



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 85 OF 2015

(From original conviction and sentence in Kitale Criminal case NO. 3362 of 2013 delivered by J.A. Owiti Principal Magistrate on 25/6/15)

LUSURU EWOI MORUKING.....1ST ACCUSED

PETER KOROBÉ KABURU.....2ND ACCUSED

VESUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The appellants were 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 28th day of November 2013 at Chepchoina Settlement Scheme in Trans Nzoia Count jointly with others not before court while armed with pangas, clubs robbed Fred Aiga Ettam of a cell phone make Tecno valued at Kshs 4000 and Gps Machine valued at Kshs 70,000/- all valued at Kshs 74,000/- and immediately after the said robbery assaulted Fred Aiga Ettam.**
2. The second count was **Assault contrary to Section 251 of the Penal Code**. The particulars of the offence were that **on the 12th day of March 2013 at Chepchoina Settlement Scheme in Trans NZOIA County intentionally and unlawfully assaulted Pius Apetole thereby causing actual bodily harm.**
3. After hearing 9 witnesses from the prosecution as well as the appellants defence they were convicted on both counts hence this appeal. They have raised several grounds of appeal as well as lengthy written submissions. The learned state counsel has conceded to the appeal only to the extent that the first count was not proved but the second was hence the charges should have been on the same, namely assault but not robbery with violence.
4. Before considering this appeal it would be appropriate to summarise the proceedings at the trial court.
5. **PW1 Samuel Kipchumba** a clinical officer based at Kachibora health centre produced a P3 form of Pius Opetole the complainant, when he examined him he found that he had sustained soft tissue injuries on the chest, right upper arm and thigh.
6. **PW2 Fred Aiga Ettam** stated that he was a civil servant working as a surveyor and that on 29/11/2013 at around 10 am in the company of Simon Okwako and David Lugale went to Chepchoina phase two to identify boundary between parcels numbers 940 and 941. As they carried out the exercise they were attacked by mob of people upto 20 people who were armed with clubs and pangas. He was hit on the nose and fingers and bled profusely as he defended himself. He managed to limb out of the scene and was taken to Kapkoi health centre. In the processes he lost his phone worth Kshs 4,000/, make Tecno. He also lost a GPC Machine which belonged to the state.
7. He was thereafter taken to Kitale District Hospital where he was further treated and issued with a P3 form.
8. He later identified at Endeless the 1st appellant who was armed with a club that day. Later on 20/1/2014 her participated in the identification parade where he managed to identify the 2nd appellant. He however did not beat him that fateful day.
9. **PW3 John Koima** a clinical officer based at Kitale District Hospital examined Fred Kapkonga and filled the P3 form. The injuries he sustained included injuries on the back and cut wounds on the right hand as well as the left index finger.
10. **PW4 David Okiru Ruguria** a driver with Lands office Trans Nzoia testified also that they went to Chepchoina for official duties. He drove motor vehicle Registration No GK No 281B. He remained in the vehicle as his colleagues went to check the boundaries in dispute. He saw a group of about 20 people approach the vehicle and he ignited the same and moved closer to where Okwako was. He jumped to the

vehicle and took off. He saw the appellant armed with a stick who hit Okwako. They then went to Kapkoi health centre where Okwako was treated. They also found Fred there. They reported to Kapkoi police post and were referred to Kitale District hospital.

11. He was called to Endebess police station for an identification parade. He was able to pick out the 1st appellant before the parade when he saw him while being escorted to the toilet. He did not identify anybody else when the parade was called.

12. **PW5 Simon Wesala Okwako** works with Survey department Trans Nzoia County. On 28/11/2013 he went with other colleagues to Chepchoina Scheme. As they carried out their work a crowd approached them and were armed with pangas and clubs. He was attacked who hit on the back three times but he did not identify them. He rushed to the vehicle and they drove off. He was treated at Kapkoi health centre. He did not identify the culprits. In the process the Global Positioning System (GPS) machine was stolen.

13. **PW6 Martin Wanyonyi** a resident of Chepchoina Settlement Scheme went to the scene when he heard that surveyors were coming as he had a dispute also in respect to his land parcel No 899. As they continued a crowd of people came and attacked them and one Peter Kaburu was among the people who beat him up. He later recorded statement at Endebess police station.

14. **PW7 Pius Apetolee** was also at the scene and he testified that when the surveyor was going on he heard distress calls from some large crowd. They attacked them with crude weapons and he sustained injuries. He recognised the appellants herein as some of the people who attacked them. Infact it was the first appellant according to him who pleaded with others not to attack them. The 2nd appellant beat him severally on the chest and other parts of the body till he lost consciousness. He was later treated and issued with P3 form at Endebess police station.

15. **PW8 C.I. Mames Saoke** carried out the identification parade where the appellants were identified.

16. **PW9 CPL John Kimani** carried out the investigation and recorded statements from the witnesses and preferred charges against the appellants.

17. When put on their defence the 1st appellant gave unsworn evidence denying the charges. He said that on the material day he had gone to Kanyarkwat to purchase a goat which he was to slaughter in his birthday. He was however arrested on 11/12/2013 by the police who escorted him to Endebess police station and later charges preferred against him.

18. The 2nd appellant said that he was an employee at Elgon Orchards ltd and while on duty on 17/1/2014 he was arrested by police officers who escorted him to Endebess police station and later charges preferred against him.

Analysis and Determination

19. I have read the submissions by all the three parties sufficiently. What is not however in dispute is that both complainants were attacked by a rowdy mob when they were to carry out some survey work at Chepchoina Settlement Scheme. Both sustained injuries which were confirmed by the P3 forms produced.

20. The ingredients herein of Robbery with violence must always include either of the following;

1) The offender must be armed with dangerous or offensive weapons or instrument or

2) in the company of more other person or persons and

3) t or immediately before or immediately after the time of the robbery he wounds, beats, strikes or uses any other violence to any person.

21. These seemed to have been done against the complainants. The question however is whether the appellants were part and parcel of the crowd who had formed a common intent of resisting the adjudication on survey work at all costs.

22. PW2 stated that it was the 1st appellant whom he saw on that day. He however later in his evidence stated that he could not describe the people who beat him up. He however saw him being escorted to the toilet. He identified the 2nd appellant at the parade. During cross examination however he said that he was confused but he was however able to identify his attackers before he was attacked. At the parade he only pointed out the 2nd appellant without touching him.

23. PW4 said that he saw a dark, stout man who was armed with stick. He identified him at Endebess police station while he was being escorted to the toilet before he participated at the parade. He however did not identify anybody at the parade.

24. PW5 was unable to identify any of the attackers properly as they took off. On cross examination he only stated that he knew the people who attacked them by appearance only.

25. PW6 however stated that the 2nd appellant beat Alka until he felt on the ground. On cross-examination he said that the people who attacked them were those who bought the land.

26. PW7 stated that it was the 1st appellant who infact pleaded with his accomplice not to beat him up. He however said that it was the 2nd appellant who assaulted him severally.

27. I have emphasized this element of identification to show that there was a mixture of evidence by the prosecution witnesses. It appears that they were not explicitly clear concerning their presence at the scene. At the same time they seemed not unanimous on who assaulted who. PW7 on the other hand absolved the 1st appellant from any blame while blaming the 2nd appellant. In short one cannot categorically state that the prosecution presented a unanimous evidence that the appellants jointly and severally were part of the crowd.

28. More importantly it appears that even at the level of identification, the same was not categorical. Some of them saw the 1st appellant “accidentally” while being taken to the toilet. There was no evidence led to suggest that prior to the intended identification parade they were able to single out the two appellants from the crowd of upto 30 people.

29. In a nutshell I find that it would be very difficult to tie the loose ends left by the prosecution which the court should refrain and I think this informed the state to concede to this appeal by reducing the charge or outrightly allowing the same.

30. In my view, there is every likelihood that the appellants may have been at the scene, but the role played by either of them was not clear as the prosecution witnesses contradicted each other. This should go to the benefit of the appellants.

31. The appeal is therefore allowed, the appellants set free unless lawfully held.

Delivered, signed and dated at Kitale this 11th day of April 2018.

H.K. CHEMITEI

JUDGE

11/4/18

In the present of:

Mr Kakoi for State

Appellant – present

Court Assistant – Kirong

Judgment read in open court.