



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAMIRA**

**CRIMINAL APPEAL CASE NO. 10 OF 2012**

**IRENE BOSIBORI SAMUEL.....1<sup>ST</sup> APPELLANT**

**JOSEPHAT ONGUSO MOREKA.....2<sup>ND</sup> APPELLANT**

**=VERSUS=**

**REPUBLIC.....RESPONDENT**

**Appeal arising from the judgment of [Mr. J. Macharia, S.R.M] in Keroka Criminal Case No. 347 of 2012}**

**JUDGMENT**

The 1<sup>st</sup> Appellant Irene Bosibori Samuel and the 2<sup>nd</sup> appellant Josephat Onguso Moreka were the 1<sup>st</sup> and 2<sup>nd</sup> accused in the Principal Magistrates's Court at Keroka Criminal Case No. 347 of 2012. They were both facing the charge of robbery with violence contrary Section 296(2) of the Penal Code. The particulars of the charge were that on the 19<sup>th</sup> day of February, 2012 at Keroka Township in Masaba District of Nyanza Province jointly while armed with dangerous weapon namely pangas they robbed Jonathan Nkiti 2 mobile phones make Nokia 2310 and Matrix M all valued at Kshs.8,500/= and immediately before and immediately after the time of such robbery used actual violence to the said Jonathan Nkiti.

The 2<sup>nd</sup> accused herein Josephat Onguso Moreka also faced an alternative charge of handling stolen goods contrary to **Section 22(2) of the Penal Code**. The particulars of the charge were that on the 19<sup>th</sup> February, 2012 at Keroka Township Masaba District Nyanza Province otherwise than in the cause of stealing he dishonestly retained one mobile phone make Nokia 2300 the property of Jonathan Nkiti knowing and having knowledge to believe them to be stolen goods or unlawfully obtained.

They both pleaded not guilty to the above charges and trial ensued.

PW1 was Jonathan Nkiti (the complainant). He told the court that on 19.02.2012 he was at Keroka after being called by 1<sup>st</sup> accused. Apparently, he had made 1<sup>st</sup> accused before the material day and she had told him that she wanted some work. They then exchanged numbers.

On 18.02.2012, 1<sup>st</sup> accused called him and told him to go to Keroka as she was ready to work. The following day i.e 19.02.2012 they met at the Keroka stage and 1<sup>st</sup> accused requested him to accompany to her house to collect a card. On reaching her house, (1<sup>st</sup> accused) shortly after he heard someone knocking at her door. Immediately after 2<sup>nd</sup> accused entered armed with a panga. The 2<sup>nd</sup> accused then ordered him to sit down and to give him all that he had. The 2<sup>nd</sup> accused then took his two phones and identity card.

He identified his 2 phones in court which were Nokia 2310 and Matrix phone. They were both marked s MFI 1 and MFI 2 respectively.

In addition to this, he also had Kshs.10,000/= in his phone's Mpesa account and about Kshs.500 cash. That notwithstanding, the 2<sup>nd</sup> accused also proceeded to cut him in his left hand with a panga. The 1 accused then told him to wait for 2<sup>nd</sup> accused as he was coming back again.

Soon after, an unknown person came to 1<sup>st</sup> accused house and gave him back his identity card. That person informed him to go to the Petrol Station and look for 2<sup>nd</sup> accused. He immediately left 1<sup>st</sup> accused house and reported the matter to Keroka Police Station. After reporting the matter, he was sent to Masimba Hospital where he was treated. He produced his P3 form which was marked as MFI 3. After being treated, he went near the bus stage and met a friend of his who was a community policing officer. They both went back to 1<sup>st</sup> accused house as his friend the community policing officer informed him that he knew the 1<sup>st</sup> and 2<sup>nd</sup> accused. On reaching the 1<sup>st</sup> accused house, they searched the house and found his Nokia Phone hidden under the bed. The 2<sup>nd</sup> accused informed them that the other phone was with the 1<sup>st</sup> accused. They then proceeded to search for the 1<sup>st</sup> accused but did not find her. However, the following day the 1<sup>st</sup> accused was arrested and found with the other phone of Matrix make. However, the Kshs.10, 000/= which was in his mpesa had all been withdrawn from his account and the sim card was also missing too. Lastly, he told the court that he had not known the 2<sup>nd</sup> accused before the material day.

PW2 was Wilfred Nyakoe Joel the community police officer. He corroborated PW1's testimony but further stated that when they went to PW1's house, they only met some children who identified the name of 2<sup>nd</sup> accused as the person who had attacked PW1. The children also told them that their mother (1<sup>st</sup> accused) had attacked PW1. Sine, he knew 1<sup>st</sup> accused house they proceeded to his house where they met 2<sup>nd</sup> accused and he told them that he had hidden the phone and indeed they found one phone inside the house. Furthermore, he told them that the other phone was with the 1<sup>st</sup> accused. They then embarked on searching for 1<sup>st</sup> accused but they did not find her. Meanwhile, the 2<sup>nd</sup> accused also disappeared the following day. 1

However, they were able to trace 1<sup>st</sup> accused and they recovered the Matrix phone on her. After about a fortnight, the 2<sup>nd</sup> accused resurfaced and he arrested him at the stage. The complainant (PW1) positively identified the phones i.e Nokia and Matrix phones. , Lastly, he stated that the panga was not recovered.

PW3 was Joel Oyaro a clinical officer at Kijauri Hospital. He confirmed that on 20.02.2012 he examined the complainant who alleged to have been assaulted by a known person. He explained that the complainant had alleged that the thumb finger of his left hand had been cut. He noted that the injuries on the complainant were one day old and he classified the injuries on complainant as harm. He produced PW1's P3 Form as P Exhibit No.3.

PW4 was No.79399 Cpl Jane Gikenya Kijamanga. She recalled that on the 20.02.2012 at around 4p.m she recorded a report from a community policing officer who brought accused (1<sup>st</sup> accused) with the offence of having stolen PW1's phone. She then placed the accused in the cell. PW4 was then called and he positively identified phone. She also told the court that the 2<sup>nd</sup> accused was also positively identified

by PW1 and so was 1<sup>st</sup> accused. She then produced the 2 phones as Exhibit 1 & 2 respectively. This marked the close of the prosecution's case.

After considering the above evidence, the trial court held that the prosecution had presented sufficient evidence to put both accused persons on their defences. Both accused persons in turn part chose to give sworn defences with no witnesses. The 1<sup>st</sup> accused in her defence stated that on the material day the complainant came to her house at 11.00 a.m, they took lunch together and at around 6.30 p.m the complainant gave him his phone number before leaving for home after promising her that he would be back. However, the complainant did not come back. The following day, she was arrested by people she

did not know and told to record her statement at the police station. She denied ever committing the offence.

DW2 Josephat Onguso the 2<sup>nd</sup> accused. He told the court, that on 11.03.2012 he was at his business premises when at around 6 30a.m. he went to the market to buy some things. That he then entered into a bar and found a community policing person whom he had a grudge. That the policing officer informed him that the police were looking for him.

On going to the police station, the police beat him and he fainted. He then found himself at Kisii Level 5 and on 26.01.2011 he was brought to court for an offence that he did not know.

In his judgment, the trial magistrate found that the prosecution had proved its case beyond all reasonable doubt and convicted both accused persons for the offence of robbery with violence **Contrary to Section 296(2) of the Penal Code**. Each accused was then sentenced to serve 10 year imprisonment

The 1<sup>st</sup> and 2<sup>nd</sup> accused now appellants herein Irene Bosibori and Josephat Onguso Moreka being aggrieved with the above conviction and sentence have preferred an appeal to this court. In her petition of Appeal the 1st appellant in her home made petition of appeal has appealed on grounds interalia that the prosecution failed to prove its case beyond reasonable doubt, that there were no exhibits recovered in her possession that could clearly link her with the alleged offence, that the complainant had actually given her one of his phones, that the complainant was actually her boyfriend and lastly that the sentence imposed herein was overly too harsh.

