



**REPUBLIC OF KENYA**

**High Court of Kisii**

**Criminal Appeal 26 & 27 of 2011**

**EDWARD KILINGET ALIAS BABU ..... 1<sup>ST</sup> APPELLANT**

**JOEL LEBOI PIUS ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from original conviction and sentence of the SRM's court at***

***Kilgoris in criminal case No. 578 of 2010 by Hon. B. Ochieng, SRM dated 5<sup>th</sup> August, 2011)***

**JUDGMENT**

1. The appellants herein, Edward Kilinget alias Babu and Joel Leboi Pius were the second and first accused in Kilgoris Principal Magistrate's Criminal case number 578 of 2010. They were jointly charged with one count of robbery with violence contrary to **section 296 (2)** of the **Penal code**, the particulars being that on the 27<sup>th</sup> day of June 2010 at Nkoriento village in Transmara District within Rift Valley Province, jointly with others not before the court, while armed with dangerous weapons namely sword and blunt weapons, robbed Samson Lemiso Ole Unwa of a pair of gumboots, a cap and a Masai walking stick all valued at Kshs.1,000/= and immediately before the time of such robbery did grievous harm to the said Samson Lemiso Unwa. The appellants pleaded not guilty and the case proceeded to trial during which the prosecution called 10 witnesses.
2. From the testimonies of these 10 witnesses, the facts and the evidence of this case emerge as follows. On the 27<sup>th</sup> June 2010 at about 7.30 p.m., the complainant herein, Samson Lemiso Ole Unwa was on his way home from his brother's home. The day was a Sunday. Earlier in the day at about 2.00 p.m., the complainant who testified as PW1 (hereinafter referred to as Samson) had gone to visit his brother one Joseph Ole Lengas who lives at Nkoriento village. Joseph Ole Lengas testified as PW3.
3. As Samson walked home all alone, and just after he had passed Nkoriento shopping centre, he saw one person near a thicket. Samson is a retired army man. As he passed by the thicket, the man he had seen said, **"it is him"** and immediately 2 other people emerged from the thicket and walked towards him. Samson became afraid, but before he could do anything, the trio attacked him with rungun. He was hit with a rungun that had a nut and as a result of the blow, some of his teeth fell out. Samson became dazed. He was again hit on the shoulder and cut on the head. He was cut with a small axe and though he tried to block the axe from landing on his head, he still got out on the head.
4. The attackers took Samson's shoes and walking stick. He pleaded with them to spare him and they

temporarily left him alone. He managed to escape to the nearby thickets and lay down still, and though the attackers tried to follow him they did not enter the thickets where he was lying. Samson remained in the thickets up to about 9.00 or 10.00 p.m. when he crawled to the home of Everlyne Shangali; PW2. He was given First Aid by the family of PW2 (Everlyne) and on the following day, Samson's brother came and took him to St. Joseph's Mission Hospital where he was treated and admitted for 2 days.

5. According to Everlyne, Samson went to her home between 1.00 a.m. and 2.00 a.m. He had blood all over and was seriously injured. He had also lost 3 teeth. They applied First Aid and allowed Samson to stay the rest of the night. In the morning, his people were contracted and they came and took him to hospital.

6. Samson stated that after he was discharged from hospital, he went and reported the matter to Kilgoris police station although his brother had already made an initial report. Thereafter, Samson was called to an identification parade where he identified the first accused in the lower court who he said he had seen as he passed the shopping centre and that it was this same appellant who had knocked out his teeth. Samson also stated that though he had shouted for help during the attack, nobody came to his rescue.

7. After the attack, Samson gave the description of the first accused in the court below to the area chief and the administration police. He also stated that the stolen walking stick was recovered at the home of the said first accused. The first accused was a son to Samson's in-laws.

8. During cross-examination, Samson stated that though the time of the attack was past 7.00 p.m., it had not become very dark, and that he was able to positively identify his attackers. He also said that he was not drunk and that he had no dispute with either the appellant or the appellant's co-accused. Samson also stated that the attackers had not covered their heads. About the first accused in the lower court, Samson described him as young, dark and tall, and added that he had seen the said first accused while he (Samson) passed by the shopping centre. Samson also contended that it was the description he had given of the first accused in the lower court that led to his arrest and eventual identification on the identification parade.

