



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CRIMINAL APPEAL NO. 99 OF 2017

[FORMERLY ELDORET HCCRA NO 90 OF 2014]

ROBERT ABASS MAITIJAN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the

Principal Magistrate's Court at Eldama Ravine Cr. Case no 397 of 2013

delivered on the 3rd day of March, 2014 by Hon. M. Kasera Ag. SPM]

JUDGMENT

1. The appellant herein was charged with the offence of robbery with violence contrary to section 296 (1) of the Penal Code, the particulars of which were that on the 26th day of March, 2015 at Narasha forest in Koibatek District within Baringo County with others not before the court being armed with a dangerous weapon namely a panga robbed Ernest Kibyego Bittok of his mobile phone make Samsung, one ID card and cash Ksh.1,640/= all valued at Ksh.5,640/=.

2. The appellant aggrieved by the decision of the trial court launched his petition of appeal on the 30th day of May, 2014 stating in his amended grounds of appeal dated 18th September, 2017 that:

1. That the learned trial magistrate convicted me on the prosecution evidence which does not support the charge of robbery.
2. That the trial magistrate failed in law and facts by convicting me on prosecution evidence which was unreliable and incredible.
3. That the trial magistrate failed in law and facts when he convicted me without taking into account the defence I rendered.
4. That my conviction was manifestly unsafe as my fundamental trial rights were violated.

3. The appellant through his written submissions urged the court as follows:

1. Ground 1 and 2 – insufficient and uncredible evidence

The evidence produced by the prosecution is doubtful to support the charge of robbery with violence. It is questionable of how the event took place. The encounter was frightening yet the girl did not scream or call for help. There is nowhere stated in the record that the other 4 men assisted in searching the complainant. The evidence of PW1 and that of PW2 does not point to the events taking place. The witness ought not to be relied on see *Ndungu Kimanyi v. Republic* [1979] KLR 282.

I also contest that the conviction meted upon me was unsafe this can be observed from my arrest. The police do not have on record a report. PW1 stated earlier he was hit by a panga, the police ought to have produced concrete investigation and even touring the scene.

2. Ground 3 and 4 – Defence and fundamental rights.

The trial magistrate when she said giving out the phone as security was a way of being in a hurry to dispose the phone. It is unclear as to whether the prosecution established its case beyond reasonable doubt. The trial court disregarded my evidence, see **Stephen Charo Mavuo v. Republic** [2015] eKLR. The duty of common law is to disclose to the defence all relevant materials which are tendered in to either strengthen or weaken the prosecution case. The prosecution were under duty to disclose to the defence the materials of the case. I went through the trial process without the witness statements. See **Republic v. Stinchombe** [1992] LRC (CRI) 68 SC, my rights were violated as stipulated by Article 50 of the Constitution.

4. Ms. Macharia Ass. DPP opposed the appeal in an oral submission made in court and stated that:

“Miss macharia

Appeal is opposed.

Robbery with violence under section 296 (2) of the Penal Code.

All ingredients of robbery with violence was proved. The appellant was positively identified by PW1 and PW2. The incident took place at 1.30 pm during the day.

Page 7 line 20, that it went on for 48 minutes PW1 was able to identify him. He reported to the police and reported that the accused did not have one upper tooth. PW1 arrested the appellant at the Nubian village while accompanied by his uncles. PW2 who was present corroborates the evidence and PW3 who was present when he was arrested also corroborates the evidence.

Pw1 pointed the appellant leading to the arrest so that it is clear that the appellant had been identified during the robbery and at arrest.

Upon arrest PW5 said at the interrogation the appellant took him to PW4’S shop where he had left a phone as a security.

PW4 who is the owner of the shop confirmed the same that the phone which was Samsung was recovered. The phone was identified by PW1 as the one robbed from him.

The appellant also lead PW5 to his mother’s house where the Panga used during the robbery was recovered.

PW1 and PW2 testified that when the appellant attacked him, he was searched by 4 other men who followed PW2 but could not catch up with her. The appellant in his defence does not deny that he saw PW1 and PW2 at the time of the incident but he alleges that the phone was given by PW1 as security as he had to give him Ksh.1000/=. As PW1 was to give the appellant Ksh.1000/= after the appellant found PW1 and PW2 having sex in the appellant’s shamba.

I urge the court to dismiss the defence as afterthought as the same was never raised during cross-examination by the appellant.

The prosecution has proved the case beyond reasonable doubt. Evidence by the prosecution was consistent with all the ingredients of robbery with violence under to section 296(2) was proved.

