



**IN THE COURT OF APPEAL
AT NAKURU
(CORAM: TUNOI, O’KUBASU & AGANYANYA, JJ.A)
CRIMINAL APPEAL NO. 54 OF 2010
BETWEEN**

PAUL JAKADERO OKURO APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nakuru (Emukule & Ouko, JJ.) dated 5th March, 2010

in

H.C.C.R.A. NO. 131 OF 2009)

JUDGMENT OF THE COURT

The appellant, **PAUL JAKADERO ORUKO**, was arraigned before the Chief Magistrate’s Court at Nakuru in **Criminal Case No. 996 of 2007** charged with two counts of robbery with violence contrary to **section 296 (2)** of the Penal Code. The particulars of the offence in the first count were as follows:

“PAUL JAKADERO OKURO: On the 30th day of April, 2007 at Toromo Village Saos Location in Koibatek District of the Rift Valley Province jointly with others not before court while armed with rungun and Somali sword robbed Haron Chirchir Kshs.200 and at or immediately before or immediately after the time of such robbery used actual violence to HARON CHIRCHIR CHEBII.”

As regards the second count the particulars of the offence read as follows: -

“PAUL JAKADERO OKURO: On the 30th day of April, 2007 at Tolmo village Saos Location in Koibatek District within the Rift Valley Province, jointly with others not before court and armed with rungun and Somali sword robbed CECILLIA CHEBOI Kshs.5000 and at or immediately before or immediately after the time of such robbery used actual violence to CECILLIA CHEBOI.”

The appellant’s trial commenced on 8th October, 2008 before the learned Principal Magistrate (J. Onyiego). The prosecution called a total of nine witnesses.

The learned trial magistrate considered the evidence tendered by the prosecution and the appellant’s defence and in the end came to the conclusion that the prosecution had proved the case against the appellant on both counts. In the course of his judgment delivered on 12th May, 2009 the learned trial

magistrate said: -

“PW1 said he recognized accused herein as he knew him before as a person who was operating a video show business within their market and that they had crushed barrast (sic) and stones together at some quarry before. PW2 equally said she knew accused before and that they all recognized him through bright torches they were flashing around as they searched for cash. Also when they took PW1 outside to go and ask for more money from him well through bright moonlight. There is no dispute that PW1 and PW2 were attacked. A scene visit by PW8 confirmed the attack. PW3 and PW4 who took the complainant to hospital and the P3 form filled by PW9 for PW1 is clear that the complainants were attacked on the material night and that they were robbed cash and force was applied. The only issue of determination is the person who attacked them.”

The learned trial magistrate then analysed the evidence of the prosecution witnesses and concluded thus: -

“From this chain of events from the claim (sic) of events and conduct of the accused during that night, an irresistible blame wanting finger is pointing at the accused. PW1 and PW2 appeared to be of truthful and haven't from their general... I have no reason to doubt their evidence which is quite detailed and water tight. Lighting conditions were quite favourable. The torches accused had were so bright and the moonlight too with such intense light for easy and positive identification. I have no doubt accused was positively identified and the subsequent events after the robbery accused's conduct is quite suspect and not consistent to an innocent person. The defence given of a grudge between accused and PW1 is a mere excuse. There was no proof of such differences that a mere allegation meant to escape liability. PW1 and PW2 had no reason to injure themselves so as to implicate accused. They had no reason too to imagine accused person. They gave his names immediately to villagers and area chief who mounted road blocks to look for him. It was not an afterthought.

For those reasons, I am satisfied that prosecution has proven its case beyond reasonable doubt against accused and both counts and accused is committed (sic) as charged.”

Having so convicted the appellant the learned trial magistrate proceeded to sentence the appellant as follows: -

“Sentence: Offence committed is serious. It carries mandatory sentence to hang. I have no choice but to sentence accused to hang within provisions read as per the law established in respect of Count 1. Count two is left in abeyance.”

Being aggrieved by both conviction and sentence the appellant filed an appeal to the High Court. The learned Judges of the superior court (Emukule & Ouko, JJ.) in their judgment delivered at Nakuru on 5th March, 2010 dismissed the appellant's appeal by stating *inter alia*: -

“There is no doubt in our mind from the evidence that the Appellant was properly identified by recognition by PW1 and PW2 (who corroborate the evidence of PW1 at the scene of the robbery). The Appellant was a smooth operator who hid his true character as a violent robber by crushing stones at a quarry, operating a video show in town, staging a robbery against innocent residents, and escaping in the dead of the night after his activities were busted by PW1 and PW2.

In those circumstances, there is absolutely no merit in the appellant's Petition of Appeal dated 18th May, 2009, and the same is dismissed. We confirm the judgment and conviction by the lower court.”

It is the foregoing that has given rise to this appeal to this Court. The appeal came up for hearing before us on 20th April, 2011 when Mrs. G.A. Ndeda appeared for the appellant while Mr. V.O. Nyakundi (State Counsel) appeared for the State.

In her submissions Mrs. Ndeda raised the issue of identification. She submitted that since the incident took place at night (2.00 a.m) the conditions were not favourable for proper identification although PW1 and PW2 alleged that they knew the appellant prior to the incident. The second issue raised by Mrs.

Ndeda is that the two courts below did not consider the defence of the appellant and that had the two courts looked at the evidence in the totality the appellant would not have been convicted. Finally, Mrs. Ndeda was of the view that there were many doubts in the prosecution case which doubts should have been resolved in favour of the appellant.

In supporting the conviction of the appellant Mr. Nyakundi submitted that the appellant was recognized by the two prosecution witnesses (PW1 and PW2) at the scene and that the appellant was a person these two witnesses had known. They knew that the appellant operated a video shop and they gave his names to the police who laid an ambush. Mr. Nyakundi urged us to dismiss this appeal.

We have considered the rival submissions in this appeal and it would appear that the main issue is identification. This is a case in which **Haron Chirchir** (PW1) and his wife **Cecilia Chebii** (PW2) were attacked at their home on the night of 30th April, 2007 at about 2.00 a.m. It was the evidence of these two witnesses that they recognized the appellant as one of those who robbed the couple of their property on the material night. The two courts below relied on the evidence of PW1 and PW2 in that these two witnesses did not only identify the appellant but recognized him being a person they had known prior to the incident. We have reproduced the portion of the learned trial magistrate's judgment on this issue and even the portion of the learned Judges' judgment.

In **ANJONONI & OTHERS v THE REPUBLIC [1980] KLR 59** at page 60 this Court said: -

“The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

Having considered the entire record of appeal, the submissions by Mrs. Ndeda and Mr. Nyakundi, we are satisfied that the appellant was convicted on very sound evidence. His conviction was inevitable. We therefore find no merit in this appeal and we order that the same be and is hereby dismissed in its entirety. It so ordered.

Dated and delivered at Nakuru this 9th day of June, 2011.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR