



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 195 OF 2012

Appeal against conviction and sentence from the judgment of

[G. MMASI, PM] dated 10.8. 2012 from the original Criminal Case No. 888 of 2011 in Vihiga Principal Magistrate's Court)

NICHOLAS NDUHI CHASIMBA alias OCS APPELLANT

V E R S U S

REPUBLIC RESPONDENT

J U D G M E N T

The appellant was charged with two counts of robbery with violence contrary to **section 296(2)** of the **Penal Code**. The particulars of the offence for each count were:-

“Count I:- On the 3rd day of August 2011 at around 0300hrs at Kegoye village, Wamuluma location in Vihiga County within Western Province jointly with other not before court being armed with dangerous offensive weapons namely pangas, robbed LINAH MULOMA of her four mobile phones, a DVD (make sonny), two speakers, a briefcase and cash KShs.10,000/= totaling to KShs.40,000/= and at or immediately before or immediately after the time of such robbery wounded the said LINAH MULOMA.”

Count II:- On the 3rd day of August 2011 at around 0300hrs at Kegoye village, Wamuluma location in Vihiga County within Western Province jointly with other not before court being armed with dangerous offensive weapons namely pangas, robbed JOHNSON LUMUMBA of his mobile phone, make Samsung, valued at KShs.7,000/= and at or immediately after the time of such robbery wounded the said JOHNSON LUMUMBA.”

The appellant was also charged with one count of assault causing bodily harm contrary to **section 251** of the Penal Code and one count of being in possession of public stores contrary to **section 324 (2)** as read with section 36 of the Penal Code. The appellant was found guilty of count one and four and he was sentenced to suffer death. He preferred this appeal with following grounds:-

1. That the trial court relied on the evidence on identification of PW1 and PW2 yet the circumstances were not conducive for positive identification.

2. There was no first report produced.
3. The prosecution failed to produce an inventory list and investigation diary for the alleged recoveries.
4. The parade was unfairly conducted.
5. Article 49 of the Constitution was not complied with.
6. The prosecution evidence was contradictory and the case was not proved.
7. His sworn defence was not considered.

During the hearing of the appeal the appellant filed written submissions and further submitted that the prosecution evidence is full of contradictions. PW1 and PW2 were in the same house but gave different dates. One police officer testified that they started their operation at 6.00 p.m. while another one (PW5) informed the court that the operation started at 9.00 p.m. According to the written submission it is contended that PW1 relied on torch light to identify him yet in her evidence she informed the court that the torch light was not directed to the appellant. PW1 did not know the appellant and she never gave any description or physical appearance in her report to the police. It is alleged that a police Inspector jacket was found in his room yet no memo form was produced to prove that allegation. It is further submitted that the identification parade was not properly conducted as some of the parade attendants were shorter and others taller than him.

Mrs. Opiyo, learned State Counsel opposed the appeal and submitted that the appellant was positively identified and an identification parade was later conducted and the appellant was further identified. The appellant was found in possession of a police inspector's jacket and his fundamental rights were not violated.

Being the first court to deal with this appeal it is our responsibility to evaluate the evidence on record. Seven witnesses testified for the prosecution. **PW1, LINA MULOMA**, testified that she was a secretary with the Ministry of Water based at Mbale. On the 2.8.2011 at about 12.30 a.m. she was in her house sleeping while her husband (PW2) was watching television with their son in the sitting room. Two people entered her bedroom demanding money. They were armed with pangas and were flashing torches. They took KShs.10,000/= from her handbag and three mobile phones. She was slapped using the flat side of a panga and she started bleeding. She saw one tall robber and the other one was short. The robbers left and she saw her husband lying in a pool of blood unconscious. She assisted in taking her husband to hospital. It is PW1's evidence that she informed the police that she could identify the robbers as they did not have hoods on them. On the 22.8.2011 she was called by the police to attend an identification parade and she was able to identify the appellant.

PW2, MACKAY MULOMA is a teacher at Mbale High School. On the material day at about 12.30 a.m. he was in his house watching television with his son while his wife (PW1) was sleeping. He took his son outside for a short call but they were attacked by people who armed with pangas. The robbers claimed that they were police officers. He was attacked and he became unconscious. He was robbed of his mobile phone and KShs.7,000/=. He was not able to identify any of the robbers. **PW3, JOHNSON LUMUMBA** was also in his house on the 3.8.2011 when he heard commotion outside. Some people tried to enter his house but he blocked his door. Although he was injured nothing was stolen from him. He later identified the appellant's two co-accused at an identification parade. According to PW3 he did not see the appellant that night at his place. PW3 is a neighbor to PW1 and PW2.

