



REPUBLIC OF KENYA

High Court at Kakamega

Criminal Appeal 165, 166, & 167 of 2010

CALISTUS OYOYI KHAYUMBI 1ST APPELLANT

BRADOR MUHANJI 2ND APPELLANT

AINEA KHAMASI JUMA 3RD APPELLANT

V E R S U S

REPUBLIC RESPONDENT

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 of the offence were that the appellants *on the 8th of September 2009 at Ondola village, Mukulusu sub-location, Shinyalu Division of Kakamega East District, jointly while armed with dangerous or offensive weapons namely panga and a slasher robbed JANE LUMUMBA of a mobile phone, make Nokia 1202 worth 2,500/= and cash KShs.4,000/= and a wallet worth KShs.100/= all valued at KShs.6,600/= and immediately at the time of robbery threatened to use violence on the said JANE LUMUMBA.*

The appellants were found guilty and sentenced to death. They preferred these appeals. The 1st appellant **CALISTERS AYOYI** has the following grounds of appeal:-

1. That he pleaded not guilty to the charge

2. That no P3 form was produced in court
3. That the prosecution evidence was based on recognition that was not proved beyond reasonable doubt
4. That none of the exhibits produced connected the appellant with the offence.
5. That the arresting officer and the chief who received the first report did not testify
6. That the trial court rejected his sworn defence which created doubt on the prosecution case.

The appellant filed written submissions which expounded on the above grounds of appeal. The appellant contends that PW1, PW2, PW3 & PW4 were people from the same family and therefore were bound to consult together. The incident occurred at night when visibility was difficult. PW1, was held by the neck when the robbers entered her house and a panga was put on her neck and therefore there was no opportunity to identify the robbers. The mentioning of the appellants by PW1 was an afterthought. No names were given to people in authority. The size of the room where the robbery occurred was not established and the light used to identify the appellants is doubtful. The time when the offence occurred is not clear. Some witnesses testified that it was 8.30 p.m. while others said it was 2.30 a.m. and that was material contradiction. The Aps who were used in the arrest were not called to testify. The appellant gave a sworn alibi defence and stated that he had an outstanding grudge with the complainant but that was ignored.

The 2nd appellant, **BRADOR MUHANJI**'s grounds of appeal dated 19th August 2010 are replica of those of the 1st appellant. During the hearing of the appeal he filed written submissions that expounded on his grounds of appeal. The appellant contends that the nature of light in the house was alleged to be a tin lamp placed on a high wall. The amount of light was uncertain. The size of the sitting room and bedroom was not established. PW1, was held by the throat and neck immediately the robbers entered and she had no opportunity to observe the assailants in order to recognize them. There were material contradictions on the way he was dressed that night. Some witnesses testified that he had the same clothes like the ones he had in court while others gave description of other clothes. A panga was alleged dropped at the scene of crime but the same was not dusted for finger print. The assistant chief who received the report and the Administration Police officers were not called to testify. PW5, never visited the scene and nothing was recovered from the appellant. The trial was not fair and impartial as the appellant was not given any statements in advance.

The 3rd appellant **AINEA KHAMASI**'s grounds of appeal dated 19th August 2010 are similar to those of the 1st appellant. The appellant relied on his written submissions and submitted that PW1, PW2 & PW3 were members of the same family. There was no other direct evidence. The charge sheet was defective as the complainant's name was misspelt. The evidence on identification was not proper as the attack was

sudden and the attackers concealed their identities. The nature of the light in the house where the robbery occurred was not described. The prosecution evidence was full of contradictions. The arresting officer did not testify and no exhibit was found with the appellant. The appellant's strong alibi defence was not evaluated properly. The appellant further submitted that the investigating officer testified that she got the report on 13th by that time the appellant had already been arrested.