9. PW3 was Joseph Ole Langas, brother to Samson and from whose home Samson was coming when he fell into the hands of the attackers. PW3 (Joseph) testified that on the morning after Samson was attacked, he learnt of the attack and went to Everlyne's home and applied first aid before taking him to hospital for treatment of panga cuts on the head and loss of 5 teeth. Joseph testified that when he saw Samson on the morning after the attack, Samson told him that he could identify his attackers if he saw them; that Samson was particularly sure of one of the attackers. Joseph denied that the family members were drunk on the day Samson was attacked. During cross examination, Joseph testified that he did not see the person who assaulted Samson.

10. PW4, Philip Blasto, a doctor at Transmara District Hospital prepared the P3 form in respect of Samson. According to PW4, Samson had sutured lacerations from head to toe. He also had lacerations measuring 6cm and 8 cm above the right ear. Samson had also lost 5 teeth. He also had bruises on the right forearm. Dr. Blasto opined that a blunt object had been used to cause the injuries which were classified as harm as per the P3 form which was produced as

#### **P. Exhibit 1.**

11. PW5 was Moses Mwalimu Ole Uno (Moses). He testified that he had accompanied Samson on the visit to Joseph's home. Since he slept at Joseph's home, he accompanied Joseph to Everlyne's home where they found Samson in great pain. They took him to hospital for treatment. Like Joseph, Moses told the court that the visit to Joseph's home was not for drinking.

12. Eliakim Koronye testified as PW6 stating that on 28<sup>th</sup> June 2011, he spoke with the 2<sup>nd</sup> appellant herein about his (PW6's) mother who had come home drunk and that it was the second appellant, Joel Leboi who informed him that his brother, Samson had been attacked by a Kisii. PW6 also testified that when he went to the home of the second appellant, he found one of the family members of the said second

appellant in possession of Samson's walking stick, which had allegedly been found in the hills where Samson had been robbed. He also stated that according to the information he received, Samson's walking stick was the second appellant's brother who had brought the stick. PW6 also said that after he had been told that the walking stick belonged to Samson, he took it to Samson's brother who immediately recognized the stick as belonging to Samson.

13. The report of the attack on Samson made to Kilgoris police station was received by Number 65947 Police Constable Joseph Mulinge who testified as PW7. He said he received the report from Samson's son, Ahmed Unwa on 28<sup>th</sup> June 2010 and upon booking the report, PW7 started investigations into the allegations. After Samson was discharged from hospital, PW7 met him and Samson told him that he could identify the attackers if he saw them. After the appellants and other were arrested PW7 arranged for an identification parade which was conducted by Inspector Lawrence. At the parade, Samson picked Joel Leboi Pius from the parade. PW7 further stated that on interrogation, Leboi told him that he was together with Edward Kilinget Babu when they attacked Samson. The appellant was consequently arrested on 1<sup>st</sup> August 2011. PW7 also gave out the P3 form to Samson. The form was filled by Dr. Blasto, PW4.

14. During cross examination, PW7 stated that the first appellant herein was arrested because he was mentioned by the second appellant. He also told the court that the first appellant disappeared from home for about one month before he was eventually arrested. PW7 also testified that the homes of the two appellants are not far from each other.

15. PW8 was Number 242504 APC Galgalo of Pirar Division. He recalled that on 25<sup>th</sup> June 2010 Samson went to the D.O.'s Office at Shartuka and reported that he had been assaulted. Samson had a warrant from Kilgoris police station and using the said warrant PW8 and other officers went in search of the second appellant, Leboi. The second appellant was later arrested by regular police.

16. PW9 was Dido Sora, an administration police officer. He was one of the arresting officers after Samson identified the first appellant in this case. He also told the court that no exhibits were recovered from the appellants.

17. PW10 was Number 232473 Chief Inspector Lawrence Nalo; the then OCS, Kilgoris police station. He is the one who mounted the identification parade on 7<sup>th</sup> July 2011 in respect of the second appellant, Joel Leboi Pius. The witness stated that before Samson was asked to identify the suspect by touching, he complied with the requirement of **Chapter 46 of the Forces Standing Orders**. He lined up 9 men who were as close as possible in appearance, height, social standing and colour. Samson was also informed that if he saw the suspect in the parade, he would identify him by touching him. The witness stated further that the second appellant stood next to the third person in the parade and that Samson was able to identify him by touching. After the parade, the second appellant signed the parade identification form which was produced as **P. Exhibit 3**. PW10 testified further that the suspect did not raise any complaints regarding the parade, and that the investigating officer never participated in the identification parade.

