



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO.19 AND 20 OF 2019.

SIMON LOSENGETI OLESENA.....1ST APPELLANT

VICTOR EKIDOR.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(BEING AN APPEAL FROM THE JUDGEMENT OF HON. B. MARARO

(PM) DATED 11TH MARCH 2019 IN CRIMINAL CASE NO. 302 OF 2015).

JUDGEMENT

1. The appellants were charged with the offence of Robbery with violence contrary to Section 296(2) of the Penal code. The particulars of the offence were that on the 9th day of February 2015 at Ol-rongai scheme in Rongai District within Nakuru County jointly with another while armed with crude weapons namely pangas and rungas robbed GEORGE AMDENY a motor vehicle registration number KCA 244A a Toyota Premio valued at Kshs. 1,200,000, cash Kshs. 4,000 all valued at Kshs. 1,204,000 and or at immediately before and immediately after time of such robbery used actual violence to the said GEORGE AMDENY.

2. The second count was robbery with violence contrary to section 298 as read with section 296(2) of the penal code. Particulars being that the accused on the 9th day of February 2015 at Ol-rongai scheme in Rongai District of Nakuru County jointly while being armed with crude weapons namely pangas and rungas robbed EDWIN CHERUIYOT cash amounting to Kshs. 1,000 and at immediately before or immediately after such robbery wounded EDWIN CHERUIYOT.

3. The third count was robbery with violence contrary to section 295 as read with section 296(2) of the penal code. The particulars were that the accused on the 9th day of February 2015 at Ol-Rongai scheme in Rongai District of Nakuru County jointly while being armed with crude weapons namely pangas and rungas robbed EMMY CHEBET of Kshs. 500 and or immediately after such robbery used actual violence to the said EMMY CHEBET.

4. The alternative count was handling stolen goods contrary to section 322(2) of the penal code. The particulars being that the accused on the 19th day of February, 2015 at Rafiki farm in Rongai District of Nakuru County jointly otherwise other than in the course of the robbery dishonestly retained one motor vehicle registration No. KCA 244A make Toyota Premio valued at Kshs. 1,200,000 knowing or having reason to believe the vehicle to be stolen goods or unlawfully obtained.

5. The appellants were convicted and sentence to suffer death in the three counts of robbery with violence and the two other counts were held in abeyance. Being dissatisfied with the verdict, the appellants through their counsel has filed this appeal citing several grounds as hereunder.

That ***That the learned trial magistrate erred in law and facts in convicting the appellants while relying on the contradicting evidence of the prosecution witnesses.***

a) That the learned trial magistrate erred in law and facts in convicting the appellants while relying on the contradicting evidence of the prosecution witnesses.

b) That the learned trial magistrate erred in law and in fact in convicting the appellants and yet there was no eye witness and no proper identification of the appellants.

c) That the learned trial magistrate erred in law and in fact by relying in the insufficient evidence of the prosecution and further that identification was not properly done.

d) That the learned trial magistrate erred in law and in fact by overlooking the fact that the evidence relied on was not water tight to justify conviction.

e) That the learned trial magistrate erred in law and in fact in sentencing the appellants to life imprisonment which was excessive.

f) That the learned trial magistrate erred in law and in fact by shifting the burden of proof to the appellants.

g) That the learned trial magistrate erred in law and in fact by failing to consider the strong defence and submission by the appellants.

h) That the learned trial magistrate erred in law and in fact by relying on suspicion to convict the appellants.

i) That the learned trial magistrate erred in law and in fact by failing to draw adverse inference against the prosecution for failing to call certain crucial witnesses in particular witnesses from the mob which allegedly arrested the appellants.

j) That the learned trial magistrate erred in law and in fact by making a finding that the appellants were in possession of the stolen motor vehicle against the weight of evidence.

6. Before looking at the merits or otherwise of the appeal it shall be worthwhile to summarize the evidence as presented during trial.

