



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NOS. 66 & 68 OF 2011

JOSPHAT EMMANUEL KOOL.....1<sup>ST</sup> APPELLANT

MUSA LESHORE LEMUNKE.....2<sup>ND</sup> APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The two accused persons namely **Josphat Emmanuel Kool** (hereinafter referred to as the 1<sup>st</sup> appellant) and **Musa Leshore Lemunke** (hereinafter referred to as the 2<sup>nd</sup> appellant) have jointly filed this appeal challenging their conviction and sentence by the learned Senior Resident Magistrate sitting at the Nakuru Law Courts. The two appellant (together with a third accused person who was acquitted by the trial court) faced two counts of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars of the charges were as follows:-

Count No. One:

“On the 29<sup>th</sup> day of January 2010 at Katakala area in Narok North District within Rift Valley province jointly with others not before court while armed with dangerous weapons namely pistols and rungus robbed Samuel Mwaura Mungai of a motor vehicle KAK 257G MAKE Mitsubishi Fusso lorry, 250 bags of poultry feeds, 10 bags of animal feeds one mobile phone make Nokia 1600 and cash Kshs.6,500/- all valued at Kshs.2,414,300/- and immediately before the time of such robbery, threatened to use actual violence to the said Samuel Mwaura Mungai.”

Count No. Two:

“On 29<sup>th</sup> day of January 2010 at Katakala area in Narok North District within Rift Valley Province jointly with others not before court while armed with dangerous weapons namely pistols and rungus robbed Antony Wambugu Kimani of mobile phone make Nokia 111 valued at Kshs.1,000/- and immediately before the time of such robbery, threatened to use actual violence to the said Antony Wambugu Kimani.”

Both appellants entered a plea of ‘Not Guilty’ to the charges and their trial commenced on 25/11/2010. The prosecution led by **Chief Inspector Nzoka** called a total of ten (10) witnesses in support of their case.

**PW2, Alex Mwangi Njonjo** told the court that he carries on business as a transporter of goods. On

29/1/2010 he was contracted by one **Andrew Kamau** to ferry certain specified foodstuffs to Kisumu. **PW2** had a Mitsubishi lorry Registration KAK 275G which he used for his transport business. He contacted his regular driver and had the vehicle loaded with the required items. The vehicle then set off to Kisumu.

**PW1, Samuel Mwaura Mungi** confirms that he was the driver employed by **PW1**. He states that on 29/1/2010 upon instructions from **PW1** the lorry registration KAK 257G was loaded up with 18 tones of flour, dairy meal, cattle and chicken feed etc. **PW1** then set off to deliver the items to Kisumu. He was accompanied by **PW3, Anthony Wambugu Kimani** who was the turn boy. They followed the Narok route. About 5kms after the Ewaso Nyiro junction at about 10.30 p.m. their vehicle was ordered to stop by five (5) men who were dressed in police uniforms. The men were armed with rifles and rungu. **PW1** stopped thinking this was a police check. The men then boarded the vehicle and demanded to see the documentation for the goods they were carrying. Then they began to assault both **PW1** and his turn boy **PW3**. They pulled the two men out of the lorry to the side of the road where they were forced to drink some unknown liquid. They were rendered unconscious. **PW1** stated that he regained his senses at 5.30 p.m. to find the lorry and all the merchandise gone. **PW1** stated that he was also robbed of Kshs.6,000/- which he had in his pocket and his mobile phone make Nokia 1600. On his part **PW3** stated that he was robbed of his mobile phone as well as Kshs.1,000/- cash. They borrowed a mobile phone from a Good Samaritan and phoned their employer **PW2** to inform him of the robbery. Thereafter they went to report the incident at Narok Police Station. The stolen lorry with its contents was later found abandoned in a ditch. Upon completion of police investigations, the two appellants were later arrested in Narok town and were arraigned in court facing two (2) counts of robbery with violence.

At the close of the prosecution case both appellants were found to have a case to answer and were placed onto their defence. They each gave an unsworn defence in which they denied any and all involvement in the robbery. On 25/2/2011 the learned trial magistrate delivered his judgment in which he convicted both appellants on the two counts of robbery with violence and thereafter sentenced each to death. Being aggrieved the appellants filed this appeal. Since both appellants had been tried on the same case in the lower court – their appeals were consolidated and were heard together. Each appellant relied exclusively upon their written submissions filed in support of the appeal. **Ms. Nyakira** learned State Counsel who appeared for the respondent state opposed the appeal.

Being a court of first appeal we have a duty to re-evaluate the evidence adduced by the prosecution witnesses and to draw our own conclusions on the same (see **Ajode vs Republic [2004]2 KLR 81**).

The key issue raised in this appeal is that of identification. Both **PW1** and **PW3** told the court that the incident occurred at 10.30p.m. No doubt it was dark. The witnesses have not told the court whether the highway was lit. However, both state that the men who flagged down their vehicle had torches. **PW1** told the court that he on his part was unable to identify any of the men who robbed him. **PW1** states in his evidence at page 9 line 19:-

**“I couldn’t identify any of my assailants that night because they were in hats, it was dark and they descended upon me beating me. To date am unable to identify them. I was beaten so badly....”**

Therefore **PW1** explains that due to the severe assault he was subjected to he was unable to identify the men. The situation appears to have been different for his turn boy, **PW3**.

