



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 132 OF 2014

DENNIS KOECH.....1ST APPELLANT

ELVIS SANG..... 2ND APPELLANT

VERSUS

REPUBLIC.....STATE

(Appeal from the Judgment of the Chief Magistrate's Court at Nakuru Hon. H. M. Nyaga– Senior Principal Magistrate delivered on the 12th June, 2014 in CMCR Case No. 1151 of 2012)

JUDGMENT

The two appellants namely **DENNIS KOECH** (hereinafter referred to as the 1st Appellant) and **ELVIS SANG** (hereinafter referred to as the 2nd Appellant), have jointly filed this appeal challenging their conviction and sentence by the learned Senior Principal Magistrate sitting at the Molo Law Courts.

The two appellants had been arraigned in court on 1/6/2012 facing a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars of the charge were that

“On the 3rd day of June, 2012 at Boron Village in Kuresoi District within Nakuru County being armed with a dangerous weapon namely Somali sword jointly robbed GEOFFREY KIBET TANUI, a motor cycle Registration Number KMCM 522W make Boxer valued at Ksh 80,000/= and at or immediately before or immediately after the time of such robbery wounded the said GEOFFREY KIBET TANUI”

Both appellants pleaded ‘**Not Guilty**’ to the charge and their trial commenced on 4/4/2013. The prosecution called six (6) witnesses in support of their case.

PW1 GEOFFREY KIBET TANUI who was the complainant in the case stated that on 3/6/2012 at 7.30 pm he was at Seguton stage with his motor bike Registration KMCM 522W waiting for customers.

A fellow boda boda operator called ‘**Kirui**’ came to **PW1** and asked him to ferry two customers to Boror. Since this was the direction of the home of **PW1** he agreed to take them.

The complainant set out with the two clients. Upon arrival at Boror, the two customers alighted. One of them stooped down as if he was getting something out of his socks. Suddenly **PW1** was hit in the jaw. He felt a sharp pain and took off leaving his motor cycle behind. The motor bike was ridden away.

PW1 raised an alarm and residents from a nearby IDP Camp responded. They chased the motor bike and blocked its path. The robbers alighted and ran away. **PW1** who had been injured and was bleeding went to hospital to seek medical treatment.

Later on **PW1** learnt that two men had been arrested in connection with the offence.

PW5 RICHARD KIRUI told the court that he was also a boda boda rider. On 3/6/2012 at 7.30 pm he was at Seguton stage waiting for customers. A man came and asked to be taken to Boror. **PW1** did not want to go in that direction so instead he took the client to **PW1**. **PW1** then left with the customers.

The next day **PW5** heard that the complainant had been attacked. He and other boda boda riders set out to search for the culprits. Near the river they came across 4 people whom they arrested and took to the police station. An identification parade was conducted at which **PW5** identified the appellant.

At the close of the prosecution case both appellants were found to have a case to answer and were placed onto their defence. Each appellant made an unsworn statement denying any involvement in the robbery against **PW1**.

On 5/6/2014 the learned trial magistrate convicted each appellant for the offence of Robbery with Violence. The court then sentenced the 1st appellant to serve 20 years imprisonment whilst the 2nd appellant was sentenced to 25 years. Being aggrieved the appellant's both appealed.

MR. MARAGIA Advocate argued the appeal on behalf of both appellants. **MR. MOTENDE** the learned State counsel conceded the appeal.

On the question of the fact of the robbery there is no doubt. **PW1** narrated how on the material day he ferried two men to Boror. Upon arrival the two customers turned against him and attacked **PW1** with a sharp object. **PW1** ran to save his life leaving his motor bike behind. The two men rode away with the bike.

Later on members of public who responded to the calls for help by **PW1** blocked the path of the bike. The robbers alighted and ran away.

The fact that **PW1** owned a motor bike Registration No KMCM 522W is not in any doubt. **PW1** did produce as exhibits the purchase receipts and ownership documents for the motor bike.

Similarly the fact that **PW1** was robbed off his said motor bike on 3/6/2012 is also not in any doubt. **PW1** had no reason to claim that he had been robbed if no such event actually occurred.

PW2 ZEPHANIA BOWEN was a nursing officer in charge of Kewai Dispensary. He testified that he did examine **PW1** after the incident. He noted that **PW1** had a cut on his check. **PW1** filled and signed the P3 form which was produced in court as an exhibit **P. exb 1**. The evidence of this witness confirms the fact that **PW1** was assaulted and injured on the material day. I therefore find that the complainant was indeed robbed of his motor bike as he has alleged.

The key question in this case is whether there has been a clear, positive and reliable identification of the two appellants as the men who robbed the complainant.

In his own evidence the complainant was not able to positively identify any of the appellant's as the customers whom he ferried on the night in question. The incident occurred at about 8.00pm. It was night time and was therefore dark.

PW1 was honest enough to admit that he did not see any of the two men clearly. In cross-examination **PW1** admitted at page 21 line 19

“There were no lights and I didn't see you well and accused 1 as well The bike headlights were not on”

Thus **PW1** effectively admits that there was no source of light available at the scene.

Despite this admission by **PW1** that he was not able to identify any of the robbers, **PW3 PC LAWRENCE KIOKO** claimed that it was the complainant who identified the appellant's to the police. The evidence of **PW3** directly contradicts the testimony of **PW1**.

PW4 CORPORAL KENNEDY OWINO was the officer who conducted an identification parade involving Dennis Koech (the 1st appellant). In that parade which was conducted at Keringet Police Station on 6/6/2012 a witness '**Richard Kirui**' identified the 1st appellant.

PW5 RICHARD KIRUI was the only identifying witness whose evidence the court relied upon to render a conviction. **PW5** claims that it was he who took the two customers to **PW1**. Those customers later turned out to be robbers. In his evidence **PW5** only refers to '**the man**'. At no time in his evidence did **PW5** identify the 1st or 2nd appellant as the clients whom he took to **PW1** on the night in question.

Further **PW5** did not travel with **PW1** to Boror. He was not present at the scene of the robbery. How then could **PW5** identify the robbers? It is mind-boggling that a witness who did not witness the robbery incident is the one who purports to identify the robber.

In his evidence **PW5** stated that after learning about the robbery he and other boda boda riders began to search for the culprits. They saw 4 men sitting by the river and apprehended them. **PW5** did not give the reasons why these 4 men were arrested. In his evidence at page 36 line 22 **PW5** says

“At Keringet I was called to an identification parade and I identified accused 1 as the one we arrested at the river....”

Firstly having been present when the 1st appellant was arrested it was superfluous to have **PW5** participate as a witness in the identification parade. **PW5** had already seen the 1st accused at the time of arrest so obviously he would point him out.

Secondly **PW5** says that he identified as the '**man we arrested at the river**'. Nowhere in his evidence does **PW5** claim that the 1st accused was involved in the robbery. It is no offence for the 1st accused to have been found sitting by a river.

The evidence of **PW5** was in my view worthless and the learned trial magistrate erred in placing reliance on the identification by **PW5**. Indeed in my view this was a case in which the trial court ought not to have even placed the appellant's on their defence.

In the absence of identification by the 2 appellants by the complainant, the trial court erred in relying on the identification evidence of **PW5**. The conviction of the two appellants was not sound and I have no hesitation in quashing that conviction.

The sentence imposed having no basis cannot stand and I set aside the sentences imposed upon the 2 appellants.

This appeal therefore succeeds. Each appellant is to be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered in Nakuru this 30th day of October, 2017.

Mr. Ombati holding brief for Appellants.

Mr. Motende for DPP

Maureen A. Odero

Judge