



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 211 OF 2011

(Appeal against conviction and sentence arising from the

judgment of [H. WANDERA, SRM] dated 21.9.2011 in

Mumias Senior Principal Magistrate's Court

in Criminal Case No. 452 of 2010)

ATANUS KHAIMBA BWAKWEA APPELLANT

V E R S U S

REPUBLIC REPUBLIC

J U D G M E N T

The appellant was charged with four counts of robbery with violence contrary **Section 296 (2)** of the **Penal Code**. The appellant also faced an alternative charge of handling stolen property contrary to **Section 322 (2)** of the **Penal Code**. The particulars for each count were as follows:-

Count I – *On the 11th and 12th December 2009 at [Particulars Withheld] in Mumias District within western Province jointly with others not before court while armed with dangerous weapons namely pangas, metal bars and a harmer robbed L M of two thermos flasks, one dozen of glasses, cups, one dozen plates, three kilos sugar, four kilos rice, six kilos beans, twelve kilos maize, one note book, one mobile phone make C115 Motorola, one torch, one mattress and cash money KShs.3,700/= and assorted clothing valued at KShs.50,000/= and at the time of such robbery used actual violence on the said L M.*

Count II - *On the 11th December 2009 at [Particulars Withheld] in Nabongo Location in Mumias District within western Province jointly with others not before court while armed with dangerous weapons namely pangas, metal bars and a harmer robbed G K S one pair of shoes, two pairs of trousers, one mobile phone make Motorola W180, one leather wallet, one ATM card for Equity Bank, one ATM card for Co-operative Bank, one ATM card for Post Bank, a National Identity card, one Uchumi V-club card, one Sonitec radio, one bag, one panga and cash money KShs.300/= all valued at KShs.7,000/= and at the time of such robbery used actual violence on G K S.*

Count III - *On the 17th November 2009 at [Particulars Withheld] in Nabongo location in*

*Mumias District within western Province jointly with others not before court while armed with dangerous weapons namely pangas, metal bars and a harmer robbed **B M** two mobile phones make Samsung C200, one pair of shoes, a T.V. coloured make TEK star, two pairs of trousers one T-shirt, assorted clothing and cash KShs.17,000/= all valued at KShs.35,000/= and at the time of such robbery used actual violence against the said **B M**.*

Count IV–*On the 17th day of November 2009 at [Particulars Withheld] Nabongo location in Mumias District within western Province jointly with others not before court while armed with dangerous weapons namely pangas, metal bars and a harmer robbed off **Z M B** two mobile phones make TECNO T277, three pairs of skirt suits, 2 bed sheets, two sets of sofa set covers and assorted clothing all valued at KShs.15,000/= and at the time of such robbery, used actual violence against the said **Z M B**.*

Alternative Count – *On the 12th day of December 2009 at [Particulars Withheld] , Nabongo location in Mumias District within Western Province otherwise that in the course of stealing dishonestly received and retained one mobile phone make Motorola C115 and one note book the property of L M having reason to believe them to be stolen goods.*

He was convicted of the charges in count I and II and sentenced to suffer death. His grounds of appeal are that:-

1. The trial court erred in law and fact by convicting and sentencing the appellant in two capital charges of robbery with violence hence rendering duplicity of the charges.
2. The trial court relied on the evidence of identification or recognition without warning itself as there was no description of the appellant's physical features by the witnesses.
3. The appellant was not allowed to be represented by an advocate yet the court knew that he had an advocate.
4. Upon being arrested he was not informed of his offence as required by Article 49 of the Constitution.
5. The prosecution evidence does not prove that some of the stolen items were found in possession of the appellant.
6. Evidence of bad character against the appellant was allowed without proof hence influencing the mind of the court.
7. The appellant's sworn alibi defence which was not shaken was not examined exhaustively.
8. The appellant pleaded not guilty and the prosecution evidence was full of contradictions and lacked corroboration.
9. There was no identification parade conducted.

