



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL CASE NO. 100 OF 2013

ERASTUS MWANIKI GICHOBİ.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL CASE NO. 101 OF 2013

ELIJAH MUGO MURIMI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the Senior Principal Magistrate's Court (Teresia Ngugi), Kerugoya Criminal Case Number 365 of 2011 and 369 of 2011 (Consolidated) delivered on 15th May, 2013)

JUDGMENT

1. **ERASTUS MWANIKI GICHOBİ** and **ELIJAH MUGO MURIMI** are the appellants in this consolidated appeal who were charged before Kerugoya Senior Principal Magistrate's Court Criminal Case No. 365 of 2011 with 3 counts. The relevant one in so far as this appeal is concerned is in respect to Count III where the two were jointly charged with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. The particulars were that on the 5th May, 2011 at Kagio Trading Centre within Kirinyaya County the two appellants jointly with others not before court while armed with offensive weapons to wit pangas, robbed **Sellah Adoyo Oyugi** Kshs.14,000/= in cash, and a mobile phone make Nokia 1110 all valued at Kshs.17,500/= and immediately after the time of such robbery used actual violence to the said Sellah Adoyo Oyugi. The two denied the offence and the case proceeded to full trial whereupon the appellants were found guilty and convicted in accordance with the law. They were dissatisfied with the conviction and preferred this appeal but before I consider the grounds of their appeal, I will briefly consider the brief summary of the evidence presented to the trial court against the Appellants herein. (For ease of reference in this judgment Erastus Mwaniki Gichobi will be referred to as the 1st appellant while Elijah Mugo Murimi will be referred to as the 2nd appellant).

2. The complainant in the 3rd count Sellah Adoyo Oyugi (P.W.2) told the trial court that on the material

date (5th May, 2011) and time (10.30 p.m.) she had alighted from a vehicle and was headed to where she was to sleep in company of her 2 lady friends Nancy (P.W.4) and Rose (P.W.3) when they were accosted by thugs. She told the trial court that they had torches and when they saw the assailants were upto no good they began to run for safety. However, the complainant could not run as fast as her friends and the robbers caught up with her near the gate and attacked her before robbing her of a mobile phone (Nokia) and Kshs.14,000/= in cash which was in her bag which she had thrown to them in an attempt to let her go. She further told the court that she was injured with a panga in the process. The injuries were confirmed by Hezron Macharia Maina (P.W.1) the clinical officer who treated and filled the P3 form produced at the trial as Prosecution Exhibit 3. The complainant told the trial court that she was able to identify the appellants herein due to the security lights at the gate. She stated that she knew them prior to the incident as she had worked with them previously. Besides this she was able to pick them out at an identification parade conducted by C.I.P. Lydia Malelu (P.W.10) who told the trial court that both the complainant and her witness Nancy Wangu Ngari (P.W.4) were able to positively identify the appellants from an identification parade consisting of seven people including the appellants herein.

3. The evidence tendered by the complainant was corroborated by the evidence of Nancy Wangu Ngari (P.W.4) and Rose Wangui (P.W.8) who gave same narrative to the trial court in their evidence and further added that they were able to identify the two appellants herein because of electricity lights where the complainant was caught, beaten and robbed.

4. **Inspector Jackton Opengo** (P.W.9) told the trial court that he was woken up by screams outside where he was living on 5th May, 2011 at 11 p.m. and on checking found that someone (P.W.2) was being robbed. He went back and got his Ceska pistol and went for the rescue where he managed to gun down one of the thugs. He recovered a phone from the felled suspect and was able to note a number of missed calls from the appellants herein and that is how he began his investigation which led to the arrest of the appellants and one other suspect who was later discharged under **Section 210** by the trial court. He was also able to recover the panga used in the robbery and produced it as Prosecution Exhibit 7 at the trial. **C.I.P. Lydia Malelu** (P.W.10) produced the identification parade form as Prosecution Exhibit 8 at the trial and confirmed to the trial court that the parade was duly conducted in accordance with the law.

5. When placed on their defence on the basis of the above evidence, both the appellants denied the offence and pleaded alibi as their defence. The 2nd appellant told the trial court that he worked at the market in Kagio and was known to the complainant as he had worked for her before. He told the trial court that on 5th May, 2011 he was at Kimbimbi while the 1st appellant told the trial court in defence that at the material time he was at his home resting after a day's work.

6. In her judgment, the learned trial magistrate found that the complainant had sufficient time and light to identify the appellants as they moved up and down threatening a police officer who was living in the compound where the complainant and her friends were headed to when they were attacked. She further relied on the evidence of Nancy Wangu Ngari (P.W.4) and Rose Wangui (P.W.8) on the issue of identification and concluded that the said witnesses and the complainant had positively identified the appellants. The learned trial magistrate also found that in addition the identification parade conducted showed that the prosecution case had been proved against the appellants beyond reasonable doubt and found no evidence to back up the defence of alibi raised by the appellants. The appellants were then convicted for the offence and sentenced to death as provided by law.

7. The appellants felt aggrieved about the conviction and preferred this appeal and initially raised 9 grounds and later added 7 additional grounds with leave of this court. The grounds raised by both appellants were almost similar and will summarise them as follows:

(i) That the trial magistrate erred in law and in fact by failing to note that the complainant in her first report to the police did not name any of the appellants.

(ii) That the trial magistrate erred in law and fact by failing to address herself to the sufficiency of the light at the scene of crime that helped identify the appellant.

(iii) That the trial learned magistrate erred in law and fact when she failed to consider that the appellants were arrested on the basis of calls on a phone that was not produced in evidence.

(iv) That the trial learned magistrate erred in law and fact by failing to consider that investigations were shoddy as Safaricom call data was not produced as evidence at the trial.

