



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BOMET**

**CRIMINAL APPEAL NO. 8 OF 2017**

**COSMAS KIPYEGON KORIR.....1<sup>ST</sup> APPELLANT**

**JOSEPHAT NGETICH KIPKURUI.....2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the conviction and sentence in***

***Bomet Principal Magistrate's Court No. 1063 of 2015)***

**JUDGMENT**

1. The two appellants COSMAS KIPYEGON KORIR (1<sup>st</sup> appellant) and Josephat Kipkurui Ngetich (2<sup>nd</sup> appellant) were convicted and sentenced to suffer death for the offence of robbery with violence contrary to S.295 as read with S.296(2) of the penal code.

2. The particulars being that on the 27<sup>th</sup> day of July 2015 at Sachora-Masare road within Bomet County, jointly, while armed using a motorcycle registration number KMDQ 294T robbed Michael Kibet Langat Kshs.14,700/=, 1 ½ kg of meat, ½ kg of sugar of the value of Kshs.300/= immediately after the time of such robbery assaulted him by knocking off his four upper teeth.

3. The grounds of this appeal are:

(1) The learned trial magistrate admitted unsubstantiated evidence.

(2) That the learned trial magistrate erred in law and in fact by convicting on the basis of uncorroborated evidence of one witness.

(3) That the prosecution case was ill founded and preposterous.

(4) That the trial court relied on an identification which was not properly done.

4. This being the first appellate court it has the duty of considering and re-evaluating the evidence on record so as to arrive at its own conclusion bearing in mind that it did not have the opportunity to observe the demeanour of the witnesses – Okeno –v- R 1972 EALR.

5. **Brief facts**

The complainant Michael Kibet Langat (PW1) testified that on the 27<sup>th</sup> day of July 2015 at about 7.30 p.m he boarded a boda boda (motorcycle) at Samora trading centre. He was joined by Josephat (2<sup>nd</sup> accused) a man he knew before as he used to supply him with building materials. They proceeded to Keboriot Primary School whence Josephat complained on how the rider appeared not to understand the terrain well. Josephat took control of the motor bike. After a short while the 2<sup>nd</sup> appellant turned against him and demanded to be given money. He produced a hundred shilling note thinking that it was money for fuel. The second accused said that was not money and proceeded to beat him. He hit the complainant on the head with a hard object. They struggled and he was hit on the mouth and his three teeth fell off. He ransacked his pockets and took Kshs.14,800/=. He had bought sugar and meat which items were also taken. The second accused started the motor bike. The first accused jumped on to it and they sped off. He called for help and members of public responded and took him to Kapkasosio clinic where he was treated and later went home. The following day he went for treatment at Longisa Hospital and later reported the matter at Bomet Police Station.

Corporal Stephen Mutunga (PW2) was the investigating officer in this case. He arrested the 1<sup>st</sup> appellant in the month of August 2015 at Bomet Stage after he had gone into hiding. He later arrested the 2<sup>nd</sup> accused at Kaptagir-Molo area close to four months after the incident. This was through the efforts of the owner of the motor bike.

A P3 form was produced by Julius Magut (PW4). It showed that the complainant had lost 4 upper incisor teeth. He had a cut wound on the upper mouth, cut wound on the left side of the face and tenderness on the left side of the groin. Swelling and bruises on the left hand. The degree of injury was assessed as harm.

Both appellants gave unsworn statements. The first appellant Cosmas Kipyegon testified that he deals with the sand business and was arrested for an offence which he did not commit. The second appellant also testified to be a sand collector and was at Kiptagit and was informed that his friend was in cells for having assaulted the complainant.

### **The law**

The appellants were charged with the offence of robbery with violence C/S 296(2) of the penal code.

The definition of robbery is found in S.295 of the penal code which provides: "Any person who steals anything and, at or immediately before or immediately after the time of stealing it uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained is guilty of the felony termed robbery".

S.296 (2) provides:- 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 persons, he shall be sentenced to death".

The ingredients of robbery with violence are as enumerated above and as set out by the court of appeal in the case of Oluoch -vs- R 1985(KLR) where it was held "that the offence of robbery with violence is committed in any of the following circumstances.

