



REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL NO. 153 OF 2014

BETWEEN

JARED MUDAVADI.....1ST APPELLANT

JOSEPH KINAMBETI OWITI.....2ND APPELLANT

HUDSON KADAGAYA.....3RD APPELLANT

AND

REPUBLIC..... RESPONDENT

(Being an appeal from the original conviction and sentence of Hon.G. M'masi, Ag SPM dated 10th September 2014 at the Principal Magistrate's Court at Vihiga in Criminal Case No. 738 of 2013)

JUDGMENT

1. Before the subordinate court, the appellants, **JARED MUDAVADI (DW 1)**, **JOSEPH KINAMBETI OWITI (DW 2)** and **HUDSON KADAGAYA (DW 3)** faced two principal charges of robbery with violence contrary to **section 296(2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of Count I were that, on 11th May 2013 at Mpaka Road, Mbale Township in Vihiga County, the appellants, jointly with others not before the court while armed with offensive weapons namely pangas, rungas and jembes robbed **CHARLES CHOGO** of one TV make Tiger, decoder, two radios, Sony and Sonitech, three mobile phones Samsung E222 and two Nokia 1110, 23kg rice, 9 kgs sugar, 40 litres cooking oil, two cartons of fresh milk, safaricom airtime and cash Ksh. 5,500 all valued at Kshs. 44,620/- and at the time of such robbery, threatened to use actual violence on the said **CHARLES CHOGO**.

2. The particulars of Count II were that on 11th May 2013 at Mpaka Road, Mbale Township in Vihiga County, the appellant, jointly with others not before the court, while armed with offensive weapons namely pangas, rungas and jembes robbed **CELLAH ADHIAMBO** one phone valued at Ksh. 2,500/- and at the time of such robbery, threatened to use actual violence on the said **CELLAH ADHIAMBO**.

3. The appellants were all convicted and sentenced to death on the first count and acquitted on the second count. They now appeal against the conviction and sentence. The thrust of the appellants' written submissions is that the prosecution did not prove the case beyond reasonable doubt as the evidence of identification was doubtful. DW 1 submitted that the evidence against him was contradictory and full of inconsistencies. He contended that the first report did not detail the fact that that PW 1 had recognised him. He also denied that any stolen item was recovered in his possession. DW 2 submitted that evidence of identification was insufficient in relation to him and that the prosecution did not call any evidence to prove his arrest hence his identification and arrest were a mere afterthought. He also attacked the trial court for ignoring his defence. DW 3 submitted that there was insufficient evidence of identification and

that his defence was not considered.

4. Counsel for the respondent, Mr Ng'etich, supported the conviction and sentence and submitted that the circumstances of identification were sufficient given the time spent and the nature of electric light present. He further submitted that the complainants described the appellants in their first reports to the police and that all the ingredients of robbery with violence were proved beyond reasonable doubt.

5. As this is a first appeal, the duty of the appellate court is to review all the evidence and reach an independent conclusion as to whether to uphold the conviction and sentence. In doing so the court must make an allowance for the fact that it did not hear or see the witnesses testify to assess their demeanour (see **Okeno v Republic [1972] EA 32**).

6. The facts emerging from the 3 witnesses before the trial court were as follows. Charles Chogo (PW 1) testified that he owned a shop at Mbale Township. At about 10.00pm on 11th May 2013, he was at home behind the shop doing his household chores. His neighbour, Cellina Adhiambo (PW 2), came to his house to watch television. When she arrived, she told him that she had seen a torch flashing at his door. As he went to check, two people entered armed with pangas and machetes and demanded to be given their mobile phones. Other assailants entered and took his Samsung phone in addition to other phones that were charging. PW 1 recalled that two assailants took him to his bedroom and demanded money while threatening to kill him if he screamed. He gave them Kshs. 5,500/- which constituted his day's taking for his shop. After taking the money, they continued searching the room and took his Sony and Sonitech radio. They tied him up and pushed him on the bed. The others went to the shop, stocked up on the goods and put them in a gunny bag and left.

7. In the meantime, PW 2 remained in the sitting room. She recalled that after she arrived at PW 1's house, she saw the assailants, armed with weapons, flashing a torch at the door. One of the assailants with a panga ordered them to give up their phones. She told the court that they switched off the lights about 10 minutes after entering the house while they took PW 2 to the shop, she remained with one of the assailants. A while later, the assailant took her to the room where PW 1 was. She testified that the lights were on and PW 1 had been tied. The assailants kept demanding money. Before they left, they covered her with a blanket.

8. After the assailants left, PW 1 untied himself and then PW 2. PW 1 and PW 2 went and reported the incident at Mbale Police Station on the next day. The police officers came to the scene and found a jembe. PW 1 further testified that together with the police, they went to look for the suspects. They went to the home of DW 1 where they found his Sonitech radio which he identified. PW 1 recalled that DW 1 is the first one who entered his house armed with a panga and took him to his bedroom and also took his mobile phone. He also described DW 2 as a person with a blind left eye. Since he had known him before, he showed the police his homestead whereupon he was arrested. He also recalled that he had seen the DW 3 as the person who entered his house.

9. Corporal Robert Kabaye (PW 3), the investigating officer confirmed that PW 1 and PW 2 reported the incident at Mbale Police Station on 12th May 2013 at about midday. PW 1 was able to identify one of the assailants whom he said had a blind eye and while the other one was slim. He told the court that a Sonitech radio was recovered from the home of DW 1 who was arrested while DW 2 and DW 3 were arrested after two weeks.

