



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CRIMINAL APPEAL NO. 194 OF 2019**

**1. MOSES KIPTUM**

**2. EUGENE KIPRUTO KIMAIYO..... APPELLANTS**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against the conviction and sentence of imprisonment of 10 years arising from the judgement of the Hon. Jacinta Orwa – Senior Principal Magistrate in Kapsabet – SPM in Criminal case No. 293 of 2019 dated 27<sup>th</sup> November, 2019)*

**CORAM: Hon. Justice S.Githinji**

**M/s Limo for the state**

**Wambua Kigamwa Advocate for the Appellants**

**J U D G M E N T**

**EUGENE KIPRUTEO KIMAIYO and MOSES KIPTUM**, the appellants herein, were charged in the lower Court with the offence of Robbery with violence, contrary to section 295 as read with section 296(2) of the Penal Code.

The particulars of the offence being that on the 22<sup>nd</sup> day of January, 2019 at about 21.00 hours, within Kokwet village in Nandi County, the appellants jointly robbed James Mapwai Kshs.15,000/= and a mobile phone make Techno, valued at Kshs.2,500/= all totaling to Kshs.17,500/= and at the time of such robbery beat the said James Mapwai.

The prosecution case is that, the complainant in this case one James Mapwai, who gave evidence as Pw-1, lives at Kokwet village where he is the village elder. The first appellant is his nephew, while the second one is just a neighbour. On 22<sup>nd</sup> January, 2019 at about 9.00Pm he was walking home alone from Kokwet shopping Centre. He then heard footsteps behind him. He continued walking towards home. Suddenly he was hit on the left side of his face and fell to the ground. He was held on the ground. One person hit him with a wooden object on the head. Another strangled him. He raised an alarm and his children rushed to the scene.

As he struggled with the appellants, he asked them why they were attacking him and yet he knew them. The second appellant picked a stick and hit him on the neck. He fell down again. He was then hit on the jaw and the hips of which were injured. He lost Kshs.15,000/= and a cellphone worth Kshs.2,500/=, Tecno in make. There was moonlight which enabled him recognize the assailants very well. He struggled with them for about 10 minutes. The appellants beat him seriously after calling their names. He was injured on the right eye, mouth and right knee.

Pw-2 and Pw -3 who are his children heard his distress cry. The home was about 40 metres away. When they got close to the scene, they saw the 2<sup>nd</sup> appellant (Moses) strangling the complainant on the neck, while the 1<sup>st</sup> appellant was holding and sitting on his legs. There was moonlight and Pw-3 had a cellphone with in built spotlight, of which enabled him to see. They were close to the scene and when the assailants saw them, they fled.

The complainant was taken to Mosoriot hospital for treatment and later reported the case at Mosoriot Police Station. Pw-4 filled his P3 form of which shows that he had a cut wound on the lower lip, swelling on the right eye and pains on right knee joint. He classified the degree of injury as maim. Pw-5 investigated the case. The appellants were arrested by the area chief and taken to the police station. They were then charged with the offence.

Each of the appellants in his defence gave a brief sworn testimony stating they were not at the scene of the offence at the alleged time and were just arrested by the area chief for an offence of which they did not commit. The trial magistrate evaluated the evidence and found that all the ingredients for the offence of Robbery with violence were established by the prosecution beyond reasonable doubt, and the evidence of recognition of the assailants by Pw-1, Pw -2 and Pw -3 could not be doubted. She thus convicted the two appellants and sentenced them to serve each 10 years imprisonment.

The appellants dissatisfied with the said conviction and sentence appealed to this Court on the grounds that; -

- 1) **The prosecution did not prove the case against them beyond reasonable doubt.**
- 2) **First report evidence in relation to the claimed recognition was not tendered.**
- 3) **Prosecution evidence was uncorroborated and unbelievable.**
- 4) **Section 211 of the Criminal Procedure Code was not complied with.**
- 5) **The appellants were not accorded an opportunity to tender submissions.**
- 6) **Adverse inference should have been drawn in relation to the prosecution's witnesses who did not testify.**
- 7) **Sentencing policy guidelines were not considered in imposing the 10 years imprisonment, as acquittal was inevitable.**

The appeal was canvassed by way of written submissions and the appellants as well as the respondent filed their submissions.

I have considered the charge preferred against the appellants, the evidence adduced in its support, the appellant's defence, judgement by the lower court and the sentence meted, and lastly, the submissions by each side. The only issue which is in dispute, and of which I need determine on, is of the alleged recognition of the appellants as the assailants.

The incident happened at about 9.00Pm, of which was at night. Pw-1, Pw-2 and Pw-3 alleged to had been able to see the assailants at the said time with assistance of the moonlight. Pw-3 however added that he as well used an inbuilt cell phone light. However, the moon at the time was not described in terms of its size and intensity of its light. The point at which the witnesses were able to recognize the assailants is not clear. Pw-1's evidence shows that he was attacked from behind. He initially described the assailants as "people", a "person," and "another" when he said that; -

***"People held me on the ground. A person hit me with a wooden object on the head. Another strangled me".***

The words used shows that at the beginning of the attack he had not known or recognized the assailants. It is not clear at which point he was able to recognize each of the two.

Pw-1 and Pw -2 do not reveal that there was use of phone light claimed by Pw-3. If there was need of use of extra light for one to be able to see, one then doubts the intensity of the claimed moonlight. The three eye witnesses were not clear of which side of the assailants they saw and how they were able to recognize them. One would wonder whether it was by their facial features, physique, clothes etc. No description was given about how they were on that material night. If one is a relative and the other a neighbour, we all well know that not all relatives and neighbours are necessarily well known to their relatives and neighbours. Witnesses needed establish how they knew the two very well, save for merely stating one is a nephew or cousin and the other a neighbour.

In the relied on authority by the appellants, the case of ***Simiyu -Vs-Republic 2005 KLR 192***, the Court held that; -

***".....Further, there was no inquiry as to the nature of the alleged moonlight or it's brightness or otherwise or whether it was full moon or not or it's intensity, in absence of any inquiry, evidence of recognition may not be held to be free from error."***

In the judgement by the lower court, the given summary of the prosecution evidence is slightly sexed up and is not a correct version of what the witnesses actually said. Pw-3 never said that he flashed the phone light on the assailants. Pw -1 did not also say that he asked the assailants why they were attacking him and yet he knew them very well. The wooden object used to attack the complainant, his stolen 15,000/= and phone, were not recovered. Apart from the alleged shaky recognition of the assailants as the real culprit, there is no other evidence that connects them to the alleged offence.

In the case of ***Wamunga-Vs-Republic [1989] KLR 426*** the Court of Appeal stated; -

***"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."***

The evidence of recognition of the appellants by Pw-1, Pw-2 and Pw-3 is questionable. It is not water tight and safe to lead to a conviction. The trial Court erred in finding otherwise. The appeal on the ground succeeds. The conviction and sentence are quashed. The appellants are set free unless otherwise lawfully held.

**JUDGEMENT FOR ELDORET DELIVERED VIRTUALLY at MALINDI on this 22<sup>nd</sup> day of October, 2021.**

.....

**S. M. GITHINJI**

**JUDGE**

**In the presence of:**

1. Mr Mugambi for the Appellants and
2. Ms. Limo for the state