



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL NO. 85 OF 2015

BETWEEN

ALFRED KIPLIMO KETER 1ST APPELLANT

JOSEPHAT CHERUIYOT 2ND APPELLANT

GEOFFREY MALEL KIPKOECH 3RD APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. B.M. Kimtai, SRM dated 20th April 2015 at Senior Principal Magistrate's Court at Nyando in Criminal Case No. 94 of 2014)

JUDGMENT

1. In the subordinate court, the appellants **ALFRED KIPLIMO KETER, JOSEPHAT CHERUIYOT** and **GEOFFREY MALEL KIPKOECH** and three other persons were charged with robbery with violence contrary to **section 296(2)** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. The particulars of this count was that on 9th January 2014, at Katolo Sub-location in Nyando District within Kisumu County, jointly while armed with offensive weapons namely a club, robbed **SILPHA ACHIENG ODHIAMBO** of four goats valued Kshs. 20,000/- and at or immediately before or immediately after the time of such robbery wounded the said **SILPHA ACHIENG ODHIAMBO**. The accused also faced an alternative charge of handling stolen goods contrary to **section 322(1)** as read with **section 322(2)** of the ***Penal Code*** whereby it was alleged that they, otherwise than in the course of stealing dishonestly retained two goat valued at Kshs. 10,000/- the property of **SILPHA ACHIENG ODHIAMBO** knowing or having reasons to believe them to be stolen goods.
2. The appellants were convicted and sentenced to death on the first count and now appeal against conviction and sentence. In support of their respective appeals they have all filed written submissions in which they contend that they were not identified on the material night as the assailants and that the conditions and surrounding circumstances could not allow positive identification. On the other hand, learned counsel for the respondent submits that the conviction was grounded on clear evidence of identification and that the appeals should be dismissed. In considering the issues raised by the appellants, I am enjoined to consider the entire evidence, evaluate it and reach an independent conclusion as to whether I should uphold the conviction bearing in mind that I neither heard nor saw the witnesses testify (see ***Okeno v Republic [1972] EA 32***). The prosecution case was as follows.

3. The complainant and principal witness, Silpha Achieng Odhiambo (PW 1) testified that on 9th November 2014 at about 11.00pm while in her house, she heard her dog barking and she went out. She saw two men outside and when she asked them who they were lost and needed directions to Olasi. As they were talking, one of them removed a rungu and hit her on the head, hand and thigh. She recalled that there was sufficient moonlight and she could identify the 1st appellant hit her. She also saw 2nd and 3rd appellants remove the goats from her house and take off. She started screaming causing her neighbours to come and follow the animals.
4. After the neighbours came, PW 1 was taken to Ahero Hospital where she was treated for her injuries. She was later examined by Nicodemus Mbunge (PW 8), a Clinical Officer, who confirmed that she suffered cut wounds on the neck and head and left hand caused by a sharp object. He also confirmed that she sustained a fracture of the left base of the 2nd proximal phalanx. He classified the injury as harm.
5. PW 1 confirmed that her four goats were stolen; a she goat with brown with white dots, a black and white he goat, a grey she goat and a she goat with black and brown spots which were valued at Kshs. 19,000/-. When she recovered from hospital, she found only two goats had been recovered and the identified skin of the goat.
6. Among the villagers who came to PW 1's rescue were Joseph Ondego (PW 6) and Philip Odhiambo (PW 7). They both testified that they found PW 1 had been injured and she told them that her goats had been stolen. PW 6 took her to hospital and they both joined the other villagers and neighbours from the border in giving chase to the robbers by following foot and hoof marks along the Nyanza/Rift Valley border. Early in that morning they went to a homestead where they found the 3rd appellant washing his face but he ran away. In the house they found a goat had been slaughtered and an animal skin.
7. William Korir (PW 3), a local farmer, testified that he was awoken on the night of 10th January 2014 by a neighbour and accompanied AP Officers from Olasi Camp in a search for animals. In the morning, they followed animal foot marks which led them to the 1st appellant's home where they found meat and an animal skin. PW 3, PW 6 and PW 7 confirmed that after the incident, a meeting was called by the local administration whereupon the other suspects were arrested.
8. The Assistant Chief of Simbi Sub-location, Reuben Cheruiyot Rono (PW 2) recalled that at about 8.00am on 10th January 2014, he received a call informing him that some goats had been stolen from the Luo Community and that the owners had trailed the same and a goat had been slaughtered. He proceeded to the 1st appellant's house where he found a goat had been slaughtered. He told the court that PW 1 was able to identify the skin as belonging to her goat. He called the 1st appellant on phone who implicated the 3rd appellant and the other accused. He told the court that PW 1's goats were found at the homes of other accused and taken to Olasi where they were identified by PW 1. He thereafter called a barasa on 27th January 2014 and after a resolution, the other accused were arrested.
9. The Chief of East Kano Location, Evan Ondiek Okayo (PW 4), recalled that on the material night he received a call from a village elder informing him of the theft of goats from PW 1's home. He went to see her in the morning and confirmed that she had been injured. He followed the villagers who had gone to Simbi Sub-location where he found PW 2 with a crowd in a house said to belonging to the 1st appellant. Later on he learnt that the other accused had been arrested after a public barasa. According to Snr Sergeant Jackton Moldong (PW 6), the 3rd appellant was arrested as he was implicated by one of the accused who stated that he sold him one of the goats for Kshs. 3000/-.
10. The Investigating Officer, Corporal Lilian Sinai (PW 10) of Boya Police Station, gave an account of the investigation following the complaint by PW 1. She issued her with a P3 form and recorded

statements of the witnesses. She confirmed that PW 1 identified the stolen goats as hers and the same were photographed by the Scene of Crime officer. She noted that the 3rd appellant was arrested because sold some goats to one of the co-accused.

11. When put on their defence, the appellants all elected to make unsworn statements. The 1st appellant stated that he could not recall what happened on 9th January 2014 but that he was arrested on 17th January 2014 when he was at the posho mill where he works and taken to Boya Police Station. The 2nd appellant denied that he knew anything about the stolen goats on 9th January 2014 but recalled that he was arrested on 17th January 2014 while taking changaa and taken to Boya Police Station. The 3rd appellant denied knowledge of the offence and recalled that he was arrested on 11th January 2014 while coming from Church.

12. The ingredients of the offence of robbery with violence were clearly set out by the Court of Appeal in the case of ***Oluoch v Republic* [1985] KLR 549** where it was held:

Robbery with violence is committed in any of the following circumstances:

- a. *The offender is armed with any dangerous and offensive weapon or instrument; or*
- b. *The offender is in company with one or more 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*” [Emphasis mine]

13. The use of the word “or” in this definition means that proof of any one of the above ingredients is sufficient to establish an offence under **section 296(2)** of the ***Penal Code***. In this case PW 1 said that she was met three men, one of whom had a rungu and assaulted her causing her injuries. Her testimony was corroborated by that of PW 4, PW6, PW 7 and PW 8. This evidence proves ingredients (a), (b) and (c). Moreover, the fact that her goats were stolen is not doubt as two of them were later recovered.

14. The central issue in this appeal is whether the appellants perpetrated the offence as the robbery was committed at night hence the need for the court to exercise caution in assessing the evidence. The principles guiding the court’s approach to matters of identification in difficult circumstances are well settled. Our courts have emphasised that unless handled with care, evidence of visual identification can occasion a miscarriage of justice (see ***Karanja & Another v Republic*, [2004] 2 KLR 140** and ***Wamunga v Republic*, [1989] KLR 424**). In ***Republic v Eira Sebwata* [1960] EA 174**, and ***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* (supra)** 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 ***R v Turnbull* [1967] 3 ALL ER 549**).

