



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CRIMINAL APPEAL NO.2 OF 2014**

*(Consolidated with Criminal Appeals Nos. 1 of 2014 & 4 of 2014)*

MUSA KIBET OKUMU.....1ST APPELLANT

SAMUEL MUTEMBEI.....2ND APPELLANT

SIMON JAMES SOIKONG.....3RD APPELLANT

**VERSUS**

REPUBLIC.....RESPONDENT

*(Being an Appeal against the Conviction and Sentence by the Ag. Senior Resident Magistrate Hon. Onkwani H.M at Karatina Principal Magistrate's Court dated 17th December, 2013 in Criminal Case No. 236 of 2013.)*

**JUDGMENT**

1. **Musa Kibet Okumu, Samuel Mutembei, Simon James Soikong** hereinafter referred to as 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants respectively were jointly charged with the offence of Robbery With Violence contrary to **Section 296** of the **Penal Code**.

The particulars in the charge sheet being that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants ***“on the night of 4<sup>th</sup> and 5<sup>th</sup> day of May, 2013 at Mathahiti Girls Secondary School in Mathira East District within Nyeri County, jointly with others not before court, robbed Francis Kasabubu of two computers make Dell valued at Kshs. 132,500 and at or immediately before or immediately after the time of such robbery wounded the said Francis Kasabubu.”***

**Alternative Count**

Neglect to prevent a felony contrary to **Section 392** as read with **Section 36** of the **Penal Code**

The particulars being that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> ***“on the nights of 4<sup>th</sup> and 5<sup>th</sup> of May, 2013 at Mathahiti Girls Secondary School in Mathira District within Nyeri County, knowing that Musa Kibet Okumu 2) Samuel Mutembei 3) Simon James Soikong were designated to Mathahiti Girls Secondary School and failed to prevent a commission of a felony namely school breaking and stealing of two computers valued at Kshs. 132,500/=.***

2. The Appellants denied the charges and the case proceeded to full hearing. The prosecution lined up six (6) witnesses who testified. When placed on their defence the 1<sup>st</sup> Appellant gave an unsworn statement, 2<sup>nd</sup> Appellant sworn statement, while the 3<sup>rd</sup> Appellant gave an unsworn testimony.
3. After the hearing all the three (3) Appellants were found guilty and convicted and each was sentenced to death. They were aggrieved by the judgment and filed Appeals No.1 of 2014, 2 of 2014 and 4 of 2014 which were consolidated by an order of this court with HCRA No.2 of 2014 as the lead file. They raised the following grounds;
4. 1<sup>st</sup> and 2<sup>nd</sup> Appellant's grounds;

***a. That the learned Magistrate erred in both law and fact while convicting them on doubtful PW3's evidence that wasn't sufficient to sustain my conviction.***

***b. That the learned Magistrate erred in both law and fact while convicting them on charges that weren't proved to point to their guilt to meet the needs of justice as spelt in Section 50 (2) (a) of the Constitution.***

***c. That the learned Magistrate erred in law while rejecting their sworn defence that was partly supported by PW1 which rendered the same to be relied upon.***

5. 3<sup>rd</sup> Appellant's grounds filed by M.C. Kamwenji & Co. Advocates;

***1. That the learned Magistrate erred in law and fact in basing the conviction on presumptions that the happenings of the previous night to wit;***

***a. That PW3 was assigned the alarm to cover up the intended robbery.***

***b. That PW3 was assigned duty at the dormitories to put him in the line of the attack.***

***c. That the absence of a clear point of entry showed that the appellants were involved.***

***2. That the learned Magistrate erred in law and fact by convicting in the absence of any evidence as the main witness said he did not identify his attackers.***

***3. That the learned Magistrate erred in law and fact in convicting the appellant on inconclusive evidence as the investigating officer could not explain the basis of his arraigning the appellant in court.***

***4. That the learned Magistrate erred in law and fact in shifting the burden of proof on the appellant to prove why they did not hear the robbery.***

***5. That the learned Magistrate convicted where none of the elements to proof the charges had been shown.***

6. A summary of the evidence by the prosecution witnesses is that all the three (3) Appellants plus PW3 were employees of Paper Security Services and they had been deployed to Mathaithi Girls to offer security service. On the night of 4<sup>th</sup> and 5<sup>th</sup> May, 2013 at 12.00-12.30 am all the four (4) security guards were at their respective designated areas of work.
7. PW3 then saw three people approach him. He thought they were his colleagues, but they were not. He was attacked and hit. He yelled but the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants who were near did not come to his aid, though he believed they heard him. He struggled with the thieves and they took

away his metal rod and cut him on his ears.