Mr. Oroni, State Counsel, opposed the appeal and relied on the proceedings before the trial court. Counsel submitted that the appellant was clearly identified by PW1 and PW6.

The prosecution case was that there were several robberies committed in the area and the following day the appellant was arrested at his place of work in a hotel at Ekeru. The police were led to the arrest by PW6 who identified the appellant's voice during the robbery and led the police to where the appellant used to work. PW6, a student, used to take lunch at the hotel for a period of three years and could identify the appellant's voice. Upon arrest some items belonging to the victims were found with the appellant.

PW1, was **L M**. Her evidence was that on the 11.12.2009 at about midnight she was in her house praying when she heard voices outside. She had buried her husband and was in the house with her children. She was told to open the door as the robbers claimed to be policemen. She saw seven people armed with iron bars, harmers and pangas. They were ordered to lie down and the robbers had torches. Both her hands and legs were tied with a rope and the robbers stole several items including 12 cups, 12 plates, one thermos, sugar, bread, rice, cooking oil, bed-sheets, blankets, iron box, clothes and one Motorola mobile phone make C115. The robbers then left. One of her daughters by the name S aged 14 years informed

her that she had recognized the voice of a worker at a hotel which she used to go for food. The following day S took the police to the hotel at Ekero where the appellant was arrested and PW1's phone was recovered from the appellant's pocket. The appellant was also found with other phones and a brown wallet. PW1 recognized her phone as it had a visible scratch on the battery. PW1 did not recognize any of the robbers as it was dark and she was afraid.

G K S, was **PW2**. He was asleep on the 11.12.2009 at about 11.00 p.m. when he heard voices from outside from people who claimed to be police officers. They broke open his door and he saw 7 people armed with pangas, iron bars and hammers. PW2 was with his wife and children. He was held down by one of the robbers as they searched his house. The robbers stole his Motorola mobile phone number 180, a suitcase, brown wallet, clothes, panga, radio and KShs.7,000/=. The following day he reported the matter at the Mumias police station. PW2 met PW1 who is a neighbor who informed him that PW1's daughter had recognized one of the robbers. The appellant was arrested and PW2 was able to identify his brown wallet that was removed from the appellant's pocket. There was his ATM withdrawal receipt from Equity Bank and it was found in the wallet. PW2 was not able to recognize any of the robbers. The appellant claimed that the wallet was his although the ATM withdrawal receipt was inside the wallet.

PW3 was **B M A**. On the 11.12.2009 he was asleep when people forced his door open and entered. He saw three robbers who were armed with pangas and had torches. They claimed to be police officers. They ordered him to lie down and give out money. His legs and hands were tied and they stole his KShs.17,000/= that was inside his bedroom drawer, a fourteen inch TV, sofa seat covers and one bed-sheet. The robbers left and neighbours went for his rescue. He reported the matter to the police the following day. On the 13.12.2009 he received a report that the police had arrested some suspects and some items had been recovered. He was able to identify his six seat covers, bed-sheet and table clothes. He did not identify any of the robbers during the incident. PW4, was **Z M B**. She was the wife of PW3. Her evidence was that she was robbed with her husband of the items as per her husband's evidence but she was not able to identify any of them. She was later on called to the police station where she identified her bed-sheet and table clothes.

V M was **PW5** and PW1's daughter. She was asleep on the 11.12.2009 at about midnight when 10 people entered their house claiming to be policemen. She was pushed into one room with her mother and their hands and legs were tied using a curtain net. Once the robbers left her younger sister S untied them. She did not identify any of the robbers. PW6 was **S M** who was a student at [Particulars Withheld] when the incident occurred. She was in class seven by that time. Her evidence was that on the night of 11.12.2009 she was asleep when the robbers entered their home. She heard the robbers' voices. One of them who was tying her sister was giving orders to the others so that they could direct the torch light to where he was tying PW1 and PW5. PW6 recognized the voice as that of the appellant. She knew the appellant as he used to serve her lunch at Sunrise Hotel. PW6 was in class four when she knew the appellant and used to take lunch at the hotel for a period of three years. PW6 was sleeping under a net and she kept quiet. Robbers then left. PW6 later informed the police that one of the robbers sells at a hotel where she usually went for lunch. She knew the appellant very well and took the police to the hotel. The appellant was then taken to Mumias police station. It is PW6's evidence that she heard the appellant's voice that night and recognized it.