10. The appellants denied that they committed the offence in their respective defences. In his sworn testimony, DW 1 gave an account of his arrest on 12th May 2013 while he was heading home. He told the court that police officers searched his home and did not recover anything. DW 2 also gave sworn testimony. He gave an account of his arrest on 22nd May 2013 at about 8.00pm. He recalled that the police had searched his home and recovered bhang. He explained that although one assailant was said to be a man with, "squeezed eyes," he had a blind eye. DW 3 also recalled that he was arrested on 28th July 2013 as he was shopping.

11. The elements of the offence of robbery with violence **under section 295 as read with section 296 (2) of the Penal Code** were elaborated by the Court of Appeal in **Ganzi & 2 Others v Republic [2005] 1 KLR 52** as follows:

The offence of robbery with violence under section 296(2) of the Penal Code is committed in any of the following circumstances namely:-

(a) The offender is armed with any dangerous or offensive weapon or instrument; or

(b) The offender is in company with one or more other person or persons or

(c) At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses other personal violence to any person.

12. For the offence to be established, the prosecution need only prove any of the elements set out as “or” in the **section 296(2) of the Penal Code** is to be read disjunctively (see **Oluoch v Republic [1985] KLR 549**). In this case, the fact that there was a robbery is clear from the facts outlined by PW 1 and PW 2. Assailants, who were more than two in number, entered the house with weapons and threatened PW1 and PW2 with violence while taking their mobile phones. The assailants also took PW 1’s radio and assorted goods from the shop.

13. The main issue for consideration in this appeal is whether the appellants were the assailants. The prosecution case was grounded on direct evidence of identification in difficult circumstances. The Court of Appeal in **Odhiambo v Republic [2002] 1 KLR 241, 247** set out the guiding principles for consideration of such evidence as follows:

*The law on identification is not in doubt. It has been stated and restated in several judicial decisions by this Court and by the High Court. The Court should receive evidence on identification with the greatest circumspection particularly where circumstances were difficult and did not favour accurate identification. Where evidence of identification rests on a single witness, and the circumstances of identification are known to be difficult, what is needed is other evidence either direct or circumstantial, pointing to the guilt of the accused persons from which the Court may reasonably conclude that identification is accurate and free from the possibility of an error. see *AbdalaBin Wendo and Another v. Republic [1953] 20 EACA 166; Roria v. Republic [1967] E.A. 583.**

14. In **Kiarie v Republic [1984] KLR 739**, the Court of Appeal was even more categorical on reliance on such evidence holding that the evidence must be “*absolutely watertight*” to justify conviction. In **Wamunga v Republic [1989] KLR 424**, the Court of Appeal warned that;

[W]here the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely be the basis of a conviction.

Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him (see **Maitanyi v Republic [1986] KLR 198** and **R v Turnbull [1967] 3 ALL ER 549**).

15. It is also accepted in law that evidence of recognition is stronger than that of identification because recognition of someone known to one is more reliable than identification of a stranger (see **Anjoni & Others v Republic [1980] KLR 59**). But in **Wanjohi & 2 Others v Republic [1989] KLR 415**, the Court of Appeal held that, “*recognition is stronger than identification but an honest recognition may yet be mistaken.*”

16. It is against these principles that the evidence before the trial court must be examined. Both PW 1 and PW 2 testified that when the assailants came into the house, the electric lights were on. PW 1 told the court that he saw the assailants vividly. Thereafter they took him to bedroom where the lights were also on and it is only after they had finished their felonious acts that they switched off the lights. PW 2 told the court that the assailants switched off the lights after about 10 minutes. She testified that in the room where PW 1 had been taken, the lights were not switched off. In cross-examination by DW 1, PW 1 estimated that the assailants were in the house for about an hour while PW 2 estimated the time was about half an hour.

17. In my view, given the nature of electric lighting in the confined space of the rooms where the assailants were with PW 1 and PW 2, taken together with the time they interacted provided circumstances for positive identification of the assailants. PW 1 identified DW 1 as the person who first entered the house and also went with him to the bedroom. In addition to clearly identifying him, PW 1 told the court that DW 1 was familiar to him and that he knew where he resided and in fact he took police to his residence where PW 1's Sonitec radio was recovered.

18. The case against DW 1 was not merely one of identification of a stranger but one of recognition of a person clearly known. This is confirmed by the fact that on the very next day, PW 1 took the police to his home where he was arrested. His fate was sealed when DW 1's Sonitec radio was recovered in his house. From the record, PW 1's testimony was firm and was not even shaken in cross-examination. I am therefore satisfied that DW 1's conviction was safe on the basis of the testimony of DW 1.

19. Both PW 1 and PW 2 described DW 2 as the person with one blind eye. In his testimony, DW 1 described him as tall and black. He also told the court that he knew his home and directed the police to his home. PW 2 also testified that one of the assailants had one bad eye. It is clear that DW 2 had clear identifiable feature that made him recognisable. In fact, in cross-examination by DW 2, PW 1 told the court that he clearly described DW 2. In his own defence, he admitted that he had one eye and the other was blind. In this case, I am also satisfied that apart from the favourable conditions of identification, DW 2 was a person known to PW 1 and PW 2 and his conviction was therefore safe.

20. Although PW 1 told the court that DW 3 was one of the assailants and that he entered last, he did not describe him to the police or state how he was arrested. When cross-examined by DW 3, PW 1 stated that he told the police that he would be able to identify him if he saw him. Since his identification was doubtful, the police ought to have conducted an identification parade to confirm his identity.

21. Based on the conclusions I have reached, I affirm the conviction and sentence of the 1st and 2nd appellants and as such their respective appeals are dismissed.

22. The 3rd appellant's appeal is allowed. He is set free unless otherwise lawfully held.

SIGNED AT KISUMU

D.S. MAJANJA

JUDGE

DATED and DELIVERED at KAKAMEGA this 13th day of October 2017.

R. N. SITATI

JUDGE

Appellants in person.

Mr Ng'etich, Senior Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.