REPUBLIC OF KENYA

High Court of Kisii

Criminal Appeal 19 of 2011

JULIUS CHERUIYOT BETT ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

(Being an appeal from original conviction and sentence of the Principal Magistrate's Court

at Kilgoris, Hon. B. O Ochieng in Criminal Case No. 479 of 2010 dated 13th May, 2011)

1. The appellant herein, **Julius Cheruiyot Bett** was arraigned before the Senior Resident Magistrate's court at Kilgoris on one count of robbery with violence contrary to section 296(2) of the Penal Code, Cap 63 of the Laws of Kenya. The particulars of the offence are that on the 21st day of June 2011 at Olekirini village in Transmara District within Rift Valley Province jointly with others not before court, while armed with dangerous weapons namely sword and rungus robbed **Letorome Ole Naiguta** of Kenya shillings 37,600/=, animal drugs, cattle dip and two kilograms of sugar all valued at Kshs. 38,150/= and immediately before the time of such robbery, wounded the said **Letorome Ole Naiguta**. The appellant denied the charge and thereafter, the case went to trial.

2. During the hearing of the case before the trial magistrate, the prosecution called five (5) witnesses from whose testimonies the facts and the evidence of the case emerge. The prosecution's case is that on the 21st June 2010, the complainant herein **Edward Letorome Naiguta** who testified as PW1 went to Chelule market to sell his 5 head of cattle. The complainant is a cattle trader. Out of the 5 head of cattle he sold 3 for a total of Kshs. 38,500/=. He then made arrangements with cattle drivers to take the other 2 head of cattle back home.

3. The complainant also asked the appellant who was a *"boda boda"* rider to take him home. At about 5.00pm the complainant together with other traders boarded the appellant's motorcycle for the journey home. However, before they got home, the appellant stopped thrice on the way, first at Kabulecho for 10 minutes, then at Rafael's shops and then near Dikir. Each time the appellant stopped, he pretended to be checking for something on his motorcycle. Before reaching Dikir, the appellant asked each of his passengers to pay Kshs. 80/= and after the payment, the appellant drove to Dikir centre allegedly to get fuel. While the appellant went to get fuel the complainant and his colleague **Cheruiyot Arap Teituk** who testified as PW2 entered a bar. While PW2 took beer, thecomplainant took soda. While the complainant and PW2 were in the bar,

a certain Kalenjin gentleman entered the bar and asked PW2 where he was taking a Maasai (meaning the complainant). PW2 then paid the bill by giving a note of Kshs. 1,000/= but because he was drunk, the

complainant received the change of Kshs. 800/= on PW2's behalf.

4. By that time, the appellant was back after fuelling and took the complainant and another person who was unknown to the complainant. Because PW2 was drunk, the appellant refused to carry him and instead took the strange passenger who sat behind the complainant on the motor cycle. At a stage along the way, the strange passenger removed the complainant's Maasai knife. The appellant then stopped the motor cycle and immediately 2 persons emerged from each side of the road and ordered the complainant to remove his clothes. The 4 persons were armed with swords. The complainant obeyed the command and removed his clothes after which he begged to leave but the appellant told him that he was going nowhere as the Maasai's had allegedly finished the appellant's people.

5. The complainant however managed to escape into the forest until 2.00am when he walked home. Before he got home, the complainant went to thehome of his neighbour one **Ole Mayan**, called him and asked for clothes. **Ole Mayan** gave clothes to the complainant and also allowed him to sleep in until the break of day. At day break **Ole Mayan** took the complainant home.

6. PW3, **Eri Mutai** told the court that at about 2.00 a.m. the complainant knocked on his house and told him, that he (complainant) was being killed. On opening the door, PW3 noticed that the complainant was naked save for the inner clothing. According to PW3, the complainant explained what had happened to him and how he had been robbed of Kshs. 36,000/=.

7. PW3 also stated that the complainant told him that he could identify the attackers if he saw them as one of them had a motorcycle and had a mark on the face. On the following morning after PW3 took the complainant home, the complainant went and made a report of the incident at Dikir and recorded his statement in which he described the appellant's appearance to the police. The complainant stated that the appellant had carried him many times before and that he had a mark on the face. PW2 also corroborated the testimony given by the complainant as to what happened on that fateful evening of 21st June 2010. The complainantstated that a total of 6 people attacked him though only 3 were eventually arrested by police.