The 2<sup>nd</sup> appellant in his home made petition appeals on grounds interalia: that the prosecution did not prove its evidence beyond reasonable doubt and that the trial court did not consider his defence.

The appellants also filed their written submissions in which they both urged this court to reduce the sentence of 10 years imprisonment so that they can go back to their young families. The 2<sup>nd</sup> appellant has specifically stated that he is sick and the environment condition in prison is not favouring his health.

When the matter came before us on 2nd June 2015 it was agreed that both appeals i.e. the 1<sup>st</sup> & 2<sup>nd</sup> appellants appeal be consolidated for purposes of this appeal. When the matter came before us again on 14/7/2015 Miss Boyon for the State opposed the above appeal by the appellants. She submitted by first sending a warning to both appellants that should they wish to continue with their appeal and their appeal gets dismissed, the State would be seeking that Trial Court's sentence be enhanced from 10 years to the death sentence

The 1st appellant submitted by stating that she understood the warning but still she wanted to proceed with her appeal though she wished to appeal against sentence alone. She submitted that she was a single mother; the complainant was her boyfriend and he (complainant) has now left the children who are now alone. In addition to this, she submitted that the complainant had actually left her with his phone when he was going to town before he was attacked. That it was actually on the strength of that phone that she was arrested.

The 2<sup>nd</sup> appellant on his part submitted that he understood the warning but he still wished to proceed with his appeal. He submitted by stating that he had left young children at home, his two brothers like the children and his mother is too old and sick. Lastly, he submitted by stating that he was also sick as he was HIV positive.

The above appeal was opposed by the State. Miss Boyon learned State Counsel for the State submitted that the evidence tendered was sufficient and all the elements to the offence charged were satisfied. She further submitted that both appellants were armed at the time of the offence and the fact that they were both charged presupposes that they acted jointly in executing the attack.

She further submitted that at the time of the robbery, both appellants used violence on the complainant

and inflicted injury as evidence by the P3 form produced as P. Exhibit 3. Moreover, she submitted that the stolen items were recovered from both appellants and they did not offer any reasonable explanation on how they came to possession of the items. In addition to this, she submitted that the complainant was able to identify the people who attacked him i.e. the 1<sup>st</sup> appellant was known to the complainant hence she submitted that the prosecution's evidence supported the commission of the offence of robbery with violence, thus she submitted that the appeal had no merit and should be dismissed.

Lastly, on the issue of sentence she submitted that the only sentence and that there is only one sentence and that the sentence the appellants are currently serving is illegal. She thus urged this court to uphold the conviction and enhance the sentence the sentence to that of death as provided for by the law.

This court as a first appeal court is mandated to reconsider the evidence on record bearing in mind that it did not see or hear the witnesses before making a determination of its own. See Okeno v Republic Criminal Appeal. [1972] EA 32, Mohamed Rama Alfani & 2 Others v Republic criminal appeal No. 223 of 2002

From the evidence presented in the lower court the only issue that this court needs to determine is whether or not the charges robbery with violence against the 2 appellants were proved beyond reasonable doubt.