15. It is also accepted in law that evidence of recognition is stronger than of identification because recognition of someone known to one is more reliable than identification of a stranger (see ***Anjononi & 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. The evidence implicating the accused was that of PW 1 as the single identifying witness. After PW 1 responded to the barking dogs she went out and met three men. From her testimony, it is obvious that everything happened within a very short span of time, the only source of lighting was moonlight. Although she stated that she knew the assailants she did not state how she knew them. In addressing the parameters for identification by way of recognition, the Court of Appeal in ***Peter Musau v Republic NRB CA Criminal Appeal No. 229 of 2004 [2008] eKLR*** observed that;

We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him, and thus to put a difference between recognition and identification of a stranger. He must show for example that the suspect had been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness in seeing the suspect at the time of the offence, can recall very well having seen him before the incident in question.

17. PW 1 stated that she managed to identify the 1st appellant by his height and light complexion and 3rd appellant by his deformed hand. There is no evidence that she gave these descriptions to the people she made the initial report. This identification is best described as dock identification which ought to have been tested by an identification parade in order to exclude the possibility of mistaken identity (see ***Muiruri & 2 Others v Republic [2002] 1 KLR 274*** and ***Nathan Kamau Mugwe v Republic NBI CA Criminal Appeal No. 63 of 2008[2009] eKLR***). **In my view and I find, the evidence of identification was not watertight to justify conviction.**

18. The prosecution also relied on the doctrine of recent possession to implicate the appellants. In ***Gideon Meitekin Koyiet v Republic Criminal Appeal No. 297 of 2012 [2013]eKLR***, the Court of Appeal stated that the doctrine of recent possession is applicable where the trial court is satisfied that the prosecution has proved the following;

- a. that the property was found with the suspect;
- b. that the property was positively identified by the complainant;
- c. that the property was recently stolen from the complainant.

19. The 1st appellant was linked by the fact that the skin of a slaughtered goat was found in his home where he was seen in the morning by PW 6 and PW 7 who knew him as “Kundi.” I have scrutinised the testimony of PW 1 and all she stated was the she was able to identify the goat skin as her. The goat skin was not produced in evidence nor were its characteristics given to enable the court reach a positive conclusion that the slaughtered goat belonged to PW 1. I am therefore not satisfied the goat skin was positively identified by the complaint as belonging to one of her goats that was stolen.

20. The 3rd appellant was implicated by the 1st appellant when he was called by PW 2. According to PW 2, the 2nd appellant was arrested by members of the public. The goats were recovered in the home of Sally Chelangat Rugut (4th accused), who was a co-accused and was acquitted. In her defence, she stated that she was merely keeping the goats for Ronald Kemboi (5th accused). Ronald Kemboi testified that he had bought the goats from the 3rd appellant. Thus the 2nd and 3rd appellants were convicted based on the evidence of accomplices.

21. It is accepted as a principle that accomplice evidence is of the weakest kind hence the rule of practice that such evidence requires corroboration to support a conviction. Further that *the Court may only and in appropriate circumstances convict without corroboration if satisfied the accomplice is telling the truth, upon the Court warning itself on the dangers of doing so* (see ***Kinyua v Republic [2002] 1 KLR 256***). As regards the 3rd appellant, there was no corroborating evidence as he was not found with anything connecting him to the stolen goats. The 3rd appellant was implicated by the unsworn testimony of the 4th and 5th accused. In effect the 3rd appellant was

denied the opportunity to test the allegation against him by cross-examination hence the unsworn testimony could not be relied on (see *Chaama Hassan Hasa v Republic* [1976-80] 1 KLR 1). As a result, the conviction based on this testimony could not stand particularly given that the learned magistrate did not warn himself of the dangers of relying on such evidence.

22. In light of the findings I have made, the respective convictions are quashed and set aside. The appellants are set free unless otherwise lawfully held.

DATED and DELIVERED at KISUMU this 28th day of July 2016.

D.S. MAJANJA

JUDGE

Appellants in person.

Ms Chelangat, Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.