8. The report made by the complainant was received by No. 2001003556 Sgt Elija Kiprop of Enurwatik DC's officer. Sgt Elija who testified as PW4 stated that the complainant explained to him how the appellant had been hired to take the complainant and another to their homes for Kshs. 100/= each and how on the way the appellant and others who were revealed by the appellant after arrest had robbed him. PW4 stated that on the 22nd June 2010 the complainant was able to identify the appellant to the police and that it was the appellant himself who gave the names of the other robbers, among them David Saningo and Paul. Upon arrest the appellant and his accomplices were taken to Soit Patrol Base. PW4 also confirmed that he knew the appellant as a boda boda operator and that on the 21st June 2010, he saw him doing that business.

9. PW5, Number 65947 was Police Constable **Joseph Mulinge** of Kilgoris Police Station. He stated that on the 27th June 2010 at about 10.00am he was instructed by the OCS Kilgoris to go to Soit Patrol Base to collect 4 suspects among them the appellant. PW5 carried out the instructions and also visited the scene of crime. He also heard the complainant's story ofhow he had hired the appellant to take him home by motorcycle and how on the way about 2kms from Dikir the appellant stopped the motorcycle after which people emerged from the bush and robbed the complainant. PW5 stated that the complainant identified the appellant as one of the six people who had robbed him.

10. At the close of the prosecution's case the appellant was put on his defence. In his sworn statement the appellant told the court that he was a *"boda boda rider"* but denied that he committed the offence. In cross examination the appellant stated that on 21st June 2010, he carried a passenger to Dikir though the passenger was going to Ilkerin. He also said they never got to Ilkerin but he denied robbing the passenger who he said was with **Arap Teito**.

11. In his judgment delivered on 13th May 2011, the learned trial magistrate reached the

conclusion that from the evidence on record, the prosecution had proved its case against the appellant beyond any reasonable doubt. The trial court thus found the appellant guilty as charged, convicted him and sentenced him to suffer death as by law established.

12. The appellant was aggrieved by both the conviction and sentence. He has now come before us on appeal on the following home-made grounds:

1. The learned trial magistrate reached a faulty finding by relying on the evidence of identification under unfavourable circumstances.

2. That the learned trial magistrate relied on a single identification witness minus any independent witness or circumstantial evidence.

3. That there were glaring contradictions in the prosecution's evidence.

4. That the manner of arresting, acquitting (sic) and re-arresting the appellant was suspicious and consistent with mistaken identity.

5. That the learned trial magistrate did not consider the defence offered by the appellant.

13. The appellant therefore prays that his appeal be allowed, the conviction be quashed and the sentence of death be set aside.

14. This is a first appeal. On a first appeal the appellant is entitled to have his case reheard by this court, which therefore means that we must carefully reconsider and evaluate the entire evidence afresh, including a careful reading of the judgment of the learned trial magistrate so as to be able to reach our own conclusion in the matter. It is only after doing all the above that we can determine whether the findings of the learned trial magistrate can be supported. See generally **Okeno –vs- Republic (1972) E. A 32** and **Pandya –vs- Republic (1957) E. A 336**. The only thing we have to remember though in rehearing the appellant's case is that we have no opportunity of seeing and hearing the witnesses who testified during the trial before the learned trial magistrate. It is only the trial court which had the singular privilege of seeing and hearing the witnesses and was therefore best placed to deal with issues of demeanour of witnesses.

15. When this appeal came up for hearing before us, his counsel, **Mr. Orina** submitted that the conviction of the appellant was unsafe on grounds that there was no proper identification of the appellant and that in the absence of an identification parade, the court should reject the prosecution's evidence on identification of the appellant. Counsel took issue with the delay between the alleged commission of the offence on 21st June 2010 and the 26th June 2010 when a report of the same was made to the police. Counsel wondered why it took so long to make the report if it was indeed true that the appellant was easily identified by the complainant.