**PW3** told the court that he had a good look at the men who robbed them and was able to identify the two appellants. Both witnesses had testified that the robbers were dressed in police uniform and masqueraded as police officers flagging down the vehicle for a routine inspection. We have no doubt that this mistaken belief is what led **PW1** to stop even though the men were all armed with rifles. In keeping with this charade that they were police officers the robbers demanded to see the documentation for the goods being carried on the lorry. **PW2** being the turn boy had that documentation with him. He therefore switched on the lights in the cabin of the lorry in order to show the ‘**police**’ the relevant documents. In his evidence at page 11 line 35 **PW3** states that:-

**“During the incident I recognized 2 people very well and I am able to identify them when they asked for the delivery notes. I switched on the bulb light on the roof inside – ceiling of the motor vehicle.”**

It was by way of this cabin light that **PW3** was enabled to see the robbers. He was in close proximity with them inside the cabin of the lorry with the lights on and he was undoubtedly facing them to show the delivery notes for the goods on the lorry. We are further persuaded that **PW3** got a good look at the 2 appellants by the fact that he gave a detailed description of their appearances. In his testimony at page 12 line 1 **PW3** states:-

**“One of them had a black dot on his forehead and tall. The other had a small black face and very slender. This is the one who had the black dot on his forehead (pointing to accused 1). The dot is still here. This is the other one with the small black face (pointing at 2<sup>nd</sup> accused). I can’t forget the two ....”**

**PW3** would only have been able to describe the faces of the 2 appellants in such great detail if he had seen them. It is not every other person who has a black dot on the forehead. This was a mark which distinguished the 1<sup>st</sup> appellant in the mind of **PW3**.

The appellants made much of the fact that in his first report **PW3** did not describe his attackers. Indeed the appellants called for the relevant OB from Narok North Police Station. The same was produced in this court. Upon perusal we note that the OB does contain a report of the robbery but no description of the attackers. However we find that this omission is not necessarily fatal to the prosecution case. The OB is but an incident report. It cannot contain all the details of evidence. Under cross examination by the 2<sup>nd</sup> appellant **PW3** confirms that he included these descriptive details in his statement to the police. **PW3** also states under re-examination at page 13 line 3:-

**“DMF11 (his statement) last paragraph it states I can be able to identify one of the robbers. Slender black and tall. I gave the description.”**

It is clear therefore that **PW3** has not wavered in his description of the assailants. This is not just an afterthought but is what he has maintained all along.

The identification of **PW3** was further reinforced by the fact that he was able to positively identify both appellants during a police identification parade. The parade was conducted by **PW9, Chief Inspector Peter Muiruri** at Narok CID Headquarters. **PW9** gave evidence regarding the manner in which he conducted the parade. He testified that the witness **PW3** picked out both the 1<sup>st</sup> and 2<sup>nd</sup> appellants in two different identification parades. The parade forms were both produced as exhibits during the trial **PExh.7** and **PExh8** and we note that both appellants in their comments indicated that they were satisfied with the manner in which the parades were conducted. Indeed the 2<sup>nd</sup> appellant in his comments stated as follows:-

**“Yes I am satisfied and I expect to meet with witness in court for questioning.”**

It is not lost on us that the two appellants have been identified by a single witness. In the case of **Odhiambo vs Republic [2002]1 KLR 241**, the Court of Appeal sitting in Mombasa held that:-

**“Where evidence rests on a single witness and the circumstances of identification of identification are known to be difficult, then 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 error.”**

In this case the identification of the two appellants by **PW3** is duly corroborated by the identification parades in which he did positively identify the same appellants. This leads us to conclude that **PW3** was sure of whom he had seen.

At this point we deem it important to comment upon the ‘**confession**’ allegedly taken from the 1<sup>st</sup> appellant and which was produced as an exhibit **PExh.6**. **PW9** purportedly recorded this confession from the 1<sup>st</sup> appellant on 7/7/2010 at Narok CID Offices. Despite the fact that the 1<sup>st</sup> appellant clearly repudiated that confession the trial court proceeded to accept it into evidence. In so doing the learned trial magistrate erred. Courts must exercise extreme care in accepting into evidence any alleged confession. All the conditions set out in Section 25A of the Evidence Act must be met. Where (as happened here) an accused repudiates a confession then the proper procedure is for a trial-within-a-trial to be conducted to determine the admissibility or otherwise of such a confession. The trial magistrate erred in proceeding to admit the alleged confessions into evidence without conducting a trial-within-a-trial. In our view this alleged confession ought not to have been admitted by the trial court and we will not grant the same any consideration. We also note that the learned trial magistrate also paid little heed to this alleged confession in coming to his final decision.

Having said that we are satisfied that there has been a clear and positive identification by **PW3** which squarely places both appellants at the scene of the robbery. **PW3** was able to state the role played by each appellant in the incident. We find that there existed no possibility of a mistaken identity. The ingredients for the offence of robbery with violence have been shown to exist. The robbery was undertaken by more than one person. The assailants were armed with rifles and rungun. The victims were forced to drink some liquid which caused them to lose consciousness. **PW5, Dr. Allan Soita** a Medical Officer attached to Narok District Hospital testified that upon examination after the incident **PW1** was found to have head injuries and was not in his normal senses, necessitating his admission into hospital for 3 days. We find that the charge was proved beyond reasonable doubt. The conviction of the two appellants was safe and we do confirm the same. The death sentence being the sentence provided for by Section 296(2) of the Penal Code is hereby upheld. The upshot is that this appeal fails and is hereby dismissed in its entirety.

**Dated in Nakuru this 14<sup>th</sup> day of December, 2015.**

**MAUREEN ODERO**

**JANET MULWA**

**JUDGE**

**JUDGE**