



## IN THE HIGH COURT OF KENYA AT KAKAMEGA

(CORAM: CHERERE -J)

CRIMINAL APPEAL NUMBER 28 & 29 OF 2013

(CONSOLIDATED)

**IBRAHIM NDIWA.....1ST APPELLANT**

**ISAAC WEPALA.....2ND APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal against conviction and sentence in Criminal Case Number 288 of 2012 in the Senior Resident Magistrate's Court at Butali delivered by S.N.Abuya (PM) on 18<sup>th</sup> January, 2013)*

### JUDGMENT

#### Background

1. **IBRAHIM NDIWA** and **ISAAC WEPALA**, the appellant herein have filed this appeal against conviction and death sentence on a charge of robbery with violence contrary to Section 295 as read with section 296 (2) of the Penal Code allegedly committed on the night of 21st and 22nd April, 2012 against Joash Mulanda Tembo in the course of which Simon Chimengo was killed.

#### The prosecution's case

2. The prosecution called 8 witnesses in support of the charges. **PW1, Joash Mulanda Tembo**, the complainant herein stated that he closed his shop on the night of 21.4.12 and left the watchman Simon Chimengo guarding it. He stated that the following morning, he found his shop broken into and several goods among them 3 bales Tropicana flour, 2 bales chef maize flour, rice 1 sack containing 1 kg packets, 1 carton Tilly cooking fat, suit case with 2 pairs of gumboots, Supermatch cigarettes, 3 crates soda, 2 pairs men shoes, 3 pairs ladies shoes, bicycle parts, 1 tin Toss soap, 12 cartons of Cussons powder, 1 dozen matchbox and hair pieces had been stolen and the watchman killed. He stated that some of his stolen goods were recovered in his absence. **PW3, Leo Maloba Mungal** stated that unknown people broke into his shop on the night of 21st and 22nd April, 2012 and stole various items some of which were recovered in his absence. **PW4 Zachariah Injendi Mualat** stated that some of the stolen goods were recovered on 22.4.12 from in and outside 4 different houses one of which belonged to the 1st appellant and that the 1st appellant was arrested when he went to make a follow up on his wife who had been arrested in connection with the recovered goods. **PW5 Alfred Moses Mualaha** stated that clothes, cloth materials and ½ bundle of wheat flour were recovered from the 2nd appellant's house. **PW6 Josphat Afubwa Mumia** identified the body of Simon Chimengo to the doctor that conducted a postmortem on 25.4.12. **PW7 PC Joshua Loiting** stated he was present on 22.4.12 when some of the stolen items were recovered from some house whose owner disappeared. **PW8 PC Joseph Ngumbao** received the 2nd appellant from PW4 who also handed over to him some of the stolen goods that were allegedly recovered from his house. He stated that the 1st appellant confessed having committed the offence and implicated another who was also arrested and charged jointly with the appellants.

3. Both appellants denied the offences and in a judgment dated 18.1.13; appellants were convicted and sentenced to suffer death.

#### The Appeal

5. The conviction and sentence provoked this appeal. In their separate petitions of appeal, they raised 8 similar grounds which I have summarized into 3 grounds as follows:

- 1) *That they were convicted on a defective charge sheet*
- 2) *That the prosecution case was not corroborated*

3) *That the death sentence is unconstitutional*

6. When the appeal came up for hearing on 7.9.18, Mr. Masheti, learned counsel for the appellants stated that he was wholly relying on the written submissions filed by the appellants on 3.9.18 and on the submission he filed on 7.9.18.

7. Mr. Juma, learned State Counsel opposed the appeal and stated that he was relying on the evidence on record.

**Analysis and Determination**

8. This being a first Appeal, this Court has a duty to evaluate the evidence, analyse it afresh and draw its own conclusion, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify as did the trial Court, and give due allowance for that (see **Okeno v Republic [1972] EA 32**). This duty was aptly stated in the case of **Isaac Ng'ang'a Kahiga v Republic [2006] eKLR** where the Court of Appeal said:-

*“A Court hearing a first Appeal (i.e. a first Appellant Court), also has to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial Court had the advantage of seeing the witnesses and observing their demeanor so the first Appellate Court would give allowance of the same.*

10. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions for the appellants.

11. In dealing with this appeal, I will address the 3 grounds summarized above and one other issued deduced from the submissions as follows:

**i. That they were convicted on a defective charge sheet**

**ii. That the prosecution case was not proved**

**iii. There was no proof of violence or death**

**iv. That the death sentence is unconstitutional**

**Was the charge sheet defective?**

12. The person alleged to have been robbed according to the charge sheet is **PW1, Joash Mulanda Tembo** who was the shop owner. It was his evidence that he only learnt of the robbery the following day when he found his shop broken into, goods stolen and his watchman Simon Chimengo killed.

13. It is clear from the above testimony that PW1 was neither a witness to the robbery nor was he a victim but the property that was stolen was his.

14. The Court of Appeal considered the ingredients necessary in a charge sheet and stated as follows in the case of **Isaac Omambia V. Republic [1995] eKLR**;

*“In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge: Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence”.*

15. The question therefore is, whether the aforesaid defect in the charge sheet caused any prejudice to the appellants as to occasion a miscarriage of justice or a violation of his fundamental right to a fair trial. I think not. Having pleaded to the charge, which contained a clear statement of a specific offence, I am satisfied they were fully aware that they faced a charge of robbery with violence. The particulars in the charge sheet gave further details as to the description of the property stolen, the date, place and the manner of the alleged offence.