We urge that the appeal be dismissed.”

5. The prosecution availed a total of 5 witnesses who gave testimony and stated as follows:

1. “ **PW1 Ernest Kipyegon Bittok**

I do construction as an operator in Frabo, I live in Kabunyot. On 26/5/2013 at 1.30pm I was in church, I called my girlfriend, Faith Jepkemboi I met her at KCC. I escorted her to Morigwa forest we crossed the river towards DFO offices we saw a man seated down we passed him and went on. After 30 meters we saw him emerge with a panga in front of us, he ordered us to stop. He held me by the collar and told me to remove everything that I had. I told him I do not have anything, he told me he would cut my neck. The girl gave him Ksh.50/= he asked me for Ksh.1000/=. He held me by the collar and told me to raise up my hands, I did that, four men came, one put a panga at the back of my head told me to make noise. My girlfriend ran away as she raised alarm some of them followed her they did not get her. Accused took the panga hit my side took the phone and wallet which were in my picket.

I had Ksh.1640 and ID card in the wallet, he took my phone and I asked him for Sim card he said he was turning my cattle. I followed him and he disappeared in the forest. I was there for 48 minutes I went to the house, I did not see Faith again till Monday.

On Monday 27/5/2013 I made a report to the police station in Ravine. I told police that the man had one broken tooth. I went to Kabunyony where I live, I told my friend Sammy what transpired; I sat till 10.00am, I saw accused, he saw me turned and entered the river. I told my uncle to help me look for the accused. I saw accused at 5.00pm followed him to Nubian estate where we arrested him at the cemetery we brought him to the police station. On the way he ran away we chased him till we arrested him brought him to the police station. The police searched him and found him with a red Nokia. He told the police he stole the red phone from a lady, he said he sold my phone to a shop keeper.

Cross-examined by accused

You were lying I was not having sex with my girlfriend in your shamba. I do not have a panga. It is not wrong for a farmer to have panga.

Re-examination

I met accused in the forest walking with faith.

2. PW2 Faith Jepkemboi

I live in Ravine, on 26/6/2013 at 1.30pm I was at home my boyfriend Bittok called me on phone told me to meet him at KCC; he told me to take him to Murigwa. We went through the forest, we saw the accused seated down in the forest, he had a panga. 20 meters he approached us from ahead of us running he held Bittok by the tie as he held his panga on the other hand. He asked him if he had been cut "umewai katwa?" he told Bittok to give him all he had; he told him to give him Ksh.1000/=. I gave him Ksh.50/= which I had, he told me that was no money he threw it to Bittok. He searched Bittok took his phone and wallet, four other people came; one had a panga he put it on the back of Bittok's neck. I ran away as I raised alarm, they did not get me. On 27/5/2013 Bittok called me told me they had arrested the man who robbed him. On 28/5/2013 police called me to the station, I wrote my statement. Bittok had a Samsung phone, it was removed. I had not known accused before that date.

Cross-examination by accused

I did not know the other four people who came. I saw you take his wallet at the scene, I ran away when I saw the four men come. You gave the line to Bittok not me.

3. PW3 Peter Kipyegon

I am an athlete, I live in Kabunyonyi I know Ernest Bittok. On 27/5/2013 in the morning at 8.00am Bittok told me that someone took his phone and wallet in the forest he asked me to help him look for the person who stole from him. At 4.00pm he called me that he had sighted the man. I ran to him, we followed him to the cemetery we arrested him. He told us to leave him to walk, he ran away we chased him arrested him and took him to the police station. He had a red Nokia phone.

Cross-examined by accused

I was assisting him as he is my cousin brother. He had made a report to the police.

4. PW4 Geoffrey Kiplagat

I am a shopkeeper near Equity Bank, Posta road in Joy street groceries for six years. On 26/5/2013 at 7.00pm Robert Abas who is my brother came to the shop, he wanted food for the children; he still owed me some money, I told him it was not possible.

He said he would leave his phone Samsung, I gave him 2kgs sugar, rice 1kg, charcoal 2 tins, flour 2kgs, vegetables total Ksh,600/=. He said he would pay after 2 days so that he takes his phone. The following day 27/5/2013 two police officers came asked if Robert Abas left a phone with me, they said he stole the phone. They took me to the police station to write a statement.

Cross-examination by accused

You gave me the phone as security.