PW7 was **SULEIMAN MANGO** who was the Chief of Nabongo location where the appellant was residing. On the 14.12.2009 he got a report at 10.00 a.m. from CPL Chelang'a indicating that the police wanted to make some recoveries in his area. He went to Mumias police station with two Administration Police officers and he found the appellant there who was in custody. The appellant took them to Lureko area but no recoveries were done. He later took them to Lumino area where they recovered a grey jungle jacket and a note book written S.

PW 8 was **CPL ALICE YATOR** who was based at Mumias police station. The robbery incidents were reported at the station on the 12.12.2009 at about 8.00 a.m. PW1 went to the station with her daughter PW6. PW6 informed the police that she was able to identify one of the robbers who was a worker based at Sunrise Café. She gave the description of the robber. PW8 went with PW6 and other police officers to the hotel and found the appellant was there working. PW6 identified the appellant and he was arrested.

A quick search led to the recovery of two mobile phones and a wallet which had a withdrawal slip in the names of G (PW2). G later identified the wallet and the deposit slip to be his.

PW9 CPL BENJAMIN CHELANG'A was based at the Mumias police station and investigated the case. The report was made at the police station on the 12.12.2009. PW6 informed them that she had recognized one of the robbers during the robbery and led them to Sunrise Hotel where she used to go for lunch. They found the appellant serving customers and PW6 identified him. The appellant was arrested and three phones were recovered from his pocket one being Motorola C115 silver in colour, a mobile V10 and Nokia 620. They also recovered from his jacket a brown wallet. PW1 identified the phone to be hers but the appellant claimed that he had bought the phone in Nairobi. From the wallet they found a receipt for Account No. [Particulars Withheld], Equity Bank in the name of G K S (PW2). G identified the wallet to be his as well as the receipt. One Aisha Muzungu who had made a report of a robbery earlier identified the Nokia 620 as hers and criminal case number 1268 of 2009 was pending in court. On the 14.12.2009 together with the area chief and other officers, he went with the appellant to Lureko area but no recoveries were made. The appellant then led them to Lumino area at a plot which had five rooms. The appellant opened the doors and they recovered a notebook which had the name S. They also recovered a panga and some sofa set's seats covers. G identified the panga to be his. B identified the seat covers to be his. They also recovered a jungle jacket, a suitcase and some clothes plus an identity card in the name of **MOSES LITUNYA OSAGE**. On the 15.12.2009 the said Moses Litunya Osage went to the station and made a report of robbery. The jungle jacket was used in another criminal case.

The appellant was put on his defence. He gave sworn testimony and stated that he conducts boda boda business. On the night of 11.12.2009 he was asleep in his house. The following day 12.12.2009 he was with his bicycle when police officers arrested him and took him to Mumias police station. He saw people pointing at him alleging that he had robbed them. He was searched and his mobile phones were taken. He denied that he worked at a hotel and that some items were recovered from him.

From the evidence on record it is established that the complainants were indeed robbed on the night of 11.12.2009. The main issues for determination are whether the appellant was properly identified and whether the appellant was found in possession of the stolen items soon after the robberies. Apart from PW6 none of the victims identified the robbers. The evidence on identification is that of PW6 S who testified that she knew the appellant and she identified him by his voice. The circumstances under which PW6 identified the appellant's voice was that PW6 was sleeping in the bed and she heard the appellant's voice commanding other robbers to shine the torch where he was tying PW6's mother and PW5. She recognized the voice as that of the appellant and that the appellant ordered PW1 and PW5 to enter into a room and lie down. Immediately the robbers left PW6 informed her mother that she had identified the appellant's voice. PW6 also informed PW8 CPL Yator that she had identified the appellant by his voice.