7. **PW1 GEORGE AMDANY**, testified that on 9th February, 2015 he was at home after supper at around 9:30pm when he heard some noise and was called by one of the herd's boy Andrew whose house was 50 meters. That there was a power blackout and it was dark and that when he got to Andrew he was with fundis working for him. He stated that he found the maid struggling with 2 men and he hit one of them with a rungu and one tried to cut him and he held his panga and he was attacked. That they demanded keys to his car KCA 244V Premio white in colour, which he gave them and that he had bought the same using a loan.

8. He further testified that the other attacker was breaking the bedroom door and they were told to enter the said motor vehicle. That they were later taken to Rongai where they stopped and asked for Kshs. 20,000 and they called his friends who sent them Kshs. 3,000(Mwaura) and Kshs. 7,000 (John Arusei). He testified that they were told to alight near a shamba after which he walked to the tarmac where a police vehicle came and said that they were looking for him and that the accused had been arrested. He testified that he positively identified them and they went to the station and that he had been injured in his head and arm.

9. On cross examination he stated that he did not know the accused before and they only met on that day, and he had captured their physical appearance. He further confirmed that his witness statement did not show that he identified them in the motor vehicle and that he did not file further statement and also could not identify the weapon then.

10. Upon re-examination, he stated that he remembered the accused physical appearance as they remained with them for more than 2 hrs.

11. **PW2 CAROLINE CHELANGAT KAROS**, testified that he is wife to PW1 and that on 9th February, 2015 after having had supper she went to wash up then sleep as she was feeling unwell and as she came down, she found her maid fighting with some people after which she ran to the bedroom changed and tried to call the neighbors' as she screamed. She further testified that she heard someone banging the door and PW1 told her to open. She went on to state that she was hit at the back and they went out 4 of them to a place called Marine where they passed and headed towards the mzungu's place. Accused 1 was driving while accused 2 told her to send money to a particular number. She stated that one was tall while the other was short after which accused 1 took out PW1 and she was left with accused 2 whom she stated that she remembered well as the roof light was lit as they wanted to see the messages.

12. She went on to testify that the accused 2 kept on looking back while they were in the Toyota Premio and PW1 was bleeding and the accused gave him a jacket and accused 2 took over the driving. She further stated that PW1 was left in the forest and they took the route to Kabarak where they met an AP motor vehicle. She stated that she tried to identify herself and told them that mzee was in the forest and that she did not know if the accused left the motor vehicle and she positively identified the accused.

13. On cross examination she stated that she was hit with a panga but did not go to hospital and that one of the accused had a brown jacket while the other had a blue jumper. She confirmed that they were in a state of shock and that their statements did not show all the things as they forgot some things and that the statement could be wrong.

14. **PW3 EDWIN K. CHERUIYOT**, testified that he is a carpenter and on 9th February, 2015 he was at PW1's home putting up a zero grazing unit and at 9:30pm while at his sleeping quarters which is 20 meters from PW1's house, PW1 came in and inquired about their day and stated that he heard some screams from his house after which PW1 went and he followed him and as he entered the verandah he met someone who turned and cut his head and ear. He further stated that it was dark and the attacker took Kshs. 1,000 from him when he fell down. He testified that he heard people asking PW2 for car keys and later heard a motor vehicle start and after half an hour his friend Mark came and took him to their house and PW2's brother came and took them to Kabarak where they were treated and the next day he reported to the police and was issued with a P3 form.

15. On cross examination he confirmed that he has an ID and that he was Robert Kipruto but nothing to show that his name is different from Chemaswa. He stated that he had nothing to show that he was employed by PW1 and that he had only worked for 4 days.

