



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL APPEAL NO. 53 OF 2013**

**MOHAMED BODOLE GALOLE .....1<sup>ST</sup> APPELLANT**

**ABDI YUSSUF.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*CONSOLIDATED WITH*

**CRIMINAL APPEAL NO. 55 OF 2013**

**ABDI YUSSUF..... APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NUMBER 245 OF 2012*

*IN THE PRINCIPAL MAGISTRATE'S COURT AT HOLA - M.O.OBIERO (AG.PM) ON 11<sup>TH</sup> APRIL, 2013)*

**JUDGMENT**

Garissa High Court Criminal Appeal No. 53 of 2013 was on 14<sup>th</sup> October, 2013 consolidated with Garissa High Court Criminal Appeal No. 55 of 2013. The lead file is Criminal Appeal No. 53 of 2013. Mohamed Bodole Galole is the 1<sup>st</sup> Appellant and Abdi Yussuf is the 2<sup>nd</sup> Appellant.

The 1<sup>st</sup> Appellant was the 2<sup>nd</sup> Accused in Garissa Senior Resident Magistrate's Criminal Case No. 245 of 2012. The 2<sup>nd</sup> Appellant was the 1<sup>st</sup> Accused in the said case. They had been charged with two counts of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence in count 1 stated that on 9<sup>th</sup> February, 2012 at Bura Village Sixteen in Tana North District, Tana River County, the appellants jointly with others not before the court while armed with dangerous weapons namely pangas and rungas robbed Alfred Omondi of a Samsung E250 mobile phone valued at kshs.4,500/= and at the time of such robbery used actual violence on him.

In count 2, it was alleged that on the same date and place stated in count 1, while armed with the stated dangerous weapons the appellants robbed Charles Chepkwony of a G-Tide mobile phone valued at

Kshs.3,000/= and at the time of such robbery used actual violence on him.

At the conclusion of the trial, the magistrate acquitted the appellants in respect of count 2 but found them guilty as charged in count 1 and sentenced each one of them to suffer death. The appellants being aggrieved by the said decision have now appealed to this court.

The 1<sup>st</sup> Appellant relies on his amended grounds of appeal and submissions filed on 10<sup>th</sup> October, 2013. In summary the 1<sup>st</sup> Appellant faults the trial magistrate for convicting him on weak and contradictory evidence and failing to consider his defence.

The 2<sup>nd</sup> Appellant on his part relied on the amended grounds of appeal and submissions filed in court on 10<sup>th</sup> October, 2013. A summary of the 2<sup>nd</sup> Appellant's grounds of appeal shows that he faults the trial court for relying on poor identification and for finding him guilty without sufficient evidence.

Mr. Mulama for the state opposed the application and submitted that the evidence adduced by the prosecution supported the offence of robbery with violence. He asserted that the appellants were arrested at the scene of crime and there was no need to conduct identification parades.

In the trial PW1 Alfred Omondi (the complainant), PW2 Paul Muzee Munyoki, PW3 Justus Kinyua and PW4 Chief Inspector of Police Joel Chesire testified for the prosecution. The 1<sup>st</sup> Appellant testified as DW2 and the 2<sup>nd</sup> Appellant testified as DW1.

In brief the complainant, PW3 and other employees of the National Irrigation Board were on 9<sup>th</sup> February, 2012 working at Village Sixteen when at about midday they were confronted by men estimated to be over fifty who were shouting the slogan **"haki yetu, haki yetu."** The men who were armed with rungun gathered them at a certain part of the farm they were working on and told them to lie down. They told them they could not work while they themselves had no work. The attackers assaulted them with sticks and rungun. The complainant and PW3 were injured. The mob took the complainant's mobile phone make Samsung E250 valued at Kshs.4,500/=. The complainant managed to escape and he went to Bura Police Station about three kilometres away where he reported the matter. He then proceeded to Bura Health Centre where he received treatment.

PW2, a clinical officer, produced a P3 form confirming that the complainant was indeed injured on the head, right hand and right leg.

From the above evidence it is not in dispute that the offence of robbery with violence was indeed committed. The offenders were armed with dangerous weapons namely sticks and rungun. The offender was in the company of one or more other persons. During or after the robbery the complainant was beaten and injured—see **FANUEL OTIENO OMIDO v. REPUBLIC [2011] eKLR**.

The prosecution needed to only prove one of the three ingredients. In the case before us all three ingredients were proved. It is important to note that the complainant's mobile phone was stolen during the fracas. We therefore agree with the magistrate's finding that the offence of robbery with violence contrary to Section 296(2) of the Penal Code was committed.

As the first appellate court, we have a duty to look at the evidence adduced afresh and reach our independent conclusion on the evidence. In doing so, we are guided by the fact that we never saw not heard the witnesses testify.

The complainant told the court that they were confronted by about fifty men. He told the court that he knew the people who confronted them by appearance. That is when he identified the appellants in court. During cross-examination the complainant appeared to say that he had not known the appellants prior to the incident. He told the court he identified the appellants at the police station but he was not present at the time of their arrest.

PW3's evidence on identification appears to be that of dock identification. This is what he told the trial court:-

**“When we were going away, we met with the OCS Bura Police Station. He was in the company of other police officers. At that time, the people were still at the scene. At 2.00 p.m. I was summoned and I went to the police station where I recorded statement. I can see two of the people before court. They are the accused persons herein. That is all.”**

When cross-examined by the 2<sup>nd</sup> Appellant he stated that he did not know him prior to the incident but he was at the scene. He admitted that he was not present when the 2<sup>nd</sup> Appellant was arrested. When cross-examined by the 1<sup>st</sup> Appellant he stated that:-

**“I did not look at you well. I only know your face. The people were many.”**

From the evidence of the complainant and PW3 it is clear that the incident took place during the day. The attackers were many. It appears the witnesses had never met the appellants before the material date. We are not convinced that in the circumstances prevailing at that time the witnesses could have been able to identify any of their attackers considering that the attackers were strangers. None of the appellants had any special features. There is no evidence on record to show that they were the leaders of the mob. The trial magistrate therefore erred in concluding that the appellants had been clearly identified. Considering that the witnesses were not present when the appellants were arrested, the best recourse for the police would have been to hold identification parades.

Under what circumstances were the appellants arrested? PW4 the OCS Bura Police Station told the court that on arrival at the scene they found the armed thugs who on seeing them dispersed. They gave chase and managed to apprehend two of the thugs namely the appellants herein. The two were identified by the complainant. When cross-examined he told the court that the 2<sup>nd</sup> Appellant was not armed and was arrested about 200 metres from the scene. He also stated that no weapon was recovered from any of the appellants. Both appellants in their defence told the court that they were arrested when going about their daily chores. They were not arrested together but separately.

It is clear from the proceedings that PW4 did not personally arrest any of the appellants. The police officers who arrested them did not testify. The scene was not sufficiently described. Were there bushes? Was there a busy road nearby? Was there a possibility of arresting innocent citizens going about their daily lives? The prosecution ought to have clarified the circumstances of the arrest of the appellants by calling the arresting officers.

We are, in the circumstances of this case, not satisfied that the appellants were among the people who committed the offence. The people were said to be armed and yet no weapon was recovered from any of the appellants. Even if they threw the sticks away whoever chased and arrested them ought to have recovered the weapons.

Before we wind up, we must address something that is disturbing about the proceedings before the lower court. After the appellants testified on 27<sup>th</sup> February, 2013 the trial magistrate recorded proceedings as follows:-

**“Accused 1: That is the close of my case.**

**Accused 2: I intend to call two witnesses. However, they have gone to attend a workshop.**

**Court: Defence case closed. Judgment on the 8.3.2013. Bond extended.”**

In our view, it appears the 1<sup>st</sup> Appellant was asking for an adjournment to call two witnesses. No comment is made about the application and neither is any reason given for rejecting the request. The impression one gets is that the 1<sup>st</sup> Appellant did not receive a fair trial.

All in all, upon analyzing the evidence adduced in the trial, we agree with the appellants that their conviction was unsafe and should not be allowed to stand. We allow their appeals and set aside both the conviction and sentence. The appellants are thus set at liberty unless otherwise lawfully held.

We make orders accordingly.

**Signed and dated this 22<sup>nd</sup> November 2013**

**S. N. MUTUKU,**

**W. KORIR,**

**JUDGE**

**JUDGE**

**Dated and delivered this 29<sup>th</sup> November 2013**

**S. N. MUTUKU,**

**JUDGE**