



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO 74 OF 2016

(As consolidated with Nos. 72 & 73 OF 2017)

(Being an appeal from the Judgement of Hon. P. Biwott in criminal case No. 3344 of 2015)

LUKA WEKESA MMWELO.....1ST APPELLANT

EDWIN OMUZEE SHIKUTWA.....2ND APPELLANT

ROBERT MAKAYI MURUNGA.....3RD APPELLANT

VERSES

REPUBLIC.....RESPONDENT

BETWEEN

REPUBLIC.....PROSECUTOR

VERSES

LUKA WEKESA MMWELO.....1ST ACCUSED

EDWIN OMUZEE SHIKUTWA.....2ND ACCUSED

ROBERT MAKAYI MURUNGA.....3RD ACCUSED

JUDGEMENT

1. The Appellants were jointly and severally 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 22nd day of July 2015 at around 10.00 pm at Line Member Trans-Nzoia County jointly while armed with dangerous weapons namely metal bar robbed PAMELA SITAI cash kshs. 10,000, one hand bag, 3 ATM cards, National identity cards, two phones TECNO and LEVONO all valued at kshs. 20,500 and at or immediately after such robbery used actual violence to the said PAMELA SITATI.**

2. The second count was also **Robbery with violence contrary to Section 296(2) of the Penal Code**. The particulars of the charge were that **on the 22nd day of July, 2015 at LINE MEMBER area within Trans Nzoia County jointly while armed with dangerous weapons namely metal bar robbed NELY CHEBET of Kshs. 3,450 and mobile phone make bird valued at kshs 2000 and at or immediately after such robbery used actual violence to the said NELLY CHEBET.**

3. The alternative charge was **handling stolen property contrary to Section 322(2) of the Penal Code**. The particulars of the charge were that **on the 22nd day of July 2015 at LINE MEMBER area within Trans-Nzoia County, otherwise than in the cause of stealing, dishonestly received or retained one handbag containing bank statements, deep fried fish and liver, two mobile phones, Tecno and Lenovo, knowing or having reasons to believe them to be stolen goods.**

4. The Appellants were each convicted and sentence to suffer death. Their co –accused was acquitted for lack of sufficient evidence. For purposes of this appeal the same was consolidated and each of the appellants have separately filed their respective submissions. The learned

state counsel has equally filed his submissions. This court shall proceed to summarise the evidence as presented during trial and thereafter proceed to analyse the same and come up with some appropriate findings.

5. **PW1, PAMELA SITATI**, the complainant testified that on 22nd July 2015 she had closed her business and was walking home with her co-complainant Chebet. On their way a motorbike bypassed them and after a short distance it made a U-turn and came back. The three occupants alighted and began attacking them. They ransacked their valuables and snatched her bag which contained her phone and some money and bank ATM.

6. Through the aid of the passing motor vehicles she was able to see the armed assailants. She managed to run away and entered the house of Chebet's sister and later reported the matter at the police station. Her friend had sustained some injuries on her buttocks and other parts of the body.

7. She was later called to the police station where she was able to identify her items as well as the assailants in an identification parade.

8. When cross examined, she said that the 1st Appellant was riding the motor cycle and she identified the 2nd Appellant from his long hair.

9. **PW2 NELLY CHEBET MAKATE** testified that she is employed by pw1 in her bar as a sales lady. She said that they were walking together home that evening when they were attacked by three occupants in a motor bike. She was pinned down and was stabbed by PW1 on her buttocks. They stole assorted items from her as enumerated in the charge sheet.

10. She then managed to run away and reached her sister's house together with PW1. The following day they went to the police station and she also went to Kitale District hospital where she was treated and P3 form filled.

11. She was called to an identification parade where she identified the 3rd appellant. She said that she was able to identify the assailants because of the lights from the moving vehicles since the incident occurred on the road side.

