



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & MURGOR, JJA.)

CRIMINAL APPEAL NO. 578 OF 2010

BETWEEN

GODFREY SHIBO BEDI

SILVANUS INGOSI INGOI..... APPELLANTS

AND

REPUBLIC RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Kakamega, (Lenaola, J.) dated 29th November, 2010

in

H.C.CR.A. NOS. 112 & 113 OF 2006)

JUDGMENT OF THE COURT

1. At about 10.00 pm on 29th August 2004, a gang of 10 to 12 thugs attacked four homesteads in Shirulu Village in the then Kakamega District of Western Province. They injured and robbed some of the owners of those homesteads. Reports were made to the area Assistant Chief and police.
2. After investigations, the two appellants herein were arrested and charged with three counts of robbery with violence contrary to **section 296(2)** of the **Penal Code** and three others of assault causing actual bodily harm contrary to **section 251** of the Penal Code.
3. After trial before the Senior Resident Magistrate at Kakamega, they were convicted and sentenced to death on the first count of robbery with sentence while the sentence on the other two counts was left in abeyance. On the assault charges they were sentenced to three years imprisonment on each count. Those imprisonment sentences were ordered to run concurrently. The appellants' appeals to the High Court were dismissed thus provoking this second appeal.
4. In their joint memorandum of appeal, the appellants complain that had the High Court properly re-evaluated the evidence on record, it would have noted that their identification was flawed and

- allowed their appeals. They also complained that the High Court had no justification for dismissing their defences.
5. On the first ground, Mr. Abande, learned counsel for both the appellants, argued that although both the two courts below found that the appellants' identification was based on their recognition by witnesses who claimed to have known them and seen them on the fateful night, none of the witnesses actually said he saw either of them. To the contrary, counsel argued, the witnesses testified that there was no light in any of the houses in which the occupants were attacked. In the P3 form for PW1, it was stated that he was attacked by people unknown to him. Those of the other complainants did not state if the victims knew the people who attacked them.
 6. On the second ground, counsel faulted the two courts below for rejecting the appellants' defences. He argued that as the appellants explained that in answer to their fellow villagers' distress calls, they went to their rescue and in the process the 2nd appellant was also injured by the thugs. Counsel further argued that some of the prosecution witnesses confirmed that the 1st appellant was indeed among them when they took the robbery victims to hospital. On those submissions, counsel urged us to allow this appeal.
 7. Mr. Ogoti, Senior Assistant Director of Public Prosecutions, dismissed this appeal as unmeritorious. He said although there was no light in any of the houses which were attacked, the witnesses saw and identified the appellants with the aid of moonlight. He therefore dismissed the appellants' defences as a ploy concocted to exonerate them.
 8. We have considered these rival submissions and carefully read the record of appeal. As we have stated, the appellants' joint memorandum of appeal raises two main issues: their identification which, they claim was flawed and their defences which, according to them, were unjustifiably rejected.
 9. On the issue of identification, contrary to the submissions by counsel for the appellants, three witnesses, PW1, PW2 and PW4 testified that they saw the 1st appellant, whom they knew as their neighbour, among the thugs. PW1 testified that at around 10.00 pm on the fateful night there was a knock on his door and someone claimed that it was police who were knocking. Before he opened, he peeped through the window and saw the 1st appellant among about 10 people. He thereafter opened the door and was attacked and robbed.
 10. PW2 on his part testified that on 29th August, 2004, at about 10.00 pm, he heard his son and other people screaming and shouting "*thief, thief.*" He went out and saw both the appellants among 10 people. The two chased him. The 2nd appellant hit him with a metal bar. He fought back and hit the 2nd appellant on the right side of the head. The 1st appellant cut him with a panga on the right shoulder after which they both fled.
 11. The evidence of PW4 was that at about 9.30 pm of 29th August 2004 when he went out of his house to put his cows in the shed, torch light was flashed at him. He asked who it was and the intruders responded that they were police officers. They then crossed over to his neighbour's compound. Shortly thereafter one of them, whom he identified as the 2nd appellant, returned and cut him with a panga. He said he knew the 2nd appellant very well and he gave his name to the police. In cross-examination, the witness' statement to police was shown to him and it indeed had the 2nd appellant's name as one of the thugs who went to his home that night.
 12. True the 1st appellant was among the people who helped take the injured victims to hospital. But those victims told police and the Assistant Chief that he was one of the thugs. He obviously turned philanthropic perhaps because he knew he had been identified. The Assistant Chief found him at the scene and he was arrested. Upon arrest he led the police to the house of the 2nd appellant whom he claimed was one of his accomplices. The second appellant was not in his house but he

returned before the police left his home. He had serious injuries on one of his hands on which the fingers had been chopped off. Although the 1st appellant's confession was clearly inadmissible, it, however, led to the arrest of the 2nd appellant whose injuries corroborated the PW3's evidence to the effect that in answer to his neighbours' distress call he went out of his house with a panga. Near the road he saw a group of people and he demanded to know who they were. They attacked him. He fought back and slashed the fingers of the hand of one of them.

13. All the prosecution witnesses testified that there was a full moon that night. We have therefore no doubt that PW1, PW2 and PW4 saw the appellants as stated above. No reason was given why those witnesses would falsely testify against their neighbours. Moreover, why did they single out the appellants and yet several other people answered the victims' distress call. If the 2nd appellant was also injured by the thugs, why did he not join the other victims and go to hospital instead of returning to his house?

14. What we have stated has also disposed of the second issue raised in the appellants' memorandum of appeal. Their defences were a red herring, which the two courts below saw through and quite correctly dismissed. In the circumstances, we find no merit in this appeal and we accordingly dismiss it.

DATED and delivered at Kisumu this 6th day of November, 2015.

D.K. MARAGA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR