REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 229 OF 2012

BENSON MASAKHWE ……. APPELLANT

V E R S U S

REPUBLIC ……. RESPONDENT

J U D G M E N T

The appellant was charged with the offence of robbery with violence contrary to **section 295** as read with section **296(2)** of the **Penal Code**. The particulars were that the appellant *on the night of 22nd February 2012 at Bulanda village in Butere district within Kakamega County, jointly with others not before court while armed with dangerous weapons namely rungus robbed JAMES OKALIYO SHISAMBA a motorcycle registration No. KMCR 815 G engine No. OF 5D81667573 frame number MD625EF59bid30203 model TVS Star, red in colour valued at KShs.93,000/= and at the time of such robbery used actual violence against the said James Okaliyo Shisamba.*

The appellant was convicted and sentenced to suffer death. The grounds of appeal are that he did not plead guilty to the charge. That the evidence was full of contradictions and was not fully analyzed by the trial court. The trial court rejected the identification parade but still convicted the appellant, the exhibit produced did not support the charge, that the trial court consider extraneous evidence and that the sentence is harsh. The appellant filed supplementary grounds of appeal which he referred to as written submissions. These are ten grounds of appeal which are similar to the above grounds. The other issues raised in the supplementary grounds of appeal are that his alibi defence was not considered. The appellant was in custody in Bungoma before he was charged with the current offence. The appellant was injured by the members of the public and the identification by the witnesses at the parade was based on the injuries he sustained. The appellant also informed the court that the one who was found with the stolen items was not arrested and charged. The parade was done after the witnesses had seen him at Bungoma prison. The complainant went to the robbers place but did not find him.

Mr. Ngetich, State Counsel opposed the appeal. He submitted that the case was proved as required. PW1 saw the appellant when he boarded the motorcycle at about 7.00 p.m. and he identified him at a parade. PW2 was with PW1 when the appellant boarded the motorcycle and he also identified him at a parade. The identification parade was properly conducted.

The prosecution case was that the appellant hired PW1 who was a boda boda operator. When they reached the destination another person emerged with a club and together with the appellant robbed PW1 of the motorcycle. PW1 had talked with the appellant before they left together. He had identified him together with his boda boda operators. The complainant **PW1 JAMES OKALIO SHISAMBA** testified that he is a boda boda cyclist. He used to operate motorcycle registration number KMCR 815G TVS Star. The motorcycle belonged to Wilson Muniafu (PW3). On the 22.2.2012 at about 6.00 p.m. he was at Sabatia market when the appellant asked him to be ferried to Bulanda to pick his girlfriend. It was

approaching 7.00 p.m. and he interrogated the appellant. The appellant told him that he was a relative of his neighbor at Mushitesheni. There was a fellow boda boda cyclist **PATRICK HOSEA (PW2)** who also talked to the appellant to verify where he came from. Patrick informed him that he did not know the appellant. PW1 decided to ferry the appellant and he noted that the appellant had a scar on his lip and one of his teeth was broken. They went to Bulanda and it was now dark. The appellant asked PW1 to give him his phone saw that he could call his girlfriend but PW1 refused. The appellant gave him three numbers to call but none of them went through. Shortly another man appeared with a club and passed them. The appellant held PW1 by the neck and pulled him off the motorcycle. He started beating him while the man with a club jumped on the motorcycle. The appellant boarded the motorcycle and they sped off. PW1 started screaming and called his colleagues. They tried to look for the motorcycle but did not get it. The appellant had told him his name as BEN. The following day they reported the matter at the Butere police station with the owner of the motorcycle.

It is the evidence of PW1 that he gave the description of the appellant to the police and told the police that he could identify him if he saw him again. They tried to look for the appellant at the area where he alleged to have been living. They were told the appellant had travelled to Uganda. Later the appellant was arrested in Teso and taken to Bungoma court. He was taken to Butere police station and PW1 identified him at a parade conducted by PW5 .The motorcycle was later recovered in Teso district and it was given to the owner.

PW2 PATRICK ASHIBAGO OTUYA testified that he is a boda boda cyclist at Sabatia market. On the 22.2.2012 at about 6.30 p.m. he was at the market when the appellant asked to be taken somewhere to collect his girlfriend. The appellant talked to PW1. PW1 asked him if he knew the appellant but he told him he didn't. The appellant told them that he comes from Mushitesheni and mentioned a few names of people PW2 knew. PW1 decided to ferry the appellant. Later PW1 called him and informed him that he had been robbed of the motorcycle by the passenger he had carried. The appellant had told them that he was called Ben. They looked for the appellant and checked with one Alexander Omukanda whom the appellant had mentioned to them. Alexander later informed them that he had found where the appellant's mother was residing and they went there. The appellant's mother told them that the appellant was stranded in Uganda. After about one month they heard that the appellant had been arrested in Bungoma. PW2 later identified at an identification parade. He noted that the appellant had a scar on his mouth and one of his teeth was broken.

PW3 WILSON MUNIAFU NYANGURA was the owner of the motorcycle. He testified how he bought it and how they reported the matter to Butere police station when it was stolen. On the 6.4.2012 he was called by APs from Lukolis AP camp in Teso district and informed that his motorcycle had been found. He had circulated the motorcycle to several AP camps. He went there with police officers from Butere police station and confirmed that what was recovered was his motorcycle.

