



REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 234,235,236 of 2010

(From original conviction and sentence in Criminal Case No. 2957 of 2007 of the Chief Magistrate's court at Nakuru – W. KAGENDO)

GEOFFREY KIPKEMOI TUIYA.....1ST APPELLANT

BENARD TANUI.....2ND APPELLANT

HILLARY KIPNGENO.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Geoffrey Kipkemoi Tuiya, David Kipkemoi Kimalel, Hillary Kipngeno and Benard Tanui (Accused 1, 2, 3, and 4) were jointly charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. They were alleged to have robbed Peter Waweru Mbuthia of Kshs.9,000/-, a mobile phone Nokia worth Kshs.7,000/-, and immediately before or after the time of the robbery, used actual violence on the said Peter Waweru Mbuthia. After a full trial, the magistrate, Mrs Kagendo acquitted David Kipkemoi Kimalel (Accused 2) but the other three were convicted and sentenced to death. The three appellants being aggrieved by the said decision, filed separate appeals No. 234/2007, 235/2007 and 236/2007 which were consolidated on 25/10/2011 to proceed as Criminal Appeal No. 234/2007. The 1st appellant is Geoffrey Kipkemoi, the 2nd appellant, Bernard Tanui and 3rd appellant, Hillary Kipngeno as per the charge sheet in the trial court. Mr. Maragia, counsel for the appellants filed a supplementary record of appeal with 6 grounds which he urged before us. The grounds are as follows:-

1. **THAT the learned trial magistrate erred in law and in fact in failing to note and consider that the circumstances under which the appellants were alleged to have been recognized were not conducive for a positive identification;**
2. **THAT the learned trial magistrate erred in law and in fact in failing to note and consider that the identification by recognition was not proper and free from possibility of error;**
3. **THAT the learned trial magistrate erred in law and in fact in failing to note and consider that**

the complainants herein P.W.1 and P.W.2 never reported the occurrence of the offence on the 10th day of October 2006 hence doubt is raised as to whether the offence indeed took place;

4. THAT the learned trial magistrate erred in law and in fact in failing to note and consider that the allegations by PW1 and PW2 as against the 1st appellant were actuated by malice following the Criminal Case Number 1302 of 2006;

5. THAT the learned trial magistrate erred in law and in fact in failing to note and consider no report was made as against the 2nd and 3rd appellant in respect of the offence that had occurred on the 10th day of October 2006;

6. THAT the learned trial magistrate erred in law and in fact in failing to note and consider that the 1st appellant had offered a defence of alibi and gave the place he was on the material day yet the prosecution did not call for a rebuttal of the said defence and imported her own theories to vitiate the said defence.

Mr. Omari, Learned State Counsel, for the state, conceded the appeal for the following reasons; that there are different accounts given by PW1, PW2 and PW3 as to what happened at the time the complainant was attacked; that there was doubt as to whether the complainant was able to identify the attackers because the incident took about 3 minutes; that there is doubt as to the independence of the witnesses PW1, PW2 and PW3 because there was an earlier criminal case where the 1st appellant had been charged and it was investigated by PW3. Counsel also urged that a robbery report was made on phone but there are no records at the police station to confirm that the report was ever made. He further submitted that it was unclear when the complainant identified the attackers as darkness was creeping in and it had rained;

On request by Mr. Maragia, the Occurance Book (OB) for the following dates were produced in court by No.84196, PC Francis Osebe for this court's perusal.

1. OB No. 31/1/12/2006 - Njoro Police Station;
2. OB No. 5 of 30/11/2006 – Njoro Police Station;
3. OB No. 25 of 11/10/2006 – Nakuru Police Station;
4. OB No.81 of 11/10/2006 – Nakuru Police Station;
5. OB No.27 of 12/10/2006 – Nakuru Central Police Station;
6. OB No.10 of 13/10/2006 – Nakuru Central Police Station;
7. OB No.75 of 3/10/2006 – Central Police Station;
8. OB No. 65 of 14/10/2006 – Central Police Station, Nakuru;