(v) That the learned trial magistrate erred in law by not considering that it was dark and identification was not conducive as P.W.1 and P.W.2 gave contradictory evidence.

(vi) That the learned trial magistrate erred by not considering the defence contrary to section 169 (1) of the Criminal Procedure Code.

(vii) That the learned trial magistrate erred in law by failing to note that identification parade was not conducted in accordance with the law or error free.

8. The appellants in this appeal chose to proceed through written submissions which were in support of the above grounds. The state opposed this appeal and filed written submissions in response to the submissions by the appellants.

9. In their submissions the appellants have faulted the manner in which the identification parade was conducted. The 2nd appellant contends that very few members participated in the parade pointing out seven people were picked instead of the required minimum of eight people. He has submitted the members who participated in the first parade where the complainant (P.W.2) picked him out should have been altered before P.W.4 was called to pick out the suspects from the identification parade.

10. I have considered this ground and agree with the appellant that the regulations of standing order requires that the accused/suspected person being subjected to identification parade should be placed among at least eight persons and as far as possible of similar age, height, general appearance in order not to expose the suspect to prejudice in easily being picked in the identification parade. The identification parade conducted by C.I.P. Lydia Malelu (P.W.10) as demonstrated through Prosecution Exhibit 8(a) and 8(b) clearly show that the members picked for the identification parade were seven in number and therefore fell short of the legal requirement that the members in any identification parade must be at least 8. It was also evident that the complainant (P.W.2) knew the appellants prior to the identification parade as she told the trial court that she had had prior engagements with them at the market at Kagio. The appellants were therefore not strangers to her and this fact rendered the identification parade prejudicial and not useful in so far as positive identification of the appellants were concerned.

11. This Court has however, considered the other aspects of identification particularly by the complainant (P.W.2) who told the trial court that she recognized both the appellants as she had known them before though she did not know them by name. The prosecution witnesses told the trial court that the robbers spent quite some time in the robbery incident as they went round the compound robbing other people including raping and robbing Emily Wanja Njoka (P.W.3). The witnesses (P.W.2, P.W.4 and P.W.8) told the trial court that there was electricity lights in the compound which helped them identify the appellants. This in my view made identification of the appellants positive especially when coupled with the evidence of the investigating officer Inspector Jackton Opengo (P.W.9) who recovered a phone from one of the robbers and found many missed calls from the appellants herein. I of course agree with the appellants that the police should have done a better job by getting calls data from a mobile provider serving the deceased's phone in order to clearly connect them with the appellants but nevertheless I am satisfied that the evidence of P.W.10 corroborated the evidence of P.W.2, P.W.4 and P.W.8 in the positive identification of the appellants. The appellants also conceded that they had made calls to the phone recovered by the investigating officer. It cannot therefore be said that the identification of the appellants rested only on the evidence of a single witness. It is true that P.W.2 or the complainant did not give the names of the Appellants when she first reported the incident but that in my view did not negate the probative value of her evidence in so far as identification of the appellants is concerned. I have considered and re-evaluated the totality of the evidence adduced by the prosecution and I am satisfied that the identification of the appellants was positive and reliable. It was save to find a conviction based on the

same. This court is satisfied that the conditions at the scene even though it was dark was conducive for positive identification and error free. P.W. 9 told the trial court that he was able to shoot down one suspect as they tried to flee from the scene when they heard gunshots. The police officer could not have been able to aim and kill one of the robbers if the lighting was not sufficient. I do not agree with the 2nd appellant's contention that his arrest and the eventual conviction was merely based on suspicion and conjecture because of his calls to the robber who was felled by the police. This is because the evidence tendered by the prosecution save for what I have pointed out above was nevertheless sufficient and the learned trial magistrate was correct to conclude that identification was positive.

12. The appellants have faulted the learned trial magistrate for not considering their defence which as I have stated above was basically raising an alibi. The appellants raised alibi but tendered no evidence to support it and when the learned trial magistrate weighed the defence in relation to the positive identification of the appellants, the trial court concluded correctly that the prosecution case had been proved beyond reasonable doubt.

13. This court has considered this appeal and I am satisfied that the prosecution proved all the ingredients of the offence of robbery with violence as defined under **Section 296 (2)** of the **Penal Code**. In the case of **DANIEL NJOROGE MBUGUA -VS- R[2014] eKLR** the Court of Appeal restated the law in so far as the elements of the offence facing the appellants were concerned;

“The ingredients of the offence of robbery with violence were elaborated by the appeal in the case of OLUOCH -VS- R (1985) KLR where it was held that robbery with violence is committed in any of the following circumstances:

(a) That the offender is armed with dangerous and offensive weapon or instrument or;

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

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

14. In my view the prosecution at the trial were able to establish and prove all the above ingredients of the offence facing the appellants. The prosecution were able to connect the appellants with the commission of the offence even if nothing was recovered from them. The direct and circumstantial evidence relied on by the prosecution was sufficient to prove their case beyond reasonable doubt. In the premises, I find no merit in this appeal. The same is dismissed. The conviction and sentence are upheld.

Dated and delivered at Kerugoya this 28th day of September, 2016.

R. K. LIMO

JUDGE

28.9.2016

Before Hon. Justice R. K. Limo J.,

State Counsel Mr. Omayo

Court Assistant Naomi Murage

Appellant 1. Present

Appellant 2. Present

Interpretation English/Kikuyu

Omayo for State present

Erastus Mwaniki Gichobi present in person.

Elijah Mugo Murimi present

COURT: Judgment signed, dated and delivered in the open court in presence of Omayo for State and appellants in person.

R. K. LIMO

JUDGE

28.9.2016