REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 197 OF 2007

(CONSOLIDATED WITH CRIMINAL APPEAL NO. 196 OF 2007)

LESIIT AND MUSYOKA JJ

JOSEPH NGAI……...……1ST APPELLANT

LOMAR LOKWEI……..2ND APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

(FROM THE ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NO. 741 OF 2004 OF THE PRINCIPAL MAGISTRATE ISIOLO HON. W. K. KORIR, SENIOR RESIDENT MAGISTRATE)

JUDGEMENT

The appellant in this matter was convicted by the Senior Resident Magistrate in Isiolo Senior Principal Magistrate's Court criminal case number 741 of 2004, on one count, that is of robbery with violence contrary to **section 296(2) the Penal Code. They**were sentenced to death.

The particulars in support of the robbery with violence charge were that the appellants jointly with others not before court, robbed Dickson Eduke, of a bull valued at Kshs. 20, 000.00 and immediately before or after the time of the said robbery killed Dickson Eduke.

They were aggrieved by the said conviction and filed the current of appeal in person. In the appeal, they have raised several grounds. They attack the evidence of identification and recognition, that the prosecution's case was riddled with contradictions and inconsistencies, that the conviction was not backed by the weight of evidence

At the hearing of the appeal the appellants were unrepresented. They presented written submissions. The said submissions are detailed and liberally cite several authorities to support their case. The state was represented by Mr Mungai, he opposed the appeal. He submitted that the appellants were properly identified, indeed there were witnesses who alleged to have had recognised them as they were their neighbours.

Being a first appellate court, we are bound to follow the guidelines set by the Court of Appeal in ***Kinyanjui vs. Republic*** **(2004) 2 KLR 364**, where it was said that the first appellate court must look at the evidence presented before the trial court afresh and re-evaluate and re-examine the same, and thereafter

reach its own conclusions. The first appellate court must bear in mind that it did not have the opportunity to see the witnesses as they testified. The appellate court should also look at the grounds of appeal put forward by the appellant. We also bear in mind the point made in ***Buru vs. Republic*** **(2005) 2 KLR 533** and ***Republic vs. Oyier*** **(1985) KLR 353**, that a first appellate court will not normally interfere with the finding of a lower court on the credibility of witnesses unless it is shown that no reasonable tribunal could make such findings.

We have perused the record of the lower court. The picture that emerges is that the deceased was looking after the family cattle early in the morning before leaving for school. The animals came home alone, prompting PW1 and PW2 to find out why. They established that one bull was missing and they could not trace the deceased who was herding the cattle at the time. They mobilised others to help them track the lost bull. The followed prints of the hooves of the bull as well as of the feet of some people. It led them to Isiolo town. At the town they saw the bull with a person they named as Eluny Ekai. When they approached him, he ran away, and as they chased him, he was joined by two others, the appellants herein. They were able to identify the appellants. The pursuers turned back and drove the bull home. It was after this that the body of the deceased was found. The appellants were later arrested and charged with the offence that they were convicted of. Eluny Ekai was never apprehended. . In their defence, the appellants said they had come to the market that day to sell charcoal, and they were with some women, who testified as defence witnesses. After hearing the rival cases, the trial court, after analysing both narratives, came to the conclusion that the appellants were among the persons who robbed the deceased and accordingly convicted them.

Robbery with violence is an offence created in **section 296(2) of the Penal Code**. It is committed where the offender while committing robbery is: (a) armed with a dangerous or offensive weapon or instrument; or (b) is in company with one or more person or persons; or (c) wounds, beats, strikes or uses any other personal violence to any person at or immediately before or immediately after the time of the robbery. The *actus reus* of the offence is theft committed under the defined circumstances, that is where the offender is armed or in a gang or uses actual personal violence.

