



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL NO. 35A AND 35B OF 2017

[From the original conviction and sentence in Cr. Case

No. 7 of 2014 in Narok Chief Magistrate's court; R. v. 1.

Joseph Kipngeno Lelei 2. Peter Kipngeno Bett]

JOSEPH KIPNGENO LELEI1ST APPELLANT

PETER KIPNGENO BETT2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The two appellants have appealed against their conviction and sentence of death in respect of the offence of robbery contrary to section 296 (2) of the Penal Code (Cap 63) Laws of Kenya.
2. The state has supported both the conviction and sentence.
3. The two appellants were convicted on the sole identification evidence of the complainant (PW 1), Lilian Chepkorir Korir. The complainant knew the two appellants before and was able to identify them during that dark night.
4. The appellants exercised their right to remain silent after being put on their defence. They also did not call witnesses.
5. Joseph Kipngeno Lelei has raised 8 grounds of appeal in his petition of appeal to this court. Additionally, his counsel Mr. Kilele has filed a supplementary petition of appeal which contains 10 grounds of appeal. In ground 1, of his petition of appeal, the appellant has stated the unchallengeable fact that he did not plead guilty to the charges. In grounds 2 and 5 of his grounds of appeal, the appellant has faulted the trial court for convicting him on the contradictory evidence of the prosecution witnesses in relation to the event leading to his arrest. In this regard, the evidence of the complainant was that as they walked home from their farm with Beatrice Salat (PW 2), they met 2 men. Her evidence is that she knew both of them as her neighbours. These 2 men had a spotlight which they shone upon them. As a result, the complainant and PW 2 sensed danger and turned to run away. As they were doing so, there was a 3rd man standing right behind them who had emerged from a hideout. This 3rd man tightly held her neck. She recognized this 3rd man as the 2nd appellant, Peter Kipngeno Bett. PW 2 ran away screaming. The 3 men removed the under pants of the complainant and pushed her to the ground. They then

proceeded to assault her badly in order to immobilize her. The 2nd appellant proceeded to forcefully have sexual intercourse with her. After he was satisfied, the 1st appellant followed in raping the complainant. At this point in time she became unconscious. When she regained her consciousness, she found herself at Tenwek Mission Hospital.

6. It is after being admitted in hospital that she discovered her cash Sh. 850/- and a Nokia mobile phone were missing. Upon recovery, she recorded a complaint at Mulot police station naming the 2 appellants as the robbers. It is her further evidence that the appellants were arrested because she had provided their names to the chief who then arrested them and handed them to the police.

7. Furthermore, the evidence of the complainant is that it is the 2nd appellant who strangled her. It was also her evidence that the 2nd appellant had a spotlight and that she knew his voice. She also testified that the 2nd appellant shouted at her during the commission of this offence. It was also her evidence that she had employed the 2nd appellant as a casual labourer. It was also her evidence that the complainant clearly saw the face of the 2nd appellant.

8. I find that the complainant was able to recognize the appellants because she had known them before, because they were her neighbours. Additionally, the complainant had met the appellants at Laila trading centre a few minutes before the commission of the offence. The 2 appellants had offered food to the complainant and PW 2 at an hotel in that trading centre, which offer the complainant and PW 2 declined to take. Secondly, the complainant was able to identify them through their voices. In this regard, her evidence was that the 1st appellant shouted at her. The complainant was also able to recognize the face of the 2nd appellant clearly due to light that was coming from the spot light. Thirdly, the 2 appellants were in close proximity with the complainant.

9. In the light of the foregoing considerations, I find that the 2 appellants were positively recognized by the complainant.

10. However, there appears to be a contradiction in the prosecution evidence in relation to the arrest of the 1st appellant. The evidence of the complainant in this regard is that she is the one who gave the names of the 2 appellants to Johnstone Kiptanui Kosgei (PW 4) as a result of which the 2 appellants were arrested. The evidence of PW4 in this regard, is that he arrested the 2nd appellant following the information given to him by a village elder and one clansman from the complainant's family. PW 4 then arrested the 2nd appellant. After questioning the 2nd appellant, the latter named the 1st appellant as his accomplice. It is on the basis of that information that PW 4 arrested the first appellant. I find that this contradiction is not a material contradiction. In this regard, I believe the evidence of PW 4 that he arrested the 1st appellant on information from the complainant's family. I also believe the evidence of the complainant that she is the one who provided information to her family in respect of the 2 appellants, which in the end led to the arrest of the 2 appellants. I therefore find that this contradiction does not affect the conviction of the 2 appellants. In the light of the foregoing evidence, I find that there was sufficient evidence from the complainant which enabled her to recognize the 2 appellants. Consequently, I find no merit in grounds 2 and 5 which I hereby dismiss.

11. In ground 3, the appellant has faulted the trial court for failing to find that the prosecution did not prove their case beyond reasonable doubt. In this regard, I find that the complainant positively recognized the 2 appellants during that dark night. In the circumstances, I find no merit in this ground of appeal and is hereby dismissed.

12. In ground 4, the appellant has faulted the trial court for convicting him on the basis of suspicions. In the light of the positive recognition of the 1st appellant, I find no merit in this ground of appeal which is hereby dismissed.

