



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU
Criminal Appeal 10 of 2008

PATRICK SIBOI AMUCHAMA APPELLANT

VERSUS

REPUBLIC RESPONDENT
*[From original conviction and sentence in Criminal Case number 222 of 2007 of the
Senior Resident Magistrate's Court at Maseno]*

JUDGMENT

The appellant, **Patrick Siboi Amuchama**, was convicted and sentenced to death by the Senior Resident Magistrate at Maseno for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. This was the first count in a series of three counts. The second and third counts related to the offences of defilement and assault respectively but the appellant was acquitted in respect thereof.

The particulars in count one were that, on the 13th January 2007 at E Village Vihiga District Western Province, jointly with others not before court robbed **W.A** of cash Kshs. 4,000/= and at or immediately before or immediately after the time of such robbery wounded the said Washington Amachi.

Being dissatisfied with the conviction and sentence, the appellant preferred the present appeal on the basis of the grounds contained in his petition or memorandum of appeal.

The grounds are essentially an attack on the prosecution evidence of identification and the failure by the prosecution to call essential witnesses. There is also a complaint that the appellant's defence was disregarded by the trial court.

The appellant appeared in person at the hearing of the appeal and presented written submissions to argue his case.

Mr. Gumo, the Learned Assistant Deputy Public Prosecutor, appeared for the respondent and opposed the appeal by submitting that the conviction was safe as the attack upon the complainant occurred in most favourable and conducive circumstances which enabled the positive identification of the appellant. There was light from a lantern lamp which illuminated the scene. There was also the identification of the appellant by voice.

The learned State Counsel submitted that the appellant was recognized by PW2 and was previously known to her (PW2) as well as PW1 and PW3 and that the evidence of PW3 was corroborated by that of PW2.

Further, PW5 confirmed that PW1 suffered injuries. The Learned State counsel in urging us to disallow the appeal contended that the ingredients of the offence of robbery with violence were established and that the allegation by the appellant that his constitutional rights were violated is an afterthought as it was not raised at the earliest opportunity. In his response to the foregoing, the appellant contended that PW1 said that he did not identify any of the attackers and that PW2 talked of a tin-lamp but did not state its distance from the attackers. Further, PW3 talked of having seen him (appellant) and his wife prior to the robbery and also talked about a green jacket which was not mentioned by PW1 and PW2. The appellant submitted that the recovered panga did not belong to him and that several P3 forms which were contradictory in dates were produced by PW4.

The duty imposed on us is to reconsider the evidence and arrive at our own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses. The prosecution case arose from the facts that follows:-

On the material date at midnight the complainant **A.W (PW1)** was asleep at his home together with his wife **R.O (PW2)** and her young sister **A.K (PW3)** when they were awakened by knocks on the door apparently being made by people introducing themselves as police officers from Luanda Police Station in search of illicit brew. The door was not opened. Instead, the complainant lit two tin lamps and placed each in the sitting room and the bedroom. Without slipping their identification documents through the door as requested, the intruders continued knocking the door before they decided to break into the house. Three of them entered the house and found the complainant seated on his bed. They were armed with a panga, a club and an iron –bar. They assaulted the complainant and his wife and tied them up while carrying away the complainant’s property. The complainant and his wife were taken to the sitting room where the complainant got an opportunity to escape after head butting one of the intruders on the stomach. He (complainant) raised an alarm and people appeared at the scene but could not access the inside of the house due to fear. The intruders eventually left and went away after stealing property including Kshs. 4,000/= and after defiling the young girl A (PW3).The complainant did not see the attackers well and could not therefore identify any of them. The complainant’s wife (PW2) resisted the attempt by the attackers to rape her. She said that she heard her sister (PW3) screaming from inside a separate room and also heard the voice of Chama Siboi whom she identified as the appellant, a person known to her for a period of nine (9) years and whom she recognized at the scene of the offence with the help of light from the tin lamp in the sitting room.

A (PW3) was in her room when two people entered therein. She beamed her torch at them and saw one Amuchama Patrick and another.

Patrick snatched the torch from her and gave it to his accomplice. He then defiled her and was followed by his accomplice. They covered her mouth and after the ordeal they left and went away.

A (PW3) implied that Patrick was the appellant herein whom she knew as a relative.

After the incident was reported to the police at Embati Police station, **P. C. David Kisii (PW4)** visited the scene and commenced investigations. In the process, one Chama Siboi was mentioned as a suspect by the complainant and was later arrested at his home. He (Chama Siboi) was identified as the appellant and was charged accordingly.

Dr. Philip Athuru (PW5), of Sagam Community Hospital as well as Rabuor hospital examined the complainant and confirmed that he had suffered bodily injuries as a result of the robbery. He also confirmed as much with respect to the complainant’s wife (PW2) and her sister (PW3) who was defiled in the process.