18. During cross examination, PW10 confirmed that the identification parade was done according to the established rules and that the second appellant did not raise any objection to the manner the parade was conducted.

19. At the close of the prosecution case, the two appellants were each put on their defence. The first appellant Edward Kilinget alias Babu told the court in his sworn statement that he woke up as usual on 1<sup>st</sup> August 2010 and went to plough his shamba until about 1.00 p.m. After lunch, his parents sent him to Shartuka and on the way he met his area chief who was accompanied by one officer. The chief asked him to accompany him and threw him into cells until 6.00 p.m. when he was taken to Kilgoris police station and locked up for 5-6 days. The first appellant was finally arraigned in court together with another person he did not know and on charges he knew nothing about. The second appellant explained that the reason why he was arrested by the chief is because he had refused to give the chief some pasture. It was first appellant's contention that the case against him was a frame up by the chief who never even came to court

to testify.

20. During cross examination, the first accused told the court that though the charges were read out to him and he understood the same, he did not know what the case was all about. He also testified that though there were many other people around, he was the only one who was corrected and that he never made any report of the chief's alleged threats to his life.

21. The second appellant, Joel Leboi Pius also gave a sworn statement. He stated that while he was looking after cattle on 6<sup>th</sup> July 2010, 3 persons went to where he was and beat him up seriously. He denied the allegations made against him.

22. In cross examination, the second appellant stated that Everlyne, PW2, was his immediate neighbour. He also said that he was not sure whether Samson knew him though Samson was able to pick him out of the identification parade.

23. After a careful analysis of the evidence that was placed before the court, the learned trial magistrate was satisfied that the prosecution had proved its case of robbery with violence against both appellants beyond any reasonable doubt. Both appellants were found guilty as charged, convicted and sentenced to suffer death as by law provided.

24. The appellants were aggrieved by both conviction and sentence and now appeals to this court on the following grounds:-

1. *THAT the learned trial magistrate erred in law and fact in convicting the appellants when the prosecution had not proved its case against them beyond any reasonable doubt;*
2. *THAT the learned trial magistrate erred in law and fact in misdirecting himself grossly on the evidence and in failing to analyze and scrutinize the evidence and the facts thereby reaching a wrong decision.*
3. *THAT the learned trial magistrate erred in law and fact in relying on evidence of identification under difficult circumstances to convict the appellants.*
4. *THAT the sentence of death imposed upon the appellants was harsh and excessive in the circumstances.*

REASONS WHEREFORE the appellants pray that their appeals be allowed, conviction quashed and the sentence of death set aside.

25. This is a first appeal, and as the first appellate court we are under a duty to reconsider and evaluate the evidence afresh with a view to reaching our own conclusions in the matter. We are, in a sense, required to rehear the case, by looking at the facts and the law before determining whether the conclusions reached by the trial court were well founded. In the case of **Mwangi –vs- Republic [2004] 2 KLR 28**, the Court of Appeal held, *inter alia*, that:-

**“It is not the 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 conclusion. 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.”**

26. It was with the above guidelines in mind that we heard submissions from the two appellants and from the learned state counsel when the appeal came before us for hearing. We were also alive to the appellants' expectation for us to submit the whole of the evidence adduced before the trial court to a fresh and exhaustive examination so as to reach our own decision in the matter.

27. The two appeals were consolidated and heard as one. Each appellant filed their respective written submissions which we have carefully read and considered. We also heard submissions made by learned counsel Mr. Mutua on behalf of the Respondent.

28. In his submissions, the first appellant, Edward Kilinget alias Babu contend that no iota of evidence was placed before the trial court linking him with the commission of the offence, yet the learned trial magistrate concluded that he was part of the gang that attacked the complainant. The first appellant also faulted the trial court for basing its conviction on the uncorroborated evidence of the co-accused. He urged us to allow hi appeal.

29. The second appellant, Joel Leboi Puis submitted that both the conviction and sentence were not well founded in law. He argued that the alleged identification of the complainant's attackers was shaky and that though an identification parade was conducted he did not commit the alleged offence. The appellant further contended that the walking stick allegedly stolen from Samson was not produced in evidence. Finally, the appellant contended that the fact that the complainant took too long to go for treatment suggests that he was not injured at all on 27<sup>th</sup> June 2010. He also urged us to allow the appeal.