16. On re-examination he stated that it was the police officer who filled the P3 form.

17. **PW4 AMY CHEBET** testified that on 9th February, 2015 at 9:00pm her employers had supper and were watching Tv when PW1 went out when the lights went off and she had to get the D-light. She testified that she saw someone opening the door from inside and two people entered and said they be served. She further testified that they hit her and she screamed and they held her mouth and they fought until she tripped and they continued to beat her. She further stated that they were arguing whether to shoot her or not when they took the car keys and asked for the owner of the car and they took away Kshs. 500.
18. She stated that they were with Chumba when PW1 came and the thugs left her and went to PW1 where they fought and returned to the sitting room and they began looking for the car keys. PW2 was in the bathroom hiding when PW1 offered to give them the car keys. She stated that after beating both PW1 and PW2 in the room, they left and she heard a motor vehicle leave gate and when she got to the kitchen she found one of the fundi bleeding at the verandah until the police came. She identified the attackers since one was tall and the other short but could not recognize them.
19. On cross examination, she confirmed that one was tall and the other short but could not recognize them.
20. **PW5 JACOB MURIITHI**, testified that he is a Forest Ranger working for Kenya Forest Service and that on 9th February, 2015 while he was on normal duties along Mogotio-Kabarak road, their boss informed them that there was a hijacked motor vehicle and they liaised with the Kenya Police. He further stated that they went to Rafiki Centre and they were told to go to the highway near Kabarak University where they met with motor vehicle KCA 244A Premio and a GK vehicle AP land rover following it. He stated that they were with colleagues and they made a U-turn and chased the said motor vehicle when it hit off the road after which they opened the door and found *pangas*.
21. On cross examination he stated that he did not describe the accused but could identify them in the dock and with regard to the scene of crime they had handed it over to the police. He confirmed that the motor vehicle stopped at the shopping mall and that they had searched for the accused for long hours.
22. On re-examination he testified that they got the report from their in charge and he was with other colleagues where they eventually found the car and arrested the accused whom they knew on that day and further an identification parade was not required.
23. **PW6 WILLIAM CHEBII**, testified that he has worked at Mau Forest Conservancy for 3 years and that on 9th February, 2015 at 9:30 pm while on patrol with Jacob Njeru and corporal Tanui the officer in charge said that there was a car KCA 244A that had been carjacked. He further testified that they entered Olenguruone and later told to return to highway near Kabarak. They surrounded the motor vehicle and that the short one was the driver and other a passenger lady who fell off and found the driver had 2 *pangas* and the other 1 *panga*.
24. On cross examination he stated that the report made was not in writing and that they arrested the accused with the AP's collectively and that there were no descriptions of the people who occupied the motor vehicle. He further stated that the reporter did not describe the assailants' height or color.
25. Upon re-examination he stated that he was among the arresting officers and communication was received at 2130 hrs. and recovered between 2200hrs and 2300hrs at Rafiki Centre.
26. **PW7 JOHN MUIRU MWAURA**, testified that he works with the Ministry of Lands and that on 9th February, 2015 at 11:00pm he received a call from PW2 who was a workmate stationed at Nakuru who wanted to know if I had Kshs. 20,000 in his mpesa where he told her that he only had Kshs. 3,000. He further testified that in the background he could hear people talking and a running engine and a voice that he should not transfer to her number but another number given and he transferred the Kshs. 3,000. He further stated that he received confirmation message money sent to Brian Kipngok after which he inquired and PW2 informed him that all was well and he went back to sleep till the following morning when he called to establish what had happened and was informed of the attack. He stated that PW2 asked him to call Safaricom to do the reversal which he did and the money was then refunded after which he recorded a statement at Rongai Police station. He stated that he did not know Brian Kipngok.
27. **PW8, STEPHEN KIMULEI ARUSEI**, testified that on 9th February, 2015 at 10:30pm he was called by PW2 who asked if he had Kshs. 10,000 and he said he had Kshs. 7,000 which he sent to 0721636438 under the name Brian Kipngok and when he tried to inquire, PW2 told him to be quiet and the next day PW2 called him and told him she had been hijacked.
28. **PW9 P.C CALEB SIMBIGE**, testified that on 10th February, 2015 at 3:00pm he was called to Menengai police station by OCS CI Joseph Keranga where he was shown motor vehicle KCA 244A and told that it was an exhibit in a robbery with violence case. He went ahead and took several sets of photographs which were later produced as evidence.
29. **PW10 DR. WANGECI WERU**, a doctor at PGH Nakuru Medical Office produced the P3 forms of PW1 and PW3 filled by Dr. Matara. She testified that PW1 had history of assault by 2 people unknown to him on 9th February, 2015 using a blank object while PW3 had history of assault on 9th February, 2015.
30. **PW11 CPL PAMELA RONO**, from Menengai Police station in the Anti-Crime Unit testified that on 9th February, 2015 she was the duty officer and at 9:00pm she received a call from the OCS who informed her that there was a robbery that had occurred at Olorongai Scheme. She proceeded to PW1's residence together with her crime aide Alex Mureithi and while on their way they met with a Mr. Koros who lead them to the home and upon arrival found the main gate wide open and the alarm was on.
31. She further stated that as they approached the main door, they spotted blood spots at the door steps when PW4 the house girl opened for them and told them what had happened. She stated that as they were proceeding to the main road, they met with forest rangers in their motor vehicle responding to the incident while approaching their direction. She stated that as they met they agreed they go to the tarmac road and proceed to Kwa Gitau so as to get the robbers and she further called AP officers at Kampi ya Moto and told them to block the road to

