



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL CASE NO. 53 OF 2015

DOMINIC DIDA ALIAS MUSA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The appellant and his young brother were charged with the offence of robbery with violence contrary to section 295 as read with section 296(2) of the Penal code. The particulars of the offence in the first count were that the appellant on the night of 22nd August 2013 at Bula Bado area in Isiolo county, jointly with others not before court, while being armed with a dangerous weapon/offensive weapon namely a gun and a sword robbed ROSEMARY MUKORIUNGU of a water pump machine valued at Ksh 54,000/= and immediately before or immediately after the time of such robbery threatened to use personal violence to the said ROSEMARY MUKORIUNGU.

The particulars of the offence for the other counts were as follows:-

Count II

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 295 AS READ WITH SECTION 296 (2) OF THE PENAL CODE. 1. DOMINIC DIDA ALIAS MUSA 2. RAPHAEL EKWAM LOPIRA: On the night of 23rd day of August 2013 at Bula Bado area in Isiolo County, jointly with others not before court, while being armed with a dangerous weapon/ offensive weapon namely a gun and sword robbed MARGRET NDOMO of cash money Kshs 4,500/= and immediately before or immediately after the time of such robbery beat the said MARGRET NDOMO.

Count III

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 295 AS READ WITH SECTION 296 (2) OF THE PENAL CODE. 1. DOMINIC DIDA ALIAS MUSA 2. RAPHAEL EKWAM LOPIRA: On the night of 23rd day of August 2013 at Bula Bado area in Isiolo county, jointly with others not before court, while being armed with a dangerous weapon/offensive weapon namely a gun and sword robbed ANTHONY WAITITU of his wallet containing National ID waiting card, cash money Ksh 4,400/= and immediately before or immediately after the time of such robbery threatened to use personal violence to the said ANTHONY WAITITU.

Count IV

ATTEMPTED ROBBERY WITH VIOLENCE CONTRARY TO SECTION 297(1) AS READ WITH SECTION 297 (2) OF THE PENAL CODE. 1. DOMINIC DIDA ALIAS MUSA 2. RAPHAEL EKWAM LOPIRA: On the night of 23rd day of August 2013 at Bula Bado area in Isiolo county, jointly with others not before court, while being armed with a dangerous weapon/offensive weapon namely a gun and sword assaulted PETER KINYA with intent to steal from him and immediately before or immediately after the time of such assault beat the said PETER KINYUA.

The trial court convicted the appellant on all the counts and sentenced him to suffer death. The grounds of appeal are:-

1. That, the trial Magistrate faulted in matters of law and facts by not observing that the charge sheet was defective.
2. That, there was no positive identification.
3. That the trial Magistrate relied only on voice identification.

4. That there was no clear evidence of view of the weapon alleged to have been used.
5. That the prosecution case was not proven beyond reasonable doubt.
6. That the Accused was not represented by an Advocate.
7. The appellant was kept in police custody for more than 24 hours.

The appellant submit that the evidence of PW1 does not prove that any robbery took place. According to PW1, she argued with the robbers. It is submitted that if there was any robbery there could be no time for arguments. Victims do follow orders of the robbers as there are normally threats and weapons. It is further submitted that the charge sheet differs from the evidence. PW7 testified that the appellant was booked for the offence of burglary. The charge is for robbery with violence. The appellant also contend that the circumstances were not conducive for positive identification. It is difficult to recognize or identify someone through the help of moonlight. It is also not easy to confront armed robbers with bare hands.

The appellant submit that the trial court relied on voice recognition and walking style to convict the appellant. Most voices resembles and the limping style of walking for the appellant was not demonstrated in court. The robbers were using the torches so they did not direct the torch light to themselves. One of the robbers had covered his face. Nothing was recovered from the appellant.

Mr. NAMITI for the state opposed the appeal. Counsel submits that PW1 identified the appellant through the help of moonlight. She recognized one tall and one short robber. One robber had a Panga and the other one had something which looks like a rifle. PW5 was with PW1. She knew the appellant and his brother since childhood. They went to the same school. PW2 narrated how the robbers used her son to make her open the door. PW2 and PW3 identified the appellants. The attackers took time with their victims. The issue of identification and recognition was beyond doubt.

This is a first appeal. The evidence adduced before the trial court has to be evaluated afresh and this court make its own conclusions. PW1 ROSEMARY MUKORIUNGU was the complainant in count 1. On 22/8/2013 at about 10:00pm she was in her house sleeping with PW5. She heard someone opening her door. She asked who it was and a male voice responded. She went to the door and found the person who was there. There was moonlight. She was asked to go to bed. There were two people. One of them had something which looked like a firearm. Two girls stood behind her. One of the thieves went to a store where there was a generator. They took the generator and walked away. The following morning she learnt that her neighbours had also been robbed. The case was reported at the AP Camp and later at Isiolo Police station.

PW2 MARGARET NDOMO was the complainant in count II. On 22/8/2013 at about 1:00am she was asleep. Young men went there and woke up her son. They took her son to her house and asked him to call her to open the door. She opened the door and was hit on the face. The thieves asked for money. She gave them Kshs 5,000. Her son was ordered to go back to his house. PW2 was asked to close the door. The following morning she reported at the village elder. The village elder was also robbed. They reported at the A.P Camp.

