



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO. 34 OF 2020

KENNETH CHERUIYOT.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

(Being an Appeal from the original conviction and sentence by Hon. B. R. KIPYEGON (SRM) in Kericho CMCR. No.4178 of 2015 delivered on 14/9/2018)

JUDGMENT

1. The Appellant was convicted with the offence of Robbery with Violence Contrary to Section 296 (2) of the Penal Code and he was sentenced to Ten (10) years imprisonment on 11/10/2018.
2. The particulars of the charge were that on 24/11/2015 at Kaboswa in Kapsoit within Kericho East in Kericho County, the Appellant jointly with other robbed Edgar Kiprono Moru of his phone Nokia Lumia and Kshs.7,400/= and at the time of such robbery, used actual violence and injured the said Edgar Kiprono Moru.
3. The Prosecution evidence in summary was that the Complainant was at a neighbour's house with other villagers for a ceremony till midnight and while leaving at midnight with one Paul(PW2) who was walking behind him with a torch, the Appellant together with Kennedy and Festus accosted him.
4. Kennedy tripped him, Festus hit him on the head using a stick and the Appellant removed his trouser and took off. The Complainant lost his phone, wallet, cash in the wallet, an Identity Card, torch and trouser and also 3 ATM Cards. Later all the items were handed over to him by the Village Elder.
5. Paul Kibii Rotich and Dennis Kiprotich Too (PW.2 and PW.3 respectively) witnessed the incident. PW.2 was at the scene while PW.3 was attracted by the Complainant's screams and upon reaching the scene he saw the Appellant with Kennedy who was charged as Accused 1 leaving the scene leaving the Complainant unconscious. Both PW.2 and PW.3 saw the Appellant with the Complainant's Trousers.
6. In his defence, the Appellant distanced himself from the incident and he said there were many other people at the scene.
7. The Trial Court found the Appellant and his co-accused guilty as charged and convicted them with robbery with violence Contrary to Section 296 (2) of the Penal Code and sentence each of them to Ten (10) years imprisonment.
8. The Appellant has now appealed to this Court against both conviction and sentence on the following grounds:-
 - (i) ***THAT the Trial Court did not appreciate the Defence given by the Appellant and the submissions by the Defence.***
 - (ii) ***THAT the Prosecution did not prove their case beyond reasonable doubt and relied on hearsay evidence which was full of contradictions.***
 - (iii) ***THAT the Trial Court shifted the burden of proof to the Appellant.***
 - (iv) ***THAT the sentence imposed on the Appellant was Excessive.***
9. The parties were directed to file written submissions which I have duly considered. The Appellant submitted as follows:-
 - (i) ***THAT the Appellant called two witnesses ESTHER CHEPCHUMBA and AMOS KIPNGETICH CHIRCHIR and in the***

Judgment, the Trial Court gave only a brief summary of the testimony of the Appellant and his Co-Accused.

(ii) THAT the Prosecution did not prove the charge beyond reasonable doubt as the prosecution witnesses said the Complainant was attacked by many people and further no witness said they saw the Appellant steal anything from the Complainant.

(iii) THAT the evidence of robbery was not corroborated and there was absence of evidence of assault by the two prosecution witnesses and the Appellant ought to have been acquitted.

(iv) THAT there is no evidence that the Complainant had kshs.7,400/= or any amount as no receipts were produced or evidence of withdrawal.

(v) THAT the Trial Court relied on hearsay evidence and not direct evidence and the Court failed to consider the doctrine of recognition and or identification and further that the Court gave its own version as to what happened and became a witness in the case by stating that the parties had reasonable time at the scene.

(vi) THAT the Prosecution evidence was full of contradictions as some of the witnesses said the incident occurred on 24/11/2015 (PW.1) while the P.3 Form indicates it was 25/11/2015. Further that PW.4 said there was light at the scene and again he said it was dark and he had a torch.

(vii) Further it was submitted that the P.3 Form was given to the Complainant yet there is nowhere the Complainant said he was injured. The P.3 Form states the Complainant had injuries (bruises) on the head, Thorax and Abdomen and yet the Complainant did not give any such evidence.

(viii) THAT the Prosecution evidence was not analyzed in the light of the ingredients of the offence of robbery and by calling for rival evidence, the Trial Court shifted the burden of proof to the Appellant.

10. The Respondent opposed the appeal and submitted as follows:-

(i) THAT the Trial Court considered the defence and noted that the defence corroborated the circumstances of the case that there was a night ceremony in their neighbourhood. The Appellant was placed at the scene of the crime.

(ii) THAT the evidence of the Complainant was corroborated by that of PW.2 and PW.3 and further there is evidence that the Complainant became unconscious and he was taken to Kapkatet Hospital.

(iii) THAT the Respondent further submitted that the Appellant was identified by recognition when in more reliable than the identification of a stranger. Further that there was moonlight and the Complainant was able to identify the Appellant.

(iv) THAT the ingredients of Robbery were satisfied in that the offender was armed and was also in the company of others and he used personal violence against the Complainant.

(v) The Respondent submitted that at no time was the burden of proof shifted to the Appellant and further that the Learned Magistrate gave a lenient sentence as a person convicted with Robbery with Violence Contrary to Section 296 (2) should be sentence to death.

(vi) Finally, the Respondent submitted that the evidence of the Prosecution witnesses was consistent and corroborative and based on direct evidence rendering the conviction safe.

11. This being a first appeal, the duty of the Court is to re-evaluate the evidence adduced before the Trial Court and to arrive at its own independent conclusion while bearing in mind that the Trial Court had the opportunity to see the witnesses.

12. In the case of **Okeno vs. Republic** [1972] EA 32, the Court of Appeal set out the duties of a first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424.”

13. The issues for determination in this appeal are as follows:-

(i) Whether the Prosecution proved its case to the required standard in Criminal Case

(ii) Whether the burden of proof was shifted to the Appellant.

(iii) Whether the Appellant was positively identified.

(iv) Whether the sentence was Excessive.

14. On the issue of discharging the burden of proof, I find that the Prosecution called three witnesses. The testimony of the Complainant was corroborated by that of PW.2 who had accompanied the Complainant on the material night. The testimonies of PW.1 (the Complainant) and that of PW.2 and PW.3 were corroborative and based on direct evidence. The witnesses identified the role played by the Appellant. They saw the Appellant remove the Complainant's trousers.

15. I find that the Prosecution proved the element of robbery with violence in that the Appellant was with others and they used personal violence on the Complainant whom they left unconscious at the scene of crime.

16. PW.3 saw the Appellant and his colleagues escaping the scene. I find that the three witnesses, PW.1, PW.2 and PW.3 identified the Appellant as having been among the people who robbed the PW.1.

17. I also find that at no time did the burden of proof shift to the Appellant. The Prosecution evidence was overwhelming and the same was direct evidence and not hearsay as alleged by the Appellant. The three Prosecution witnesses were at the scene of crime and they witnessed the incident.

18. I find that the Appellant was positively identified by PW.1, PW.2 and PW.3. Although the incident happened at midnight, there was moonlight and again the three witnesses who knew the Appellant as a neighbor were able to recognize him. I find that the evidence of recognition is more reliable than that of identification of a stranger.

19. Finally, I find that the sentence meted by the Trial Court of Ten (10) years imprisonment is lenient considering that the offence carries a penalty of life imprisonment.

20. I dismiss the appeal and uphold both the conviction and the sentence.

Delivered, signed and dated at Kericho this 22nd day of January, 2021.

A. N. ONGERI

JUDGE