



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NOs. 26, 27 and 28 OF 2011

(Being an Appeal Against the Original Conviction and Sentence by the Honourable T. Okelo, Principal Magistrate at Bomet in Criminal Case No. 20 of 2010 in the Judgment Delivered on 8.06.2011)

ONESMUS KIBET CHERUIYOT.....1ST APPELLANT

**GEOFFREY KIPKOECH KIRUI ALIAS
KIMALEL.....2ND APPELLANT**

DENNIS KIPYEGON YEGON.....3RD APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Before Hon. Justice J.K. Sergon and Hon. Justice Byram Ongaya on Friday 25th October, 2013)

JUDGMENT

The 1st, 2nd and 3rd appellants are Onesmus Kibet Cheruiyot, Geoffrey Kipkoech Kirui Alias Kimalel and Dennis Kipyegon Yegon respectively. In the first count, the first and third appellants were charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars were that on 1.01.2010 at Bomet Township in Bomet District within Rift Valley Province, jointly with others not before the court, robbed Charles Mwaura of Kshs. 11,800, a torch, Samsung mobile phone and a pair of black shoes all valued at Kshs. 6,100 and at or immediately before or immediately after time of such robbery, wounded the said Charles Mwaura.

In the second count, the 1st, 2nd and 3rd appellants were charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars were that on 1.01.2010 at Bomet Township in Bomet District within Rift Valley Province, jointly with others not before the court, robbed Charles Mwaura of Kshs. 11,800, a torch, Samsung mobile phone and a pair of black shoes all valued at Kshs. 6,100 and at or immediately before or immediately after time of such robbery, wounded the said Charles Mwaura.

In the judgement, the learned trial Magistrate found that the prosecution had proved its case beyond reasonable doubt against all the appellants and proceeded to convict the appellants as charged pursuant to section 215 of the Criminal Procedure Code. Each appellant was sentenced to death and each has appealed against the conviction and sentence.

Mr. J. K. Koech Advocate appeared for the appellants. He urged the following grounds and submissions

for appeal:

1. The trial court erred in law and in fact by relying on uncreditworthy evidence. It was submitted that the complainant PW1 testified that he saw and he could identify the accused persons at the scene of the incident which occurred at night. It was submitted that the complainant could not have seen the attackers because it was raining and at night. Thus, the complainant PW1 could not have identified the attackers during the sudden attack especially that he was cut in the face and the flowing blood obviously impaired his sight. Further, PW1 alleges that he could identify the attackers but PW4 the doctor clearly testified that PW1 was attacked by unknown persons. Counsel for the appellants submitted that the first report as per the P3 form, and as per testimony by PW4, that PW1 was attacked by unknown persons should prevail. In urging the ground, counsel further submitted that the court should take judicial notice that all prosecution witnesses were police officers and in absence of independent witnesses, there could be police connivance to nail the appellants.
2. It was submitted for the appellants that there was no weapon found at the scene of the crime and there was no corroborating evidence so that the identification of the appellants was suspect.
3. During the identification parade, the suspects were shown to the public. It was submitted that they were taken through a public gallery and it was open for any person or witness such as PW1 to see them prior to the parade. Thus, collusion to identify was possible because the identification parade was a sham as it was conducted in breach of the applicable force standing orders.
4. The evidence of PW5 was that the 2nd accused person being the third appellant was short with protruding teeth whereas none of the appellants could fit that description and PW1 as the primary witness on the identification never alluded to such description.
5. It was submitted that the panga recovered had fresh blood stains but the same was not subjected to blood analysis to establish a linkage to PW1 and therefore, the robbery in issue.

For the respondent, it was submitted that PW1 had given a vivid testimony of attack by appellant number 2 whom he knew as Kimalel Mrefu and other persons he did not know. Secondly, the fact that a complainant was a police officer and other prosecution witnesses' except PW4 was no ground to assume collusion to nail the appellants' as convicted and sentenced by the trial court. It was submitted that it was necessary to prove the connivance for such submission to succeed. The court agrees with the submission made for the respondent on that account.

This court has considered the record of the trial court as well as the submissions made for the appellants' and the respondent and makes the following findings:

1. As far as the 2nd appellant is concerned, PW1 testified that he was known to him because he had seen him on several occasions before the day he robbed him. In cross examination, PW1 stated that he recognised the 2nd appellant before he started cutting him, that he knew his nick name Kimalel which meant a brown person, he knew him as Geoffrey Arap Kirui and having worked in Bomet for seven years at the DC's office, PW1, knew many people in town and he recognised the 2nd appellant at the scene of the crime. The court finds that the evidence of PW1 as far as recognition of the 2nd appellant is concerned is credible and trustworthy. PW1 had a torch whose light in the opinion of the court was sufficient for PW1 to see and recognise the 2nd appellant.
2. As far as the 1st and 3rd appellants are concerned, PW1 did not provide testimony of distinctive features about the two appellants that PW1 may have observed of them at the time of the robbery and by which features, PW1 would have identified them at the identification parade held on 11.01.2010. In the case of **Michael Mburu Njonjo Vs. Republic, Criminal Appeal No. 61 of 2002 at Mombasa**, the Court of Appeal held that by prosecution witnesses barely saying that they identified the appellant without more, a sense of incertitude pervaded the case for the prosecution against the appellant. Further, in that case, the court held, that kind of evidence did not inspire confidence in sustaining a conviction for the offence of capital robbery under section 292 (2) of the Penal Code. In this case, of the two appellants, PW1 merely stated that he saw them and identified them in the identification parade. In the opinion of the court, it cannot be said that PW1 had any justifiable basis of identifying the two appellants as he testified to have done at the

identification parade. PW5 stated that accused 2, Onesmus Cheruiyot was short with protruding teeth yet PW1 the primary witness did not give such testimony. PW2 testified that PW1 told him that he knew the attackers and further testified that PW1 told him that he knew the one called Kimalel Mrefu. The evidence by PW2 did not then refer to PW1's knowledge or recognition of the 1st and 3rd appellants. The court has taken all the evidence into consideration and finds that nothing linked the 1st and 3rd appellants to the robbery in issue.

In conclusion, the court upholds the conviction and sentence of the 2nd appellant and quashes the conviction and sets aside the sentence of the 1st and 3rd appellants.

Accordingly, the appeal by the 1st and 3rd appellants is allowed, their conviction for the offence of robbery with violence contrary to section 292 (2) of the Penal Code is quashed and their death sentence is set aside and are set at liberty forthwith unless held in custody for any other lawful cause.

Signed, dated and delivered in court at Kericho this Friday, 25th October, 2013.

J.K. SERGON

JUDGE

And

BYRAM ONGAYA

JUDGE