



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 97 OF 2010

BENJAMIN KEMBOI KIPKORE APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Appeal arising from the decision of Hon. G. M. A. Ongondo, PM in Kapenguria Principal Magistrate's Court in Criminal Case No. 313 of 2009)

J U D G M E N T

The Appellant in this case was jointly charged with another with two counts of robbery with violence contrary to Section 296 (2) of the Penal Code. Particulars of count one are that on the 17th day of March 2009 at about 17.30 hours at Kamalei Trading Centre, Tapach Division in West Pokot District within Rift Valley province, being armed with dangerous weapons namely AK 47 rifles, jointly with others not before Court robbed David Chemelili of cash Kshs. 250,000 and at or immediately before or immediately after the time of such robbery used personal violence to the said David Chemelili.

Particulars of count two are that on the 17th day of March 2009 at about 17.30 hours at Kamalei Trading Centre, Tapach Division in West Pokot District within Rift Valley Province, being armed with dangerous weapons namely AK 47 rifles, jointly with others not before Court robbed Stephen Kuloba of a mobile phone make Motorola C168 valued at Kshs. 7,000 and at or immediately before or immediately after the time of such robbery used personal violence to the said Stephen Kuloba.

The Appellant was convicted on both counts and sentenced to death in respect of count one. The Appellant was dissatisfied with the decision of the Trial Magistrate and preferred an appeal. The Appellant in his grounds of appeal contended that no sufficient evidence was adduced to sustain a conviction; that the Investigating Officer produced exhibits recovered from a room in a bar without any proof that he was the occupant of the room; that no evidence was adduced to show that he had a gun during the alleged robbery and that no identification parade was carried out.

The complainant in the first count Pw 1 David Chemelili is a salesman and the complainant in count two Pw 2 Stephen Kuloba Ondiek is a driver. The two were employees of a business man Pw 3 called Charles Toroitich trading in the name of Nafuu Stores based at Kapcherop Trading centre. On 17/03/2009 Pw 3 dispatched his two employees to go and supply goods to his customers using motor vehicle registration No. KAR 980 X. At around 17.30 pm, the two complainants left Kamalei Trading Centre headed to Makutano Town. While on their way about two kilometers from Kamalei Trading centre, they saw three men emerging from a bush besides the road. One of the men stood on the road while holding an AK 47 rifle. The driver was ordered to stop and he complied. One of the men who was holding a walking stick demanded that the two hand over their mobile phones. The driver of the vehicle handed over his mobile phone. One of the men demanded for money. The salesman (Pw 1) handed over Kshs. 150,000 which

was in his trouser pocket. He also gave Kshs. 100,000 which was in a polythene paper in the vehicle.

The salesman was ordered to come out of the vehicle and lie down which he did. After the thugs accomplished their robbery mission, the Appellant who was armed with an AK 47 rifle fired one shot in the air as they fled away.

The two complainants proceeded to Kapsange G. S. U. Camp where they reported the incident. They were advised to proceed on. They went and met their employer Pw 3 who accompanied them to Kapcherop Police Station where the incident was reported.

On 17/03/2009 at 7.00 pm, Pw 4 Matthew Mwangi Wamuguga District Officer Tapach Division of Pokot Central District received a call from one Benjamin an Assistant Chief of Kamelei Sub-location who informed him that there had been an incident near Kamalei Trading Centre in which a lorry crew had been attacked and robbed. The D. O. visited Kamalei area on the following day and held a public baraza. Members of the public gave out the name of the Appellant as one of the suspects who was also said to be a ring leader of a gang terrorizing people around the area. He further received information that the Appellant had been seen at Makutano Town.

Pw 4 proceeded to Makutano town where he sought assistance of the OCPD. The OCPD assigned Pw 5 Cpl. Collins Opiyo and Pw 6 P.C. Benedict Mwendwa to accompany the DO and carry out investigations. The Police Officers had information from informers that the Appellant had been seen going to Kitale earlier in the day. Later on that day the Appellant was seen riding a motor cycle. He was tracked to Shrek Bar where he was found enjoying a drink in the company of another suspect who was subsequently charged with him but was acquitted. It turned out that the Appellant had booked a room at Shrek Bar and had kept an assortment of clothes in the room. A new motor cycle was parked outside the room. He and his colleague were taken to the room where a search was conducted. Some Kshs. 14,000 was recovered under the mattress in the room. Also recovered was a Motorola C168 which had been stolen from the complainant in count two.

