



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 94 OF 2017

(Being an appeal arising from Kitale Chief Magistrate's Court Criminal Case No. 271 of 2015 delivered by M.I.G. Moranga Principal Magistrate on 18/1/2018)

DAVID WAKOLI WALUBENGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The appellant with his co-accused were charged with the offence of **Robbery with Violence contrary to Section 296(2) of the Penal Code**. The particulars of the charge were that **on the 16th day of January 2015 at Kiptogot farm in Chepchoina location, within Trans-Nzoia County, jointly with others not before court, being armed with a dangerous weapon namely a rifle and pangas, robbed Ezekiel Wanyonyi Khaemba, of a motor cycle registration No. KMCX 266 N make TVs star, a mobile phone make Tecno and cash Kshs 3,000/= all valued at Kshs 63,000/= and immediately after the time of such robbery injured the said Ezekiel Wanyonyi Khaemba.**
2. They were each convicted and sentence appropriately. The appellant was sentenced to suffer death. He was dissatisfied with the said judgment and has filed this appeal which grounds centres around the fact that the evidence as presented by the prosecution was so insufficient as to allow a conviction. He stated that there were total contradictions in the said evidence and that his defence was never taken into consideration.
3. Before looking at the merits or demerits thereof it shall be worthwhile to summarise the evidence as presented.
4. **The complainant** told the court that on 16/1/2015 at around 5.00 pm he was approached by the appellant co-accused who requested him to go and transport some maize and beans for him. The complainant was a boda boda rider. On the way the 2nd accused changed course and decided to take a different route which the complainant reluctantly did. At some point the complainant declined to go further as there was a pool of water.
5. The co-accused left and came back with a group of people (4 of them) who were armed with a gun and rungu. He identified the appellant herein who stayed near his home and had lived together for along time. The appellant was armed with AK 47 rifle and the others concealed their weapon. The appellant co-accused hit the complainant on the head using a rungu and he lost consciousness. He realised 3 weeks later that he was at Endebess hospital. He was also take to Cherengany Nursing home.
6. A Kenya police Reservist recovered the motor cycle and handed it over to the complainant's brother-in-law. During the trial the complainant identified the motorcycle photographs as well as the P3 form issued at Endebess police station. He had purchased the motor cycle from one Stephen Korir.
7. **PW2 Dr Charles Ngugi Macharia** from Endebess sub County hospital produced the P3 form on behalf of Dr. Kakundi who had explained the injuries suffered by the complainant as harm. An operation had been done on the left side of his head.
8. **PW3 Joseph Ngunyir** a police reservist at Kiptogot farm testified that on 17/1/15 at 6.00 am he was on a patrol with his colleagues when they were called by chief Kirui of Chepchoina location concerning a suspect who turned out to be the appellant co-accused. The co-accused was found in possession of a Tecno phone. The following day a group of boda boda cyclist traced the appellant and arrested him. They did not recover anything from him.
9. When placed on his defence the appellant gave sworn evidence denying the charge. He said that he had come home on 27/12/2014 from Nairobi to Kitale, for purpose of undertaking some remembrance rituals of his late father. He decided to visit his girlfriend and in the process had altercation with one Wesakulila the brother to the complainant over the girl. They were taking busaa. The said Wesakulila promised to teach him a lesson. He went to Matisi on 1st February 2015 to see his uncle and was arrested on 3/2/2015 by the police.

Analysis and Determination

10. The court has carefully read the proceedings herein and specifically the written submissions by the appellant. As at the time of writing this judgment the State had not provided any written submissions as directed by the court.

11. It is apparent that there was no eye witness to the incident except the complainant. The rest of the witnesses did not witness the same. In such a case of a single identifying witnesses the courts have previously advised that great caution must always be taken as there could be mistaken identity.

See Abdalla Bin Wendo & Another Vs Regina (1953) EACA 166, Rovia Vs Republic (1967) E.A 583.

12. It is also imperative to note that under the provision of Section 296(2) of the Penal Code, the offender must be armed with any dangerous or offensive weapon or instrument, be in a company of one or more persons and immediately before or after the time of robbery inflict injuries upon the victim.

13. PW1 testified that the assailants were armed with a gun as well as a club (rungu). He suspected that the rest had concealed their weapons. They were 4 in number. Subsequently after the attack they stole his motorcycle as well as his phone and seriously wounded him. He lost consciousness and recovered later at the hospital. The P3 produced attest to this.

14. In my view therefore the findings of the trial court regarding the ingredient of robbery with violence were firmly established.

15. As regards identification of his assailants. The complainant stated as follow;

“ I identified David Wakoli Walubengo. I knew him because he stays near my home. We had lived together in the area for long. Bruno had a rungu. David had a gun AK 47 rifle.”

16. It is worthy to note that the incident took place at 5.00 pm or thereabouts and the issue of light cannot be questioned. Moreover I do not see how the witness would not positively identified the assailant whom he had stayed with for long. That fact of knowing each other was not challenged by the appellant.

17. The sum total of this court finding s that the trial court's decision was strong both in law and fact. From the proceedings, even the question of alibi that came late in the day was well tackled by the prosecution when it recalled the investigating officer and allowed the appellant the latitude to prove the same. I find the defence of alibi completely consistent.

18. The upshot is that this appeal must fail. The appellant however pursuant to the Supreme Court decision in ***Francis Muruatetu & Another Vs AG (2015 SCOK)*** shall grant the appellant the opportunity to mitigation on sentencing afresh and thereafter this court shall proceed to consider an appropriate sentence.

Orders accordingly.

Delivered, signed and dated at Kitale this 30th day of January, 2019.

H.K. CHEMITEI

JUDGE

30/1/19

In the presence of:

Mr. kakoi for the Respondent

Appellant – present

Court Assistant – Kirong

Judgment read in open court.