The issue that confronts this court is whether all the constituent elements of the offence of robbery with violence are established in this case against the appellants. That is theft in the circumstances envisaged in **section 296(2) of the Penal Code**. It was held in ***Johana Ndung'u vs. Republic*** **(1995) LLR 387** that only one of the three elements envisaged in **section 296(2) of the Penal Code** suffices to establish robbery with violence. In this case the appellantsare said to have been in the company of more than one person at the time of the incident. There is also evidence that the deceased was killed in the process of the commission of the theft. There was actual use of personal violence on him. There is also medical proof of the injuries sustained by the complainant. These two elements were established.

The third element, of being armed with dangerous or offensive weapons, was not established; indeed it was not even pleaded. The requirement is that the assailant be armed with a dangerous or offensive weapon. What amounts to a 'dangerous or offensive weapon' is not defined in **section 296 of the Penal Code**. The Court of Appeal in ***Kimemia and another vs. Republic*** **(2004) 1 EA 99, 2 KLR 46**, defined 'a dangerous or offensive weapon' to mean any article made or adapted for use for causing injury to the person or intended by the person having it in his possession or under his control for such use. For the purposes of the appeal before it, the court held that a knife is not made or adapted for use in causing injury to a person, but it would be nevertheless a dangerous or offensive weapon for the purposes of **section 296(2) of the Penal Code** if the assailants in wielding it in the course of a robbery intend to use it for causing injury to any person.

Theft is the other element of robbery. Was there a theft in this case? The complainant testified that her bull was taken away from her son violently in an incident where her son was killed. It was traced to Isiolo town where it was found in the possession of Eluny Ekai. We believe that the element of theft was properly established. There was a taking of the animal; it was moved from the custody of its owner.

The central issue at the trial was whether the appellants were properly identified. The complainant told the court that she knew one of the appellants, and she had previously seen the other. The other witnesses

also testified to knowing the appellants. This indeed appeared to be case of recognition rather than identification. The events happened in broad daylight.

The issue for us to ponder is whether the appellants even recognised by the witnesses were guilty of the offence charged. It is quite evident that none of the witnesses saw the appellants steal the bull from the deceased. Indeed, none of the witnesses testified to the fact of witnessing the fatal attack on the deceased by the appellants. None of them testified as to the fact of witnessing the said bull being driven by the appellants to the market at Isiolo. The witnesses talked of following footmarks, however none of them claimed to have had connected the footmarks theywere following with the appellants. The only connection between the appellants and the commission of the alleged offence is the alleged fact that they joined Eluny Ekai in running away when the latter staring running away after seeing the witnesses. It is instructive that at that point the stolen bull was seen being driven by the said Eluny Ekai alone and the appellants only joined him in running away later.

The record shows that PW3, a watchman, alleged that he saw the appellants and a third person driving a red bull. He was in a toilet relieving himself. He said it was raining heavily and he saw them through a glass window. It is not indicated what in particular captured the attention of this witness and attracted him to these three people who were apparently driving an animal to the market, particularly as at this time the witness was not aware of the loss of the bull. He did not know these people, and was only able to identify them at the dock in court. It is a well-known principle that dock identification is to be treated with caution. The testimony of PW3 no doubt cannot evidence that the court can rely on exclusively to find the appellants guilty of the offence charged.

The doctrine of recent possession was not raised by the state; neither did the trial court in its judgement allude to it. and this was rightly so. The appellants were never in possession of the said bull at any time. Should they be held liable only on account of their running away? Should it been inferred from the mere fact of running away that the appellants had something to do with the offence charged? With respect, it is our considered view that the fact of running when they saw Eluny Ekai running from the witnesses only raised suspicion as to the appellants' complicity, but that by itself was not sufficient to sustain their conviction of the ultimate offence of robbery with violence. .

On the evaluation of the evidence recorded by the trial court, this court forms the opinion that the offence charged was not proved to the required standardand the trial court ought to have acquitted the appellants of the same..

In view of everything we have said above, the conviction cannot stand. We allow the appeal, quash the conviction and set aside the sentence of death imposed on the appellants. Theyshall be set free from prison custody unless theyare otherwise lawfully detained.

DATED, SIGNED AND DELIVERED AT MERU THIS

24TH DAY OF OCTOBER, 2013.

J LESIIT

JUDGE

W MUSYOKA

JUDGE