



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CRIMINAL APPEAL NO. 42 OF 2013

ERICK ANYONA alias PETER MITUNDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the convict and sentence of Hon. J. Ndururi, Principal Magistrate, Kericho dated 27th September 2013)

JUDGMENT

ERIC ANYONA *alias* **PETER MITUNDA**, the appellant herein was tried and convicted for the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**.

“The particulars of the offence are that on the 7th day of July 2012 at Chepseon in Kipkelion District within Rift Valley Province jointly with others not before court while armed with offensive weapons namely pangas and metal bars robbed one Anthony Ronoh of his mobile phone make Samsung 3010s S/no.356301044017020, nokia 1085, radio sonitek, three pairs of safari boots and cash of Kshs.8,209 all valued at Kshs.35,209 and at the time of such robbery threatened to use actual violence to the said Anthony Ronoh”.

The appellant was thereafter sentenced to suffer death. Being aggrieved, the appellant preferred this appeal and put forward the following grounds:

1. **That my Lordship, the learned trial Magistrate erred both in law and facts by basing my conviction on inconsistent evidence.**
2. **That my Lordship, the learned trial Magistrate erred both in law and facts by not considering and convicting I the appellant on the evidence of identification parade without informing himself adequately with caution as the alleged identification was not free and fair as required by the law.**
3. **That my Lordship, the learned trial Magistrate erred both in law and facts that he did not give out any evidence as a vital exhibits such as mobile phone or the receipt to proof that he was robbed of the said items.**
4. **That my Lordship, the trial Magistrate furthermore erred again in law and facts by not seeing that the witness proceeded in court upon the appellant was fabricated to suit me the appellant in case and crime which I didn't commit at all.**

5. **That my Lordship, the learned trial Magistrate erred on the evidence of PW6 who came from safaricom and alleged the money were sent to I the appellants number but their names which appears were not my names.**
6. **That my Lordship, the trial Magistrate erred in law and facts by not considering on the charge sheet which was defective, according to the mobile make phone make samsung 3013 and in the Judgment proceeding appears as Samsung 30105.**
7. **That my Lordship, the sentence of death is so manifestly harsh,excessive,inhumanity and extremely oppressive, given to the facts that I was not a complicity to the crime in question.**
8. **That my Lordship, my defense was strong enough and it was not treated as required by the law.**

We wish to set out in brief the case that was before the trial court before considering the merits of the Appeal. The prosecution's case was supported by the evidence of six witnesses. It is the evidence of **Anthony Rono** (PW1) and **Alice Chepkemoi Rono** (PW2) that at about 2.00am on 7th July 2009 they were asleep in their home at Chepseon Market when a group of robbers broke into their house. Three robbers entered into their bedroom while some entered the bedroom of the couple's daughter. The leader of the robbers is said to have announced that they are good robbers and that they only wanted to be given money. One robber held a yellowish torch while another held a panga and the other an iron bar. PW1 was ordered to remain seated on the bed while PW2 was ordered to get out of bed and hand over money to the robbers. PW2 was hit on the head using the flat side of the panga when she hesitated to respond to the robbers demands. PW1 directed PW2 to fish out from the drawer Kshs.5,000 which she handed over the same to one of the robbers. The robbers demanded to be given more money. PW1 told PW2 to get some money which he had hidden at the bathroom. At that time, the only source of light was the torch. PW1 with one robber who had a torch went to the bathroom leaving the bedroom dark. The robber who stood on guard over PW1 put on electric lights. PW2 fished out from the toilet Kshs.3,200 and handed over the same to the robber she was with. PW1 said he was able to partially see the robber who stood guard over him after he put on the lights. He claimed he fully saw the robber who had a torch and who had gone with PW2 to the toilet. PW2 handed over two mobile phones to the robbers. One of the mobile phones is Samsung 3010 serial no.356301044017020 belonging to PW1. The robber who had a torch is said to have moved closer to where PW1 was with a view of having him switch on the phone using his pin number. The robbers are said to have used a bag they stole from the bedroom of the couple's daughter to carry away three pairs of shoes belonging to PW1 and PW2. The robbers left using PW1's motorcycle registration no. K.M.C.A 374G which was later found abandoned at the main road. When the robbers left, PW1 woke up his neighbour and requested to be given a phone which he used to call Terry Kipkurui to inform the police at Chepseon Police Station. Police officers arrived at PW1's house the next day. C.I.D officers from Kericho Police Station later called PW1 informing him to make a visit to identify a suspect in an ID parade comprising of nine people. PW1 said he was able to identify the appellant as the person who had a torch and who took his phone. PW1 said he was able to identify the appellant by his appearance and voice having asked each parade member to repeat the words ***"we are good robbers, give us chipesa."*** PW2 also claimed to have identified the appellant in court at the dock as the person whom she handed over money. **Cpl George Otuoma** (PW3) and **Cpl Stanley Musembi** (PW5) after tracking mobile no.0719118369 and through an informer managed to arrest the appellant in Kericho town on 11th August 2012. PW3 and PW5 recovered from the appellant one mobile phone make nokia 1200. PW5 stated that the police analysed the data and found that the samsung phone had been used with safaricom line no.0719118369 registered in the name of Peter Mitunda. A search at the safaricom indicated that line no.0719118369 is registered in the name of Peter Kerimba Mitunda. The appellant when placed on his defence, denied the offence. He said he was arrested for causing a disturbance at Mwananchi Hotel in Kericho. The appellant claimed that the identification parade was not properly conducted, in that PW5 was present when **IP Abdurahman Mohamed** (PW4) conducted the identification parade. It is said PW1 was allowed to go through the parade twice without identifying anybody. The appellant further alleged that the police took his identity card but never returned it. The learned Principal Magistrate concluded that the prosecution's case was established by circumstantial and identification evidence.