8. He collapsed after being hit on the head with the metal rod, but regained consciousness in Hospital where he was admitted for fourteen (14) days. It was his evidence that the thieves had come from the direction where the alarm was. PW3 was in-charge of the alarm.
9. PW1 **Margaret Munene** is the Principal of Mathaithi Secondary School. On 5<sup>th</sup> May, 2012 at 5.00am she was woken up by the 2<sup>nd</sup> Appellant who informed her that the staff room had been broken into. He called another teacher (PW2) and together they walked to the staff room. It was dark and there was no electricity. Several offices were broken into. Two laptops and two computers were missing from the Head of Department room. Present with them were the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants.
10. The 1<sup>st</sup> Appellant and PW3 were missing. They found PW3 injured and was between one of the classrooms and lab. The police were called as PW3 was rushed to hospital. They went round the compound with the Police. That morning the guards had no torches yet it was dark. It was her evidence that the Appellant's were two (2) metres from the office that was broken into.
11. She explained how the school alarm works. It had rained that material night. PW2 in cross-examination mentioned a gadget which was to be with the 1<sup>st</sup> Appellant but he did not have it that night. PW4 **Maina Ndirangu** whose qualifications were not stated produced the P3 in respect of PW3 (EXB2).
12. PW5 **Daniel Peter** works with paper security services as Operations Manager. He confirmed that the Appellants and PW3 were their employees. Upon receiving the report of the attack he went to the school where he met police officers. They went round the compound but were not able to identify the point of entry and the gate was locked.
13. PW6 **No.86433 PC Allan Ojwang** was the Investigating Officer. He said they failed to get the point of entry to the compound. He therefore concluded that entry was by consent. He said he did not charge PW3 because from the investigations he was at work and his colleagues turned on him because he did not co-operate.
14. The 1<sup>st</sup> Appellant in his defence denied the charge. He explained how he assigned duties that night and how they worked. At 1.15am it started raining and lights went off. As they checked round at 5.15am they came across a broken padlock and PW3 was nowhere to be seen. He sent the 2<sup>nd</sup> Appellant to call PW1. That night he never heard any siren or alarm yet each of them had one.
15. The 2<sup>nd</sup> Appellant gave a sworn statement denying the charge. He explained he had worked that night. That most of the time he was doing some work assigned to her by PW1. It rained that night and power was on and off. The rest of his evidence is similar to that of the 1<sup>st</sup> Appellant. He was the one who assigned the others duty.
16. The 3<sup>rd</sup> Appellant denied the charge. He said he carried out his duty in his place of assignment and there was no problem there. He did not hear any siren or alarm or phone call that night.
17. When the appeal came before us for hearing the 1<sup>st</sup> and 2<sup>nd</sup> Appellants relied on their written submissions which are just the same. Their main submission is that the evidence adduced fell short of what is required to prove a case of this nature. Secondly, that the learned trial Magistrate did not consider their defences.
18. Mr. Kamwenji for the 3<sup>rd</sup> Appellant submitted that the judgment by the learned trial Magistrate shows she had a set mind which made her shift the burden of proof to the 3<sup>rd</sup> Appellant. He referred to the questions asked by the learned trial Magistrate in her judgment. Finally, there were

no reasons for charging the 3<sup>rd</sup> Appellant. He raised issue as to who was the Complainant.

19. Mr. Njue learned Senior Counsel opposed the appeal saying there was sufficient evidence connecting the Appellants with the offence. They did not respond as PW3 screamed, yet they were not far apart. The conclusion by PW6 was that entry was at the gate with consent.
20. He submitted that the sound of breaking of steel doors should have attracted the Appellants but they chose not to hear. He submitted that the learned trial Magistrate did not shift any burden to the Appellants to prove their innocence. He further stated that the person who was guarding the computers was PW3 hence use of his name as the Complainant and not PW1.
21. In response the 1<sup>st</sup> Appellant stated that the school is on a 22 acre parcel of land and is guarded by only four (4) watchmen. Mr. Kamwenji in response submitted that the evidence adduced was purely circumstantial, (page 9 and 13). That there was no consent on entry. Further that there was breakage at the gate though the gate was not broken, force was used. Secondly, entry could be accessed through the fence.
22. This is a first appeal and this court is enjoined to reconsider and re-evaluate the evidence and come to its own conclusion, bearing in mind that it did not hear nor see the witnesses.

In **Soki V R (2004)2 KLR 21** the Court of Appeal held thus;

***“It is the duty of a first appellate court to remember that parties are entitled to demand of it a decision on both questions of fact and of law, and the Court is required to weigh conflicting evidence and draw its own inference and conclusions bearing in mind always that it has neither seen nor heard the witnesses and make due allowance for this.”***

It also held the same in **Mwangi V R (2004)2 KLR 28** when it said;

***“1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate court's own decision on the evidence.***

***2. The first appellate court must itself weigh the conflicting evidence and draw its own conclusions.***

***3. It is not function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witness.”***

23. We have considered the evidence on record together with the grounds of appeal and the submissions by both the Appellants and the State.