Mogotio direction after which they begun a manhunt of the motor vehicle and the robbers.

32. She further stated that as they were still on the manhunt she received a call from OCS who told her that motor vehicle KCA 244A Toyota Premio white had been spotted at the tarmac road. They proceeded towards Rafiki farm direction and as they approached they found forest officers and AP officers and there was a motor vehicle KCA 244A which had swerved to the right side of the road. She further testified that the people who were in the motor vehicle were in the AP's land cruiser who were 2 young men and PW2 was seated by the roadside. She stated that they found *pangas* on the left side of the front seat in the motor vehicle which they removed and placed in their vehicle and the accused took them to the scene where PW1 had been dumped and he was found bleeding and they went to Menengai Police Station where Alex conducted a search and recovered Kshs. 12,000 from the 1st accused and Kshs. 1,650 from the 2nd accused.

33. On cross examination she confirmed that she was not the investigating officer and was only responding to a distress call and could not confirm who was in the motor vehicle as she found them in the AP's vehicle.

34. Upon re-examination she stated that she identified 2 suspects present in court and that they found PW2 at the scene and PW1 who came later.

35. **PW12 CPL JANE KIRUI**, testified that on 1st July, 2017 she was asked to take over a file Cr. 792/15 a robbery with violence case investigated by PC Alex Mureithi who had been transferred to Nairobi. She produced the exhibits.

36. On cross examination, she stated that the investigation file was handed over to her by PC Murimi and that she did not know the accused persons and that their names were not in the statements. She further stated that she was not given inventories/recoveries and that she did not know whose phones/sim cards were recovered from as the investigating officer did not record from Safaricom. She did not visit the scene but it was the duty officer and hence did not know which victim was at the scene at the time of arrest. She stated that the report on phone was not in the OB and that an identification parade was not done as one of the complainants knew one of them.

37. When placed on their defence the appellants gave unsworn evidence where the 1st appellant stated that he lived in Kampi ya Moto and was a fundi and on 9th February, 2015 at 10:30pm the day he was arrested he had come from watching football and was going home with about 5 people when a vehicle came and parked behind and another next to it. He stated that people in civilians alighted and came to where they were and they were told that they would be detained for a while and then they were taken to the police station and on the next day 3 other people were released. He added that on 11th he was taken to court and was shocked to hear the charges which he denied and that he did not know the complainants.