P.W.1 the complainant during evidence in chief stated the following:-

**"I had met 1st accused person before this offence and she told me that she wanted some work. We exchanged numbers.**

**Then on 18/2/2012 she called me and told me to go to Keroka and she was ready to work. On 19/2/2012 we met at the stage she told me to enter her house which I did. Then heard somebody knocking the door. A person entered and was armed with a panga. That person wanted to cut me. He told me to give him all I had. He searched me that person is the 2nd accused person. He asked for my phone and I gave him. He went with my 2 phones and identity card. The 2 phones are before this court. They are Nokia 2310 and Matrix phone.....**

**The 2<sup>nd</sup> accused cut me on the left hand with a panga.**

**.....the first accused told me to wait for the 2<sup>nd</sup> accused as he will be coming back.**

On cross-examination the complainant stated:-

**"We had met in a hotel and you asked me if I could find a job for you. You saw me as I was being attacked. I was attacked by 1<sup>st</sup> accused person.**

P.W.2 the community policing officer stated the following in his evidence in chief: -

**"I knew 2nd accused's house and we proceeded to his house.**

**We met the 2<sup>nd</sup> accused person. He told us that they had hidden the phone and we went and found one phone inside the house. The other phone was with 1<sup>st</sup> accused person. The complainant positively identified the two phones as his i.e. Nokia and matrix phones. We searched for 1st accused but we did not find her. The 2nd accused escaped the next day. We found a matrix phone from her.**

**.....After two weeks the 2nd accused resurfaced and I arrested him on the stage.**

P.W.3 the clinical officer in his evidence in chief produced the P3 form detailing the complainant's injuries and he classified the same injuries as harm.

When put to their defences, the 1<sup>st</sup> appellant stated the fact that the complainant and herself were just friends and denied ever committing the offence. The 2<sup>nd</sup> appellant on the other hand stated that he had a grudge with P.W.2 and he did not know anything about the offence he was charged with. The trial court in its judgment found the charges of robbery with violence against the appellant proved beyond reasonable doubt convicted them for the same and sentenced them to serve 10 years imprisonment.

On the offence of robbery with violence the following ingredients need to be established as set out by the Court of Appeal in the case of *Oluoch -versus- Republic (1985) KLR* 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 of one or more person; or**
- (c) At or immediately before or immediately after the time of robbery the offender wounds beats, strikes or uses other personal violence to any person ....."..... Emphasis)**

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 the instant case it is rather evident from the facts as presented by the prosecution that the 1<sup>st</sup> appellant did not actually carry a weapon or injure the complainant. However the 1<sup>st</sup> appellant had a common intention as correctly submitted by Miss. Boyon for the prosecution to lure the complainant to her house so that appellant may attack him and rob him of his two phones. The doctrine of common intention was defined in the case of *Wanjiru d/o Wamano -versus- Republic 22 EACA 521* as:-

**"A premeditated plan but this does not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with.**

In the present case, the doctrine of common intention is well demonstrated by the fact that both appellants had an intention to violently rob the complainant. The 1<sup>st</sup> appellant's role was lure the

complainant to her house in the guise that she had forgotten something and she therefore convinced the complainant to innocently accompany her as she went for her identity card.

However moments after the two entered 1<sup>st</sup> appellant's house, the 2<sup>nd</sup> appellant swings in and immediately starts asking the complainant (alone) to lie down, he frisks him, takes away his two phones not forgetting the fact that he injures the complainant with a panga. All this events unravel in the 1<sup>st</sup> appellant's house as she just stands and watches. She is neither told to lie down like her companion (the complainant) nor is anything stolen from her. The manner in which the complainant was attacked and robbed clearly establishes the fact that there was a common intention by both the 1<sup>st</sup> and 2<sup>nd</sup> appellants to rob him since in this case the robbery with violence was committed by two people i.e. 1<sup>st</sup> & 2<sup>nd</sup> appellants while armed with a panga and further by actually inflicting an injury on him with the said panga on his fingers.

In addition to this, both the appellants are found in possession of the stolen phones i.e the 2<sup>nd</sup> appellant was traced the same day by P.W.2 and he actually directed them where to find one of the phone .While the other phone was found in the possession of the 1<sup>st</sup> appellant. The 1<sup>st</sup> appellants contention that they were lovers is not to be belied as the complainant had already stated that he had known the complainant prior to the material day when the 1<sup>st</sup> appellant had requested the complainant to find her work. Furthermore, the 1<sup>st</sup> appellant's contention that they were lovers with the complainant is also dispelled by

the fact that moments after the complainant was robbed she disappeared and was only traced the following day in possession of the phone that the complainant had lost.