30. The appeal was opposed. Counsel for the respondent submitted that Samson was able to pick out the appellant on the identification parade by touching him. With regard to the 2<sup>nd</sup> appellant, counsel submitted that Samson's walking stick was recovered at the home of the second appellant who failed to give an adequate explanation as to how he had come to be in possession of it and that in the circumstances, the doctrine of recent possession was applicable. Counsel urged us to dismiss the appeal in its entirety.

31. We have now carefully reconsidered and evaluated the evidence afresh. We have also considered and weighed the judgment of the trial court. It is not in doubt that the attack on Samson is alleged to have taken place at about 7.30 p.m. on the material day. This means that the issue of identification is critical in deciding whether or not the case against the appellants can still stand. In cases such as **Wamunga –vs- Republic [1989] KLR 424** and **Mugo –vs- Republic [1966] EA 124**, courts have been cautioned against convicting a defendant based on evidence of identification when such identification took place under difficult circumstances. In the **Wamunga case**, the court held, *inter alia*, that:-

**“where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”**

32. In the instant case, the only evidence of identification of the appellants is that given by Samson from what he said he saw at the scene and from the evidence of the identification parade. Samson said that he walked along a path that was about 30 metres away from the shops at Nkoriento shopping centre and that while he passed by he saw the second appellant herein and that it was the same second appellant who with 7 others, attacked him at some thicket which was also 200 metres away from Nkoriento shopping centre near a thicket. Samson also stated that after the incident, he gave the description of the second appellant to the chief and the area Administration Police. Samson stated that it was the same description which helped him to identify the second appellant during the identification parade.

33. As to how much light there was for Samson to identify his attackers just before and during the attack, Samson said:

**“I saw you once at one time at lingat shopping centre. It was approaching 7.30 p.m. I was not drunk. I positively identified you. Samson also said that it was not yet dark.”**

34. When Samson talked to his brother Joseph Ole Langas, PW3, he (Samson) stated that he could identify his attackers if he could see them, and in particular, that he could identify one. PW5, Moses Mwalimu Ole Uno also said that Samson told him that he could identify one of the boys who attacked him. PW7, No.65947 PC Joseph Mulinge also stated in his evidence that Samson told him that he could

identify the attackers if he saw them and that Samson was able to identify the second appellant from the identification parade.

35. Taking all this evidence together, we are satisfied that Samson clearly identified the second appellant as one of the 8 men who attacked him on the material day. Samson's testimony that he could identify one of the attackers remained consistent to more than one of the witnesses, until he was able to pick out the second appellant on the parade. What we are saying with regard to the second appellant is that there was no mistaken identity and that he (second appellant) was clearly and positively identified by Samson. Samson had seen him a little while before the incident idling at the nearby shopping centre.

36. As regards the first appellant, the prosecution's case is that Samson's walking stick was recovered in the home of the first appellant. The relevant testimony is that of PW6, Eliakim Keronye told the court that when he went to the home of the second appellant, he found a stick – **MF1-P1**, but from the rest of the testimony, it is not clear who actually had the walking stick and how it had reached the home where it was found. Taking this evidence against the totality of the entire evidence, we are of the considered view that no sufficient evidence was adduced against the first appellant Edward Kilinget alias Babu to support the charge of robbery with violence.

37. In the premises, the appeal against both conviction and sentence against the first appellant, Edward Kilinget alias Babu is allowed, the conviction quashed and the sentence set aside. The appeal by the second appellant, Joel Leboi Pius fails on both conviction and sentence and is accordingly dismissed in its entirety.

38. Unless Edward Kilinget alias Babu, the first appellant herein is otherwise lawfully held, he is to be released from prison custody forthwith.

39. It is so ordered.

**Dated and delivered at Kisii this 27<sup>th</sup> day of February, 2013**

**RUTH NEKOYE SITATI**  
**JUDGE.**

**R. LAGAT-KORIR**  
**JUDGE.**

In the presence of:

Mr. Shabola (present) for State/Respondent

Present in person for 1<sup>st</sup> Appellant

Present in person for 2<sup>nd</sup> Appellant

Mr. Bibu - Court Clerk

**RUTH NEKOYE SITATI**  
**JUDGE.**

**R. LAGAT-KORIR**  
**JUDGE.**