38. The 2nd appellant testified that he was from Olorongai and a boda boda operator and on 9th February, 2015 he went to work in the morning and the rings of the engine had a problem when he took it to Rongai to be fixed where he stayed until 5:00pm. He stated that he left Rongai and took Sobea route and passed Rafiki farm where there was a football match which he decided to watch until late. He added that he left and met vehicles assembled with lights on after which he went there and that he showed the police his abstract as he did not have an identity card but was put in a land cruiser and taken to Menengai police station and there were 5 or 4 others released the next day . He however denied the charges.

39. Parties were directed to file written submissions where both parties complied.

Appellant's Submissions

40. The appellants submitted that no inventory was produced in court for any recoveries made thus there was no way of knowing what was recovered from them. The appellant further submitted that the evidence of PW2 was heavily marred with contradictions hence not a credible witness. He draws the court's attention to the case of **Erick Onyango Odeng' Vs R (2014) eKLR**.

41. The appellants further submitted that when dealing with the issue of identification care should always be taken so as not to convict innocent persons who did not commit the alleged offences. He added that PW1, PW2 and PW3 did not identify the persons who attacked them at the time of arrest which led to wrongful conviction of the appellants. He placed reliance on the **Criminal Appeal case 23 of 2017 of George Maraba Machogu & 2 Others Vs Republic**.

42. The appellants submitted that the learned trial magistrate erred in law and fact by failing to draw adverse inference against the prosecution for failing to call witnesses from the mob which allegedly arrested the appellants and argued that the prosecution evidence was not sufficient to convict the appellant.

43. They urged the court to allow the appeal and set aside the judgment on conviction and sentence.

Respondents Submissions

44. The Respondent submitted on the grounds of appeal as raised by the appellant. Ground 1 the respondent highlighted each of the prosecution witness testimony. On ground 2 it submitted that the appellants came into close contact with all the witnesses hence easily identified at the station. Ground 3 the respondent submitted that all the evidence by all witnesses were well captured and corroborated. On ground 4 it submitted that the judgment was well crafted while on ground 6 the respondent submitted that the accused made mere denials and the evidence adduced was cogent and was never challenged.

45. Regarding ground 7 the respondent placed reliance on **section 296(2)** of the **Penal Code** and the Court of Appeal case in **Genzi and 2 Others Vs Republic [2005] 1 eKLR** and **Johana Ndung'u V Republic Cr Appeal No. 116 of 2005 (unreported)** which gave 3 ingredients of robbery with violence which is enough to base a conviction and that the evidence was void of any errors and so complete that there was no

escape from the conclusion that crime was committed by the appellants.

46. Finally, on ground 8 in regard to recent possession the respondent submitted that the doctrine of recent possession entitles the court to draw inference of guilt where the accused is in possession of recently stolen property in unexplained circumstances. It urged the court not to interfere with the conviction and sentence as the appeal lacked merit.

Analysis and Determination

47. The court in **OKENO V. REPUBLIC [1972] EA 32** laid down the elements to be considered on an appeal namely that this court should re-evaluate afresh the evidence and reach an independent conclusion taking into consideration the fact that it did not hear or see the parties unlike the trial court.

48. Upon carefully considering the proceedings as well as the evidence tendered and the exhibits produced and together with the parties written submissions the following issues arise for determination; **Whether the appellant was sufficiently identified and Whether the prosecution proved their case on the required standard of beyond reasonable doubt.**

49. On the first issue for determination the appellant submitted that no identification parade was carried out to enable the complainants properly identify their attackers and further that PW1, PW2 and PW3 did not identify the persons who attacked them at the time of arrest. On the other hand, the respondent submitted that the appellants came into close contact with all the witnesses and that the two never escaped hence the link was never lost and therefore easily identified.

50. In **Donald Atemia Sipendi v Republic [2019] eKLR** the court cited with approval the case of **Kariuki Njiru & 7 others vs Republic Criminal Appeal no. 6 of 2001 (Unreported)** where the court held inter alia that: -

“the law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error.”

