REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 27 OF 2019

1. GEOFFREY GISEMBA NYANDIKA.....1ST APPELLANT

2. EMMANUEL MOKUA.....2ND APPELLANT

3. PETER ATAMBO KERIGA.....3RD APPELLANT

=VRS=

THE REPUBLIC.....PROSECUTOR

(Being an Appeal against the Judgement of Hon. B. M. Kimtai – PM Keroka dated and delivered on the 4th day of July 2019 in the original Keroka Principal Magistrate's Court Criminal Case No. 339 of 2018)

JUDGEMENT

The appellants were the 1st, 2nd and 4th accused persons in a charge for 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 were that on the night of 20th March 2018 at Nyamakairo village in Masaba North Sub-county within Nyamira County Jointly with others not before court being armed with offensive weapons namely pangas and rungus robbed James Magusa Gisemba of cash Kshs. 27,000/= and at the time of such robbery used actual violence to the said James Magusa Gisemba.

The appellants and their co-accused pleaded not guilty to the charges whereupon the prosecution called a total of five witnesses. When they were put on their defence the 1st appellant testified on oath as did the 2nd appellant but the 3rd appellant elected to make an unsworn statement. After considering and evaluating the evidence, the trial Magistrate found there was overwhelming evidence against the appellants, convicted them and sentenced them to imprisonment for twenty-five (25) years.

Their appeal is against the conviction and sentence and it is premised on the following grounds: -

> **"1. THAT, the learned magistrate erred in both law and fact by maliciously ruling on shoddy prosecution, evidence which were baseless and valueless for he never recovered any of the complainant items from us.**
>
> **2. THAT, the learned magistrate failed in both law and points to have maliciously based his judgment on fabricated evidence on the said Kshs. 6,000 two us had without warning himself that the complainant was claiming Kshs. 27,000/= which was not found with us.**
>
> **3. THAT, my lord the learned magistrate equally erred in both law and facts in convicting and sentencing us 25 years without realizing that nobody was arrested at the scene at the fateful night of incident.**
>
> **4. THAT, magistrate at Keroka failed in both law point to have pass judgement without taking unto account the evidence of the complainant for he admitted the attackers were unknown to him as per the OB 1st report and even on medical report.**
>
> **5. THAT the learned magistrate sitting at Keroka equally erred in both law and point to have convicted and sentenced us without going extra mile to note that names of suspects was given by unknown villagers who were not invited to verify of confirm to there allegation for there was no identification parade done.**
>
> **6. THAT the learned magistrate strongly erred in both law and facts to have inclined his conviction and sentence without realizing that its only chiefs who appeared in court as witnesses whose evidence had a lot of contradictions.**

7. THAT the learned magistrate failed in law and facts for he passed judgment while there was not finger dusting done even to any exhibit to connect us to alleged robbery.

8. THAT, the learned magistrate did not come clear as to why other three suspect were early released for we were arrested 6 suspects only to convict and sentence only three of us.

9. THAT the learned magistrate totally failed both law and facts to have passed judgment against us without first enduring from our bosses in our difference places of work.

10. THAT, learned magistrate faulted in law and fact to have not taken time to analyse, evaluate the condition and kind of source on the fateful night that could warrant recognition or identification."

The appellants argued the appeal by way of written submissions to which Learned Prosecution Counsel Ms. Okok replied orally.

I have considered the rival submissions and also analysed the evidence in the court below so as to arrive at my own independent conclusion. I have done so bearing in mind that unlike the trial Magistrate I did not see or hear the witnesses.

From the record it is evident that a robbery was committed against the complainant. It was his evidence that the attackers were more than one and that they roughed him up before making away with a sum of Kshs. 27,000/= which they demanded from him. The essential elements of the offence of robbery with violence were therefore proved beyond reasonable doubt. I am however not certain that the same can be said about the identification of the three appellants as being part of the gang that committed the offence.

It was the complainant's testimony that this offence occurred at night (7pm) although his wife (Pw2) approximated the time to be 7.30pm. The complainant had just gone into the house when he heard noises and on trying to get up possibly from where he was seated, a jacket was thrown at him and he was ordered to sit. Then one person held his neck while the other held his buttocks. It is clear from this testimony that he was ambushed. It all happened so suddenly making it unlikely that he could have had a chance to see the assailants. Indeed, initially he alleged to have identified the appellants by the light of a solar lamp, he later changed to say he recognized the 1st and 3rd appellants by their voices. It is doubtful that he could have seen the attackers when it all happened so fast and when a jacket had been thrown at him. As for recognition by their voices, his evidence was very scanty on what they said only stating that they demanded he gives them money. It behoved him to tell the court what each said and for how long for the court to determine that he had opportunity to indeed hear their voices and recognize them. The evidence of the area Assistant Chief (Pw3) confirmed my suspicion that neither Pw1 nor his wife (Pw2) identified the attackers. According to Pw3, the report he got was that the couple were attacked by young men who were armed with rungus and pangas. There was no mention of specific names in the report which would not have been the case if Pw1 and Pw2 had identified specific people. Pw3 further stated: ***"The members of the public were able to suspect Geoffrey (accused) pointy (sic) him and another Emmanuel (accused 2) on being given this names, I managed to arrest accused 1……."*** It is clear from this part of Pw3's testimony that the appellants were arrested not because Pw1 and Pw3 identified them as their attackers but because they were suspected by members of the public and the suspicion of the members of the public was confounded by the recovery of money from them. It is my finding however that finding money in their possession was not enough. Each of them gave an explanation of how they came by the monies found in their possession and their explanations were not rebutted by evidence from the prosecution. The case against the appellants was not therefore proved beyond reasonable doubt. Though there may have been a strong suspicion that they committed this offence, suspicion no matter how strong can never be the basis of a conviction. Accordingly, the appeal is allowed, the conviction quashed and sentence of twenty-five (25) years imprisonment set aside. The appellants shall be set at liberty forthwith unless otherwise lawfully held.

Signed, dated and delivered in open court this 23rd day of January 2020.

E. N. MAINA

JUDGE