Mr. Orinda, State Counsel opposed the appeals. Counsel submitted that the incident occurred at night, about 8.30 p.m. There was enough light from a tin lamp that enabled the witnesses to identify the appellant. Although no medical evidence was adduced, there was threat to use violence and therefore the ingredients of robbery with violence were satisfied. The appellants raised the issue that all the witnesses were family members before the lower court and it was dealt with by the trial court. The non-attendance of the area chief to testify did not prejudice the appellants' defence.

The record of the trial court shows that five witnesses testified. The complainant **JANE MASALISA LUMUMBA** testified as PW1. Her evidence is that on the 8.9.2009 at about 8.00 p.m. she was in her house shelling maize with Pamela Ngaiywa (PW3). Her husband was sick and resting in the bedroom. She heard a knock on the door and heard **JOHN ANGOLO (PW4)** talking. She opened the door and the said Angolo entered with three other people. There was a tin lamp on the sitting room and the three people alleged that they were policemen. Angolo was trembling and the 2nd appellant Muhanji asked her to give them money. He pushed her to the bedroom and ordered her to give them money. She had a mobile phone strapped on her neck in a pouch. Muhanji pulled it and took away the mobile phone Nokia 1202 worth 2,500/= and some KShs.4,000/=. The robbers ran away but fell on the door and dropped a panga. All along Pamela was seated in the sitting room. The robbers did not touch her husband who tried to wake up and told them that he had realized that they were not policemen. Two of the robbers had pangas while one had a slasher. PW1 reported the matter the following day to the village elder. The appellants were later arrested.

PW2, HENRY SHIMENGA, is the husband of PW1. His evidence is that on the material day he was sick and sleeping in his bedroom leaving PW1 and PW3 in the sitting room. People entered the house and alleged that they were police officers. They dragged PW1 to the bedroom. PW2 recognised the 2nd appellant who was holding PW1 while holding a panga. PW2 tried to wake up and said that he did not think the people in the house were police officers. PW1 told them that PW2 was sick. The robbers ran away after pulling PW1's mobile phone from her neck. The matter was reported to the village elder who referred them to the area assistant chief. The appellants were later arrested by the assistant chief and AP officers. **PW3, PAMELA NGAIYWA**, testified that she was with PW1 on the material night. She had visited PW1 who is her sister in-law and they were shelling maize together. Three young men entered the house together with Angolio. Angolio was made to sit down. Two of the robbers went with PW1 to the bedroom. The robbers said they were police officers. Two had a panga and one had a slasher. PW3 was sitting at the sitting room and the robbers dashed out running. They dropped a panga on the door. They started screaming and neighbours went to their rescue. PW3 did not know the appellants.

PW4, JOHN ANGOLIO, testified that on the 8.9.2009 at about 8.00 p.m. he went to a shop to buy cooking oil and tomatoes. On his way back he met three young men who said they were police officers. They snatched the oil and tomatoes and took him to PW1's house. PW1 opened the house after she heard his voice as the robbers were beating him up using apanga. Inside PW1's house the robbers took PW1 to her bedroom while he was made to sit down. There was a tin lamp in the house and he was able to identify the three appellants since he knew them before the incident. The robbers came out of PW1's bedroom and left. PW4, went out of the house and started screaming for help.

PW5, PC IRENE JUMA, testified that she got the report of the robbery on the 13.9.2009 at around noon from PW1. She investigated the case and charged the appellants with the offence. She gave a letter to PW1 to take to Murhanda AP camp and the appellants were arrested. The appellants dropped a panga during the robbery which she produced in court. She did not know the appellants before and she was informed that the appellants are neighbours to the complainant. The appellants were arrested on the 12.9.2009.

