



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT LODWAR

HIGH COURT CRIMINAL APPEAL NO. 17 OF 2017

EGES ESEKON.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from conviction and sentence in original

Lodwar PMCR 90/2013 delivered on 17/2/2014

by W Wachira – Senior Resident Magistrate)

JUDGMENT

The 1st appellant **EGES ESEKON** was the 1st accused in the lower court and the 2nd appellant Ekadeli Erupe the 2nd accused. They were charged with the offence of robbery with violence contrary to section 296(2) of the penal code.

The particulars of the offence are that 1. **EGES ESOKON 2. EKADELI ERUPE** on the 19th day of January, 2013 at Kalemorok in Turkana South within Turkana County jointly with another not before the court while armed with AK47 rifles robbed Kelvin Ondari of his laptop make HP worth 50,000/=, mobile phone make Samsung Chart 322 valued at Kshs.8000 cash 2000 the property of Kelvin Ondari.

In count II the accused is charged with Violence Contrary to section 296(2) of the penal code.

The particulars of the offence are that **EGES ESEKEN 2. EKADELI ERUPE** on the 19th day of January, 2013 at Kalemorok in Turkana South within Turkana County jointly with another not before the court while armed with AK47 rifles robbed Gilbert Nyagi of his phone make Samsung mobile make MT750 worth 5000/= and cash 1850, (one thousand eight hundred and fifty shillings) the property of Gilbert Nyagi.

In count III the accused is charged with robbery with violence contrary to section 296(2) of the penal code.

The particulars of the offence are that 1. **EGES ESEKON 2. EKADELI ERUPE** on the 19th day of January,2013 at Kalemorok in Turkana South within Turkana County jointly with another not before the court while armed with AK – 47 rifles robbed of **STEPHEN NYERERE** of his mobile phone make Nokia E71 worth 25,000and case two thousand shillings (2,000) the property of Stephen Nyerere.

In count IV the accused is charged with robbery with violence contrary to section 296(2) of the penal code.

The particulars of the offence are that 1. **EGES ESEKON 2. EKADELI ERUPE** on the 19th day of January, 2013 at Kalemorok in Turkana South within Turkana County jointly with another not before the court while armed with AK 47 rifles robbed Lenson Mutuku mobile marked Asha 303 worth 13,000 and cash 1000 (one thousand shillings) the property of Lenson Mutuku.

In count V the accused is charged with robbery with violence contrary to section 296(2) of the penal code.

The particulars of the offence are that 1. **EGES ESEKON 2.EKADELI ERUPE** on the 19th day of January, 2013 at Kalemorok in Turkana South within Turkana County jointly with another not before the court while armed with AK-47 rifles robbed Peter Otindo of his phone make Nokia C3 worth 7,000 and one thousand one hundred shillings (1100) cash the property of Peter Otindo.

The evidence before the trial court was that **PW1 David Ondari**, the complainant in count 1 as with his colleagues **PW2 Gilbert Mikala Nyagi** and **PW3 – Stephen Nyerere Tegisi** who were on assignment by a company called Broadcom communications Network in Turkana. On 19/1/2013, at 5.30pm they were travelling from Lodwar to Kainuk in motor vehicle Registration No.KBD 921G driven by Stephen Nyerere.

On reaching between Kalimirok and Kaphri Junction he saw a person emerge from the bush to the road while armed with a gun. He aimed a gun at the driver and the driver stopped. To other people emerged from the bush and joined him. They ordered that to come out of the vehicle and ransacked the vehicle and took a laptop; they searched their pockets and took from Kevin Ondari (complainant in count 2) Shs.2000, mobile phone, Samsung, from Gilbert Nyagi (complainant in count 2) they took his mobile phone and cash 1850, from Stephen Nyerere (complainant in count 3) they took mobile phone and cash 2000 and from Lenson Mutuku (complainant in count 4) took a mobile phone and cash shs.1000.

The robbers after taking the items ordered them to get into the vehicle ordered them to get into the vehicle and drive off. The complainant entered into the vehicle and drove off to Kaptir Centre. On the way they met the young men when they gave a lift and explained what had happened. He promised to mobilize the local people to track the robbers. The next day with the help of the members of public they followed the footmarks which led them to a bush where they found the accused. They were arrested at the scene recovered an SFP connector. Other items which were recovered including a modem, adaptors, mouse, keys, code for modem and USB cables were recovered. The accused 1 was then taken to Kalimorok AP Camp. When 2nd appellant was arrested a memory card belonging to Peter Otinod was recovered from him.

The appellants gave unsworn evidence. 1st appellant Eges Esekoni testified that on 20/1/2013 he was tending for his goats at Akeritete when he met 4 people dressed in police uniform. One of them asked him if he was Lokwai. They arrested him and took him to Kalimorock where he was beaten and later taken to Lokichar where he was charged with present offence. The 2nd appellant Ekedeli Erupe testified that he went to Kalimorock to collect relief food. He was given the relief food and he bought an alcoholic drink and while drinking he was arrested by some people who took him to Lokichar police station. He was issued with witness statements which he was referred to as Aipa which is not his name.

The trial magistrate after considering the evidence found the appellant guilty of the offence of robbery convicted them and sentenced each one of them to life imprisonment.

The 1st and 2nd appellant filed this appeal in the following grounds.

- 1. That there was no exhibit produced before the court/probable weapon used.**
- 2. That there was no any medical report produced by the court.**
- 3. That the prosecution witness gave a contradicting evidence on he alleged time and the place of incident**
- 4. That there was no identification parade conducted.**
- 5. That one KPR namely Immanuel Chegem who was a key witness and also arresting officer did not testify before the court.**

The appellants filed written submissions which are similar in nature. The 1st appellant submitted that he was arrested by KPR because of a grudge over grazing land and that the people who arrested him who included members of public and KPR were not called to testify, and their omission therefore left the prosecution evidence in a shaky position. He submitted that his defence was not considered by the trial magistrate contrary to the provisions of the constitution.

Appellant further submitted that the first report to police was never produced which would have shown the appellants and dressing of the robbers. He submits that his arrest for this offence was a case of mistaken identity and denied even being found with any of the recovered exhibits produced.

The 2nd appellant adopted similar submissions and adduced that the exhibits alleged to have been recovered from him was not recovered from her as the evidence on record is that he was brought to the police station with the memory card.

This is a first appeal. The first appellant court is enjoined to re-evaluate and re-examine the evidence, consider any conflicting evidence and arrive at its own conclusions but giving due allowance that it did not see or hear the witnesses (**Ekeno –vs – Republic 1972 EA 32**).

The appellant were charged with the offence of robbery with violence contrary to section 295 as read with section 296(2) of the penal code which provides.

295: Any person who steals anything and at or immediately before or immediately after the time of stealing it uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or prevent or overcome resistance to its being stolen or retained is guilty of a felony termed robbery.

296(1) any person who commits the felony of robbery is liable to imprisonment for fourteen years.

296(2) if the offender is armed with any dangerous or offensive weapon or instrument or is in company of one or more other person or persons or if at or before or immediately after the time of such robbery he wounds, beats, strikes, or uses any other personal violence to any person, he shall be sentenced to death.

In a charge of robbery with violence the prosecution is under duty to establish by evidence that the complainants property was stolen, that it was stolen by the accused person, and that at the time of such robbery the accused was armed with a dangerous or offensive weapon or was in the company of one or more persons, or had at or immediately before or immediately after the time of such robbery beat, strike or used personal violence to the complainants or any other person.

(See Oluoch –v – Republic 1985 KLR)

The prosecutions in this case had to establish that the appellants were identified as the robbers, that they were armed with a dangerous or offensive weapon, or used or caused actual violence on the complainant and that indeed the complainants were robbed of their property.

The trial magistrate in his judgment stated the following as a basis of his finding of guilt.

All the five complainants were firm in their evidence that the accused persons herein are the ones who robbed them. They were especially firm that the 1st accused is the man who got onto the road and pointed a gun at them. Their faces were not covered. The two accused persons were arrested the next day and when the complainants saw them they immediately identified them. They could still remember how the accused persons were dressed. They told the court that the accused persons were still in the same clothes they had when they robbed them at time of arrest. It is also significant to note that the scene of the 1st accused arrest SFP connectors together with the other computer accessories were recovered. The recovery of the said connectors together with the other computer accessories and PW1's bag confirms that indeed the 1st accused was among the robbers. The 2nd accused was found with a memory card which was positively identified by PW4. The evidence of the complainants herein and recoveries made from the accused persons sufficiently shows that the accused persons are actually the ones who robbed the complainants.

It is evident that the trial magistrate based his finding on both positive identification of the appellants by the complainants and the doctrine of recent possession of items stolen from the complainant by the appellants when they were arrested.

On identification PW1 Kevin Ondari stated that the offence occurred at 5.30pm during the day he was seated in the co-driver's seat when he saw 1st appellant emerge from the bush to the road and aim pointed a gun at them. He testified that he was able to observe the 1st appellant clearly; and he is the one who searched complainant pocket and took away shs.2000, and mobile phone. When he was arrested the next day he was able to recognize him as the person who had the gun. PW3 Thomas Nyerere Tigisi who was driving the motor vehicle testified he saw a man emerge from the bush and point a gun at him. He stopped the motor vehicle and was ordered to come out. He did and together with other robbed him of his mobile phone. These two witnesses who were in the front of the vehicle saw the 1st accused well and had an opportunity to observe him. It was during the day and visibility proper and conditions of visual identification favourable.

In respect of 2nd appellant **Ekadeli Erupe, PW2 Gilbert Makeke Njagi** testified that he surrendered the phones to 2nd appellant and he handed the witness when the witness requested to be given a sim card from his mobile phone. The witness testified that it was day time and he was able to see the 2nd appellant clearly.

The second ground for the basis of finding of guilt by the trial court was that some of the stolen items during the robbery were recovered from the appellants. The evidence of the witnesses led to the invoking of the doctrine of recent possession in this case.

To invoke this doctrine the possession must establish first that the property was found with the suspect; secondly that the property was positively identified by the complainant, that the property was stolen from the complainant that the property was recently stolen from the complainant. The proof of time will depend on the easiness with which the stolen property can move from one person to another (**see Arum – vs – Kisumu C. CR 85 of 2005**) the prosecution must also establish that there were no co-existing circumstances which point to any person as having been in possession of the item. Once the prosecution has established the above the burden shifts from the prosecution to the accused to explain possession of the item complained of; if he fails to do so an inference is drawn that he either stole it or was a guilty receiver.

PW1 Kevin Andari testified that on being assisted by KPR and member of public to trace the robbers, they traced by use of footmarks which led them to where they found 1st appellant in a bush. They found him in the bush and nearby found an SFP connector which is a gadget used for optical fibre connection. He identified it as among the items which were in his bag. They found 1st appellant having lit a fire to burn the items. He testified that the items were recovered at the scene where 1st appellant was arrested.

PW6 APC ISAAC OJWANG testified that attached to Kalemorok Administration Police Post testified that he received the 1st appellant from the complainants and members of public. He interrogated 1st appellant who led them to where 2nd appellant and a 3rd suspect was. He then testified;

“I was with two KPRs we asked him where the third suspect was but he could not talk. He was too drunk. I conducted a quick search in him and found Kshs.400 on his left shirt pocket. I also found a memory card. I handcuffed him and took him to the AP post where the complainants were. The complainants identified the 2nd accused with ease. They confronted that he was present during the incident since he was drunk we didn't interrogate him much. We called the OCPD. Lokichar Patrol Base. He came and picked the two accused persons. My work ended there. The first accused is the one who was first brought to the AP post. He led us to the arrest of the 2nd accused.

On being cross-examined by 2nd appellant he stated I searched you. I found you with Ksh.400 and a memory card. The memory card was in our pocket. I am the one who found you with the memory card. You are known at Kalimorock as Aipa. You had been implicated in so many incidents of assault. The whole of Kalimorock community were there when we

arrested you?".

The memory card which was recovered from the 2nd appellant was identified by **PW4 Lenon Mutuku Tivo** as belonging to him and which was in his stolen mobile phone. The memory card when played contained photographs of the witness and other people a confirmation that indeed it was his.

The items recovered from the appellants were positively identified by the complainant as among those stolen from them during the robbery. They were rare items nor readily available and the appellant in their evidence gave no reasonable explanation as to how they came by them. In my view the prosecution in the trial court established that the items were stolen recently from the complainants, this complainant positively identified them; the appellants were found in possession of the items, and that the appellants did not offer reasonable explanation as to how they came by them. This therefore leads to the irresistible inference that they are people who robbed the complainants in the material day. I am satisfied that the conviction for the offence of robbery was based on sound evidence and this appeal has no merit. I hereby dismiss this appeal.

Dated and signed at Lodwar this 19th day of December, 2017

S.N. RIECHI

JUDGE