PW3 ANTONY WAITITU is PW2's son and was the Complainant in count III. He testified that he is a Boda boda operator. On 22/8/2013 at about 12:00am he was at home. Some people went there clamming to be Police Officers. He opened the door and saw two people. One had a firearm and the other one had a Panga. The robbers took his torch and ransacked his house. He was robbed of Kshs 4,500. He was taken to his mothers' house where they took Ksh 10,000/=. He went to his room and slept. The matter was reported to the Police the following day. He identified the appellant in the manner he was walking and his height. The appellant's face was covered. He went to school with the appellant. He also identified him by his voice.

PW4 PETER KINYUA is the village elder and the complainant in count IV. On 22/8/2013 he was at his home at about 11:00pm. People opened his door. He armed himself with a Panga. One short robber who was armed with a sword entered. He hit a sack which had Sorghum. One person had a firearm. He argued with them for a long time. Nothing was taken from him. The following morning his neighbors told him that they had been robbed. He was not present when the appellant was arrested.

PW5 FRIDA KATHURE was a secondary school student. She was with PW1 that night. PW1 is her grandmother. She heard the appellant's brother arguing with her grandmother. They were able to recognize the appellant's brother's voice as he asked if she wanted them to kill her. They entered the house and closed the door. While inside they hear the robbers opening the store where there was a generator. They got out of the house and found that the generator had been stolen. On 23/8/2013 the owners of the generator (PW6) went to their home together with the appellant's brother and asked if he was one of the robbers. PW1 identified him as one of the robbers. The appellant's brothers had a firearm. She knows the appellant as he is her neighbours. The appellant was dressed in clothes which looked like Police uniform. The appellant was arrested the following evening.

PW6 ALI IBRAHIM ADEN is a farmer. He irrigates his plants through water from Isiolo River. He had left his generator at PW1's house who lives near his farm. He had bought the generator for Ksh 54,000/=. PW1 told him that the generator had been stolen by the appellant and his brother. He peeped at the house of the appellant's brother but did not see the generator. In the evening, they arrested the appellant and his brother. They searched the appellant's house but nothing was recovered. The appellant's were taken to Isiolo Police station.

PW7 Corporal MARK ARAO was stationed at the Isiolo Police Station. On 24/8/2013 at about 8:00am he found that the case had been reported on 23/8/2013. He investigated the case and had the appellant charged with the offence. He visited the various places where the robberies had occurred. The appellant had initially been booked for burglary. The generator was not recovered.

In his unsworn defence, the appellant denied committing the offence. He testified that on 22/8/2013 he slept at his home. In the morning he went to the shop where he was working. He went back home at 6:00pm. While at home, five people went there and took his brother who was the second accused. PW6 was with the people who took his brother. They then told him that they could not leave with the young one and

leave the older person. He was also arrested and taken to the Police Station. He was later charged with the offence.

The appellant's younger brother Raphael Ekwam Lopira gave sworn evidence. He testified that he was a standard five student. On 23/8/2013 he went home from school and found his mother was not at home. Three people went there and arrested him. He lived in a different house from where the first accused lived. He was assaulted and taken to Isiolo Police Station. The people passed through his brother's house and they arrested him too. He was 16 years old.

DW3 ALIMLIM EKIWA is the appellant's mother. She testified that the appellant's brother was a primary school student. He arrived home from school and went to play. He was brought back by people with his hands tied. She was told that the boy had stolen. The boy was bleeding. He was taken to the Police station.

The issue for determination is whether the prosecution proved its case beyond reasonable doubt. The conviction of the appellant and his brother was based on their identification. According to the evidence of PW1, PW3 and PW5, they identified the appellant through his voice and walking style. No voice identification Parade was conducted. The evidence shows that the case was reported at the Isiolo Police Station on 23/8/2013. There is no evidence that the appellant's name was given to the police by the reporters.

The prosecution evidence is to the effect that it is PW6 who arrested the appellant; PW6 took the appellant to PW1'S house. It is the evidence of PW6 that the appellant was identified at PW1'S house. This form of identification is quite dangerous and a conviction should not be grounded on such form of evidence. The evidence on record does not prove that the appellant was positively identified. The evidence of PW1 and PW5 is that they were told to go and sleep. The generator was stolen while they were inside their house. PW2 MARGARET NDOMO did not identify any of the robbers. PW3 testified that the appellant had covered his face. He identified the appellant in the manner he walks. PW3 did not make any report to the police that he identified the appellant. The arresting of the appellant is not due to PW1's report to the Police or due to PW3's report.

According to PW6, PW1 told him that the generator had been stolen by the appellant and his brother. It is not clear why PW6 had to take back the appellant's brother to PW1 for identification. The manner in which the case was investigated leaves doubt on the prosecution case. The charge sheet shows that the appellant was arrested the following day. The police were not looking for the appellant to arrest him. The appellant was initially booked with an offence of burglary. This changed to robbery with violence.

From the evidence on record, I do find that the conviction is not safe. The prosecution evidence does not prove the case beyond reasonable doubt. The evidence seems to suggest that the robbers were quite friendly to their victims. PW1 and PW5 were told to go and sleep. PW3 was taken to his mother's house and was released to go and sleep. PW4, the village elder argued with the robbers. The robbers wanted him to take them to a neighbor but he refused. He was not assaulted by the robbers. He simply argued with them and the robbers left.

From the evidence on record, I do find that the prosecution did not prove its case beyond reasonable doubt. The appeal is merited and is hereby allowed. The appellant shall be set at liberty unless otherwise lawfully held.

S. CHITEMBWE

JUDGE

Dated, Signed and Delivered at Meru this 18th Day of January, 2018

A. MABEYA

JUDGE