12. **PW3 VALARIE AKINYI** testified that on the 29th July, 2015 she was called at the police station by one Willy. She said that she owned motor cycle Reg. No. KMDN 579D which the police said that it was involved in some stealing. She produced the logbook and the purchase receipts which were in the name of Michael Wanjala her late husband. Geoffrey Simiyu the rider was with some other 3 suspects. She said that she had given the motorcycle to the said Simiyu.

13. **PW4 MILTON OWADE** owned a Motorbike Registration Number KMDK 658E. He was called by one Isaiah on 24/7/15 and told that the same was being taken to the police station. He had given it to the 3rd Appellant and it was said that it had been involved in a robbery. He produced the purchase receipt to the police. He said that the logbook was misplaced.

14. When cross examined by the 3rd Appellant he said that he had employed him although there was no formal agreement and that he had been using it for two weeks.

15. **PW5 JAPHETH OMBIMA** stated that on 23/7/2015 at around 1.30 hours he was travelling with his colleagues **SGT. CHEPKONGA** and **A. P. C. ORATI** from Nairobi to Kitale. Near Matunda they spotted a Motorbike Registration No. KMDN 579D which had three occupants. They had 3 black bags and they became suspicious. They followed them but they changed cause and disappeared through a maize field. They short in the air and the passengers escaped but they managed to arrest the driver and collected an assortment of items which included foodstuffs.

16. They also managed to recover other metallic items or weapons which were used in the robbery as well as phones. The rider of the motorbike was the 3rd Appellant. They handed him over to Matunda police station after he had given out the names of the other Appellants.

17. On cross examination he said that he directed the police to his co accused who had apparently escaped. They were later arrested at Mitume area in Kitale.

18. **PW6 JOHN KOIMA** from Kitale District hospital examined PW2 and produced the P3 Form which he had filled. He said that from examination her face had injuries and had a cut on her buttocks. Her left eye as well as her neck had injuries too. He said that blunt objects had been used. He produced the P3 Form.

19. **PW7 GEOFFREY WAFULA SIMIYU** testified that he was a boda man. On 22/7/15 at around 6.00 pm he went for a drink and the 3rd Appellant also known as **Starehe** told him that his motorbike had problems and he borrowed his. He was accompanied by 2 men. They did not turn up and at 2.00 a.m he received a call and he was asked whether the motorcycle was his. He was told that the same was in Matunda. His motor bike was Reg. No. KMDN 579D and that of the 3rd Appellant was KMDK 658B.

20. He explained to the police that he had lent his motorbike to the 3rd Appellant and their chairman also confirmed that position. The other Appellants were arrested and they were the two he had seen with the 3rd Appellant. He was released and the police brought the appellants to court.

21. **PW8 SGT. GEORGE KAMARICH** from Mitume AP Camp said that he received a call from Sgt Chepkonga who was at Matunda with a suspect, the 3rd Appellant. He said that the suspects had mentioned LUKE WEKESA, EDWIN OMUSE and GILBERT MAKAYI who lived at Mitume as his accomplices. He went with his friends and arrested the suspects. They were assisted by other riders.