51. Further, in **Anjononi & Others –Vs – Republic [1980] KLR** the court held that: -

“To be “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.

52. In the instant case, PW1, PW2, PW3 and PW4 gave very cogent and concise account of the events of what transpired and their testimonies remained unshaken under cross-examination by the appellant, despite the few discrepancies. More importantly the appellants were at the scene of crime together with PW2 and some of the witnesses for some time and she was able to identify him. Further, from the evidence PW2 testified that at some point the roof light of the motor vehicle they were all in was lit and she was able to see the accused person and therefore she could recognize them.

53. On the other hand, the appellant does not dispute any or the descriptions given by the witnesses to be his and further he has not presented any other name/s together with documents as evidence proving his true identity to the contrary. In view of the foregoing this court finds that the appellant was positively identified.

54. On the second issue for determination **Section 296 (2)** of the **Penal Code** provides as follows with respect to the offence of robbery with violence:

“If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

55. This was affirmed by the Court of Appeal in the case of **OLUOCH –VS – REPUBLIC [1985] KLR** where it was held: -

“Robbery with violence is committed in any of the following circumstances:

The offender is armed with any dangerous and offensive weapon or instrument; or

The offender is in company with one or more person or persons; or

At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person

The use of the word OR in this definition means that proof of any one of the above ingredients is sufficient to establish an offence under section 296(2) of the Penal Code.”

56. In the instant case, PW1, PW2 and PW3 testified that the appellant used a *panga* and injured them. PW10 the doctor who examined and treated PW1 and PW3 confirmed history of assault by two unknown people on 9th February, 2015 using a blunt object. She further produced the P3 forms in support of her testimony. PW5 upon being recalled testified that they recovered 3 *pangas* from motor vehicle KCA 224.

Further, PW11 testified that they found *pangas* on the left side of the front seat in the motor vehicle when they arrived at the scene.

57. The appellant on the other hand submitted that the prosecution case was marred with contradictions. The Court of Appeal decision in **Erick Onyango Odeng' v. Republic [2014] eKLR** cited with approval the **Uganda Court of Appeal case of Twehangane Alfred v. Uganda Criminal Appeal No. 139 of 2001, [2003] UGCA, 6** in which it was held as follows:

“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case.”

58. It is worthwhile to note that the appellant submitted that the investigation officer failed to produce an inventory of the items seized from the scene. In the Court of Appeal Case **No. 10 of 2018 Badi Mohamed Nagi v Republic [2020] eKLR** the court held that: -

“The Petitioner also faulted the prosecution for failure to produce an exhibit memo form with respect to what was forwarded to the government analyst for examination. As I have held in relation to the inventory, the production of the exhibit memo form is a procedural step which did not in any way prejudice the Appellant or the evidence adduced as the drugs seized were produced in court as Pexh 2.”

59. In the instant case, despite the inventory not being produced, it is a fact that the confiscated exhibits were produced in court and therefore it is my view that failure to prepare an inventory is a procedural issue and not fatal.

60. In view of the foregoing evidence, the court finds that the respondent proved all the ingredients of robbery with violence and it was safe for the trial court to conclude as such. Further, the contradiction noted in the witness statement in my view are minor and do not affect the main substance of the prosecution case to wit the offence took place. The appellants were placed on the scene of crime and they did not provide any alibi or call any witness on his defence.

61. Further their unsworn defense was of no probative value as they did not accord the respondent the opportunity to test its veracity by way of cross examination.

62. The allegation that the sentence was excessive is not factual as there is no other verdict or punishment for the offence except the death penalty. The appellants can however try their luck at the appellate court.

63. In the premises the court does not find any merit in the appeal and the same is hereby dismissed.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO CALL THIS 17TH DAY OF FEBRUARY 2022.

H K CHEMITEI.

JUDGE