13. In ground 6, the appellant has faulted the trial court for shifting the burden of proof to him. I have considered the judgement of the trial court and I find that it properly directed itself on the applicable law

and rightly came to the right conclusion that the prosecution had proved their case against him beyond reasonable doubt. I therefore find that the burden of proof was not shifted to the appellant.

14. In ground 7, the appellant has faulted the trial court for rejecting his defence. It is to be noted that the 2 appellants did not give evidence in their defence. Furthermore, in the light of the positive recognition of the appellants, I find that the 2 appellants were at the scene of the robbery. This ground of appeal is lacking in merit and is hereby dismissed.

15. Counsel for the 1st appellant filed a supplementary petition of appeal, which contains 10 grounds. I have considered those 10 grounds and I find that I have addressed and made findings of fact in all of them except grounds 2, 6 and 10. In ground 2, the appellant has faulted the trial court for failing to find that the appellant was convicted on a defective charge sheet. I find that the 1st appellant was jointly charged with robbing the complainant of cash Sh.850/= and a phone valued at Sh.2500/=. The charge as framed is not defective in any way. Counsel for the appellant has submitted in this regard that the complainant in her testimony did not specifically mention the appellant as one of her robbers. In this regard, the evidence of the complainant is that the 1st appellant is the one who had a spot light and that the complainant knew his voice. She further testified that the 1st appellant shouted at her. In a joint charge, which was preferred against the 2 appellants, the actions or omissions of one appellant are deemed to be the actions or omissions of the co-appellant. The reason for this is that the 2 appellants were engaged in prosecuting a common purpose against the complainant namely robbery and gang rape. The submission by counsel that the 1st appellant is not specifically mentioned as having committed the robbery by the complainant is immaterial in view of the application of the doctrine of common intention as set out in section 21 of the Penal Code (Cap 63) Laws of Kenya. This ground of appeal lacks merit and is hereby dismissed.

16. In ground 6, counsel for the appellant has faulted the trial court both in law and fact for relying on uncorroborated accomplice evidence to convict him. The evidence of the complainant is that this appellant participated in committing the robbery against her. I have found that her recognition of this appellant was positive. It therefore provided corroboration of the accomplice evidence of the co-appellant. I therefore find that there is no merit in this ground of appeal and is hereby dismissed.

17. In ground 10, the appellant has faulted the trial court for imposing a manifestly harsh and excessive sentence. In this regard, I find that the complainant was assaulted and gang raped by the 2 appellants until she became unconscious. She is lucky to have survived the ordeal. The record also shows that the appellant were 1st offenders, which was a mitigating factor. After taking into account, both the aggravating and mitigating factors, I find that the sentence of death, which was imposed was merited. It is important to point out that it is a mandatory sentence.

THE 2ND APPELLANT'S APPEAL - PETER KIPNG'ENO BETT

18. The second appellant has raised 4 grounds of appeal in his amended petition of appeal. In ground 1, he has faulted the trial court both in law and fact for relying on evidence of visual recognition which was not free from error or mistake in convicting him. I have already found that the complainant positively identified the 2nd appellant as one of her robbers. This ground of appeal is similar to that of the 1st appellant which I have already considered and rejected for the reasons given in the foregoing paragraphs. This ground of appeal lacks merit and is hereby dismissed.

19. In ground 2, the appellant has faulted the trial court both in law and fact for convicting him on the accomplice evidence of his co-appellant. This was not the only evidence upon which the appellant was convicted. There was the recognition evidence of the complainant who positively identified him. This ground of appeal lacks merit and is hereby dismissed.

20. In ground 3, the appellant has faulted the trial court both in law and fact for convicting him on contradictory evidence. I have already dealt with this issue in ground 2 of the 1st appellant's appeal for reasons given in the foregoing paragraphs. This ground of appeal lacks merit is hereby dismissed.

Additionally, the appellant has faulted the trial court for failing to find that the trial process was irregular. I find that the trial of the appellant was conducted as required by law. He was accorded the opportunity to cross examine the prosecution witnesses and he did so. Following his being put on defence, and the explanation as to how he had to exercise his right to defend himself, the appellant decided to remain silent. In the circumstances, I find that this ground of appeal lacks merit and is hereby demised.

21. In ground 4, the appellant has faulted the trial court for dismissing his plausible defence. In this regard, it is important to point out that this appellant elected to remain silent following his being placed on his defence. There was therefore no defence evidence that had to be considered by the trial court. I have also found that this appellant was positively identified by this complainant. In the circumstance, I find no merit in this appellant's appeal and I hereby dismiss it.

22. This is a first appeal. As a first appeal court according to *Okeno v. R (1972) EA 32*, I am required to reassess the evidence upon which the 2 appellants were convicted. I am also required to consider the evidence against each appellant separately. I have done so and I have come to the conclusion that the 2 appellants were convicted on sound evidence.

23. In the light of the foregoing considerations, I find that the appeals of the 2 appellants lack merit and are hereby dismissed in their entirety.

Judgement delivered in open court this 17th day of October, 2017 in the presence of Mr. Kilele for 1st appellant and 2nd appellant.

J. M. Bwonwonga

Judge

17/10/2017