



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEALS NOS. 145 & 151 OF 2012

JOHN NAMAYI ETEMESI 1ST APPELLANT

GEOFFREY NELIMA ASMAN 2ND APPELLANT

V E R S U S

REPUBLIC RESPONDENT

***(Appeal arising from the original Criminal Case No.2517 of 2011 from the Chief Magistrate's Court
Kakamega – [M.I.G. MORANGA, PM])***

J U D G M E N T

The appellants were charged with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code**. The particulars were that the appellants *on the 10.10.2010 at Ekema area in Mumias District Western Province jointly with others not before court while armed with dangerous weapons namely pistols robbed JAMES SHIKAMA of cash KShs.35,300/= and personal effects namely 2 cameras, one digital and one analogue, 2 leather jackets black, 3 blankets, 2 pairs of shoes, 2 oats, 1 black bag, 3 long trousers, 1 DVD machine, 2 mobile phones make Samsung, 250 and Nokia 479, 1200 cash all totaling to KShs.74,5000/= the property of Jairus Shikanda and at the time of such robbery used actual violence to the said Shikanda by wounding him.*

The appellants were convicted and sentenced to death. the grounds of appeal for the 1st appellant GEOFFREY NELIMA ATHUMANI are that he pleaded not guilty to the charge, the circumstances were not conducive for identification, the evidence on identification parade was not reliable, there was no physical description given to the police, the evidence was not properly analyzed, his alibi defence was not considered, when he was arrested his KShs.150,000/= was taken by the police and the decision was made without jurisdiction. The grounds of appeal for the 2nd appellant **JOHN NAMAYI ETEMESI** are more or less similar to those of the 1st appellant except the issue of money. During the hearing of the appeal the 1st appellant filed written submissions. He contends that no exhibit was recovered from him. The charge sheet was defective and the evidence was never corroborated. Some witnesses indicated that the incident took about 10 to 20 minutes while others said it took about 1 ½ hours. His alibi defence was also not considered. He was arrested three months after the incident. The identifying witness saw him before the identification was conducted.

Mr. Elung'ata, counsel for the 2nd appellant submitted that the matter was heard by three magistrates. One magistrate heard the prosecution case while another one only wrote the judgment. In the judgment it is indicated that identification was by touching yet evidence indicate it was voice identification. No description of the 2nd appellant was given to the police. The incident occurred at night and the

identification was not proper. Nothing was recovered from the 2nd appellant. It is alleged that it is the 1st appellant who mentioned the 2nd appellant but there is nothing to connect the two.

Mr. Ngetich, State Counsel, opposed the appeal. Counsel contended that the appellants were positively identified and they were armed with dangerous weapons. The 2nd appellant was identified by his voice at an identification parade. The defence evidence was doubtful.

The record of the trial court shows that six witnesses testified for the prosecution. **PW1 JAMES SHIKANDA WAMBANI** was the complainant. On the 10.10.2010 he was outside his house at about 8.00 p.m. when a group of about six people invaded his home and attacked him. He was outside his house checking his matatu vehicle. Some of the robbers were wearing police jungle uniform. He was able to identify the two appellants but did not attend any identification parade. The robbers took KShs.5,000/= from his pocket. They tied him and took him to his house where his wife was. He pushed around the house and taken to the bedroom. The robbers ransacked the house and left at about 10 to 20 minutes. They stole several items from his house including two cameras, DVD machine, mobile phones and KShs.33,000/=. The matter was reported at the Mumias police station. The following day he went to Matungu Health Center where he was treated and later issued with a P3 form.

PW2 ALICE MULUNDI is the wife of PW1. On 10.10.2010 she was in the house watching TV when the robbers entered through the kitchen door dressed in jungle jackets. They were six robbers. She saw her husband having been tied from behind and bleeding from the head. She was ordered to lie down and the robbers started beating her husband. There was electricity light and she was able to identify the two appellants. The robbers were armed with a pistol. She was from a chama meeting and had KShs.30,000/= that was stolen. The robbers took about 2 ½ hours in the house. She was pushed into the bathroom together with the houseboy and locked inside. She later attended an identification parade and was able to identify the two appellants. It is her evidence that she did not give the description of the robbers to the police. She recorded her statement after the appellants were arrested.

PW3 APC WASHING NDEGE was based at the Butula D.C's office. On the 14.10.2010 the 1st appellant went to the D.C's office and reported to him that he was a worker at Togoland Bar in Butere and he had been hijacked at the bar by customers and put in the boot of a car on the 12.10.2010. The 1st appellant also told him that a bar maid was also placed in the boot and they were driven towards Ogalo market. He was dropped in a sugarcane plantation and he was found by the workers in the morning. The appellant informed him that he was an employee of a CID officer from Mumias by the name Wanyonyi and that Wanyonyi's wife was one Hellen. He gave him the telephone numbers of the two but the first number was picked by one person by the name Peter who was a teacher and did not know Wanyonyi. The second number was picked by Hellen who was an officer at Mumias police station. She told him that she was not married to Wanyonyi. PW3 became suspicious and contacted Butere police station to find out if there was such an incident at Togoland bar. He was informed that the bar was intact and there was no such incident. Investigations were done and the appellant was detained but was later picked by police from Mumias police station. He handed him over to PC Momanyi of Mumias police station.

PW4 IP DANIEL KAIRU was based at the Mumias police station. On the 18.10.2010 he conducted an identification parade of the 1st appellant at the station. There were five witnesses namely Alice Wende, Mulunda Katume Onyango Felix, Dorothy Simiyu, Robinson Anami and Joshua Wanga. The appellant was identified by four witnesses and he claimed that he was being unfairly targeted by the witnesses.

