



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL CASE NO. 62 OF 2016

EPHANTUS KAMAU.....1ST APPELLANT

SAMMY MULEMI KOECH.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the Principal Magistrate Honourable H. Barasa

in Eldoret Chief Magistrate's court Criminal Case No. 6995 of 2014

dated 10th May, 2016)

JUDGMENT

EPHANTUS KAMAU, the appellant herein, was charged together with another known as *SAMMY MULEMI KOECH* with the offence of Robbery with violence, contrary to Section 296(2) of the Penal Code.

The particulars of the offence being that on the 15th day of October 2010 at Huruma Estate, in Eldoret West District within Uasin Gishu County, the two jointly with others not before court while armed with dangerous or offensive weapons namely Rungus, robbed Richard Owino of his motor cycle Registration No. KMCH 917Y make TVS Star, Engine No. OFSH91555776, valued at Kshs 85,000/- and immediately after the time of such robbery used actual violence to the said Richard Owino.

The prosecution case is that Richard Owino Oloo, who gave evidence as PW-1 and who's also the complainant in this case, resides at Hawaii in Eldoret and operates a Boda boda using a motorcycle. The motor cycle is his and its registration No. is KMCH 917Y TVS Star, and the engine No. is OFSH 91555776. On 15th October, 2010 at around 7.00 p.m PW-1 was at work using the said motorcycle. He was at Lengut in Eldoret town and had a customer who wanted to be ferried to Pilot, in Huruma. He took the said customer to his destination. On his way back at Raiply Factory gate, near the petrol station, he was stopped by a stranger. He stopped. The man, who is said to be the appellant herein told him that he had a patient at Huruma Sub District Hospital and wished to be taken there. PW-1 took him to the place. At the hospital gate he stopped and the appellant alighted. There were two strange men at the place and the appellant went to talk to them. He then returned to PW-1 in their company. The appellant told PW-1 that the patient he was to meet had left towards Huruma. He urged PW-1 to take them that way to catch up with her. There was a trench in front and PW-1 was urged by the appellant to get over it before he could board. As PW-1 was doing so, one of the two men who were with the appellant, hit him with a stick on the back of the neck, twice. As a result the motor bike fell. The appellant went on the complainant, holding him on the neck. The two fell down with the appellant being on top of the complainant. The complainant struggled with him as he screamed for help. The other two men took the motor cycle and started it. A woman got to the scene and also screamed for help. The appellant left the complainant, joined the other two and they left on the motorbike. Members of the public reacted to the distress call and got to the scene shouting thief, thief. The complainant followed the assailants as well as members of the public. The motor bike hit a pipeline ahead and fell down. Members of the public caught up with them there and managed to arrest two as one escaped. The complainant joined them. The two were taken next to the road to be lynched. At that moment PW-4 and another officer called *Mwiti* were on patrol along Kitale-Eldoret road, Mulima area. They spotted a crowd of people at Huruma ground, next to Nyathiru Hotel. They went to the place. They found the crowd beating two men who were alleged to have robbed the complainant of his motor cycle. They rescued the two and placed them in the police vehicle. The motor cycle was also there and they as well collected it. The suspects were taken to Baharini police post where they were booked. Investigations were commenced. PW-2 was called to photograph the motor cycle. He did so and it was released to the complainant.

PW-3 examined the complainant at Uasin Gishu County Hospital. He had injuries on the neck, left shoulder and chest. The neck was swollen and tender. He was treated and the P3 form filled to the effect that the degree of injury was harm. The P3 form and the motor cycle photographs were produced in court as exhibits. The complainant alleged there were bright security lights which enabled him see the

assailants. The appellant herein is the one who had posed as a passenger. The one who hit him with the stick is the one who escaped. The previous 2nd accused person was the 3rd person.

The trial court found at the close of the prosecution case that the accused had a case to answer and placed them on their defence.

The two gave related defence, in that on 15th October, 2010 the appellant herein worked at the market till 7.30 p.m. He then left and went to a place called Staro where he took one beer. Thereafter he boarded a vehicle towards home. He alighted at Nyathiru stage, in Huruma. There were many people there. He went to 2nd accused's place to buy samosas. He ate two samosas and bought two more. 2nd accused was selling the samosas while he had another person who was cooking them. As the appellant was going home the 2nd accused told him that he had not paid for two samosas. The appellant insisted he had paid. A physical struggle ensued. The 2nd accused kicked him on the jaw and was injured to an extent that he could not talk. The police appeared as the fight had attracted the nearby crowd. Both were arrested. PW-4 questioned the appellant but he was not able to talk. He was taken to the police post and later to Moi Teaching and Referral Hospital where he was treated. He was later charged.