22. The 1st Appellant was found with a techno phone in his pocket. He was brought to the police station and booked.
23. **PW 9 APC STEPHEN MULI** also from Mitume AP Camp also participated in the arrest of the 1st and 2nd Appellants. They found the 1st Appellant with the Tecno phone.
24. **PW10 STANLEY KORIR APC**, based at Kitale District commissioners' office participated in the arrest of the 1st and 2nd Appellants. He said that the 1st Appellant was arrested and when searched a phone was found in his pocket.
25. **PW11 C.I.P STEPHEN OLOO** the OCS Kitale police station conducted an identification parade on all the Appellants. The Complainants identified them at the parade and he signed the parade forms which he produced. When cross examined he denied that the witnesses had seen the Appellants before the parade.
26. **PW12 PC BENJAMIN KOONO** from the CID office Kitale produced the set of photographs of the assorted items recovered by the police.
27. **PW 13 CPL CATHERINE WAMUGANDA** from the CID Office Kitale was the Investigating Officer. She testified that the appellants were brought to the office by AP Officers having been intercepted along Eldoret road with goods suspected to have been stolen. She identified the assorted items recovered from the 3rd Appellant as well as the motorcycle used. She produced the exhibits as pieces of evidence.
28. **PW14 CIP SIMON MISIGO** testified and produced the 1st Appellant's confession which he wrote on 27/7/15. In the said confession the Appellant told the said officer how they participated in the robbery. According to the witness the same was obtained voluntarily.
29. All the three Appellants were placed on their defences and they gave each unsworn testimony denying the charge.
30. The 1st Appellant **LUKA WEKESA MUMERO** testified that on 22/7/15 he was not found with the stolen property. That he was home on 23/7/15 when he went to buy milk and to clean his house. The police raided a changaa den and people were running away. He was also arrested and taken to Kitale police station. He said that they were looking for one Wafula but he gave them his name. He was later charged with the offence of robbery.
31. The 2nd Appellant **EDWIN OMUZEE** equally denied the charge and said that on 23/7/15 he left for work when he saw two people who were police officers and who arrested and took him to Kitale police station. While at the office he saw someone who alleged that he had robbed him. He was assaulted. At 2.30 pm he was taken to an identification parade and the person he had seen earlier identified him.
32. The 3rd Appellant **ROBERT KWOPA** also denied the charges. He said that he was on duty on 22/7/15 and he got a customer for Eldoret and he took him. He was arrested at Matunda on his way back home. He slept at the said station till 8am the following day when he was taken to Kitale police station. Strangers were brought to him and he was accused of stealing with them.

ANALYSIS AND DETERMINATION

33. The court has carefully perused the proceedings as well as the written submissions by the parties. The court is aware that at this stage it is required to evaluate afresh the evidence with a rider that unlike the trial court it did not have the benefit of seeing the witnesses testify and their demeanour. (*See Okeno Vs. Rep. (1972) EA 32.*)
34. The grounds of appeal raised by the Appellants generally attacks the evidence presented by the prosecution and they submit that the same did not meet the threshold to have them convicted. They complain of the inadequate evidence and that the key witnesses were not call.
35. In their submissions, they have added other grounds which are to do with identification. They said that given the obtaining circumstances that night the complainants were not in a proper position to identify them as there was insufficient lighting. They said that the identification parade was not properly conducted. Finally, they said that the sentence was illegal and that the court should consider the Supreme Court decision in the case of *Muruateteu*.
36. The learned state counsel opposed the appeal and submitted that all the ingredients of the charge had been proved and that the court should not disturb the findings of the trial court.
37. The decision in the case of **JOHANNA NDUNGU VS. REPUBLIC CRIMINAL APPEAL No. 116 OF 1995**, echoed the provisions of Section 295 of the Penal Code which sets out the ingredients of the offence of robbery with violence. The court stated that for the offence to be proved the offender ***must be armed with dangerous offensive weapons; in a company of more than one person; if at or immediately after the time of the robbery, he or she wounds, strikes, beats, or uses violence to any person; the act of stealing and identification.***
38. There was no doubt that both the Complainants were attacked and robbed on the material day. The 2nd Complainant Chebet was injured and this was proved by the production of the P3 form by PW4 as well as her testimony.
39. The people who attacked them were many and they stated that they were three. They describe how they were attacked by the assailants who were riding on a motor bike. They were armed with crude weapons namely metal bars and other assorted items.
40. The same assailants stole from them in particular their bags which had mobile phones and other assorted items.

41. Were the assailants the appellants in this case.? They have each denied that they were at the scene and in their unsworn evidence they said that they were not. To answer this the court must look at the question of identification.
42. Both Complainants said that they were able to identify the Appellants from the lights from the passing vehicles. They said that the scene was near the road and thus the vehicles were passing although none of them stopped.
43. This line of evidence is buttressed by the evidence of PW2 who said that the first Appellant pinned her down and he stabbed her on the buttocks. On cross examination PW2 said that the 3rd Appellant was the rider of the motorbike.
44. Even if the evidence of the Complainants was not sufficient the other witnesses corroborated their evidence.
- PW 4 for example owned the motor bike Reg. No. KMDK 658E which was given to the 3rd Appellant whom she had employed. She produced the documents to prove that she owned the same.
45. The evidence of PW5 APC JAPHET OMBIMA was not controverted. He was travelling from Nairobi that early morning with his workmates and on the way they saw some motor cycle with three people. They became suspicious and challenged them to stop but they instead took off. The passengers escaped and the rider, the 3rd Appellant, was arrested and the items they were carrying recovered. He was then taken to Matunda police station where interrogation began and the rest of the appellants arrested after the 3rd Appellant gave their names to the police.
46. PW7 gave his motor bike to the 3rd Appellant who was with the Co-appellants. He told the witness that his motor bike had problems and that is why he was borrowing his. The next thing he had was that the said motor bike was at Matunda police station. The witness identified to the police the rest of the Appellants namely No.1 and 2.
47. PW 8 and his police friend went looking for the Appellant 1 and 2 and they arrested the first Appellant with the assistance from other boda boda riders. Upon searching him, they found a mobile phone which belonged to the Complainants.
48. I have also seen the evidence of PW11, **CIP STEPHEN OLOO** who conducted the identification parade. The court has also perused the parade forms produced and the evidence as well as the submissions by the Appellants in regard to this item. The Appellants were well identified and I do not find any fault on the way the parade was conducted. The Appellants signed the parade forms and I do not see any evidence of breach of any of the identification parade rules and the procedures.
49. The evidence of **PW14 C.I.P SIMON MISIGO** on the confession by the 1st Appellant was very material to the Respondent's case. He said that the 3rd Appellant who was nicknamed *Starehe* was riding the motorcycle. This corroborates the evidence of PW 5 who arrested the appellants after conducting another theft at Nangili. The confession was made without any coercion or persuasion for any reward.
50. The unsworn evidence by the three appellants was of no probative value especially the fact that they did not permit cross examination.
51. The upshot is that this appeal is not meritorious. Though the incident happened at night and the lights from the passing vehicles aided the Complainants to identify the assailants, the parade identification crowned it all. Further, the intervening factors namely the arrest by PW5, which was coincidental triggered the arrest of the Appellants. It cannot be true that the 3rd Appellant was simply coming back from Eldoret and he was arrested for nothing.
52. The confession by the 1st Appellant was voluntary and without any force or coercion and it was done by an Inspector of police as required legally. In essence the sequence of events led to the arrest of the Appellants. The Complainant's items were recovered in the custody of the Appellants.
53. As the appeal is dismissed one other issue that merits consideration is sentencing. The appellants were each granted an opportunity to mitigate and which they did. The court passed appropriate sentence, namely death. However, taking into consideration the decision in the now famous case of **FRANCIS KARIOKO MURUATETU & OTHERS VS. REPUBLIC. (SOCK) 2016**, the sentence of death may not be the only efficacious punishment. The court granted the discretion to the courts to consider other discretions.
54. In this regard and considering the circumstances of this case, this court is inclined to tamper with the sentence. It appears from the evidence on record that the Appellants were habitual thieves noting that when they were apprehended they were coming from another incident at Nangili after stealing in Kitale.
55. Consequently, the sentence of death is hereby set aside and substituted with custodial sentence of 12 years' imprisonment of each of the Appellants from the date herein.
56. The appeal is otherwise dismissed.

Dated signed and delivered in open court at Kitale this 18th day of December, 2019.

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H. K. CHEMITEI

JUDGE

18/12/19

In the presence of:-

Mr Omoori for respondent

Appellant – present

Court Assistant – Silvia

Judgement read in open court