EPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.244 OF 2011

EPHANTUS LOTOLUAI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(From original conviction and sentence in CMCR Case No.1319 of 2006 – a decision by B. ATIANG, Resident Magistrate)

JUDGMENT

The appellant EPHANTUS LETULUAI was convicted on a charge of robbery with violence and sentenced to death. The particulars of the charge were that on 12th May 2006, at KBC transmitter Milimani Estate in Nakuru, the appellant jointly with another not before court, while armed with dangerous weapons namely swords, robbed ENOCK OWUOR of his mobile phone make SAGEM MY3 valued at Kshs.6500/=, cash Kshs.1000/= and identity card, voters card and Teacher's Sasa Account all to the total value of Kshs.7500/= and immediately before or immediately after such robbery, he used actual violence.

ENOCK MBOYA (PW1) a teacher at Menengai Hill School told the trial court that on 12/5/2006 at 2.30 p.m., he was walking with his colleague JOHN MAINA, and after going past the KBC Transmitter Station, he met two people who had Maasai swords. These two people emerged from the forest with their swords raised and ordered the two men to lie down. JOHN MAINA escaped but they got hold of the appellant and cut him on the head, right shoulder and right wrist, and robbed him and his phone, cash and wallet which also contained personal documents. The attackers escaped into the bushes and PW1's colleague returned to assist him. PW1 sustained injuries and bled a lot so he was taken to hospital for treatment. The P3 form was produced as Exhibit.

On 25/05/2006, one of PW1's students told him he had met some people who matched the description of the people who had been involved in the attack. The student accompanied PW1 to Kwa Buda area near Maili Sita – they posed as persons who wanted to buy cattle to slaughter. PW1 saw the person who had cut him – he called the OCS and was given police officers. PW1 identified the appellant to police who arrested him.

JOHN MAINA (PW2) who had accompanied the complainant confirmed the incident, saying that the complainant saw two people who emerged from the bushes carrying pangas. PW1 who was ahead of him begun blowing a whistle and the two people confronted them. He managed to escape and he saw one person go towards PW1. He later saw PW1 with injuries. On cross examination PW2 stated:-

"I saw the person near me. . . . he had a hole on the ear and long hair. You had . . . . a shirt and a lesso which had red lines. . . . The lesso. . . . on your shoulder. . . ."

PC DAN ORINA received a report about the robbery from PW1 and he accompanied PW1 to the area where the appellant was identified by PW1 and he was arrested. **DR. SAMWEL ONCHERE PW4** told the court that Dr. John Omboga (PW4) confirmed that PW1 sustained deep cut injuries probably caused by a sharp weapon. Dr. Omboga was out of the country at the time of hearing pursuing further studies.

The appellant in his unsworn testimony denied robbing the appellant saying that he worked as a watchman at Section 58. On the material date, he reported on duty and left in the morning. He went to his house at Mawanga and slept until 11.00 a.m. when he had shower and went back to bed. At 3.30 p.m. he was woken up by police who arrested him on claims that someone alleged he had beaten him.

The trial magistrate in his judgment held that the evidence clearly confirmed that the complainant was attacked and robbed of his property. He noted that the attack took place in broad daylight and there was no evidence that the assailants had covered their faces. The evidence of PW1 as to how the attack took place was corroborated by PW2 and both consistently described the appellant's physical features especially the hole on his ear, which was an added advantage on identification.

The appeal is challenged on amended grounds that:-

1. **There was a mistake regarding the identity of the person who executed the offence and he was convicted on mere suspicion.**

2. **Hid defence was rejected without cogent reasons.**

3. **The charge was read to the appellant in a language he did not understand.**

4. **The appellant was retained in custody for over 24 hours without being taken to court.**
5. **The appellant was not represented by an advocate during trial, and this occasioned him great prejudice.**

6. **His mitigation was not considered.**

The court is urged to quash the conviction, set aside the sentence and order for the appellant's acquittal.

At the hearing of the appeal, Mr. Omutelema appeared for the State while Mr. Lawrence Karanja represented the appellant. It was submitted by the appellant's counsel that there appeared to be a contradiction as regards the date the incident took place. He pointed out that the charge sheet stated that it was on 12/05/2006, and whereas evidence led before J. THUITA (Principal Magistrate was that the offence was on 12/05/2006, as per evidence of PW1 and PW2). When the matter went before the High Court which ordered for *de novo* hearing, it proceeded before B. Atiang (Senior Resident Magistrate) and the date changed to 12/04/2006. When the trial magistrate wrote judgment, he noted the discrepancy in the dates but held that it was a simple technicality. This is contested on grounds that the appellant raised an alibi defence saying where he was on the date alleged.

This contradiction was further compounded by the evidence of PW4, (the Doctor) whose testimony was that the complainant sustained injuries on 12/06/2006. This is why the appellant's counsel insists that the variance in dates was not a simple technicality especially when it is apparent that the P3 form was filled 2 years after the event. Mr. Karanja submits that with all these contradictions, the appellant should have been given the benefit of doubt. This is because he was never given a chance to make reference to the amended date which only appeared in the judgment.

It is also submitted that with regard to identification although the offence took place during the day, it must be borne in mind that it was the first time the witnesses saw the appellant. The attack was immediate and swift and involved a chase. The features describing the appellant i.e. hole in the ear, long

hair and carrying a sword/panga is not unique as in the Samburu community this is the look most of the male members don and there ought to have been an identification parade, not the court relying purely on dock identification. Counsel also questions why the former student who led to the arrest of the appellant never testified.