The appellants were put on their defence. The 1st **appellant CALISTUS AYOYI KHAYUMBI**, in his sworn evidence testified that on the 12.9.2009 he was at his home when the assistant chief and AP officers asked him to go to Murhanda AP camp. He complied and was later taken to Kakamega Police station. He was later charged with the offence. He denied that he committed the offence. He further testified that PW1 has a habit of reporting people to the police. His mother had bought land from the complainant and he had built a house six months before he was arrested. His mother died and the complainant had not issued his mother with a title deed. The 2nd appellant **BRADOR MUHANJI** also gave sworn evidence. He testified that he was arrested on the 12.9.2009 by the area assistant chief. He saw the complainant who asked for KShs.6,000/= from the appellant and the 3rd appellant who had already been arrested. When they refused to give the money the complainant went to Kakamega police station and recorded her statement. The appellants were later taken to the police station and were charged. The complainant later took a panga to the police station. According to him the complainant normally uses tricks to extort money from people. He denied committing the offence. The 3rd appellant **AINEA KHAMASI JUMA** also gave sworn testimony. His evidence is that he was arrested on the 12.9.2009 by the village elder who summoned him to the assistant chief's office. He found the complainant at the office. The complainant reported that the appellant had attacked her and the appellant denied. He was taken to the Murhanda AP camp and later to Kakamega police station. His further evidence is that his father died and he is the only son in the homestead. The complainant would like to inherit their land. He knows the complainant very well and all along he was at his home. He denied committing the offence.

According to the prosecution evidence the robbery occurred on the 8.9.2009 at about 8.30 p.m. There was a tin lamp in PW1's house. The trial court held that the appellants were positively identified. The trial court noted that the attackers did not use their torches during the robbery. From the evidence on record it is clear that the only source of light was a tin lamp that was in the sitting room. According to PW1 the tin lamp could illuminate up to the bedroom. There is no evidence that there was another light in the bedroom. PW2 was asleep and he tried to wake up. It is not clear how long the robbery incident took. According to PW1 the robbers demanded to be given money quickly and ran away after snatching her mobile phone. It is PW1's evidence the PW4 was trembling an indication that he was scared. PW3 Pamela was a visitor and did not know the appellants. She did not attend any parade to identify them. All the appellants gave sworn testimony and denied committing the offence. They were all arrested on the same date 12.9.2009 by the area assistant chief who did not testify. According to the investigating officer the report of the incident was made on the 13.9.2009 at noon. We have confirmed with the handwritten record of the trial court that indeed the investigating officer got the report on that date. By that time the appellants had already been arrested and taken to the police station by the assistant chief and APs. It is not clear why PW1 did not report the incident to the police for over four days yet the appellants are her neighbours. It is also not clear why the area assistant chief did not report the matter to the police for all this time.

Given the evidence on record, we are not satisfied that the tin lamp could have enabled the four witnesses to identify the robbers. Even the trial court in its judgment had this to say:-

“I am surprised that the said ‘karoboi’ did provide adequate lighting to have the four witnesses identify their attackers”

The identification of the appellants by the witnesses raises some doubts. PW4 was terrified and it is not clear whether he was simply made to sit down and just watch. The same applies to PW3 who appears to have been watching without being attacked or made to lie down. The entire incident does not appear to us to have been a robbery despite the fact that PW1 alleged that a panga was placed on her neck. It is the evidence of PW4 that he was slapped with the sides of the panga and beaten by the robbers. There was no evidence that he was taken for medical treatment or that he was indeed injured. Although a robbery with violence can occur without the victims being injured, we do find that the current case raises some doubt as those who claimed to have been attacked were not taken for medical examination. We also find it unclear as to why the complainant went to report the robbery to the police after the appellants had already been arrested. That would give credence to the appellants’ contention that the complainant were wanted to extort money from them and when they refused they were charged with the offence.

In the end, we do find that the prosecution did not prove its case beyond reasonable doubt. The appeal is merited and the same is allowed. The appellant shall be set at liberty unless otherwise lawfully held.

Delivered, dated and signed at Kakamega this 9th day of May 2013

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SAID J. CHITEMBWE

J U D G E

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B. THURANIRA JADEN

J U D G E