9. OB of 10th and 11th October 2006 – Njoro Police Station.

Mr. Maragia submitted that the OB reports made in Nakauru only refer to the 1st appellant for purposes of being collected by officers of Njoro Police Station; that the charge sheet reflected in the OB is of 31/12/06 but it had no bearing on the charge before the court, the OB No.5 of 30/11/2006 did not refer to the charge in OB of 10th and 11th October 2006; that there were no reports made by either PW1 or PW2 of any attack by the appellants. Counsel submitted that although PW3 said that a report had been made, there was no proof of any report having been made and counsel therefore concluded that the case is a frame up which may have been instigated by the fact that PW3 had previously arrested the 1st appellant for theft of the complainant's money. Counsel urged that reporting the commission of an offence is very important to a criminal case and for that proposition, relied on the Court of Appeal decision in **David Masinde Simiyu, Antony Wekesa Simiyu v Rep. CRMA 33 & 34 of 2004.**

The brief facts of this case are that Peter Waweru Mbuthia (PW1) a resident of Egerton Njoro was on 10/10/06, going home from his shop at about 6.45 p.m. PW1 was riding his bicycle slowly while carrying his 6 year old daughter while his wife PW2, Josephine Wanjiku, was walking behind them. PW1 spotted a group of boys about 30 metres ahead. On drawing near them, he found the appellant. As they approached the appellant's cousin who was leaning against the fence, he moved close to the road. PW1 continued to walk but his wife stopped. As he approached the people, the one who was against the fence held the steering of the bicycle, punched PW1 while the others watched. PW1 fell as he screamed and asked Geoffrey (1st appellant) what was the matter. The appellants approached him while others ran after his wife. PW1 said the attackers wore jackets, removed rungu (clubs) from the jackets and attacked him while his daughter ran off. He sustained deep cut wounds on the head. He managed to run but was unable to open the gate to his house. He ran to the landlord's house but was also unable to open it. He was cornered there by the 2nd appellant (Benard) who continued to assault him until he lost consciousness. He came to at Egerton Hospital and noticed that his money and mobile phone had been stolen. He was later transferred to Kijabe Hospital and thereafter reported at Njoro Police Station where he found that his parents had already reported the incident. He was issued with a P3 form (PEX.2) which was filled by the Police Doctor. PW1 told the court that the 1st appellant had been his employee and he had stolen his Kshs.40,000/- and was charged but they had negotiated and they agreed that he would repay. The case was supposed to be withdrawn on 19/9/2006 but on 18/9/2006, the 1st appellant again stole Kshs.18,000/-. After they left the court, the 1st appellant did not pay PW1 but instead, called PW1 and threatened to finish him. PW1 reported to police and the threats disappeared. Thereafter, he was assaulted on 10/10/2006 and therefore did not go to court on 11/10/2006. They started to receive threats on his wife's phone 0727591710 to the effect that they would be finished. PW2, confirmed that she was walking behind PW1 when a cousin of the 1st appellant blocked PW1's bicycle, while the others were still ahead. She recognized Geoffrey and sensed danger as he had threatened PW1 following the case between them over the Kshs.40,000/- he had stolen from PW1. She retreated and started to scream. PW2 said that the 1st appellant had told them that they would go to heaven before the case was over. Part of the group with the 1st appellant ran after her while others assaulted PW1. She met a passerby who went back with her to the scene at the landlord's gate where they found PW1 had sustained serious head injuries and was unconscious. PW2 knew the 1st appellant and 2nd appellant (Accused 3) who used to live with the 1st appellant and used to visit 1st appellant at their shop. PW3, PC Hillary Kimutai was the Investigation Officer. He recalled that PW2 called him on 10/10/2006, at 9.00 a.m. and informed him of the robbery incident that Geoffrey with his brother and cousins had attacked her husband. She went to police station next day and reported that her husband was admitted at War Memorial Hospital, PW3 visited him and found that he was injured on the head and eyes. He commenced investigations as a result of which he arrested the other appellants in Kericho. PW3 also established that the appellants were related, 1st and 3rd appellants being brothers and 2nd appellant a cousin.

All the appellants testified on oath and denied committing the offence. The 1st appellant acknowledged that PW1 employed him on 16/1/2005. A shortfall had been found and he left work. PW1 persuaded him to go back to work but he was arrested and released on bond. PW1 later suggested that they negotiate so that the 1st appellant could pay. On 19/9/2006, he went to court for the hearing for a case of stealing by servant but it was adjourned to 11/10/2006 and when he went to court on that day he was arrested for allegedly committing this offence. The 3rd appellant said that when the 1st appellant was arrested, he used to take to him food at the Police Station and it is then PW3 got to know him. He was arrested in Bureti where he had gone to visit his uncle. On the other hand, the 2nd appellant denied the offence and said he was just at his place of work when he was arrested on 25/10/2006. He said that on 10/10/06 he was just at home looking after cattle.