16. It was further submitted that the evidence of PW2 should not be given undue weight because he was too drunk to properly identify the appellant. Counsel out pointed out that there are material contradictions between the testimony of PW1 and that of PW2 as to who between the 2 witnesses made arrangements for the boda boda and whether the fare was Kshs. 80/= or Kshs. 100/=.

17. Counsel also took issue with the judgment of the trial court, submitting that the learned trial magistrate did not give much thought to the appellant's defence generally, and in particular the appellant's contention that he was first arrested on 23rd June 2010 but released and then re-arrested on 26th June 2010. He submitted that the only reason for that circus of arresting, releasing and then arresting again was because the prosecution was not sure of who the suspect was. It was also counsel's submission that the prosecution did not prove common intention between the appellant and the other suspects to commit the robbery. Counsel faulted the trial court for concluding that the appellant used delaying tactics in order for him and his companions to rob the complainant. The appellant also contended that if a report

was indeed made on 22nd June 2010, then the evidence concerning such a report should have been given to the court otherwise why would complainant make another report on 26th June 2010?

18. Lastly, counsel submitted that there was no explanation by the prosecution as to why the other suspects who were arrested alongside the appellant were released. The inference made by the appellant's counsel is that the investigations into this case were shoddy and that in the circumstances, the appellant should be given the benefit of the doubt so that his appeal is allowed, the conviction quashed and the sentence of death set aside.

19. The appeal was opposed on both conviction and sentence. **Mr. Mutuku** learned senior prosecuting counsel submitted that there was no doubt that the appellant was properly and clearly identified by the complainant. Counsel also submitted that the complainant knew the appellant well as he had used him for similar purposes on a number of times in the past, and that infact it was the complainant who assisted the police in arresting the appellant. Counsel contended that contrary to what the appellant alleges, there were no material contradictions between the testimonies of the complainant and PW2. That there is no doubt that the complainant and PW2 were carried together until Dikir where PW2 was left behind because he was allegedly drunk. Counsel submitted that there is ample evidence on record to show that the appellant had no intention of taking the complainant to his destination for the reasons that:-

- *The appellant made many stops on the way.*

- *Even after stopping at Dikir the appellant was not in a hurry to pick up his passenger.*

- *Even after picking up the complainant, the appellant refused to carry PW2 on allegations that PW2 was drunk and instead he picked up another passenger who was unknown to the complainant and made him to sit behind the complainant.*

- *The appellant on his own stopped the motor cycle after some distance from Dikir when 4 other people emerged from the bushes and together with the other passenger they robbed the complainant.*

20. Counsel therefore submitted that when the appellant told the complainant that he (complainant) would go nowhere after the complainant had been ordered to remove his clothes, the appellant knew exactly what he was saying and that there was a common intention between the appellant and his accomplices to rob the appellant.

21. Regarding the appellant's contention that there was mischief in having him first arrested on 23rd June 2010 and released before finally being arrested on 26th June 2010, counsel for the respondent submitted that it was normal for suspects to be arrested and released and then re-arrested. Counsel urged us to find that the appellant's arrest was normal and not an afterthought.

22. Concerning the defence of the appellant counsel submitted that the same was duly considered by the trial court at page 14 paragraph 7 of the judgment where the learned trial magistrate wrote:- ***"accused denied ever robbing anyone and said they carry many passengers".*** Counsel also submitted that throughout his defence the appellant never admitted to having been hired by the complainant and PW2. That he only talked of his arrest and re-arrest and being arraigned in court.

23. Further, counsel submitted that neither the complainant nor PW2 had any grudge with the appellant and that in any event, they hired the complainant at about 5.00pm, so that in the circumstances, the appellant was properly identified by both the complainant and PW2, the journey having commenced during the day when there was no problem with visibility. Counsel urged us to dismiss the appeal.

24. In reply counsel for the appellant submitted that PW2 voluntarily chose to remain at Dikir. He also submitted that the nexus of a common intention between the appellant and the other suspects was not established and that in any event there was no evidence that the appellant went into the bar to pick the pillion passenger who replaced PW2 on the motorcycle.

25. We have now carefully reconsidered and evaluated the evidence afresh. We have also carefully considered and weighed the judgment by the trial court. In addition, we have considered the contending submissions by counsel. The issue that arises for determination from all the above is whether the conclusions reached by the trial court were well founded. In other words, was the appellant clearly seen and identified by the complainant in connection with this offence.

