



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO. 6 OF 2014

Consolidated with

CRIMINAL APPEAL NO. 7 OF 2014

EVANS CHERUIYOT KIRUI.....1ST APPELLANT

CHARLES KIPKOECH RUTO.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence of Hon. W.N.Kaberia, Ag. Senior Principal Magistrate, Kericho dated 21st January 2014)

JUDGMENT

Evans Cheruiyot Kirui and **Charles Kipkoech Ruto** being the 1st and 2nd appellants respectively were together with **Joseph Odenda Sidera** and **Eric Kibett Lang'at** *alias* **Blackie** tried on a charge of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The second appellant i.e **Charles Kipkoech Ruto** separately faced an alternative charge of handling suspected stolen property contrary to **Section 332 (2)** of the **Penal Code**. At the close of the prosecution's case Joseph Odenda Sidera and Erick Bett Langat *alias* Blackie were acquitted. After undergoing a full trial both appellants were convicted on the main charge and were subsequently sentenced to suffer death. Being aggrieved, the appellants each filed an appeal which appeals were ordered consolidated at the insistence of the Director of Public Prosecutions.

On appeal Evans Cheruiyot Kirui, the 1st appellant put forward the following grounds of appeal:

1. **That, the learned trial Magistrate erred in law and fact when he convicted me in the instant case relying on the evidence of prosecution yet failed to find that (a) The same wasn't free from error. (b) Was not preceded by a properly educed evidence from the prosecution side.**
2. **That the pundit trial Magistrate erred in law and fact when he convicted me in the instant case yet failed to find that the evidence is contradictory and could not support safe conviction.**
3. **That the pundit trial Magistrate erred in law and fact when he dismissed my plausible defence which was capable of displacing the prosecutions case.**

4. **That the learned trial Magistrate erred in both law and fact when he made a partial evaluation of the case thus arriving to a biased decision.**

On his part, Charles Kipkoech Ruto, the 2nd appellant listed in his Petition the following grounds of appeal:

1. **That the learned trial Magistrate erred in law and fact without consideration that there was an identification matter and the prime aspects favouring conviction the present matter was not availed by the prosecution.**
2. **That your Lordship, the trial Magistrate did not arrive on equitable judgement basically taking into an account on a confession statement adopted from the 1st accused person without warning himself against the dangers of such evidence.**
3. **That the state failed to call key witness to tie the loose end of the prosecution case i.e Administrative authority representing the appellant to distinguish the fact of residing place of the appellant following the recovery of the exhibit in the present matter.**

When the appeal came up for hearing, the appellants relied on written submissions. Mr. Lopokoiyit, learned Prosecution Counsel vehemently opposed the appeal in his oral submissions. Before delving deeper into the merits or otherwise of the appeal, we wish to set out in brief the case that was before the trial court. Six witnesses were summoned in support of the prosecution's case. **Onyango Patrick Juma** (PW1) told the trial court that he together with one Fredrick Onyango Omomo travelled on board motor vehicle registration no. KBL 179D Isuzu Tougher on 28th October 2011 from Nairobi to Kericho. The aforesaid motorvehicle was driven by PW1. On reaching Chepsir, PW1 said they found the road blocked with huge stones and that he also saw motor vehicle Toyota DX Station Wagon stalled and blocking the road. PW1 was forced to stop and immediately two people came out of the stalled Toyota DX and pretended to seek the assistance of PW1. The duo started attacking PW1 and his colleague using clubs and swords. The duo were joined by two other gangsters. The quartet robbed PW1 of money and mobile phones before forcing them to lie down at the back seat of their motor vehicle. The robbers drove motor vehicle registration no. KBL 199D to the nearby bush where PW1 and his colleague were tied. The robbers made away with the motor vehicle. The victims managed to untie themselves and walked to the main road where they were given a lift by a Nation Media Group van to Kericho Police station where they reported the incident. Investigations began. **Sgt. Edward Elima** (PW4), interrogated the 1st appellant who had been arrested as a suspect by administration police officers and taken to custody at Kericho Police station. PW4 stated that the 1st appellant confessed to him that he together with others had robbed PW1. PW4 also stated that the 1st appellant took him to where his accomplices were. The 1st appellant is said to have taken PW4 to Kuresoi where the police arrested the 2nd appellant. At Kuresoi, police officers are said to have recovered from the house of the 2nd appellant, three doors, two metallic frames and one steel plate. Police also found motor vehicle registration KBL 199D abandoned at Kuresoi with its two rear tyres, a side mirror, spare tyre and the battery missing. The scenes of crime officer **Cpl Charles Kiprono Rotich** (PW6) visited the scene where he took photographs which were produced in evidence as exhibits.