16. Although **Section 295** of the Penal Code provides that the offence of robbery with violence is committed when a person steals something and in the process uses or threatens to use actual violence on the victim, in terms of **Section 137 (d)** of the Criminal Procedure code, the name of the complainant need not be provided in the charge sheet. The section provides that:-

*“(d) the description or designation in a charge or information of the accused person, or of another person to whom reference is made therein, shall be reasonably sufficient to identify him, without necessarily stating his correct name, or his abode, style, degree or occupation; and if, owing to the name of the person not being known, or for any other reason, it is impracticable to give such a description or designation shall be given as is reasonably practicable in the circumstances, or the person may be described as a person unknown.”*

17. It is my view that it was sufficient that the person whose property was stolen was called and testified. The victim was unavailable having been allegedly killed during the robbery. The appellants got the opportunity to cross-examine PW1 hence no prejudice was suffered by the mix-up. In any case, the stolen goods, from the evidence, belonged to PW1, and not Simon Chimengo.

18. Again, **Section 137** aforesaid is to the effect that no objection shall be taken to a charge in respect of its form or content as long as it is framed in accordance with the rules enumerated under that section.

**That the prosecution case was not corroborated**

15. It is on record that none of the prosecution witnesses witnessed the robbery. It is also on record that the 1st appellant was not found in possession of any of the stolen items. The link between the 1st appellant and the stolen goods arose from the evidence by **PW4 Zachariah Injendi Mualati** who stated that some of the stolen goods were recovered from in and outside 4 different houses one of which belonged to the 1st appellant. There is evidence that the 1st appellant's wife who was at home when the said goods were recovered was arrested and later released. 1st appellant denied that he was involved in the robbery and it was therefore upon the prosecution to prove that he was the one who took the stolen goods to his house or was aware of their being there a duty it failed to discharge. An attempt to link the 1st appellant by way of confession failed since the alleged confession was not tendered in evidence.

16. I have considered the judgment of the trial court and I find that the verdict that the 1st appellant was one of the persons that committed the robbery, and was found with some of the stolen goods was not supported by the evidence on record and his defence ought to have been accepted.

17. Concerning the 2nd appellant, **PW5 Alfred Moses Mualaha** stated that clothes, cloth materials and ½ bundle of wheat flour were recovered from the 2nd appellant's house. The brand of the ½ bale of wheat flour recovered from him was not identified as either Tropicana or Chef that had been robbed from the shop of the 1st complainant and the 2nd appellant cannot therefore be said to have been found in possession of any of the goods that were robbed. There is however evidence that the 2nd appellant was found in possession of clothes and cloth materials which form part of the goods in the 2nd charge of breaking into a building and committing a felony. Consequently, I find that the offence that was proved as against the 2nd appellant was not robbery with violence but that of breaking into a building and committing a felony and he ought not to have been convicted for robbery with violence.

**There was no prove of violence or death**

18. The offence of **robbery with violence** is committed when robbery is proved and further if any one of the following three ingredients are established:-

**(a) The offender is armed with any dangerous or offensive weapon or instrument, or**

**(b) The offender is in the company of one or more other person or persons, or**

**(c) The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person.**

19. Simon Chimengo who would have tendered evidence in support of the charge of robbery did not testify because it was alleged that he was killed during the alleged robbery. I am referring to the robbery and death of the watchman since none of the ingredients of the offence of robbery were established. There no prove of violence or death during the alleged robbery since the postmortem of the watchman that was allegedly killed was not tendered. It therefore follows that even if any of the appellants had been found with any of the goods stolen from the 1st complainant, the charge of robbery of violence would not have been sustained.

**Is the death sentence is unconstitutional**

20. The Supreme Court in ***Francis Kariuki Muruatetu & Another v Republic & 5 others [2016] eKLR*** did not outlaw the death sentence death penalty under sections 296(2) and 297(2) is not unconstitutional but made it a discretionary death sentence. (See ***William Okungu Kittiny v Republic [2018] eKLR***).

21. From the above analysis, I have come to the conclusion that: -

**1) The appeal by the 1st appellant has merit and it is allowed. His conviction is quashed and the sentence set aside and unless otherwise lawfully held, it is ordered that 1st appellant shall be released and set free forthwith.**

**2) The appeal by the 2nd appellant partly succeeds. His conviction for the offence of robbery with violence is quashed and the death sentence set aside and substituted with conviction for the 2nd count of breaking into a building and committing a felony.**

**3) A charge of breaking into a building and committing a felony attracts a maximum imprisonment term of seven years. The 2nd appellant has already served 5 years and 8 months which in my considered view is a sufficient sentence term. It is therefore ordered that 2nd appellant too shall be released and set free forthwith.**

DATED THIS 19<sup>th</sup> DAY OF September, 2018

T. W. CHERERE

JUDGE

DATED, DELIVERED AND SIGNED AT KAKAMEGA THIS 26<sup>th</sup> DAY OFS eptember, 2018

WILLIAM M.MUSYOKA

.....

JUDGE

In the presence of-

Court Assistant - Erick/Polycarp

Appellant - Present

For Respondent - Mr.Juma