This being the first appeal, it is our duty to re-evaluate the evidence adduced in the lower court in order to arrive at our own independent conclusion but always bearing in mind that we neither heard nor saw the witnesses testify in order to assess their demeanour. See **Okeno v Rep (1972) EA 32** and **Ajode v Rep (2004) 2 KLR 81**.

Upon considering the evidence, it is common ground that the 1st appellant was well known to both PW1 and PW2 having worked for the witnesses at their shop before this incident. It is also not in dispute that

the 1st appellant had been arrested and charged over misappropriation of funds from PW1's business. Both PW1 and PW2 maintained in their evidence that they knew the 3rd appellant before as the 1st appellant's cousin. PW1 knew the 2nd appellant as the 1st appellant's brother. The 2nd appellant testified that he also knew PW2 as he used to sell tomatoes to her. The appellants were not strangers to PW1 and PW2. They are people they had related with for long. Both PW1 and PW2 told the court that they were accosted by the robbers at about 6.45 p.m. to 7.00 p.m. They came in close proximity with them. The robbers were not disguised. In the case of **Anjononi & Another v Rep. (1976-80) KLR 1566**, the Court of Appeal said:-

“The proper identification of robbers is always an important issue in a case of capital robbery emphatically so in a case where no stolen property is found in the possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of assailant in some form or other.”

In the instant case, even though the attack took place at dusk, that is at 6.45 p.m. going to 7.00 p.m., the witness said that it was not yet dark and we have no doubt that the complainant and PW2 did not only positively identify but in fact, recognized the appellants.

It is the appellant's contention that they were framed. The 1st appellant explained that he was framed because PW1 had wanted him to go back to work and pay for the loss incurred but he refused. Even if that were the case, there is totally no reason why the complainant could have made such serious allegations against the three others charged with the 1st appellant. If he had disagreed with the 1st appellant, we doubt that he would blame the whole family who included an uncle, cousin and brother with the offence. We find that defence untenable.

To buttress the allegation of a frame up, the appellants contend that there was no complaint to the police about the robbery having taken place and as a result, Mr. Maragia called for various entries in the Occurrence Books of Njoro and Nakuru Police Stations. There is no doubt that PW1 was seriously injured on the material day. The P3 form that was produced in evidence shows that PW1 was seriously injured. He was admitted for some days. He could not therefore personally make a report to the police. PW3 said that PW2 called him on same night and made a report of the attack. The State Counsel conceded the appeal basically for this reason that no report was made about the robbery. We had occasion to peruse the OB of Njoro Police Station and we found that on 10/10/2006, a telephone report was received and recorded in OB 27 of 10/10/2006 at 22.02. It was noted by PC Gituathi on 11/10/10. The report reads as follows:-

“TELEPHONE REPORT: A telephone report has been received from David Gitau Kinyanjui of Box 431 Egerton Tele. No. 0723-288481 that his neighbour by the name Peter Waweru was attacked by seven thugs while trying to open his main gate at Egerton estate; he was cut-deep with panga on the head and became unconscious. They robbed unknown money and a mobile phone. Now rushed to War Memorial Hospital by Egerton ambulance for further treatment.”

It seems the Learned State Counsel did not peruse the OB of the material date but went by the word of the appellants. The submission that no report was made as respects the robbery is incorrect. Further, PW3 received a report of the attack on the same night where the 1st appellant was mentioned and that is why the 1st appellant was arrested on the next day at the court premises as he went for mention of his case. We do subscribe to the principle in case of **David Masinde Simiyu & Another v Rep. CRA 33/34 of 2004** that making a report of the commission of an offence is essential and the contents of the report are crucial to a criminal case. In the instant case, the report was made by somebody who described himself as a neighbour and PW2 too made a report to PW3 soon after the robbery .

The trial court did not believe that this case is a frame up. The trial magistrate observed as follows:-
“The court examined the demeanor of PW1 and PW2. They appeared honest. PW1 did not have any malice against accused 1. He was willing to forgive (A1) and withdraw the earlier case as the court record clearly shows on 19/9/06..”

