



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU

Criminal Appeal 56 of 2005

BARNABAS CHACHA KWAHU APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi

(Onyancha & Kubo, JJ) dated 2nd March, 2004 in H.C.CR.A. NO. 240 OF 1998)

JUDGMENT OF THE COURT

The appellant *Barnabas Chacha Kwahu* and two others were convicted by the Senior Principal Magistrate, Migori of three counts of robbery with violence contrary to **section 296(2)** of the Penal Code and each sentenced to death. The appeals of the appellant's co-accused to the superior court against conviction and sentence were successful. The appellant's appeal against conviction and sentence in counts 2 and 3 was also successful. However, the appellant's appeal against conviction in respect of the count 1 was dismissed hence the present appeal.

The particulars of the charge in count 1 were that on the 4th February, 1998 jointly with others not before the court while armed with dangerous weapons namely bows and arrows, pangas, rungun, iron bars, spears and swords robbed **JOSEPH KENGANYA ROMARA** of bicycle tyre, Shs.4,500/=, one long trouser, 10 exercise books, 2 kgs sugar, 1 packet maize seed all valued at Shs.10,270 and immediately before or immediately after such robbery used actual violence against **JOSEPH KENGANYA ROMARA** (Romara).

On 4th February, 1998 at about 5 p.m. Romara, the complainant and one **JOSEPH WAMBURA MWITA** (Mwita) were riding home. Each was carrying a luggage on his bicycle. When they reached near Getongora village they were confronted by a group of about twenty people who were armed with bows and arrows, spears, simis, pangas and rungun. Those people were not wearing shirts. Romara was beaten and Shs.4,500/= stolen from his coat pocket. His luggage was also stolen but his bicycle was not stolen. He claimed to have recognized the appellant whom he knew before. He also identified two other people who were the appellant's co-accused. Mwita was also viciously beaten and robbed of his bicycle and the luggage he was carrying. Mwita testified at the trial that he identified the appellant but did not see the appellant's co-accused at the scene.

On the same day at about 5 p.m. one **JOSEPH RANGE IJIKO** (Ijiko) who was the complainant in

count three was riding home on his bicycle. He was carrying 8 kilos of seed maize. He met a group of about 50 people near a school who were armed with pangas, rungas, bows and arrows. The people robbed him of Shs.3,000/=, wrist watch and bicycle. He testified that he identified the appellant's co-accused.

The appellant was arrested by Mark Gati Obosi, the Assistant Chief of Kirikiri sub-location on 5th February, 1998 who testified that he found one new bicycle tyre in the house of Joanes Mondu Kamarigo – appellant's co-accused but found nothing in the house of the appellant. On 12th February, 1998, the appellant was identified in an identification parade by Romara and Mwita.

The appellant in an unsworn statement, stated that he was arrested by the Assistant Chief in his house and that nothing was recovered in his house.

The superior court in allowing the appeal of the appellant and his co-accused against conviction in count 2 relating to robbing Mwita said in part:

“We are of the view however, that under the circumstances that there were (sic) prevailing as narrated in PW2's evidence (i.e. Mwita's), PW2 might have been mistaken as to the identity of his attacker.

.....

The benefit of doubt in respect to count two therefore goes not only to the 1st appellant but also to the 2nd appellant”.

The superior court in dismissing the appellant's appeal against conviction in count 1 relating to robbing Romara said in part:

“The identification by PW1 was corroborated by similar evidence of PW2. Furthermore, the evidence of direct identification was strongly and even independently supported by evidence of possession of recently stolen goods in that P.W.1's bicycle tyre was found with the 1st appellant at his home the next day”.

There are 17 grounds of appeal but the principal grounds relate to the misdirection of the superior court regarding the credibility of the evidence of the identification of the appellant and misdirection regarding the evidence of recovery of a bicycle tyre in the house of the appellant.

Mr. Ouma, learned counsel for the appellant submitted, among other things, that it was a misdirection by the superior court to rely on the evidence of Mwita to support the identification of the appellant by Romara when it had already rejected his evidence. Mr. Ouma further submitted that the evidence of recovery of a stolen tyre tube in the appellant's house was contradictory.

Mr. Musau, the learned State Counsel did not support the conviction on the ground that the superior court did not fully evaluate the evidence.

The conviction of the appellant was dependent on identification and possession of recently stolen goods.

On the identification of the appellant, there was consistent evidence that Romara and Mwita were attacked by a group of about 20 people. There was evidence from Romara that the people were from “Nyabasi” and when they saw Romara and Mwita they said:

“Wairege are here”.

According to Assistant Chief of Kirikiri sub location he received a report of clashes between “Nyabasi” and “Werege” clans. On this aspect of the evidence, the superior court said:

“It would appear that during this particular time there were tribal clashes between two clans of Kuria tribe”.

Both Romara and Mwita were viciously attacked. Mwita received serious injuries and went to hospital for treatment. Romara was hit twice on the back by a person he did not see. He was also hit on the right leg by a person he did not identify.

He said that he recognized appellant by name and appearance and that his attackers included the appellant’s co-accused.

This was a case where Romara and Mwita were unexpectedly attacked by many people who were armed with various weapons. This was not an ordinary robbery. It seems that the attack was in furtherance of a clan rivalry. Romara admitted that although he testified that he saw the appellant’s co-accused, he did not identify them at a subsequent identification parade. Mwita infact testified that he did not see the appellant’s co-accused at the scene. There was further evidence of Ijiko, complainant in the third count, that he was attacked about the same time but at a different place by a group of about 50 people who included the appellant’s co-accused.

Romara did not describe the circumstances which made him recognize appellant. An identification parade was unnecessary if he had recognized the appellant. The fact that an identification parade was held is indicative of the fact that Romara did not infact recognize the appellant.

We agree with Mr. Musau that the superior court did not adequately and carefully evaluate all the circumstances surrounding the identification of the appellant by Romara.

Secondly, the superior court misdirected itself by relying on the evidence of Mwita as supporting the evidence of identification of the appellant by Romara when it had already found Mwita to have been mistaken about the identity of his attackers.

Romara and Mwita were together and were attacked by the same group of people. If the circumstances were not favourable for identification by Mwita of his attackers, they were equally unfavourable to Romara for proper identification of the appellant.

Lastly, there was no evidence that the appellant was found in possession of a new bicycle tyre. The Assistant Chief of Kirikiri sub location who arrested the appellant testified that nothing was found with the appellant and that the bicycle tyre was found in the house of Joanes Mondu – the appellant’s co-accused.

In the circumstances, we are satisfied that had the superior court properly evaluated the evidence and properly directed itself it could have come to the conclusion that the evidence of identification of the appellant was unsatisfactory and that he was not found in possession of recently stolen property.

For those reasons, we allow the appeal, quash the conviction and set aside the sentence. The appellant shall be released forthwith unless otherwise lawfully held.

Dated and delivered at Kisumu this 9th day of February, 2007.

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR