



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 83 OF 2017

(Being an appeal arising from conviction and sentence

in Kitale Chief Magistrate Court Criminal Case No. 1394 of 2011

delivered by M.I.G Moranga Principal Magistrate on 19/10/2017)

ISAAC KIBET NAIBEI.....1ST APPELLANT

MICAH KIBET.....2ND APPELLANT

DAN CHEBUS.....3RD APPELLANT

VERSUS

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 offence were that **on the 9th day of May 2011 at Cheptantan farm in Trans Nzoia County jointly while armed with an AK 47 rifle robbed Benard Chemeget Ngeiywa a torch valued Kshs 250 and at or immediately before or immediately after the time of such robbery shot and wounded the said Bernard Cheget Ngeiywa.**

2. The appellants have filed this appeal citing several grounds pursuant to their conviction and sentencing to life imprisonment. Before looking at the merits or the demerits of the same it shall be appropriate to summarise the evidence as presented during trial.

3. **PW1 the complainant** testified that he was a watchman at ADC farm and while he was doing his patrol on 9/5/2011 at around 2.00 am he was approached by 3 people who were ahead of him. He flashed his torch towards them and they complained. The intruders wanted to cover him with a coat but he resisted and was pushed. He was then shot on the stomach and the arm. He screamed for help and neighbours came to his rescue. He managed to identify all the three as they were people he knew. He said that the 1st appellant had a panga, the 2nd had a jericane and the 3rd had a gun.

4. He was rushed to Cherengany Nursing home. He told Patrick the police reservist who helped him to the hospital the persons who had attacked him.

5. **PW2 Patrick Juma Yego** a police Reservist testified that at around 3.00 am on 9/5/2011 they were on a patrol within Cholim area when they heard gun shots. They then notified OCS Endeless and rushed to the scene where they found the complainant lying on the ground. They rushed him to hospital and in the process told them his attackers who were Dan, Isaac and Daniel. He reported the incident at Kitale police station on the same date.

6. **PW3 Peter Dera** also a police reservist was with PW2 on the same morning. Similarly he testified that they rushed to the scene where they found him on the ground and bleeding. He said that while at the hospital, he told them the names of the attackers.

7. **PW4 Chrisantus Masinde** a clinical officer from Kitale District Hospital produced the P3 form which he filled on behalf of the complainant. On examination he found that the iliac bone had a fracture on the right penetrating wound to the abdomen with entry and exit points. There were scars small and large intestines. Had deep cut wounds on the right elbow with fracture of ulna bones.

8. **PW5 chief Inspector Charles Koilege** attached to CID Nairobi Ballistic Section produced the ballistic report after examining the 3 cartridges found at the scene. He concluded that they had been fired from an AK 47 rifle.

9. **PW6 CIP Peter Njoroge** was previously OCS Endebess and carried out investigations of the matter with P.C. Simon Maranga. He also recorded statements from the witnesses after receiving the report from PW2. He also produced the spent cartridges which he had ordered that they be examined by the ballistic experts. He preferred charges against the appellants.

10. When put on their defence, the appellants each gave unsworn evidence denying the charge.

11. The 1st appellant explained how he was at home with his family on the night of 8/5/2011 and was arrested on 21/6/2011.

12. The 2nd appellant equally denied the charge and explained that he was hospitalised on 8/5/2011 having been admitted on 28/4/2011 and discharged on 13/5/2011. He was arrested on 21/6/2011 and later charged. He denied the charge.

13. The 3rd appellant denied the charge and in particular stated that his names were Micah Kibet Kisara and not Daniel Kisara. He produced his identity card. He said that he was asleep in his house on 21/6/2011 when he was arrested by the officers.

Analysis and Determination

14. The court has meticulously perused the proceedings herein which apparently had to be undertaken by several Judicial officers courtesy of the delay by the parties herein. The submissions by the appellants have equally been read by the court save that there were no submissions by the Respondent.

15. The duty of this court was well captured by the *Court of Appeal in Nguni Vs Republic (1984) KLR 729* where the court stated inter alia that;

“ The first appellate court must reconsider the evidence, evaluate it itself and draw its own conclusion in order to satisfy itself that there was no failure of justice, it is not sufficient for it to merely scrutinize the evidence to see if there was some evidence to support the trials court's findings and conclusions.”

16. Its clear that the following ingredients as provided under Section 296 (2) of the penal code must be satisfied in the offence of robbery with violence, namely;

1. Offender being armed with a dangerous or offensive weapon or instrument.

2. Offender being in company with one or more other person or persons

3. If at or immediately before or immediately after he wounds, beats, strikes or uses any other personal violence to any person.

17. Any of the 3 ingredients ought to sustain a conviction .

See Munyi Alias Karanja & Another Vs Republic (2005) 1 KLR 441.

18. In the matter at hand i find that all the 3 were established. The report by the ballistic expert coupled with the production of the P3 form corroborated what PW1 stated.

19. It appears that the centrality of the prosecution evidence centered on the question of identification of the assailants. In *Wanunga Vs Republic (1989) KLR 441 the Court of Appeal* stated inter alia that;

“ it is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”

20. In the instant case the complainant testified in his evidence in chief that;

“ I screamed for help and my neighbours came to my rescue I did identify my assailants. I identified the 1st accused by voice. The 1st accused is a stammerer. I identified the 2nd accused and 3rd accused through the spotlight which I had flashed at them I had a spotlight with 7 globes. The 1st accused was armed with a panga, 2nd accused had a jericin in his arms and the 3rd accused was armed with a gun.”

21. He went ahead to state that;

“ I have known the 1st accused for over 10 years. There is a time I arrested the 1st accused with some maize suspected to have been stolen from ADC Farm. I also knew the 2nd accused. I have known him for over 10 years. There is a time I

arrested the 2nd accused while grazing his animals on the ADC farm. I have no grudge with the 3rd accused . I have also known him for a longtime.”

22. On cross-examination by the appellants and even by their counsel when they were recalled, I find the complainant's evidence unshaken. The torch which he had seemed to have been strong and emitted a strong light which enabled him to identify or recognise the assailants.

23. More importantly, the assailants did not take any steps to conceal their identities.

24. The other significant finding is that the complainant immediately after being rescued told PW2 and PW3 that he had been attacked by the 3 persons and that should he not survive the attack they should be held responsible. Lucky enough he survived to tell the story.

25. I have perused the defence tendered by each of the appellants. First of all they all gave unsworn evidence. The prosecution and by extension the court had no chance of cross-examining the 2nd appellant concerning his admission to the hospital as well as whether there was confusion on the 3rd appellant's names. As a matter of fact both the 2nd and 3rd appellant ought to have raised their defence during the substantive hearing of the prosecution case. It cannot be true that the 3rd appellant all along knew that the name on the charge sheet was not his and only raised it at the penultimate stage.

26. Having analysed the entire case as well as the grounds raised by the appellants in the appeal, which in my view a good number of them do not go to the substance of the appeal I find this appeal to be unmeritorious and I proceed to dismiss. The evidence laid down by the prosecution clearly met the ingredients of the charge earlier stated above.

27. On sentencing however and following the decision by the Supreme court in *(Francis Muruatetu & Another Petition NO. 15 & 15 of 2015)* I find that it shall be necessary to review the death sentence meted by the trial court. It must be understood however that there was absolutely nothing wrong with the death sentence as it was rightfully meted against the appellant.

28. I shall grant the appellants the opportunity to mitigate afresh on the question of the sentence and thereafter grant an appropriate sentence in the circumstances.

Orders accordingly.

Delivered, signed and dated at Kitale this 27th day of September, 2018.

H.K. CHEMITEI

JUDGE

27/09/18

In the presence of:

Mr. Kakoi for the Respondent

Appellants 1,2 & 3 – Present

Court Assistant – Kirong

Judgment read in open court.