The 2nd accused was aided in the fight by his colleague Isaac who called upon the crowd to rescue him. He was at the time bleeding from the nose. Upon their arrest, Isaac tried to talk to the police at Baharini police post but was chased away. The 2nd accused was taken to district hospital where he was treated. On 22nd October, 2010 he was charged. He had told Isaac to get him witnesses who were present but he said they feared arrest. By the time of giving defence Isaac had left the stage and could not be called as a witness.

The trial court evaluated the evidence and found that all the ingredients for the offence of robbery with violence. Were proved by the prosecution beyond reasonable doubt. The court further found that the appellant herein was with the complainant longer, and was positively identified as a culprit, while it doubted the identification of the 2nd accused who was with the complainant for a short period. The appellant was therefore convicted of the said offence while the 2nd accused person was acquitted of the same.

The appellant did not mitigate and was given the "mandatory" death sentence.

The appellant dissatisfied with the said conviction and sentence appealed to this court on the grounds that:-

1. The prosecution witnesses contradicted their statements to the police and their evidence was unreliable.
2. Evidence concerning the recovered motor cycle particulars contradicted what is carried in the charge sheet.
3. The evidence was of identification rather than recognition and was unreliable.
4. The motor cycle was not dusted for fingerprints.
5. He was not photographed with the said recovered motor cycle at the scene.
6. His defence was wrongly rejected while that of his co-accused was accepted.

I have weighed the charge, evidence adduced in the lower court's judgment and sentence passed, grounds of the appeal and submissions by both parties.

There's no dispute in the case that that the evidence of PW-1 and the rest of the prosecution witnesses establishes clearly that the offence committed was of robbery with violence. The assailants were 3 in number; one was armed with a stick; during the said robbery the complainant was hit twice with the stick on the back of his neck after which another assailant held on his neck and grappled with him to the ground. The complainant suffered harm as a result. His motorbike was in the process robbed. These facts gives rise to the said offence. What is in dispute is whether the appellant herein was properly identified as one of the three assailants. The appellant was as the trial court rightly observed, with the complainant longer than the other two assailants.

They were together at Raiply gate where he posed as a customer. They talked as he requested to be ferried to Huruma sub district hospital to see a patient. They were together as they travelled to the place. At the hospital they were together as he talked to the other two strangers before they all turned out to be robbers. Though it is not clear where the described bright security lights were as there are two scenes, one which is outside Raiply gate, and at Huruma sub district hospital, the appellant was at both scenes and wherever the said lights were, he is the one who deliberated with the complainant at both places and the complainant was therefore able to see him clearly. Also to be considered in line with this evidence, is that the appellant was arrested just a few metres from the actual scene of robbery in an open field where they fell while getting away after they hit a pipeline.

Identification of a suspect a few minutes after the incident is easier and safer than identification that happens long after the incident. All these circumstances when weighed together leaves no doubt that the appellant took part in commission of the said offence. His defence is not convincing as true. If he fought with his co-accused over samosas issue, that would have been clear to the police as there were many eye witnesses at the scene. There is also no way they would have been connected with a motor cycle robbery incident. The defence was rightly dismissed.

On sentence, the appellant did not mitigate and the trial court sentenced him to the mandatory death sentence for the offence. However, given the finding in the case of *Francis Karioko Muruatetu and another –vs- republic [2017] eKLR* the Supreme court found that the death sentence though legal, is not a mandatory sentence for any offence. The trial court expressed that it was a mandatory sentence and probably

if aware then that it was not, would have passed a lesser sentence. On this ground I'll allow the appeal on sentence as I dismiss the appeal on conviction. The appellant will just mitigate for resentencing by this particular court. This court so finds.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 23rd day of May, 2019.

In the presence of:-

The appellant

Ms. Kagali for State

Ms Sarah - Court assistant

Accused in Mitigation:-

I am alone in the family. They all depend on me. My parents depend on me. I have been in custody for 9 years. I am rehabilitated. I pray for a lenient sentence. I have a letter from Naivasha Maximum Prison showing I am reformed.

COURT:-

I have considered the mitigation and the period served in remand and prison. Convict's probation report be prepared by the probation officer.

Mention on 24/6/2019.

S. M GITHINJI

JUDGE

23/5/2019