REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL APPEAL NUMBER 5 OF 2015

(From original conviction and sentence in criminal case number 1615 of 2014 of the Principal Magistrate's Court at Kapenguria)

TOM MASOLO...........................1ST APPELLANT

ABDALLAH LOPEYON............2ND APPELLANT

GEOFFREY KIBET......................3RD APPELLANT

VERSUS

REPUBLIC....................................RESPONDENT

JUDGEMENT

TOM MASOLO, ABDALLAH LOPEYON and GEOFREY KIBET, hereinafter referred to as the 1st, 2nd and 3rd appellants respectively, were charged, tried and convicted in the lower court with the offence of **Robbery with violence, contrary to section 296(2) of the Penal Code.**

The particulars of the said offence are that on 26th day of November 2014, at Konyo Market within West Pokot County, the three appellants jointly robbed Cheptoyo Lobaratum of cash kshs.1,000/- and a bag containing clothing and vegetables, all valued at kshs.4,000/- and at or immediately before or immediately after the time of such robbery used personal violence against the said Cheptoyo Lobaratum.

The prosecution case is that on 26th November, 2014 at about 7.00pm PW-1, one Cheptoyo Lobaratum, hereinafter referred to as the complainant, was heading home from Konyao Centre. She was walking carrying a bag containing sugar and a pair of shoes. Ahead of her she saw the appellants. She recognized them as she knew them very well, since their childhood, as they come from the same area. When they got to a certain spot the appellants stopped her. They demanded money from her. She told them that she had no money. The 1st appellant whose name was given as Masolo produced a knife. He stabbed her with it on the right side of the head. They then took her bag and ran away with it. PW—2 who was at the time from Konyao Market, heading home, heard the complainant screaming. He rushed towards her. On the way he met the three appellants who were well known to him as they were from the same village. The sun was setting and there was still some light. The appellants were ransacking the complainant's bag. When they saw PW-2 they escaped with it. PW-2 went to where the complainant was. She was lying on the ground in pain. He tried to speak to her but she was not coherent. The following day he accompanied the complainant to the police station to report the case.

PW-3 investigated the matter. The complainant indicated that she was attacked, injured and robbed by

the appellants whose names she mentioned. PW-2 also gave the appellants names to the said officer.

The complainant was examined on 28/11/2014 at Konyau Health Centre. She had a deep cut on the head. Sharp object must have caused it. Her P-3 form was filled. She was smelling of alcohol that morning and it was observed that she must have drunk the previous night. The degree of injury was assessed as maim.

The complainant assisted the police to trace and arrest the suspects. They were then charged.

When the three appellants were placed on their defence each gave unsworn testimony and called no witness. Each denied the offence and stated how he was arrested.

The trial magistrate evaluated the evidence, found them guilty of the offence, convicted them and sentenced each to death as per law provided. Dissatisfied with the said conviction and sentence, they appealed to this court on the following grounds:-

1. **That the trial magistrate failed to give reasons in his judgment as to why he recorded a conviction.**

2. **That the trial magistrate misdirected himself on the burden of proof.**

3. **That no finding was made on the credibility of the prosecution witnesses.**

4. **That identification parade was not conducted in the matter.**

5. **That investigation was not done in the case.**

6. **That the rights of the appellants during trial were not considered.**

In arguing the above stated grounds on behalf of the appellants, Mr. Bororio submitted that the identification of the appellants was not proper. It was at night and the source of light was not stated. Their descriptions were not given and no identification parade was carried out. On this point he relied on the decision of the ***High Court in Embu, Criminal Case number 44 of 2013 of Fredrick Gitonga Njue versus Republic.*** In the case the court relied on the finding in the case of ***Peter Maina Mwangi and Jackson Kimaru versus Republic, Criminal Appeal number 389 of 2009.*** In this case the court considered that the complainant did not give the description of the 1st appellant to the police before he was arrested and before she identified him when he was brought into the police station. The court was of the view that complainant's evidence ought to have been tested by her first recording of the initial statement indicating whether she could identify her attackers and giving their descriptions. Her ability to identify her attackers should have been tested by an identification parade. Such lacking, the court doubted whether the lower courts would still have come to the same conclusion if considered. On the ground they reversed the decision of the lower courts.

Still on the issue of identification, the appellants relied on the case of ***Awadhi Mubarak versus Republic, o***n night identification.

Credibility of the evidence of PW-1 was challenged on the grounds that PW-2 stated on 28.11.2014 in the morning when she was examined she was smelling of alcohol and must have been drunk the previous night. Appellants argued that during the said attack she must have been drunk. PW-2 also stated that when he talked to her after the attack she was incoherent, which gives credence to the implication that she was drunk during the attack or then.