The trial magistrate in our view correctly convicted the appellants for the offence of robbery with violence. However, he sentenced them to serve 10 years in prison which is an illegal sentence. **Section 296 (2) of the Penal Code** clearly stipulates a mandatory sentence for anyone found guilty for the offence of robbery with violence which is death.

The appellants were given a warning at the beginning of this appeal by the State that should they wish to continue with the appeal and should appeal be dismissed the State would be urging the court to enhance their sentence from ten years imprisonment to the death sentence.

The appellants in their own wisdom or lack of it decided to proceed with the appeal and as we have demonstrated above, indeed the offence of robbery with violence was proved by the prosecution beyond reasonable doubt and the trial magistrate in the lower court correctly convicted both the appellants for the same but simply misdirected himself when he sentenced appellants to a 10 year sentence as opposed to the death sentence.

**Section 354 of the Criminal Procedure Code** is on powers of an appeal court on appeal and stipulates:

1.....

2.....

3. The court may then if it considers that there is sufficient ground for interfering dismiss the appeal or may:-

(i) .....

(ii) **Alter the finding, maintaining the sentence on, with or without altering the finding, reduce or increase the sentence, or**

(iii) **With or without a reduction or increase and with or without altering the finding, alter the nature of the sentence.**

In the case of *Stanley Mtunya –versus- Republic Criminal Appeal No. 280 of 2012* it was held:-

**"While it is prudent and fair to warn the appellant and give him a notice of enhancement, we are of the view that such a notice is not required in respect of an illegal sentence. This is because by virtue of the provisions of Section 347 (2) of the Criminal Procedure Code, appeals to the High Court may be on matters of facts and law.**

**Illegality to a sentence is a matter of law and therefore, the learned Judge was correct in enhancing the sentence to life imprisonment.**

Similar sentiments were echoed in *Kingsley Chikwu -versus- Republic Criminal Appeal No.257 of 2007* where the Court of Appeal in a second appeal enhanced sentence despite the fact that no notice of enhancement of sentence had been given and there was no cross-appeal.

In *George Morara Achoki -versus- Republic [2014] eKLR* the Court of Appeal in Kisumu as per Maraga, Azangalala & Kantai JJA held:-

**.....although there is no legal requirement for the State to file cross-appeal an appellant must be inform at the earliest opportunity, at the commencement of hearing of his appeal, that there is a real danger that should the appeal he heard and fail a sentence could be enhanced by the High Court in terms of the said Section 354 of the Criminal**

**procedure Code.**

In the instant case, although there was no cross-appeal by the State, as well demonstrated by the above authorities the appellants were correctly convicted but were sentenced to an illegal, sentence.

As well stated in the case of Stanley Nkunja (*supra*), the state only needed to warn the accused that they would be urging the appeal court to enhance the sentence and needed not to cross appeal. The appellants were duly warned but nevertheless proceeded with this appeal.

After analyzing all the above evidence we have come to the conclusion that the above appeal by the appellants lack merit and we hereby dismiss the same. This court in exercising its Powers in accordance with **Section 354 of the Criminal procedure Code** enhances the 10 years sentence meted out to each of the appellants by the lower court to the mandatory death sentence in accordance with **Section 296 (2) of the Penal Code.**

It is so ordered

**Dated and delivered at Nyamira on this 11<sup>th</sup> day of December, 2015**

**J. WAKIAGA**

**C. B. NAGILLAH**

**JUDGE**

**JUDGE**

**In the presence of: }**

Irene Bosibori Samuel, in person for the appellant

Josephat Ongubo Moreka, in person for the appellant

Malesi for State

Mercy - Court Clerk