



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

(CORAM: CHERERE -J)

CRIMINAL APPEAL NUMBER 119 OF 2015

BETWEEN

MARTIN OBATE LUTHER.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Criminal Case Number 1193 of 2014 in the Principal Magistrate's Court at Kimilili delivered by M.A.Nanzushi (SRM) on 03.07.15)

JUDGMENT

Background

1. **MARTIN OBATE LUTHER**, the appellant herein has appealed against the conviction and death sentence imposed on him in the second county 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 charge are that:

On 24th August, 2014 at Makwata Village in Kimilili location within Kimilili District within Bungoma County whoie armed with dangerous weapons namely a panga, slasher and knife robbed Geoffrey Iringo Osere of a mobile phone ITEL 610 valued at Kshs. 4,000/- and at or immediately after the time of such robbery wounded the said Geoffrey Iringo Osere

The prosecution's case

2. PW1, **Geoffrey Iringo Osere**, the complainant recalled that on the material date, he was woken up by his wife at 03.00 am and it was then that someone directed a bright torch at him. He stated that the said person took his phone from a table and was in the process of ransacking their bags when he wrestled him as his wife screamed until members of public went to their rescue and arrested the appellant whom they beat senseless before he was rescued by the police. Complainant stated that he was injured during the robbery. The complainant stated that he was issued with a P3 form. Complainant's wife Nancy Ajaa PW2, confirmed that the Appellant was arrested in their house on the material night. PW3 Geoffrey Mauka arrived at the scene long after the Appellant was arrested. He stated he saw 4 phones at the scene. PW5 Catherine Akinyi, a clinical officer produced as PEXH.2 the P3 form for the complainant she said had bruises on the right elbow, sternal area and 3rd toe. PW4 CPL Tobias Lwambi rescued the Appellant from a mob who included the complainant and his wife who reported that he was arrested in their house during a robbery. He was given 4 phones one which was identified by complainant, a panga which complainant said was his and a slasher and knife alleged to have been recovered from the Appellant.

3. The Appellant denied the offence and *in a judgment* dated 03rd July, 2015; he was convicted and sentenced to suffer death.

The Appeal

4. The conviction and sentence provoked this appeal. In his petition of appeal filed on 09.07.15, additional grounds of appeal filed on 08.11.18 and written submissions filed on 20.09.18, the Appellant raises the following grounds: -

1) Appellant was not properly identified

2) Appellant's rights under Articles 49 and 50 of the Constitution was breached

3) The prosecution case was not proved beyond reasonable doubt

5. When the appeal came up for hearing on 05.08.19, the Appellant stated that he was wholly relying on the additional grounds of appeal and written submissions.

6. Ms. Nyakibia, learned State Counsel opposed the appeal on conviction but conceded to the appeal on sentence and proposed that Appellant the sentence be substituted with one of life sentence. The state submitted that the Appellant was properly identified by the complainant and his wife and further that violence on the complainant was proved by way of a P3 form.

Analysis and Determination

7. This being a court of first appeal, I am expected to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I neither saw nor heard any of the witnesses and have to give due allowance. I am guided by the Court of Appeal's decision in the case of **Issac Ng'ang'a Alias Peter Ng'ang'a Kahiga V Republic Criminal Appeal No. 272 of 2005.**

8. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions for the appellant and the state.

9. In determining whether the ingredients of the offence of robbery with violence are proved, the evidence on the theft, the number of attackers, appellant being armed with a dangerous weapon and the beating of the complainant are determinant. The ingredients of robbery with violence are as set down in section 296 (2) of the Penal Code, as follows:

“296. Punishment of robbery

(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

10. The Court of Appeal in the case of **Odhiambo & Another v Republic (2005) 2 KLR 176** (Omolo, Githinji & Deverell JJA) explained the ingredients of the offence of robbery with violence as follows:

“The act of being armed with a dangerous or offensive weapon is one of the elements or ingredients which distinguishes a robbery under section 296(2) and the one defined under section 295 of the Penal code. Other ingredients or elements under section 296(2) include being in the company of one or more persons or wounding, beating etc the victim and since all these are modes of committing the offence under section 296(2), the prosecution must choose and state which of those elements distinguishes the charge from the one defined in section 295.”

11. In this case, the Prosecution relied on the appellant being in possession of dangerous weapons namely panga, slasher and knife. As regards using violence on the victim of the robbery, the clinical officer (PW4) produced a P3 form which shows that complainant had bruises on the right elbow, sternal area and 3rd toe. Of interest to note however is that the complainant did not in his evidence did not state that he was injured or what injuries he suffered. The clinical officer's evidence therefore lacks a basis and on that ground, I find no evidence that complainant was injured.

12. On the issue of identification, the complainant and PW2 stated that the Appellant was arrested at the scene of the robbery which was inside their house. The issue of first report and lighting at the scene does not arise the Appellant having been arrested in the act and having been detained until police arrived and took him away. For the foregoing reasoning, I similarly find that it was not necessary for the investigating officer to conduct an identification parade. I am persuaded that the Appellant was positively identified and the first ground must this fail.

13. The Appellant did not tender evidence nor did he explain which of his rights under Article 49 and 50 had been breached and in what manner and this ground must similarly fail.

14. Concerning robbery of complainant's phone by the Appellant, the record demonstrates that the complainant was not called upon to identify the phone produced by the investigating officer as his. None of the witnesses stated that any phone was recovered from the Appellant. In fact, PW3 and PW4 only stated they found 4 mobile phones not in possession of the Appellant but at the scene where the he was being assaulted by members of public.

15. From the totality evidence, I find that the evidence on record did not establish a charge of robbery with violence contrary to section 279 (1) of the Penal Code but disclosed a lesser offence of burglary contrary to section 304 (1) (a) as read with section 304 (2) which provides for an imprisonment term that does not exceed ten years.

16. Consequently, the *appeal succeeds*. For that reason, the conviction for robbery with violence contrary to section 296(1) of the Penal Code and is quashed and substituted with a conviction for the offence of burglary contrary to section 304 (1) (a) as read with section 304 (2). The death sentence is set aside and since the Appellant was said to be a first offender, it is substituted with a sentence of 4 years from date of original conviction which is 03rd July, 2015.

17. In the event that the Appellant has already served 4 years' imprisonment, he shall be set at liberty unless he is otherwise unlawfully held.

DELIVERED AND SIGNED AT BUNGOMA THIS 09th DAY OF August 2019

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Brendah

Appellant - Present in person

For the State - Ms. Wakibia