The conduct of the complainant was not such as one harbouring a grudge against the 1st appellant as to

cause the 1st appellant and his relations to be arrested for an offence only the 1st appellant committed. In any event, the 1st appellant may have had a motive, to ensure that the complainant did not attend the hearing of the case on 11/10/06. We find the allegation of a frame up unfounded. The next question to consider is whether an offence of robbery was committed. The offence is committed:-

“1. If the offender while armed with any dangerous or offensive weapon or instrument uses or threatens to use violence against any person or property at or immediately before or after any manner of the act of stealing; or

2. If the offender commits robbery while in the company of one or more other person or persons; or

3. If the offender immediately before or immediately after the time of robbery wounds, beats, strikes or uses any other violence to any person.”

In considering what constitutes an offence of robbery with violence, the Court of Appeal had this to say in the case of **Muneni Ngumbao Mangi v Rep CRA 141 of 2005:-**

“As already stated, there are three ingredients, any of which is sufficient to constitute the offence of robbery with violence under Section 296(2) of the Penal Code. If the offender is armed with any dangerous or offensive weapon or instrument, that would be sufficient to constitute an offence. Secondly, if one is in company with more than one or more other person or persons, that would be evidence of the offence too. And lastly, if at or immediately before or immediately after the time of the robbery he wounds, beats, strikes or uses any other violence to any person, that would be yet another set to constitute the offence.”

Again in the case of **Ajode v Rep (supra)**, the Court of Appeal reiterated the fact that any one of the three ingredients suffices to prove the offence of robbery with violence.

In the instant case, the robbers were more than one, they were armed with clubs and they used actual violence on PW1. PW1 was seriously injured, he lost consciousness and was admitted in hospital as a result. The P3 form, produced in evidence confirms that he sustained two fractures of the frontal sphenoid bone and fracture of the occipital wall. The Doctor opined that both sharp and blunt objects were used to inflict the injury. The Doctor assessed the degree of injury as grievous harm. The complainant told the court that he lost property. A receipt for his mobile phone was produced in evidence. We are satisfied that an offence of robbery with violence was proved.

The 1st appellant raised an alibi in his defence that after PW1 found a shortage and he stopped working, he went to do farming in Eldoret in July 2006. It is not in dispute that by then the 1st appellant had been charged for the loss of the complainant's monies. According to PW1 after the 1st appellant was charged his parents urged him to forgive the 1st appellant and they did sign an agreement which was produced in court as PEx.1. It is dated 15/9/2006. It was also signed by the 1st appellant in the presence of an advocate – Kinga Advocate. It means that the appellant was in Nakuru on 15/9/2006. PW1 said that he was supposed to withdraw the case on 19/9/2006 but that the 1st appellant stole from him Kshs.18,000/- again and absconded from work. The 1st appellant admits being in court on 19/9/2006. The case was put off to 11/10/06. During cross examination of the 1st appellant, he admitted having come back to Nakuru on 18/9/2006 and 10/10/2006. It means that the 1st appellant had not stayed in Eldoret from July 2006 till his arrest on 11/10/2006. He was in Nakuru on the day the complainant was attacked. Further, the 1st appellant was unable to demonstrate that he had been living in Eldoret. In reply to questions put to him by the prosecutor he said:-

“I was in our shamba in Eldoret. So I cannot call anyone to say I was in Eldoret. No one saw me in Eldoret. No one in Nakuru can say I went to Eldoret. My relatives do not stay in Eldoret....”

This alibi that the 1st appellant lived in Eldoret was only raised in the defence. No where during cross examination of the witnesses had the 1st appellant raised it, yet the 1st appellant cross examined the witnesses at length. The prosecution had no notice of the alibi. In any event, the prosecution totally dislodged the said alibi during cross examination. Since the 1st appellant admitted that he came to Nakuru

on 10/10/2006, supposedly for the mention of his case on 11/10/2013, it put him squarely within the vicinity of the scene of crime. The trial court did consider the said alibi but did not believe it. We likewise, do not believe the 1st appellant's defence and dismiss it as a sham. We also find nothing in the 2nd and 3rd appellants defences to shake the prosecution evidence against them.

In the circumstances, we are satisfied that the appellants' convictions are safe. We find no merit in the appeals and they are hereby dismissed.

DATED and DELIVERED this 28th day of March 2013.

R.P.V. WENDOH
JUDGE

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W. OUKO
JUDGE

PRESENT:

Mr. Maragia for the appellants

Ms Idagwa for the State

Kennedy – Court Clerk