From the evidence adduced it is clear that there was a theft of two computers from Mathahiti Girls Secondary School on the material night. PW1 produced certified copies of vouchers, delivery and payment documents (EXB1).

24. PW3's evidence is that those who attacked him were three hence more than one. Actual violence was used on PW3 and a P3 Form in respect of PW3 was produced by PW4 who confirmed that the injuries suffered by PW3 amounted to Grievous Harm. (EXB2).
25. We are therefore satisfied that the offence of Robbery with Violence contrary to **Section 296 (2)** of the **Penal Code** was committed.

26.The next issue for determination is whether the Appellants or any of them was involved in the robbery.

27.The person who was robbed was PW3. In his evidence he said he did not identify his attackers though there were electricity lights on. Furthermore what followed could not give him an opportunity to identify the attackers. However, one thing he was clear about was that none of his colleagues was among the attackers. These said colleagues are 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants.

28.We therefore find that there was no visual identification of the robbers.

**What therefore connects the Appellants with this offence?**

29.There is no evidence that any of the Appellants was found with any of the stolen items for the doctrine of recent possession to apply.

30.We have gleaned the following facts from the evidence of PW1 and PW2

- *The school compound measures 22 acres.*
- *The guards are to guard the whole compound.*
- *They have a farm of coffee and nappier grass.*
- *They have dorms, staff houses, classes and office block.*
- *The guards have no specific point to guard. They organize among themselves.*
- *The lower compound has the staff houses and the farm while the upper compound has offices and classrooms.*
- *The compound has a Keiapple fence and barbed wire.*
- *At the fence one can enter the compound.*
- *The gate was intact and locked.*

31.From the above facts we have found that the school was on a vast compound. PW5 who was the operations manager went round the compound with police officers and he was able to see at the corner of the entrance gate a point of entry. He could not however with certainty say that entry was gained through that point. He further said the gate was locked and it was hard to identify the point of entry (page 20 lines 28-30). He could not however with certainty say that entry was gained through that point. He further said the gate was locked and it was hard to identify the point of entry page 20 lines 28-30.

32.This witness was blowing both hot and cold for reasons well known to him. He appeared not clear on what an entry point was. Then finally he says this at page 21 lines 7-9;

***“I saw negligence on the part of the accused persons from my own observation and from my experience as a guard for long I did not further interrogate them since the matter was with the police.”***

He did not explain what he saw as negligence by his employees. And if there was negligence, could that be the basis of a criminal charge?

33.It is not in dispute that the four guards were to guard the whole compound of 22 acres. We found this to have been too demanding an assignment which was not practical. It's also not disputed that

it had rained that night and electricity went off up to the next morning. PW1 explained that, that morning she discovered that the Appellants had no torches yet there was no power.

34. Besides telling the Court what the company offers the guards with, PW5 did not demonstrate that indeed he had equipped the Appellants as he claimed. He did not even know the areas that were guarded by his employees.

35. PW6 at page 23 lines 29-30 states;

***“I did not charge the victim because from the investigations, he was at work and his colleagues turned on him because he did not co-operate.”***

36. PW6 was the Investigating Officer. He did not explain what it was that PW3 refused to co-operate with or who he refused to co-operate with and over what. He did not present to the Court the evidence resulting from the investigation he talked about.

37. If he had any evidence on why the Appellants would turn against their colleague he never presented it to the Court through a witness or witnesses. PW3 himself told the Court that he had no differences with his colleagues. This statement by PW6 was unsupported and was misleading. The court should not have believed him without supporting evidence.

38. It is now clear that the prosecution did not present to the court any evidence that would connect the Appellants with the Robbery with violence charge. What the Court relied on was mere suspicion. Suspicion cannot found a conviction. In the case of **Sawe Vs. R (2003) KLR 364**. The Court of Appeal stated thus of suspicion;

***“Suspicion, however strong cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”***

39. We find that the conviction of the Appellants for Robbery with violence cannot in the circumstances stand.

40. The Appellants faced an alternative count of neglect to prevent a felony. From what we have explained herein-above, ranging from the vast compound and its demands, the rain of that night, lack of electricity and torches, we find that no neglect by the Appellants has been proved. It is not clear what they ought to have done in the circumstances and yet failed to do. We would not condemn them on this alternate count either.

41. The result is that the appeal by all the three appellants succeeds. Their convictions are quashed and the sentences of death set aside. They shall all be released forthwith unless otherwise lawfully held under a separate warrant.

Orders accordingly.

**Signed, dated and delivered in open court this 15<sup>th</sup> day of December, 2015**

Hedwig Imbosa Ong’udi

Ngaah Jairus

**JUDGE**

**JUDGE**