The defence raised by the appellant in his sworn statement was that he was tilling and tending his livestock on the material date. He was then at home with his wife when a neighbour called Elizabeth visited them and later accompanied his wife to a funeral. They returned at about 5:30 p.m. while he was still working on the farm. They ate dinner with Elizabeth and at 8:30 p.m the complainant and family went to sleep. At about midnight they were awakened by Elizabeth who said that people were screaming.

The appellant blew his whistle and later returned to his house. He was arrested on the 18th January 2007 while at his place of work in Luanda township. He was released after seven (7) days on the 24th January 2007 as no complaint was forthcoming against him. He was re-arrested on the 28th February 2007 in the presence of the complainant and his wife who are related to him. He was later arraigned in court and denied having committed any offence. He could not tell why he was falsely implicated by the complainant and his wife.

The appellant’s wife **Mary Owano (DW2)** more or less confirmed what the appellant stated and contended that the appellant was framed up.

The complainant’s neighbour and mother **Elizabeth Siboi (DW3)** confirmed as much and contended that the appellant was falsely charged as he was at his home on the material night when they heard screams emanating from the complainant’s home which was a distance away.

After having considered the entire evidence in its totality, the learned trial magistrate found that the offence of

robbery with violence had been committed as alleged and that the appellant was recognized by PW2 and PW3 as one of the robbers in circumstances which provided favourable conditions and adequate opportunity for identification.

The learned trial magistrate further found that the alibi raised by the appellants was not credible as DW2 and DW3 could not have been in a position to monitor the appellant's movement on that material night.

On our part, we are also satisfied that the ingredients of the offence of robbery with violence under Section 296 (2) of the Penal Code were duly established by the evidence adduced by the complainant, PW2, PW3 as well as PW5.

However, we are not satisfied that the evidence of identification of the appellant as having been one of the robbers was watertight and free from the possibility of error or mistaken identity.

We are also not satisfied that the appellant's alibi defence was discredited and / or displaced by the prosecution.

On identification, we do not think that the alleged tin lamps provided adequate light to enable positive identification by recognition of the appellant by PW2. The intensity of the lamp was never stated and so was its position from the appellant.

PW2 was also not certain whether the source of light which enabled the purported positive identification of the appellant was the tin lamp or the attackers torches. She also talked of having heard the voice of the appellant but did not state at exactly what point. She implied that the appellant talked to her yet she heard his voice while he was allegedly in her sister's room.

It is no wonder that although the complainant and PW2 were in the same house and room, the complainant was unable to identify any of the attackers, the presence of tin lamps notwithstanding.

We are convinced that favourable conditions for the alleged identification of the appellant were not afforded by the presence of the tin lamps or the attackers torches.

Even the opportunity for the complainant's wife (PW2) to make a positive identification of the appellant does not seem to have existed. As to the identification of the appellant by PW3, it would seem to us that PW3 might have beamed her torch at a person whom she mistakenly identified as the appellant. This explains the difference in the name mentioned by herself and that mentioned by PW2. PW3 talked of one Amuchama Patrick while PW2 talked of one Chama Siboi. These are two different names and could not obviously have been referring to one and the only appellant as implied by both PW2 and PW3.

We also have serious doubt as to whether PW3 had adequate opportunity to properly make a positive identification of the appellant given that she said that two people suddenly entered her room after breaking the door and one of them snatched her torch from her. She did not even say that the torch was bright enough to sufficiently illuminate the scene and enable positive identification.

On the alibi defence, we think that the learned trial magistrate shifted the burden of proof to the appellant by stating that his witnesses (DW2 and DW3) were incapable of knowing his movements in the night yet the same witnesses said that the appellant went to bed at 8:30 p.m on the material night and woke up at midnight when screams were heard. The screams were allegedly from the complainant's homestead. The appellant even blew his whistle to further raise the alarm about the happenings in the complainant's homestead.

In the case of **Macharia vs Republic [2001] KLR 155**, the Court of Appeal had the following to state regarding the alibi-defence:-

“We would state here that when the appellant put forth an alibi as his defence it was upon the prosecution to disprove it since an accused person is under no obligation to prove his own innocence as the burden of proving a case against an accused remains on the prosecution throughout the trial”.

In **R vs Johnson [1961] 3 All ER 969**, it was laid down as a general rule of law that if an accused puts forward an alibi as an answer to a criminal charge, he does not thereby assume a burden of proving his defence and that the burden

of proving his guilt remains throughout on the prosecution.

In this case, we do find that the prosecution failed to disprove the alibi raised by the appellant.

All in all, this appeal must and is hereby allowed with the result that the conviction of the appellant by the learned trial magistrate be quashed and the sentence set aside.

The appellant is set at liberty forthwith unless otherwise lawfully held.

Ordered accordingly.

Dated, signed and delivered at Kisumu this 4th day of May 2010

J. R. KARANJA
JUDGE

ALI-ARONI

JUDGE

JRK/aao