5. PW5 No. 53759 P.C Wilson Mwangangi

I work at Eldama Ravine police station, I have worked for 25 years. I was at the police station when complainant made a report that on 26/5/2013 he was robbed off his phone and wallet Ksh.1640/= ID card. He said he was with Faith going to Murigwo they met accused who was sitting down. He later emerged ahead of them while holding a panga. the complainant said he was able to identify this person and that his one tooth was missing.

On 28/5/2013 at 6.00pm he was found at a Nubian Village, searching him he had a Nokia red phone which someone had reported to have lost the same day. I interrogated accused he said he robbed complainant and left the phone in town as security for shop items which he took. I and Corporal Chebus went to the shop collected the phone. We wrote statement for the shop keeper. On 28/5/2013 we took him out on temporary removal, he gave me the panga which he had.

Cross-examination by accused

That door was open, you gave me the panga from your mother's kitchen. I did not see you raise the panga at the complainant. You took me to the scene, he also took me to the scene."

6. The appellant on his defence as **DW1** gave testimony as follows:

"DW1 Robert Abas Marijan.

I live at Nubian village, I am farmer. On 27/5/2013 on Sunday I was at home trimming Cyprus trees. I was called at 12.30pm that sheep were at the shamba; we had a shamba at the forest. I heard people talk at the shamba, I went there and found the complainant and PW2, they had spread kikoi they were playing sex. As I neared them I told them to stop, the man came to where I was, he told me that we should talk; I told them it was not good for them to do that in the shamba. He said he was giving me Ksh.1000/= so that I keep quiet; I agreed, he told me to go to town. He told me he would leave me with his phone so that he gets the money from M-pesa as I was still looking for the sheep that invaded the shamba. He took his sim card and left me the phone and asked me for my phone number. He gave the number to the girl to save in her phone. I left the forest at 5.30pm, the complainant did not come back. On 28/5/2013 I was called on phone by the complainant, I told him I was at the Nubian field, he came; I was playing with my friends he arrested me asked for the phone I told him the phone was in town with Jeff.

He told me to get him the phone, we came to town, told me to go towards green view as some people were waiting for me. I met three men, they arrested me asked me for his phone took my Ksh.180/= and Nokia phone; they took me to the police station. He said I robbed him of his phone and Ksh.1400/=, ID, ATM card. I asked them for my phone. I was charged with the offence and placed on the cells. On Tuesday the Investigating Officer took me to the CID office. He told me to give him the wallet; they were six people. I told them I found the complainant having sex in my shamba. The IO asked me for the panga, I told him I had no panga. He took me to my mother's house in KCC the kitchen door and the bedroom door were bolted there were no padlocks we entered the kitchen he did not get anything. He told me to enter my mother's bedroom, I told him it is against tradition he open the bolt checked behind the door and took a panga. He asked me why I robbed the complainant and PW2 in my garden. I requested him to allow me to take him to the shamba. On 23/1/2014 I was told my case was withdrawn at the police station, I complained in court three and the magistrate told me to ask the OCS to give me my phone that is all. I did not get my money and phone.

Cross-examination by prosecution

I had not known the complainant and PW2, my shamba is on the forest; there are falls in the shamba where people pass my shamba when they go also go towards Benonin. I could not have seen anyone in the shamba if I was at the road. I took the phone to Jeff on Sunday 27/4/2013 the same day at 7.00pm. I did not run away from them. The shamba is mine the receipt for the shamba, ID and wallet. They left them at the police station. I was not given a record of what I left at the police station.”

7. The trial magistrate considered the issue whether the accused robbed the complainant of his phone and cash, and held as follows:

“Complainant explained to the court how accused in company of others robbed him of his phone and cash in Narasha forest. PW2 Faith who was with the complainant confirmed the incident.

PW3 also confirmed they trailed accused and arrested him he even ran away on their way to police station and he was chased for being re-arrested.

The accused alleged that the complainant gave him the phone as security. This does not come out in his cross-examination on complainant. He simply said complainant was having sex in his shamba.

The accused said the complainant gave him the phone as security on 26/5/2013 it is the same day he gave the phone out to PW4 in exchange for food. This shows that the accused was in a hurry to dispose of the phone.

I have considered this evidence on record, I find the evidence by the prosecution is not shaken by the accused.

Accused did not raise his defence at cross-examination on complainant. I find it to be an afterthought tailored to make up his case. I proceeded to dismiss the case.

I find the prosecution has proved their case beyond reasonable doubt, accused was in the company of other four men. Accused together with another were armed with panga's at the time they robbed complainant. I find that the offence herein is proved.”