In the case of **MBELLE V REPUBLIC [1984] KLR 627** the court indicated that in dealing with the evidence of identification by voice, the court should ensure that:

- a. *The voice was that of the accused;*
- b. *The witness was familiar with the voice and recognized it;*
- c. *The conditions obtaining at the time it was made were such that there was no mistake in testifying to what was said and who had said it.*

The evidence shows that it is only PW6 who identified the appellant. The general rule is that the court has to caution itself where the identification is by a single witness. In the case of **CHOGE V REPUBLIC [1985] KLR 1 at page 55** the court stated that the fact that it is a voice identification does not lessen the need for caution where it is by a single witness. In the case of **NJERI V REPUBLIC [1981] KLR 156**, it was submitted that voice identification is less satisfactory than visual identification. The court stated as follows:-

“Mr. Otieno has submitted that identification by voice is less satisfactory than visual identification. In our view it can be equally safe and free from error, more so if the identification takes place at night. We agree with the two lower courts that in the

particular circumstances of this case, the appellant and the complainant being familiar with each other for many years, the possibility of error was excluded.”

The trial magistrate evaluated the evidence and concluded that the appellant was properly identified although the court did not mention the fact that the identification was by voice. The court correctly concluded that there was no need for an identification parade as the witness knew the appellant. From the evidence on record, we do find that although the identification was by a single witness, the same was proper as PW6 was consistent on the fact that she had identified the appellant by his voice. Although the specific words used by the appellant during the robbery were not stated, we are satisfied that the identification by voice was proper. PW6 was certain that the voice was that of the appellant. PW6 had visited the hotel where the appellant used to work for a period of three years and she was familiar with the appellant’s voice. Further, the witness was not attacked and she was inside her bed when the appellant commanded his colleagues to shine the torch to where he was. We find that the identification was safe.

The next issue is whether the appellant was found in possession of some of the stolen items. According to PW8 when they went to arrest the appellant, a quick search was done and a mobile phone belonging to PW1 was recovered from the appellant’s pockets. PW1 identified the mobile phone to be hers. Similarly a brown wallet was recovered from the appellant and it belonged to G (PW2). According to PW9 CPL Benjamin Chelang’a, the appellant took them to a place at Lureko where they recovered a note book in the name of S, beddings and sofa seat covers. It is the evidence of PW9 that the brown wallet contained an ATM receipt for account number [Particulars Withheld] which belonged to G. The appellant in his sworn defence denied that he was found in possession of the wallet and other exhibits. He further denied that he used to work at the hotel where he was arrested. The appellant contends that the landlord of the room where some of the stolen items were recovered was not called to testify. We do find that the appellant was found in possession of PW1’s phone as well as PW2’s wallet which contained an ATM receipt the following day after the robbery. The doctrine of recent possession did apply. The trial court in examining the evidence held that the appellant did not give a proper explanation as to how he had those items and convicted the appellant on the main charge of robbery with violence. The appellant contends that the investigating officer and the prosecutor gave negative information about him and therefore influenced the mind of the court. The record shows that the prosecutor did not give any past records of the appellant and the court ignored the prosecutor’s allegation that the appellant was repeat offender. Similarly, PW9 only referred to another criminal case which involved the recovered jungle jacket. The trial court considered the appellant’s defence. Mr. Elung’ata advocate appeared for the appellant and there is no evidence that the appellant’s rights were violated.

In the end, we do find that the prosecution proved its case, the appeal lacks merit and the same is hereby dismissed. Taking into account the circumstances of this case we do find that imposing the death penalty may not be fair. We hereby set aside the death sentence and replace it with 15 years’ imprisonment from the date of conviction. The appellant shall serve years’ imprisonment.

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

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SAID J. CHITEMBWE

GEORGE DULU

JUDGE

JUDGE