Counsel faulted the identification saying PW2 ought to have been called to an identification parade so as to give credibility to the purported identification instead of letting the court rely on his dock identification. Furthermore, PW1 had already been told that the people who had attacked him were going to be arrested, so his mind was made up that whoever would be arrested would be the culprit.

It is further argued that the death sentence meted was rather harsh and the court ought to have considered the circumstances and given an appropriate sentence as the complainant only lost Kshs.1000/= and a phone. He has suffered sufficient punishment having been in prison for 7 years.

The appeal is conceded on grounds that the evidence was not satisfactory and the circumstances leading to the appellant's arrest were not established. It is also admitted that the gravity of the offence is not worth the sentence.

This is a matter which had many false starts in the lower court before the hearing begun. From 31/05/2006 when plea was taken, the hearing only begun on 13/7/2007, almost a year later. It was heard then by J. Thuita and we confirm the date referred to in the evidence of PW1 and PW2 was 12/05/2006.

After hearing those two witnesses in the year 2007, the matter was not heard again due to various challenges by the court and prosecution until 27/10/2008, when it was indicted that the trial magistrate was on interdiction, and the appellant requested *de novo* hearing. For the entire year 2008, the matter was never heard, although fresh hearing dates kept being given, and eventually on 10/7/2009, (probably out of desperation), the appellant elected to have the matter proceed from where it had reached.

Once again the matter seemed to experience a variety of hiccups and was regularly adjourned until 22/3/2010 when PW3 testified before Hon. W. Korir (SPM). The evidence was that on 24/5/2006 the OCS Nakuru Police Station called him to the office where he found the complainant who had made a complaint about a robbery. The report was entered in OB No.68 of 12/4/2006. When PW4 (Dr. Omboga) testified he stated that the complainant said he was assaulted by people unknown to him on 12/4/2006 at about 4.20 p.m.

Before the trial could come to a conclusion – and after the appellant had given his defence, the trial magistrate realised that the matter had proceeded without the benefit of interpretation and eventually the appellant opted for *de novo* hearing on 7/7/2010. However the false starts never ceased, and the matter only got to be heard afresh on 30/12/2010 before B. Atiang (SRM). When PW1 testified that on 12/04/2006 is when he was attacked. This was also the evidence of PW2, and PW3 (Cpl. Joseph Chirchir) who was assigned investigation in the matter. We confirm from the record that when PW4 (Dr. Onchere) testified his evidence was that the complainant was injured on 12th June, and the P3 form was filled on 9/05/2008. The appellant thus made his defence referring to events leading to his arrest on 24/05/2006.

Indeed the trial magistrate was alive to the fact that there were discrepancies on the dates, the charge sheet referred to 12/05/2006 whilst the evidence related to 12/04/2006 and pointed out that the prosecution ought to have amended the charge sheet, but held that it was:

"a technicality that cannot defeat justice."

Matters would have been simple if the evidence before Hon. Atiang was the only one, but there was evidence previously recorded before another magistrate where the two witnesses consistently referred to the date of the incident as 12/05/2006. We are thus curious as to why at the subsequent fresh trial the two witnesses now chose June as the month when the incident occurred – was this so as to tally with the evidence of the doctor who had consistently stated before two different magistrates that the incident

occurred on 12/06/2006 – we suspect this might be the reason for the sudden shift.

Alongside this then comes the issue of identification, who did the witnesses encounter on 12/05/2006? It is clear in our minds that the evidence on record was not clear as to what date the offence occurred, the trial magistrate made no attempt to reconcile the discrepancy, only saying it was a technicality. With the greatest of respect of respect, we disagree it was no longer a technicality or a memory lapse, because it was on the basis of those dates that the appellant offered his alibi defence regarding his whereabouts in June – yet the charge he faced related to an incident in May. We are persuaded that the discrepancies in the dates, occasioned a miscarriage of justice to the appellant and the contradictions ought to have been resolved in his favour.

The 2nd aspect which is of concern relates to the identification. The offence occurred at 2.30 p.m., which is daytime and opportunity for identification would naturally be favourable. However there were other factors which would have to be considered in the context forming such opportunity quite apart from the lighting conditions. The attackers emerged from the bushes already in a charged mood with pangas/swords raised and barted orders to the two gentlemen to lie down.

The natural reaction would be panic or fear – which in fact manifested itself in three forms – PW1 begun blowing his whistle and screaming, as he and PW2 took off on their heels. If the attackers were chasing them, then we consider, at what point did they both get an opportunity to observe the appellant closely and mark his facial features. In this instance facial identification was important rather than the general appearance of long hair and a hole on the ear lobe (which we take judicial notice, are common characteristics for many young men who are from the appellant's community). An identification parade was necessary for PW2 to confirm the person who he claimed to have attacked them. Secondly PW1 relied heavily on his former student who remained nameless and never testified. It is not clear to us why this unnamed individual was never called to testify. Would he perhaps have told the trial magistrate that appellant was not the person he had meant when he told PW1 about the persons known to be carrying out attacks? Or perhaps there was no such person at all. We are guided by the decision in **BUKENYA and 5 others V UGANDA 1972 EALR pg 549** which held as follows:-

ii. **the prosecution must make available all witnesses whose evidence appears essential to the just decision of the case;**

iii. **the court has the right, and the duty, to call witnesses whose evidence appears essential to the just decision of the case.**

iv. **where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.**

We find that the court relied on dock identification, and the circumstances leading to the appellant's arrest were not very clear. The appeal is merited and is properly conceded.

We hold that the conviction was unsafe and is hereby quashed. Consequently the sentence is set aside, and accused shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this 26th day of April, 2013 at Nakuru.

ANYARA EMUKULE **H.A. OMONDI**

JUDGE **JUDGE**