Issues for determination

8. The court will consider whether the offence of robbery and the involvement of the appellant with violence was proved by the prosecution beyond the reason for doubt.

DETERMINATION

Proof of the offence of robbery with violence

9. The provisions of the law on simple robbery and robbery with violence are as follows:

i. 295. 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.

ii. 296. (1) any person who commits the felony of robbery is liable to imprisonment for fourteen years.

iii. (2) 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 person, he shall be sentenced to death.

See also *Oluoch v. R* (1985) KLR 549.

10. The use of the panga in the case, even if the panga were held not to be inherently a dangerous weapon was used as a dangerous weapon; although a panga is not an inherently dangerous weapon; it is the use to which the person wielding it puts it that makes it dangerous. In the present case, the panga was used to threaten the complainant with cutting; it was on the evidence shown to have been intended to cause injury and was, therefore, a dangerous weapon. See *Njoroge v. R* (2006) 1 KLR 145, 149. It was, however, not shown that the accused had wounded, beaten, struck or used any other violence on the complainant or any person.

11. However, in robbing the complainant of his mobile phone and money while in the company of a gang of 4 other assailants and using threats to cut the complainant with a panga on his head, the offence of robbery with violence contrary to section 296(2) of the Penal Code was committed.

12. The evidence of the complainant PW1, his girlfriend PW2, the complainant's athlete friend PW3, brother shopkeeper PW4 and the Investigating Officer PW5, detailed a consistent story of the attack by the accused, while armed with a dangerous weapon namely a panga and in the company of four others, when he was robbed of money and mobile phone, which was subsequently recovered from the accused's brother with who it had been deposited as security for food provisions and the arrest of the accused with the assistance of PW3 upon the identification by the complainant.

13. The accused's evidence did not raise a reasonable doubt to the Prosecution case. If the mobile phone had been given by the complainant as a security for the payment of the bribe of Ksh.1000/- to allegedly buy the silence of the accused having found the complainant and his girl friend engaging in sex on his shamba, the matter as pointed out by the DPP and held by the trial court was not raised in cross examination so that is clear appears to have been an afterthought.

14. There was no issue of identification of the appellant, the robbery having taken place during the day and the accused having well identified the accused by his missing tooth to the Police and the accused having led PW3 to the arrest of the accused. Moreover, the identification of the accused is not denied by he accused who confirms that he was with the complainant and his girl friend PW2 save alleging that the two were caught having sex in his Shamba.

15. The allegation that the complainant had called the accused on his phone before his arrest could easily have been demonstrated by reference to the phone call records. Although the accused is not under a duty to prove his innocence, the lack of such evidence removes the opportunity to raise a reasonable doubt on the prosecution's consistent evidence.

Conclusion

16. The evidence of PW1 and PW2 of the theft of the complainant's mobile phone by the accused, while armed with a dangerous weapon and in the company of a gang of four other men and its recovery on the information of the accused from the accused's brother PW3 where it had been given as security for food provisions and the accused's subsequent arrest upon identification by the complainant, leads the court to a finding that the offence of robbery with violence c/s 296(2) of the Penal Code proved beyond reasonable doubt, and I, consequently, dismiss the appeal on conviction.

Sentence

17. In sentencing the appellant, the trial court said:-

“Court: Considers mitigation note. Offence is serious and calls for deterrence sentence. Accused to suffer death sentence as per the law.”

18. The Supreme Court in *Francis Karioko Muruatetu & another v. Republic* [2017] eKLR has since clarified the law that the death sentence is not a mandatory sentence but only a maximum penalty. The trial court's sentence must therefore be interfered with as it was based on a wrong principle of law that the death sentence was mandatory. In exercising, therefore, the discretion on sentencing the court must consider the degree of violence and the value of the stolen items. I do not find the violence in this case to have been aggravated, and coupled with modest value of the stolen items, there does not appear to be any justification for imposing the maximum sentence of death in this case. Pursuant to section 333 (2) Proviso of Criminal Procedure Code, I consider that having regard to the pre-trial detention of the appellant for one (1) year since 27th May 2013 while awaiting conclusion of his case before the magistrate's court, an imprisonment term for **nine (9) years** is an appropriate sentence. The said sentence of imprisonment for 9 years shall begin from **3rd June 2014**, the date of the conviction and sentence in the trial court.

Order accordingly.

DATED AND DELIVERED THIS 28TH DAY OF NOVEMBER 2018.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.