- (a) The offender is armed with any dangerous and offensive weapon or instrument.
- (b) The offender is in the company with one or more person or persons.
- (c) At or immediately after the time of the robbery the offender wounds, beats strikes or uses other personal violence to any person.

In the present case the complainant was hit with a hard object which

He does not seem to have seen clearly.

Secondly, the complainant testified to have been robbed by two persons, the 1<sup>st</sup> and 2<sup>nd</sup> appellant.

Thirdly, the complainant was beaten and sustained injuries on the mouth losing four teeth.

### **Identification**

The complainant took a boda boda at a trading centre. The time was around 7.30 p.m. He testified that there was some light from the nearby shops. They haggled over the fare with the boda boda rider and agreed at kshs.50/=.

The second appellant arrived at the scene. This is a man the complainant knew before as he used to supply him with building materials. They travelled together for a considerable distance before the 2<sup>nd</sup> appellant turned against him beat him up and stole his money. The two appellants were very close to the complainant as they were riding together. He had the opportunity of seeing them at those close quarters. They were together for a considerable period and time. As for the second appellant he was known by the complainant before.

I am satisfied that the circumstances obtaining at the time were ideal for positive identification and recognition.

### **Evidence of a single witness**

In the case of ABDALLAH WENDO -VS- REPUBLIC (1953) 20 EACA the Court of Appeal held:- subject to certain exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence whether it be circumstantial or direct pointing to guilt from which a Judge or Jury can reasonable conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error".

I have perused the judgment of the learned trial magistrate. At page 58 she did warn herself on the danger of convicting an accused person on the basis of the evidence of a single witness.

### **Common intention**

S.21 of the penal code provides:- when two or more persons from a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose each of them is deemed to have committed the offence”.

In the case of R. Tabula Yanka (1943) 10 EACA, the East Africa Court of Appeal held:-To constitute a common intention to prosecute an unlawful purpose. It is not necessary that there should have been any concerted agreement between the accused prior to the attack their common intention may be inferred from their presence, their action and the omission of any of them to disassociate himself from the assault”.

In the present case, the complainant approached the 1<sup>st</sup> appellant who was a boda boda rider. They agreed at a fare of Kshs.50/= to be taken to an agreed destination.

The second appellant came on board and they rode together the three of them. The second appellant did not pay for the ride. The 1<sup>st</sup> appellant did not refuse him to ride in his motor bike. There must have been some understanding between the 1<sup>st</sup> and 2<sup>nd</sup> appellant.

The 2<sup>nd</sup> appellant proceeded to beat the complainant and stole from him the money he had. At no time did the first appellant shout for help or in any other way try to help his passenger(complainant). After the assault and robbery the 1<sup>st</sup> and 2<sup>nd</sup> appellant rode away together.

The 1<sup>st</sup> appellant did not disassociate himself from the attack. The two appellants had a common intention of assaulting and stealing from the complainant.

I am satisfied that all the ingredients of robbery with violence were proved beyond reasonable doubt. The conviction was safe and its upheld.

There will be a mention for direction on the issue of sentence on 18<sup>th</sup> May 2018.

**Judgment delivered signed this 30<sup>th</sup> April 2018**

in the presence of the appellants and counsel Mr. Motanya.

**M. MUYA**

**JUDGE**

**30/4/2018**

**25/5/18**

Before Hon. M. Muya – J

CA- Wambany

State

Miss Omondi for the state

Appellants present

Motanya for the appellants

Miss Omondi – I have not seen Mr. Motanya for the appellants

Court- Case to be mentioned on 29<sup>th</sup> May 2018 at Bomet. Notice to issue to Mr. Motanya Advocate.

**M. MUYA**

**JUDGE**

**25/5/18**

**29/5/18**

Coram: Before Hon. M. Muya- J

Barasa for state

Rotich – CA

Matter is for mention

Mr. Motanya for the Advocate absent

Court – So as to give the appellants the benefit of appeal to the High court, in the event, they are dissatisfied with the sentence by the lower court and in view of the decision of the court of appeal in Malindi.

This case is remitted to the lower court for re-hearing on sentencing only.

Mention on 14/6/18.

Notice to issue to Mr. Motanya Advocate.

**M. MUYA**

**JUDGE**

**29/5/18**