REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CORAM: D.S. MAJANJA J.

CRIMINAL APPEAL NO. 3 OF 2016

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 4 OF 2016

BETWEEN

GABRIEL KIMELI .....1ST APPELLANT

RODGERS KIPKOSGEI SITIENEI.....2ND APPELLANT

AND

REPUBLIC .....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon.C.Obulutsa, SPM dated 15th January 2016 at Eldoret Magistrate's Court in Criminal Case No. 6320 of 2014)

JUDGMENT

1. The appellants, **GABRIEL KIMELI** and **RODGERS KIPKOSKEI SITIENEI** were charged, convicted and sentence to death for the offence of robbery with violence contrary to **section 296 (2)** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. The particulars of the offence were that on 21st September, 2014 at Lekebet Village, Eldoret West District of Uasin Gishu County, they robbed **ERICK KIMELI** of his mobile phone make G.Tide, Serial No. 354**** 2681, a pair of sports shoes and cash1200/= all valued at Kshs.5,200/= and immediately before the time of such robbery used actual violence against the said **ERICK KIMELI**.

2. The appellants now appeal against conviction and sentence on the grounds set out in the respective petitions of appeal, grounds of appeal and written submissions. The thrust of their complaints against the trial court is that the prosecution failed to prove their case beyond reasonable doubt. They complain that they were not identified and that they nothing was found in their possession implicating them in the offence. The respondent's case was that the prosecution proved all the elements of the offence of robbery with violence.

3. In accordance with the principle that it is the duty of the first appellant court to evaluate the evidence afresh and reach its independent conclusion while taking into account that the it never heard or saw the witnesses testify, I am satisfied the prosecution proved all the elements of the offence of robbery with violence.

4. The complainant Erick Kimeli (PW 1) testified that on 21st September, 2014 at about 6.30 pm, he met the 1st appellant whom he knew and another. The stranger hit him with a stone on his face and he collapsed. Thinking he was dead, they pushed him in a hole and covered him with a sack. When he recovered and got up in the morning, he found they had stolen his shoes, phone and the money he had. He managed to go to his brother Philip Kipkoech (PW 2) and narrated to him what had transpired. Both PW 1 and PW 2 went to the local centre where they found the appellants playing pool. PW 1 recognized the 1st appellant who had the phone and the 2nd Appellant who was wearing his shoes. The Clinical Office, Jospin Kiror (PW 4) who examined PW 1 on 22nd September 2014 testified that he had broken teeth and was bleeding on the face.

5. The offence of robbery with violence under **section 296(2)** of the ***Penal Code*** is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at, immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see ***Dima Denge Dima & Others v Republic*** **NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR,** ***Oluoch v Republic*** **[1985] KLR 549** and ***Ganzi & 2 Others v Republic*** **[2005] 1 KLR 52).**

6. I am satisfied the prosecution established the elements of the offence of robbery with violence. PW 1's shoes, mobile phone and money were stolen and in the course of stealing, two assailants inflicted violence on him. The main issue in this appeal is whether the appellants were identified since they both denied the offence in the unsworn statement. PW 1 testified he knew the 1st appellant. This was not identification of a stranger. It was recognition and since the incident took place at 6.30 pm and the parties were in close proximity with each other, the circumstances were favourable for positive recognition. I am therefore satisfied that the 1st appellant was positively identified as one of the assailants.

7. The prosecution also relied on the doctrine of recent possession where the trier of fact may draw an inference of guilt of theft or of offences incidental thereto upon proof of the unexplained possession of recently stolen property. In ***Arum v Republic*** **[2006] 1 KLR 233**, the Court of Appeal set out conditions that must exist before a court can rely on the doctrine of recent possession as a basis of conviction in a criminal case. These include proof that:

(a) The property was found with the suspect;

(b) The property was positively the property of the complainant;

(c) The property was stolen from the complainant;

(d) The property was recently stolen from the complainant.

The proof as to time will depend on the easiness with which the stolen property can move from one person to another.

8. In this case both appellants were found in possession of the PW 1's shoes and phone on the morning after they had assaulted PW 1. They did not lay any claim to the items and said nothing of the items in their defence. The inescapable inference is that the appellants were the assailants. I therefore find their conviction safe and it is accordingly affirmed.

9. As regards the sentence, the mandatory death sentence was found unconstitutional by the Supreme Court in ***Francis Karioko Muruatetu & Another v Republic*** **SCK Pet. No. 15 OF 2015 [2017] eKLR.** The same principle was applied to the offence of robbery with violence under **section 296(2)** of the ***Penal Code*** by the Court of Appeal in ***William Okungu Kittiny v Republic*** **KSM CA Criminal Appeal No. 56 of 2013 [2018]eKLR.**.

10. I set aside the death sentence and substitute it with **fourteen (14) years** imprisonment from 24th September 2014.

DATED and DELIVERED at ELDORET this 23rd day of April 2019.

D.S. MAJANJA

JUDGE

Appellants in person.

Ms Mumu, Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.