Having set out the case that was before the trial court, we now wish to consider the substance of the appeal. Though the appellant put forward a total of eight grounds in his Petition, Mr. Motanya learned advocate for the appellant argued two main grounds. **First**, it is the submission of Mr. Motanya that the evidence of the appellant's identification was flawed and unreliable. The learned advocate pointed out that no good reasons were given as to why PW2 was not called upon to attend the parade. He also pointed out that there was no evidence to show that PW1 had given the appellant's description to the police prior to the identification parade. Mr. Motanya further pointed out that the parade should have comprised of members of people of Kisii tribe since the complainant identified him using voice recognition. Mr. Mutai, learned Senior Prosecution State counsel was of the view that the identification parade was properly conducted. Mr. Mutai pointed out that the conditions for identification were ideal for a positive identification which was free from error. He stated that lights were put on and that the appellant spent a considerable amount of time with the complainant. We have on our part critically re-evaluated the evidence of identification and we think there were serious lapses and defects which emerged. **First**, it is obvious from record that the complainant (PW1) and his wife (PW2) did not give the police the physical appearance or the description of the appellant prior to his arrest and identification. Secondly, it is clear from the evidence that PW1 relied on voice identification to pick out the appellant from the parade. PW1 is quoted to have said that the robbers demanded to be given '*chipesa*' in kiswahili language. He told the police that the attackers had a 'Kisii' accent. He further stated that he told the police officer who conducted the identification parade to tell each of the eight members of the parade to say the following words "***We are good robbers, give us 'chipesa'***". There is no dispute that the tribe of the members of the parade was not stated. In the circumstances of this case, it was necessary for the members to be people from the Kisii tribe. With respect, we agree with the submissions of Mr. Motanya that the identification parade cannot be relied upon. We have entertained some doubt which the law enjoins us to give it in favour of the appellant.

In the second ground of appeal, Mr. Motanya argued that the evidence obtained from safaricom could not by any stretch of imagination link the appellant to the offence. He pointed out that the learned Principal Magistrate introduced extraneous evidence to link the appellant to a series of robberies within Chepseon area. Mr. Motanya further pointed out that the police failed to tender evidence showing that the name Peter Kerimba Mitunda and Erick Anyona Mitunda refer to one and same person. Mr. Mutai was of the view that since the appellant was found in possession of the sim card which had been robbed from PW1, then the inference which the court should make is that the Appellant was the robber since he did not explain how the phone came into his possession. We have carefully re-examined the evidence of PW3 and PW5. It is the evidence of PW3 that following a tip-off from a police informer, the police managed to arrest the appellant in Kericho town on 11th August 2012. Upon arrest, the police searched Anyona and recovered one mobile phone make Nokia 1200 IMEI 353307042525170 serial no.884543 and a birth certificate bearing the name of Erick Anyona Mitunda. PW5 was tasked to obtain the phone data from Safaricom. PW1 is alleged to have lost two mobile phones namely Samsung 3010, serial no.356301044017020 and Nokia 1085. It is the evidence of PW5 that his investigation revealed that the Samsung phone had been used with Safaricom line no.0719118369 registered in the name of Peter Kerimba Mitunda after the robbery. That line was tracked to Kericho leading to the arrest of the Appellant. PW5 stated that they were unable to get the identity card of the appellant. It is clear from the evidence of PW3 and PW5 that the police were unable to tender evidence showing that Peter Kerimba Mitunda referred to the person known as Erick Anyona Mitunda hence being one and the same person. The police were unable to obtain the appellant's identity card. The police also failed to get the appellant's identity card number from Safaricom. The failure to obtain such crucial evidence is fatal in that the nexus linking the appellant to the offence is missing. With respect, we are persuaded by the submissions of Mr. Motanya that the investigation missed a critical link making it unsafe for this court to sustain the conviction. We also agree with Mr. Motanya that the learned Principal Magistrate erred when he incorporated in his judgment the evidence relating to a robbery case where one Peter Kirui is a complainant. To say the least, such evidence should be treated as hearsay.

In the end, we find the appeal to be well founded. We allow the same by quashing the order on conviction and set aside the death sentence. The appellant is hereby set free forthwith unless lawfully held.

Dated, signed and delivered in open court this 31st day of July, 2014.

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J.K.SERGON

JUDGE

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H.A.OMONDI

JUDGE

In the presence of:

..... for Director of Public Prosecutions

..... for Appellant