The appellants denied committing the offence. The 1st appellant claimed that he was arrested on 3rd November 2013 and forced to sign a statement whose contents he did not know. The 2nd appellant on his part claimed he was arrested by the police while he was repairing his motor cycle. He said he was straight away taken to Kericho CID where he was beaten up and shown door frames, two power saws, items he had no idea about. The learned Principal Magistrate considered the sum total of the evidence and came to the conclusion that the confession by the 1st appellant was the only evidence linking the appellants to the offence. However, the learned Principal Magistrate did not believe the confession. He instead convicted the appellants on the basis that the 1st Appellant was arrested by **APC Jonathan Mulwa** (PW3) and **Sgt AP Geoffrey Rop** (PW2) while manning an illegal road block at Chepseon Kericho highway. The 1st appellant led the police to the house of the 2nd appellant where the items robbed from PW1 were recovered.

Having set out the case that was before the trial court, we now turn our attention to the substance of the appeal. We have already set out the grounds put forward by each appellant. The first common ground raised and argued by the appellants is to the effect that there was no cogent evidence connecting them with the offence. The appellants argued that the prosecution had failed to tender medical evidence to show that PW1 had been assaulted. The appellants further argued that PW1 never tendered any documentary evidence showing that the items recovered from the 2nd appellant's home belonged to him or his employer. Mr. Lopokoityit opposed the appeal claiming that the prosecution had proved the case against the appellants to the required standards of beyond reasonable doubt. We have, on our part, re-evaluated the evidence. It goes without saying that the prosecution's case heavily rested on the doctrine of recent possession. It is the evidence of PW2 that he together with PW3 were on patrol on 2/11/2011 along Kericho-Nakuru highway and on reaching Chepsir they were stopped by people who were dressed in police uniform and were flashing torches at them. Those people had blocked the entire road using boulders. PW1 said they alighted fast and when the gang saw them they fled into the nearby bush. PW2 and PW3 gave a chase and managed to arrest two of them. One of them was Evans Cheruiyot Kirui, the 1st Appellant herein. The 1st Appellant and his accomplice were taken to Kericho Police Station. **Sgt Edward Elima** (PW4) interrogated the 1st appellant. The 1st appellant led PW5 and other police officers to the house of 2nd appellant at Kuresoi. PW5 stated that he together with other police officers did a search at the 2nd appellant's house and recovered two T-doors, two frames of steel, one steel plate and two power saws. The 2nd appellant could not explain how he came into possession of the aforesaid items. PW1 was summoned to Kericho Police Station to identify the two doors, the frames and the steel plate as the items stolen from him. He clearly identified the door as made of mahogany and the prefab frames. The 2nd appellant denied knowledge of the items which were allegedly recovered from his house. He said he was not found with the items. The 2nd appellant raised alibi defence. He said he was arrested when his motor vehicle stalled having developed a mechanical problem while on his way home at Kipkelion. The police are categorical that they visited the 2nd appellant's home at Kuresoi. We are unable to accept the 2nd appellant's defence and explanation. It is very clear from the evidence of PW5 that the 1st appellant took the police to the house of the 2nd appellant where the items robbed from PW1 were recovered. The 2nd appellant duly signed the search certificate containing the inventory of the items recovered. The search certificate was duly produced in evidence. We are satisfied that the doctrine of recent possession was properly applied by the learned trial Principal Magistrate. The 2nd appellant did not discharge the burden of explaining how he came into the possession of those items.

The second common ground of appeal argued by the appellants is that their defences were never considered by the trial Magistrate. Mr. Lopokoityit urged this court to find that the appellants' defences were considered and properly rejected. The record shows that the 1st appellant claimed he was arrested at Kericho and taken to police cells. He claimed he was forced to sign a statement whose contents he did not know. He did not specifically deny nor confirm whether he took the police to the 2nd appellant's house at Kuresoi. The 2nd appellant too indirectly denied that he was at home when the police visited his house. The record shows that the learned Principal Magistrate considered the appellants defence but did not believe them. We too have reconsidered those defences and we do not believe the appellants. The learned Senior Principal Magistrate cannot therefore be faulted.

In the end, we see no merit in the appeal. The same is dismissed in its entirety.

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.OMONDI

JUDGE

In the presence of:

..... for Director of Public Prosecutions

..... for Appellants