PW4 PC KENNEDY LUBEMBE was based at the Butere police station and investigated the matter. The incident was reported at the station on the 23.2.2012 at about 9.00 a.m. He recorded statements of witnesses and went to the scene. PW1 and PW2 informed him that they could identify the suspect who had given them some information about his home. They told him that the suspect had a scar on his upper lip and had a broken tooth on the upper jaw. He traced the appellant's home in Musanda area and knew that he was called BENSON MASAKWE. The appellant was arrested in Teso district in another case and they went to collect him. He organized for an identification parade conducted by CI Songok. The appellant was identified by PW1 and PW2. He received the stolen motorcycle from Lukolis AP camp and he was informed that boda boda operators in that area found someone operating the motorcycle and became suspicious. They reported to the AP camp and when the APs tried to arrest that person he sped off and when they tried to arrest him he left the motorcycle and disappeared. According to PW4 the appellant was arrested at Simbachai market by members of the public as he attempted to rob someone of a motorcycle.

PW5 CIP PAUL SONGOK was based at the Butere police station as the DCIO. On the 9.3.2012 he conducted an identification parade at Khwisero police station and the appellant was identified by PW1 and PW2. PW1 informed him that he identified the appellant because of his scar on his upper lip while

PW2 identified him because of his broken upper tooth. **PW6 APC MICHAEL MUHADIA** was based at the Lukolis AP camp. On the 6.4.2012 at about 2.30 p.m. he was at the AP camp when boda boda cyclist went to report that there was someone who was operating a motorcycle and was suspicious. They went with the cyclist and when he saw them he sped off. They chased him and he abandoned the motorcycle and disappeared into the bush on foot. They took the motorcycle to the camp. Three days later officers from Butere police station went there and took the motorcycle. **PW7 APC JUSTUS KIMOI** was based at the D.O's office at Simba Chai in Teso district. On the 2.3.2012 at about 8.00 p.m. he was on duty when members of the public went with the appellant who had several injuries on the face. The members of the public informed him that the appellant had tried to rob a bodaboda cyclist of his motorcycle registration number KMCT 320R. The complainant was one PATRICK ANGI who was the bodaboda cyclist. He rescued the appellant from members of the public and took him to hospital. The appellant was later charged in Bungoma court.

The appellant was put on his defence. In his unsworn evidence he stated that he digs boreholes for a living. He was arrested at Simba Chai by members of the public. They broke his upper tooth and cut his lip. They also injured him on the chest. He was taken to an AP camp who took him to hospital. When he enquired what was wrong he noted that there was a complainant whom he had fell out with over a certain girl. He had gone to Simba Chai that day to visit his ailing mother. He denied committing the offence.

The main issue for our determination is whether the prosecution proved its case beyond reasonable doubt against the appellant. It is the evidence of PW1 and PW2 that they talked to the appellant before PW1 decided to ferry him. It was about 6.30 p.m. and they were able to see the appellant. The prosecution evidence also shows that PW1 was robbed off a motorcycle registration number KMCR 815 G. It is established that it is the passenger whom he had carried who together with another person robbed him of the motorcycle. Both PW1 and PW2 were able to identify the passenger due to his cut on the lip and one broken tooth on the upper jaw. The recovered motorcycle was not in possession of the appellant but it is established that the motorcycle was stolen on the 22.2.2012 and it was recovered on the 6.4.2012. The appellant was arrested on the 2.3.2012 by members of the public and this is in line with his defence. He was not arrested in connection with the motorcycle that had been robbed from PW1. However, when investigations were done the appellant was brought to Butere and was identified by PW1 and PW2 at a parade.

The appellant contends that when the members of the public arrested him he sustained a cut on his lip and broke his upper tooth. Those who identified him at the parade used those two features to identify him. From the evidence on record it is established that PW1 and PW2 informed the police that they could identify the suspect because he had a cut on his lip as well as a broken upper tooth. That information was given to the police on the 23.2.2012. We do find that the contentions by the appellant that he sustained those injuries when he was assaulted by members of the public not to be true. PW5 conducted the parade. The trial magistrate indicated that there was a possibility that the witnesses saw the appellant before the parade was conducted. She disallowed the identification by PW1 who travelled to the Bungoma court where the appellant had been charged. The trial court was of the view that PW1 could have seen the appellant in Bungoma before the parade was conducted. The court allowed the identification by PW2 who did not travel to Bungoma.

From the evidence on record we do find that PW1 was robbed of a motorcycle on the 22.2.2012. We do also find that the stolen motorcycle was recovered on the 6.4.2012 but the person who was operating it disappeared. The contention by the appellant that the person who found with the stolen item was not charged cannot stand since that person ran away and was not arrested. Going by the findings of the trial court we do find that the appellant was properly identified by PW2 at an identification parade. PW2 identified the appellant as the one with who they had talked to with PW1 on the 22.2.2012. It is not by coincidence that the appellant has a cut on his lip and a broken upper tooth. These features were noted by the trial court. We do not find that the two features were inflicted on the appellant by members of the public as the same features had already been given to the police. Given the totality of the evidence on record, we do find that the prosecution proved its case beyond reasonable doubt. It is the appellant who robbed PW1 of the motorcycle. The appellant was later arrested and the description given to the police marched the appellant's physical appearance.

In the end we do find that the appeal lacks merit and the same is hereby disallowed.

Delivered, dated and signed at Kakamega this 14th day of October 2014

SAID J. CHITEMBWE **GEORGE DULU**

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