** and not him. His further evidence is that he has red lips which are clearly visible and the identification was not based on his red lips.

DW3 JOSPHAT MWORE, testified that he knew the deceased **F S** who was his neighbor. He had a succession dispute with him, this being succession cause number 421 of 2008 before the Kakamega High Court. The deceased was the petitioner while DW3 was the objector. The other petitioners were **FOSTU, JAMUHURI ANGOTE, OLIVER MULINDE** and **EMMANUEL SHIKUYU**. The dispute

was still pending in court. He testified that the 2nd appellant is his brother in-law and on 19.1.2011 they slept together at his place. The following day they travelled together on a motorbike and while at Mukumu Girls Boarding Primary somebody shouted that they were the killers. Somebody blocked the motorbike and snatched the keys. They started assaulting them and APs had to shoot to disperse the crowd. They were taken to Khayega chief's camp. They were beaten because it was alleged that he had hired people to kill F S. Oliver Mulindi and Jamuhuri Angote were at the scene when they were attacked. When they reached Kakamega police station the petitioners and some family members of the deceased were already there. At the police station he was questioned about the death of the deceased and he learnt that the family members had written a letter to the Western Province PPO indicating that he had hired people to kill the deceased yet he had not been arrested. Investigations were done and he was not charged. His further evidence is that he is a civil servant and works at the Vihiga lands office. He produced the letter from the family members and a grant of letters of administration for the succession cause.

The main issue for determination is whether the appellants were the robbers who invaded PW1's house and committed the robberies and whether the appellants were positively identified. The main identifying witnesses are K (PW2) and D (PW5). It is the evidence of PW2 that he identified the 1st appellant during the robbery and that there was light. PW2 later participated in an identification and identified the 1st appellant. It is also the evidence of PW5 that she identified the 2nd appellant using kerosene lamp. The type of light used by PW2 to identify the 1st appellant was not given. With regard to the 1st appellant it is clear that he was arrested the following day and arraigned before the court on the 11.10.2010. At that time the 2nd appellant had not been arrested. It is also clear from the defence evidence that the 1st appellant was summoned by the area assistant chief and went to meet him. According to the Occurrence Book PW2 had informed PW6 that they had been attacked by unknown people. At that time PW6 had not visited the scene and when he went there PW2 gave the name of the 1st appellant while PW5 mentioned the 2nd appellant. It is also clear that the 1st appellant is a boda boda cyclist. Nothing was recovered from the two appellants. The main issue is whether the identification was positive. The identification parade was conducted on the 20.1.2011. This was a period of over three months after the incident. By that time the 1st appellant was already in custody. It is not clear how the parade could be conducted after the appellant had appeared in court. This would be tantamount to gathering evidence after the matter has been in court for a period of over three months. We do understand that PW2 was hospitalized for a short period but there is no evidence to show that the 1st appellant had ran away and could not be found. The fact that police officers went to his house at about 10.30 p.m. and failed to get him cannot be concluded to mean that he had disappeared. The appellant was doing his work the following morning and presented himself when he was arrested. Indeed PW2 knew him and the parade could not have been of any assistance. The requirement for conviction in a criminal case is that of beyond reasonable doubt. We are doubtful whether PW2 conclusively identified the 1st appellant. When making his phone call to the area assistant chief it would have been easy for him to give the name of the 1st appellant. It is likely that the name was given after trying to figure out the appearance of the robbers. We do find that the 1st appellant is entitled to the benefit of doubt and allow his appeal.

With regard to the 2nd appellant the evidence on identification is that of PW5 who was aged 14 years. There is no evidence that from the 8.10.2010 when the incident occurred to the 20.1.2011 when the appellant was arrested there was any attempt to have him arrested. It is the evidence of PW5 that the 2nd appellant is their neighbor. The appellant was arrested when he was in the company of DW3 who was the main suspect. We have seen the letter produced by DW3 dated 16.12.2010 addressed to the Provincial Police Officer Western Province. It is clear from the letter that the petitioners in the succession cause were suspecting the objector DW3 to be the one who hired people to kill the deceased. It is not clear to us as to how the appellant could have been connected to the incident. According to PW5 she identified the appellant using kerosene lamp. The evidence shows that the deceased was killed in the main house while the children were in another house. It took over three months for the ID parade to be conducted. The appellant testified that when they went to the Kakamega police station the family members of the deceased were there and they saw them. It is clear that the parade was conducted on the same date the appellant was arrested. The appellant and DW3 had been assaulted by members of the

public and were rescued by the police. Immediately he was taken to the police station a parade was conducted and he was identified. There is no evidence that PW5 had given his description. According to the investigating officer PW5 had mentioned the 2nd appellant but there is no evidence to show that the police were looking for him. His arrest was a mere coincidence because the petitioners managed to see DW3 on a motorbike and shouted that he was a killer. It is clear that if the appellant was not with DW3 he was not going to be arrested. The evidence of PW5 is not corroborated by any other independent evidence to make a conclusion that indeed the appellant was one of the robbers. It is unfortunate that the deceased lost his life during the robbery. It is also clear that the intention was not that of robbery but to kill the deceased. However, we are not satisfied that the 2nd appellant was one of the killers. We do find that his appeal is merited and the same is allowed.

In the end we do find that the two appeals are merited and same are allowed. The appellants shall be set at liberty unless otherwise lawfully held.

Delivered, dated and signed at Kakamega this 15th day of May 2014

SAID J. CHITEMBWE

GEORGE DULU

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