26. In order to answer the above question, we must go back to **section 296(2)** of the **Penal Code** to establish the ingredients for the offence of robbery with violence. The subsection reads:-

"(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other persons, or if, at or immediately, before or immediately after the time of the assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death".

27. Thus, any of the circumstances described under **section 296(2)** above will result in robbery with violence and anyone found guilty thereunder is liable to be sentenced to death.

28. In the instant case the appellant has argued that he was not properly identified as being the robber or among the robbers who robbed the complainant. What does the evidence on record show? From the testimonies of both the complainant and PW2, the appellant was someone well known to them as *"boda boda"* and they had used him on a number of occasions before. The complainant stated they took off from Chelule at about 5.00p.m for Kilkerin. The complainant also stated that the appellant made many stops along the way – 3 times in all and that each time the appellant stopped he seemed to be checking for a problem on the motor cycle. The appellant was also complaining that PW2 was not sitting well on the motorcycle. The complainant also stated that while he was in the bar with PW2, a certain kalenjin gentleman entered the bar and asked PW2 where he (PW2) was taking a Maasai since Maasai's had finished their people. Finally, the appellant declined to carry PW2 and instead got another passenger who was a total stranger to the complainant and placed him strategically behind the complainant. While they were moving along and before the appellant stopped the motorbike, this strange passenger removed the complainant's knife, then the appellant on his own volition stopped the motorcycle and immediately 4 men, 2 from either side of the road pounced upon the complainant and ordered him to remove his clothes.

29. From an analysis of all the above evidence, we are satisfied that the appellant was properly and clearly identified by both the complainant and PW2 as they set off for their homes at about 5.00p.m. This was daytime and the appellant was well known to the complainant. Although the offence took place in the night there is no doubt that it was the appellant who was riding the very same motorcycle on which they had set out at 5.00p.m. at the time the complainant and the appellant left Dikir. It is also instructive to note that the appellant made a stranger sit behind the complainant on the motorcycle and as soon as the said passenger had removed the complainant's knife the appellant stopped the motorcycle and 4 other people jumped into the road and together all the 6 men relieved the complainant of all his clothing and other belongings. We are therefore in agreement with both the trial court and counsel for the respondent that there was no mistaken identity about the appellant. The appellant himself also states in his defence that he had been hired to take some passengers to Ilkerin and had been paid Kshs. 200/= but that they never reached the destination. Although the appellant does not say why they did not reach Ilkerin, we are satisfied that they did not do so because of the robbery.

30. We are also satisfied that the appellant shared a common intention with the strange passenger and the other 4 men to rob the complainant. We wholly agree with the learned trial magistrate that the appellant used delaying tactics in an effort to accomplish his reason to rob the complainant. The appellant was in the company of others when the complainant was robbed. The appellant may not have known the names of the complainant and PW2, but they knew him and they had used him before. The complainant was even able to point out the appellant to the police because of the mark on his face. The appellant also threatened to use violence on the complainant when he told the complainant that he was going nowhere after being ordered to remove his clothes.

31. As regards the appellant's contention that his arrest was motivated by mischief we think that

there is no substance in such an allegation. There were other suspects involved in the robbery and before zeroing in on the appellant we believe the police were right in arresting and releasing the appellant before deciding finally to hold the appellant and to charge him with the offence of robbery.

32. In the premises and for the reasons above given we are satisfied that the conclusions reached by the learned trial magistrate vide the judgment delivered by him on 13th May 2011 were well founded and we see no reason to interfere with the same. There is therefore no merit in this appeal on both conviction and sentence. The same is hereby dismissed inits entirety.

33. Before we sign off this judgment we express our deep regret at the delay in delivering the same. This was caused by the sickness of one of us who was crafting the initial draft of the judgment.

34. These are the orders of this court. R/A within 14 days.

Judgment dated, signed and **delivered at Kisii** this 13th day of February, 2013.

RUTH NEKOYE SITATI **R. LAGAT KORIR**

JUDGE **JUDGE**

In the presence of:

Present in person for Appellant

Miss Cheruiyot for Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI **R. LAGAT KORIR**

JUDGE **JUDGE**