PW4, is a **CPL AP ELPHAS OLUOCH**. He was based at Mbale in Vihiga District Headquarters. On the 20.8.2011 the police organized a special raid as there were several complaints of robbery. The appellant was arrested in his house and taken to Mbale police station. A jacket for police inspector was found with the appellant. The raid started at about 8.00 p.m. **PW5, CIP RAJAB MUNGA** was the investigation officer. His evidence is that on the 20.8.2011 he conducted a raid together with Administration Police officers. He got information from members of the public that some robbers were residing at Zimba area. He went there and arrested the appellant with one of his co-accused. He recovered an inspector's police jacket in a black suitcase that was produced as one of the exhibits. He later had the appellant charged after he had been identified in a parade by PW1. **PW6**, is a clinical officer who is based at the Vihiga District Hospital. PW6 attended to both PW2 and PW3 and produced their P3

forms. **PW7 CIP PETER KIEMA** conducted the identification parade on the 22.8.2011 at Mbale police station. It is his evidence that the appellant agreed to participate in the parade and was identified by PW1.

The appellant was put on his defence. In his sworn testimony the appellant testified that he is a cook at a hotel. On 20.8.2011 he was asleep in his rental house when police officers went to arrest him. He was taken to Mbale police station. He denied that a police uniform had been recovered from his house. On the 22.8.2011 a parade was conducted and one person identified him. He was beaten so that he could sign the parade form. He was later arraigned in court.

The main issue for determination is whether the complainant (PW1) was robbed and whether PW1 positively identified the appellant as one of the robbers. The prosecution evidence is that PW1 was robbed while she was in her bedroom. Her husband (PW2) was also attacked and he became unconscious. Medical evidence was adduced to show that PW2 sustained injuries during the robbery. PW1 testified that she was robbed of KShs.10,000/=, three mobile phones, an empty suitcase and Samsung DVD. It is her evidence that she sustained injuries on the chick and face although no P3 form was produced on her behalf. The prosecution evidence does prove that PW1 was robbed. There were two robbers who were armed with pangas and they used force and threatened PW1. The ingredients of robbery with violence were therefore proved.

The next issue is whether PW1 was able to identify the appellant. According to PW1 she did not know the appellant before. Her main source of identification was the torch light from the robbers. The appellant contends that the conditions were not suitable for positive identification. According to PW1 although she had slept she was not in deep sleep. There were only two robbers in the room and one of them was tall and black while the other one was short. It is her evidence that there was enough light in the room that enabled her to identify the appellant. The incident occurred on the 2.8.2011. Although the appellant submitted that PW1 and PW2 gave different dates of the robbery, we do find that the date of 12.8.2011 was a typing mistake and the correct date as per the handwritten record is 2.8.2011.

It is the evidence of PW1 that on the 22.8.2011 she attended an identification parade and managed to identify the appellant. It is also her evidence that she informed the police that she could identify the robbers. One of the grounds of appeal is that the identification by PW1 was made in difficult circumstances. The evidence shows that PW1 was alone in the room and there were only two robbers who were armed with pangas. PW1 did not sustain serious injuries which can be said to have affected her mental status. She was with the robbers who demanded money. There was light from the torches the robbers had. Although it is not indicated how long the incident took, we are satisfied that PW1 had ample time that could have enabled her to identify the robbers. There were only two robbers in the room and it was easy for PW1 to identify them. It is PW1's evidence that the robbers had no hoods on their heads.

The evidence on identification is by a single witness. The court has to warn itself on convicting an accused based on the evidence of a single identifying witness. In the case of **ABDALLA BIN WENDO V R [1953] 20 EACA 166**, it was stated:-

“Subject to certain well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a Judge, or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”

PW1 attended the identification parade after a period of 20 days. The parade was conducted by a chief inspector of police and we do find that the same was conducted properly. The appellant's contentions that he was forced to sign the parade forms are not proved. Article 49 of the Constitution relates to the rights of arrested persons and the appellant did not make any submissions on this ground of appeal and we do find that the same has not been proved. PW1 was able to pick the appellant as one of the robbers. Although the appellant submitted that the first report was not produced, the record of the lower court

shows that the first report was not called for. It is clear from the evidence on record that PW1 had reported the matter to the police. From the evidence on record we are satisfied that PW1 positively identified the appellant during the robbery as well at an identification parade. We are also satisfied that PW1 was violently robbed of the items as per the charge sheet. The appellant's defence only dealt with the issue of arrest and did not dislodge the prosecution evidence. There is no doubt that the appellant was one of the robbers and he was found in possession of a police inspector's jacket. We find that the appeal lacks merit and the same is hereby disallowed.

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

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SAID J. CHITEMBWE

JUDGE

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GEORGE DULU

JUDGE