PW5 JOSHUA MUKOMA WANGA was the houseboy of PW1. On the 10.10.2010 at about 7.30 p.m. he was in house with PW2 while PW1 was outside. Robbers entered the house while armed with firearms. They were dressed in jungle clothes like the ones of AP officers. He was told to lie down which he did. He was later lifted and taken to the washroom. He was able to identify the 2nd appellant as the one who had the firearm. He later attended an identification parade and managed to identify the 2nd appellant. There were six robbers during the incident.

PW6 PC CHARLES MOMANYI was the investigating officer and was based at the Mumias police station. He was informed about the arrest of the 1st appellant on the 15.10.2010. He went to Butula

D.C's office and read the report made by the 1st appellant that had been booked. He took the 1st appellant with him and during interrogation the 1st appellant mentioned the 2nd appellant. He later went to the 2nd appellant's kiosk at Itenje and arrested the 2nd appellant who was at his kiosk. Identification parade was done and the appellants were identified. The 2nd appellant was arrested at his shop at about 1.00 p.m. **PW7 ISAAC MUKWANDA** was a clinical officer based at Matungu sub-district hospital. He attended to PW1 and filled in the P3 form. He classified his injuries as harm.

The appellants were put on their defence and they both gave sworn evidence. The 1st appellant testified that he is a fish vendor and he is employed by his uncle. On the 4.10.2010 he went to Butula by motorcycle and later went to Port Victoria to buy fish. He did not get fish that day. He saw Mr. Momanyi who is a CID officer from Mumias (PW6) who asked to be dropped at Bumala. He declined to drop the officer. Shortly afterwards he saw another CID officer by the name Agnes Auma who told him that he was under arrest. He was taken to Port police and he was told that he had a case which he did not know. He had KShs.100,000/= for purposes of buying the fish and he gave it to Mr. Momanyi before he was taken to Bookers police post. He was then tortured and pierced using needles and pliers. He denied committing the offence.

The 2nd appellant in his sworn testimony stated that on the 17.10.2010 at about 2.00 p.m. he was at his shop at Muberi village where he also lives. Police officers went to his shop and arrested him. They conducted a search in his shop but nothing was recovered. The police told him that he was armed with a gun and started digging at the farm of his landlord but nothing was recovered. He was taken to Bookers police post and later brought to Mumias police station. On the 19.10.2010 he was charged in court with the offence. It is his evidence that Inspector Daniel Kairu only conducted an identification parade for the 1st appellant. He does not know the 1st appellant.

The main issue for determination is whether the prosecution proved its case beyond reasonable doubt against the appellants. We have perused the record of the trial court both typed and handwritten and did not see any evidence by any witness who conducted an identification parade for the 2nd appellant. PW5 Joshua Wanga testified that he attended an identification parade and identified the 2nd appellant. The record of the trial court shows that PW4 IP Daniel Kairu conducted an identification parade only for the 1st appellant. We have looked at the exhibits produced before the trial magistrate and noted that P. exhibit 2 is an identification parade form for the 1st appellant done by PW5. There is no other parade form in the file and the evidence on record does also not refer to any parade form. The judgment of the trial court also does not mention an identification parade form for the 2nd appellant. Counsel for the 2nd appellant mentioned identification by voice which we have not seen in the proceedings. The incident occurred at night and the only evidence connecting the 2nd appellant to the offence is the alleged identification by Joshua Wanga and him having been mentioned by the 1st appellant. PW1 did not attend any identification parade. PW2 attended the parade but identified the 1st appellant. Joshua Wanga PW5 alleged to have identified the 2nd appellant at an identification parade but there is no police officer who testified to that effect. In essence therefore there was no parade conducted for the 2nd appellant. The prosecution evidence corroborates the 2nd appellant's evidence that he was arrested at his shop at about 1.00 p.m. Nothing was recovered from him. The law requires that the prosecution has to prove its case beyond reasonable doubt. We do find that the prosecution did not prove its case against the 2nd appellant. There was only dock identification by PW1 who never attended an identification parade. PW2 also alleged to have identified the 2nd appellant yet she did not pick him from an identification parade. We do find that there was not enough evidence against the 2nd appellant and the appeal is hereby allowed.

With regard to the 1st appellant it is the evidence of PW3 that the appellant went to Butula D.C's office and made a false report. This was on 12.10.2010 two days after the robbery. It is also the prosecution evidence that the appellant was identified by four witnesses. Three of the witnesses who identified him related to a different case while PW2 Alice Mulunda identified the appellant for this case. It is the evidence of PW2 that she did not give the description of the appellant to the police. The parade form indicates that the appellant was requested to walk during the parade and he was identified by his walking

style. PW2 never talked of the walking style of the 1st appellant. We do find that the identification of the appellant is not full proof. The trial court based its conviction on the fact that there was electricity light during the robbery and the witnesses identified the robbers. However, the investigations and the evidence on record do not tally to that effect. The appellants were merely arrested as suspects and the 1st appellant was made to undergo an identification parade. Indeed PW2 recorded her statement after attending the identification parade. A witness is normally called to an identification parade if he or she has informed the police that he will be able to identify the robbers if he can see them again. Such a witness normally gives the description of the robbers. PW2 did not give any description of the robbers or the manner in which they were walking in the house. Therefore, the identification by the 1st appellant by his manner of walking is not supported by any evidence. Nothing was recovered from the appellant. We do find the appeals to merited and they are allowed.

In the end we do find that the case was not proved beyond reasonable doubt as required. The appeals are merited and are hereby allowed. The appellants shall be set at liberty unless otherwise lawfully held.

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

SAID J. CHITEMBWE

GEORGE DULU

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