



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 132 OF 2013

(Being an appeal arising from conviction and sentence in Eldoret Chief Magistrate's Court criminal CAE No. 82 of 2012 delivered by F.N. Kyambia Principal Magistrate on 27/8/2013)

MORRIS OTIENO WANYONYIAPPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

1. The appellant was 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 4th day of January 2012 at Junierate Estate Eldoret – East district within Rift Valley Province jointly with others not before court, while armed with dangerous weapons namely harmer and pangas , robbed Onesmus Muchai Njunji of his cash Kshs 980/=, three mobile phones make Nokia 1202, 12800, 1110 respectively, assorted safaricom scratch cards worthy 600/= assorted airtel scratch cards worthy 700/=, a “21 inch” Panasonic T.V. set, a Sony DVD machine, one oilibya gas cylinder and a hand bag all valued at kshs 47,680/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Onesmus Muchai Njunji.**
2. He was convicted and sentenced to suffer death hence this appeal. He has filed several grounds of appeal and before looking at them it shall be worthwhile to sumamrise the evidence as presented during trial.
3. **PW1 Onesmus Muchai Njunji** testified that on the fateful night he was asleep together with his family at their Kapsoya home. At around midnight they were attacked by robbers. He hid in the bathroom but they managed to break the bathroom door and found him there. He was hid on the leg using a hammer. The robbers then stole assorted items as mentioned in the charge sheet.
4. In the process his wife managed to call the police. The appellant was thereafter arrested outside the house by the police and the stolen goods recovered.
5. Later the complainant went to the hospital and after treatment was issued with a P3 form . He said that he was able to identity the appellant with the help of the torch the appellant had as well as from the moonlight.
6. **PW3 Sarah Ng'endo Mungai** the wife to PW1 was equally awoken by the assailants. In the process of their stealing from the house she called the police who recovered the stolen items. She was not however able to identify the robbers as the lights had been put off.
7. **PW3 Ruth Wanjiru Githinji** is employed by PW1 as an Mpesa Attendant. She testified that she was in the house when they were attacked that night. She was forced to give out airtime worth Kshs 1300/= and Kshs 900/= from her bag respectively. She was unable to identify any of the assailants.
8. **PW4 Michael Waweru Njunji** testified that he was asleep in his house and at around midnight he received a call from PW1 concerning the attack. He went to the police at Central station who notified their counterparts at Kapsoya. He went with them and they managed to arrest the appellant who was hiding in a shamba. On being searched they found him with 2 phones. They recovered other items outside the house. He took PW1 to the hospital.
9. **PW5 P.C. Richard Mbithe** attached to Kapsoya police post was on duty that night . He received a call from Central police station and he went to the scene with other colleagues. While he was inside he was informed by those outside that they had arrested one of the robbers.
10. He was searched and they found him with 2 mobile phones and credit cards for Safaricom and Airtel. Outside the house they recovered the assorted items as mentioned in the charge sheet above. He produced all of them as exhibits.

11. **PW6 CPL Philip Etyang** carried out the investigations and preferred charges against the appellants.

12. **PW7 Joseph Chesamai** an officer from Huruma District hospital examined the complainant and filled the P3 form. He found that he sustained injuries on his knee which was swollen and painful. The cause of the said injury was a blunt object.

13. When put on his defence the appellant gave sworn evidence denying the charge. He said that he sells pineapples at Kapsoya Market and on that day he had gone to Keroka to collect vegetables when the vehicle arrived late. He was taken to Kapsoya market where he dropped his wares and while he was heading home he met two people who stopped him. They introduced themselves as police officers. Despite explaining where he came from they handcuffed him and took him to a home where there were many people. He was arrested and taken to Kapsoya patrol base.

Analysis and Determination

14. The court has perused the proceedings together with the submissions herein. The court has also perused the grounds raised by the appellant.

15. Fundamentally, there was no sufficient evidence to show that PW1 and the rest of the family members were able to identify the assailants. Despite the fact that the assailant had a torch, the intensity of the light from it was not fully questioned.

At the same time mentioned of the light from the moon by PW1 and PW2 was not in my view enough to show that they managed to recognise the assailants and more so the appellant.

16. I find that the only connection to the incident by the appellant is the fact that he was found with recently stolen items and specifically at the scene.

17. The evidence by PW3 and 4 clearly placed him at the scene. Why would the appellant be at the scene at that hour? I do not accept the fact that he was found at the road. In fact the appellant did not lead any evidence to show that he was from Kisii that night. Nothing was exhibited to suggest that he had a stall even at Kapsoya market. The appellant did not deny that he was found with two recently stolen phones in which he was not able to offer any explanation.

18. Circumstantially, therefore the prosecution in my view was able to establish case against the appellant. Robbery had just taken place and his explanation as to why he was at the scene at that time and with the two phones was not convincing. In short this appeal is devoid of merit and the same is hereby dismissed.

19. In view of the Supreme court decision in *Francis Mumatetu & Others Versus Republic Petition No. 15 of 2016*, I shall grant the appellant the opportunity of submitting on sentencing afresh and thereafter given an appropriate sentence.

Orders accordingly.

Judgment read, delivered, signed and dated at Eldoret on this 19th day of October, 2018.

H.K. CHEMITEI

JUDGE

19/10/18

In the presence of:

R. Karanja for the Respondent

Appellant – present

Court Assistant – Christine

Judgment read in open court.