Lastly, the appellants submitted that their rights during the trial were infringed as they were not given witness statements even after applying for them.

The state prosecutor opposed the appeal. He argued that the case at hand is of recognition rather than

identification, of which makes it more reliable. Unlike in the case of ***Fredrick Githonga Njue***, the evidence of the complainant was well corroborated by the evidence of PW-2. The time the offence took place in the submitted case was at 10.30pm while in this case it was at 7.00pm when the sun was setting and hence not yet dark. The respondents submitted that the appellants were well known by PW-1 and PW-2, were well recognized and there was no need of an identification parade.

On the issue of credibility of PW-1's evidence, the respondent argued that smelling of alcohol does not equal to being intoxicated. The evidence that she must have taken alcohol the previous night was only speculative.

The last ground of appeal that the appellant's rights were infringed during trial for failure to supply them with witness statements was argued by the respondent. Page 6 of the trial proceedings shows that the prosecution had 2 witnesses present. The appellants stated that they could not proceed without witness statements. The matter was adjourned to enable them be supplied with the statements. Before the hearing commenced on 24.2.2015 the appellants indicated they were ready to proceed. This strongly indicates they were aware of their rights to statements and indicated were ready to proceed after they had obtained them. Again before PW-4 offered his evidence, they objected on the ground that they did not have a copy of the P-3 form. The matter was adjourned and the case proceeded on 23.3.2015 after they had been supplied with copies of P-3 form. Respondents submitted that the said proceedings show that they had the statements during trial. The respondent submitted that the conviction was proper and urged this court to dismiss the appeal.

I have considered the issues raised in the appeal and reweighed the entire evidence in the case. The strongly contested issue in the appeal is of recognition of the three appellants by both PW-1 and PW-2. The time of the offence is stated by PW-1 and PW-2 to have been at around 7.00pm. That was at night. PW-1 claimed there was moonlight and the sun was setting and it was not therefore dark. PW-2 stated the sun was setting and it was not yet dark. The two are eye witnesses. They corroborated each other to the fact that the sun was setting and there was light enough to enable them see. The two witnesses come from the same village as the appellants and knew them well before then. PW-1 spoke of them at close range, close enough to have enabled them reach her bag and stab her. She was clear of who of the three assailants stabbed her. She knew the three since their childhood. These set of facts shows that she was able to see them well, and recognize them. The light must have been ample to facilitate such. PW-2 buttresses her evidence as to the source of light, ability to see and to recognize the appellants. He was able to do so. He is an independent witness whose evidence cannot be doubted. PW-3 indicated in his evidence that PW-1 and PW-2 gave the names of the suspects at the police station. PW-1 stated she assisted the police to trace them during the arrest. The facts show firm and reliable evidence of recognition of the assailants by the two witnesses. Doubtlessly the evidence of recognition is more reliable and safer to rely on than that of identification. Failure by police to conduct an identification parade raises no danger to the prosecution well established evidence of recognition of the appellants by PW-1 and PW-2 as the culprits.

The offence took place on 26th November 2014. The complaint was examined on 28.11.2014. PW4 observed that she was smelling of alcohol and must have been drunk the previous night. Previous night is on 27.11.2014 of which was not on the date the offence allegedly took place. Her evidence cannot therefore be doubted on the ground. There is nothing indicating she was drunk on 26.11.2014 at around 7.00pm. Indications by PW-2 that she was incoherent could have been as a result of the said attack and the injury she had sustained.

The lower court's record shows that the appellants were aware of their rights to have prosecution witness statements before trial. They applied for them and the case was adjourned to enable them obtain them. Though it is not indicated they were supplied. Their indication later that they were ready to proceed confirms that they had statement with them. Later still they applied for adjournment to have what they did not have, a copy of P-3 form. Such was allowed and proceeded after it was supplied. I do find that they had statements of prosecution's witnesses during trial.

The evidence was well evaluated by the trial court on ingredients of the offence of Robbery with

violence. They were all well met by the prosecution beyond reasonable doubt. The burden of proof was not shifted at any point during trial to the appellants. I do concede with the state that the conviction is safe and warranted given the evidence on record. The appeal is therefore dismissed.

Judgment read and signed in presence of all the appellants, M/S Chebet who is holding brief for Mr. Bororio for the appellants and State Prosecutor, this 30th May, 2017.

S. M. GITHINJI

JUDGE

30.5.2017