REPUBLIC OF KENYA

IN THE HIGH COURT OF KINYA ATBUNGOMA

CRIMINAL APPEAL 179 OF 2011

JACKSON BUNYASI OLUKAU.....APPELLANT

~VRS~

REPUBLIC.....RESPONDENT

(Being appeal from the conviction and sentence by the Resident Magistrate Hon. F. Kyambia at Bungoma in Cr. Case No.2395 of 2009)

JUDGMENT

The Appellant was convicted of robbery with violence contrary to section 296 (2) of the Penal Code whose particulars were that on 3/10/2009 at Lwandanyi village in Chebukuyi sub- location in Bungoma West District of the Western Province he jointly with others not before the court and while armed with a metal bar robbed Frank Bisaka Masika (PW1) of cash Ksh.1100/= and at or immediately before or immediately after the said robbery used actual violence against the said PW1. He was sentenced to death. Being aggrieved by the conviction and sentence, he filed this appeal which the State through state counsel Mrs. Leting conceded.

The prosecution evidence on which the Appellant convicted was that on 3/10/2009 at about 11.00 p.m. PW1 boarded a motor cycle at Lwandanyi market to go home. He alighted at a junction at Lwandanyi Catholic Church. The cyclist left. He saw a lone person standing on the side of the road. The man came to him and ordered him to keep quiet. Shortly thereafter, the man was joined by two others. The two attacked PW1 with kicks and blows saying *"toa simu kubwa"*. They tore his short pocket and took Ksh.1100/= and his phone after they had brought him down. PW1 screamed for help. People came and the attackers ran away. The attackers were strangers whom he did not identify. He went to Lwandanyi A.P. Camp to report. While here members of public brought the Appellant whom they had arrested. PW1 looked at him and identified him to be one of his attackers. Those who arrested and brought the Appellant included PW2 Job Mabila and PW4 Luka Wafula Angelimo. Each was in his house when he heard screams form the direction of Lwandanyi Catholic Church. PW2 then saw a man running from that direction. He (PW2) and other neighbours chased the man and managed to arrest him when he ran into a barbed fence. PW3 came after the arrest. The man (the Appellant) had a yellow paper bag in which was a kanzu. They took him to the A.P. Camp where they found PW1 who had come to report the robbery. When PW1 saw the Appellant said he was one of the attackers.

The Appellant gave sworn defence in which he stated that he was coming from Uganda with alcohol called Zebra and he was walking. He saw people following him. They stopped him and asked for his identity card. He did not have it. He was beaten and taken to the A. P. Camp. He denied robbing PW1. He did not call witnesses.

The trial court accepted the prosecution evidence and discounted the defence version and concluded that the guilt of the Appellant had been proved beyond doubt. It is the duty of this court to subject the entire evidence to fresh and exhaustive scrutiny and be able to independently determine whether the conviction that was entered was justified in law and fact **(OKemo v. Republic [1972] EA 32).** In doing this, the court has to bear in mind that it did not have the benefit of seeing or hearing the witnesses.

This case substantially turns on whether PW1 positively identified his attackers, and whether the Appellant was one of them. The attack was at 11.00 p.m at night. Were the circumstances favourable for positive identification? The court did not approach PW1's evidence with the usual caution. It is also

notable that PW1 was a single identifying witness. In the case of **Roria v. Republic [1967] EA 583** this is what the then Court of Appeal said about such evidence:

"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 the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a 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."

When PW1 testified in chief he did not say how he was able to identify the attackers. In cross-examination, he stated that he used moonlight to see his attackers. It was his evidence that the Appellant attacked him from behind and other two from the front. He had to turn his head to see the Appellant who was behind him. There was no evidence on how long the attack took, how long the Appellant was in PW1's view and how bright this moonlight was.

The Appellant was arrested because he was running from the direction of the screams, the direction where PW1 was being attacked. When he was arrested, however, he did not have any of PW1's items and yet he was arrested soon after the attack. If the evidence of PW2 and PW4 was to be accepted, and considering that they were not at the scene to see the attackers, their evidence would make the Appellant a suspect. Suspicion alone, however strong, cannot be the basis of a conviction in a criminal case.

The result is that the Appellant was convicted on evidence that was neither sufficient nor safe. The appeal is allowed, the conviction quashed and the sentence set aside. The Appellant is ordered to be set at liberty forthwith unless he is otherwise being lawfully held.

Dated, signed and delivered at Bungoma this 17th day of July 2012.

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L. KIMARU **A. O. MUCHELULE**

JUDGE **JUDGE**