



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CRIMINAL APPEAL NO 15 OF 2018

LEONARD KIMUTAI CHEPKWONY.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Cr. Case no 431 of 2017 Bomet PM's court – Hon. P. Achieng)

JUDGMENT

The appellant herein was sentenced to suffer death for the offence of robbery with violence Contrary to Section 296(2) of the Penal Code.

The particulars were that on the 1st day of May 2017 at around 9:00 pm at Tilangok trading centre in Chepalungu, Bomet County, jointly with others not before the court, robbed Paul Kiprono Mibei Ksh.100/= and a mobile phone make Tecno worth Ksh.1,000/= all of the value of Ksh.1,100/= and immediately after the time of such robbery used actual violence to the said Paul Kiprono Mibei.

This is the first appellate court. It has a duty to evaluate and consider afresh the evidence on record, so as to arrive at its own conclusion – **Okeno V.R 1972 EALR 1972.**

The prosecution in this case called seven witnesses. The defence called one.

Background

The complainant was on the 1st day of May 2017 at about 9:00 pm walking home while in the company of Bernard Kipkoech Terer. Bernard was ahead of him at a distance of about 50 metres. It was at that moment that he was attacked by two people. The Accused cut him on the right hand and the head and took his mobile phone make Tecno of the value of Ksh.1,000/=. Ksh.170/= in cash was stolen from him from his trouser pocket. He had seen the accused at the shops where there were lights but at the scene of attack there were no lights. He told the court that he was not able to identify the other attacker.

Meanwhile Bernard rushed to his rescue and the attackers let him go and went away. Bernard also went away.

The following day while in the company of his brother Samuel Mibei they went in search of the accused who was a neighbour. They also reported the matter to the area Chief. The matter was reported to police. Upon interrogation the accused said that the phone was at home. A young man was send to check for it. It was recovered. It was taken as an exhibit by police.

Richard Too (PW2) testified that on the 1st day of May 2017 at 9:00 pm he was in the shop when he saw the accused go to where the complainant was and pushed him outside.

There were a group of people outside the shop. He did not witness what happened thereafter.

He testified that the two, accused and the complainant are his neighbours. The following day the complainant reported to him that he had been assaulted by the accused and had also lost his phone.

Bernard Terer (PW4) testified to have been in the company of the complainant on their way home. On the way at about 9:00 pm they saw two people on the way. They followed them till they arrived at Tilago shops. The complainant went to the shops to buy some items. While there he heard screams coming from the shops. Upon checking he saw the complainant on the ground being attacked by the appellant. He asked the appellant why he was attacking the complainant. The complainant had cuts on the head, the forehead and the left thumb.

The complainant said that he had lost his mobile phone and Ksh.800/=.

That the following day they called the accused from his home and upon investigation he agreed to show them where the phone was. They sent a young man by the name of Samuel to go and retrieve the phone and it was recovered. The clinical officer who examined the complainant said that he had a cut wound on the head and the right hand. He also had a cut wound on the back of the head. He also had a cut wound on the right wrist which was stitched. He assessed the degree of injury as harm.

In his defence the appellant testified that he is a boda boda rider and that on 1st May 2017 he was not at the scene but had travelled to Dikirr area returning at around 1:00 am. The following day he was arrested, beaten on allegations of having robbed the complainant of his mobile phone.

The Law, Analysis and Conclusion

Section 296(2) of the Penal Code provides "If the offender is armed with any dangerous or offensive weapon or instrument, or is in the company of one or more other person or persons or if at 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.

A perusal of the charge sheet shows that the dangerous or offensive weapon is not indicated.

It is alleged that the appellant was in the company of another person. The incident is said to have taken place outside a shop. The owner of the shop (PW2) testified that he saw the appellant push the complainant outside of the shop. He did not mention the presence of another attacker.

It was alleged that a mobile phone was stolen from the complainant and was later recovered from the house of the appellant.

It is not clear how the phone was recovered.

Evidence by the complainant is to the effect that a young man whose name he did not know was sent for the phone and he went and retrieved it.

This young man was not called as a witness to testify how he retrieved the phone. PW2 testified that he did not know who went for the phone. PW2 was the owner of the shop where the incident allegedly took place outside.

PW4 testified that they sent a young man by the name of Samuel who went and recovered the phone.

PW6 is the assistant Chief of Tilago he told the court they proceeded to the home of the appellant in the company of Village Elders and Youths. They found the phone on the bed of the appellant.

They called the complainant who confirmed that it was his.

From the above it is clear that the recovery of the phone is surrounded by mystery and the circumstances of its recovery are questionable.

What is clear from the evidence adduced before the court is that there was a misunderstanding between the accused and the appellant outside the shops at Tilago and the appellant assaulted the complainant and inflicted him injuries. The degree of injury was assessed as harm. It was not proved that the appellant stole a phone and some cash as alleged.

I find the accused to have committed the offence of assault Contrary to Section 251 of the Penal Code. It is noted that he was convicted on 10th April 2018.

He is convicted on the lesser offence of assault Contrary to Section 251 of the Penal Code and sentenced to three years imprisonment from the time of conviction. The conviction for the offence of robbery with violence is altered and substituted with that of assault.

The death sentence is substituted with the imprisonment term of three years.

The appeal succeeds to that extent.

Judgment delivered and dated and signed this 21st day of December 2018 in open court and in the presence of learned counsel for the prosecution Mr. Wawire. Appellant in person present. Court assistant Rotich.

M. MUYA

JUDGE

21/12/2018