The two were then taken to Police and after completion of investigations, they were charged. In his defence, the Appellant who was the first accused in the lower Court denied committing the offence. He stated that he is a potato dealer and was able to buy the items produced as exhibit including the motor cycle. He stated that on 18/03/2009 at around 4.30 pm he was riding a motor cycle which was carrying a lady. He was stopped by Traffic Police Officers who asked for his driving licence and insurance. He did not have any of those two documents. He was arrested on allegations that the motor cycle he was riding was stolen. He was taken to Kapenguria Police Station where he was charged.

The State Counsel Mr. Kimanzi opposed the appeal arguing that the offence was committed at 5.30 pm. Pw 1 and Pw 2 identified the Appellant. Some of the items stolen during the robbery were recovered from the Appellant at a lodging at Makutano town. He argued that the conviction of the Appellant was sound and that the appeal should be dismissed.

Our duty as a first appellate Court was clearly set out in the case of **Okeno Vs Republic [1972] EA 32.** We are expected to subject the evidence adduced in the lower Court to fresh and exhaustive examination. We are supposed to weigh conflicting evidence and draw our own conclusions.

We have evaluated the evidence of the two complainants as well as the other witnesses. We have no doubt that a robbery occurred on 17/03/2009 near Kamalei Trading Centre. A mobile phone which the complainant in the second count lost was recovered a day after the robbery at Makutano Town. The mobile phone a Motorola C 168 was positively identified by the complainant Stephen Kuloba. The phone was produced as *exhibit 3*. The complainant produced a receipt issued to him upon purchase of the phone as *exhibit 23*. The receipt contained the mobile phone's serial number.

There was evidence from the salesman that they had sold goods worth Kshs. 250,000. A Sales book was produced as *exhibit 1* which showed how the sales yielded money. The robbers were more than two and were armed with an AK 47 rifle. The issue which we have to determine based on the recorded evidence

is whether the Appellant was one of the robbers.

There is evidence that the Appellant was traced to a lodge at Makutano at a bar called Shrek Bar. When a search was conducted on him, a receipt for room No. 5 was retrieved from him pocket (*exhibit 25*). He was led to the room where Kshs. 14,000 in cash was removed from under the mattress. There was a new motorbike outside room No. 5 which had been bought by the Appellant from Transmatt Supermarket at Kitale. The motorbike was produced as *exhibit No. 8*. The cash sale receipt was produced as *exhibit No. 6*, motorbike plate as *exhibit 7*, motor bike helmet *exhibit 22*, and motorbike logbook *exhibit 28*. The motorbike documents were in the Appellant's name. Besides the motorbike, the Appellant had a number of clothes he had bought. He did not deny that he was the owner of these items. In fact in his defence, he stated that he had money of his own to purchase the motorbike and other items found in room No. 5. During the hearing of the appeal, the Appellant took issue with the fact that the lodging receipt did not bear his name. This does not mean that he was not the one who had taken that room. In the Appellant's defence, he had admitted that some items found in the room belonged to him. Even his co-accused who was acquitted had admitted in his defence that some of the clothes found in room no. 5 belonged to him.

There are strong indications that the money which the first complainant lost was the one used by the Appellant to purchase the motor bike among other items which were found in his possession. This inference is supported by the fact that the mobile phone belonging to the complainant in count two was found in possession of the Appellant. The phone was found in the room where the Appellant's other properties were found. It is the Appellant who had rented the room which was under his exclusive control.

There was no attempt by the Appellant to explain how he came by the phone which had been stolen during a robbery which occurred the previous day. We find that the Appellant was one of the robbers and the Trial Magistrate applied the doctrine of recent possession correctly in finding that the Appellant was one of the robbers.

The Appellant in one of his new grounds which he submitted together with his submissions contended that his was a case of dock identification. We have looked at the record and notice that there is nothing on record to show that Pw 1 had known the Appellant prior to the robbery. When the Magistrate recorded in the proceedings that Pw 1 had identified the Appellant, this did not mean that the Appellant had been identified in the dock. Pw 1 pointed at the Appellant in reference to the person whom he had seen at the Police station and in reference to the person he saw during the robbery. The Trial Magistrate did not entirely rely on the evidence of Pw 1 in relation to the Appellant. There was evidence from Pw 2 who knew the Appellant as a potato dealer and who saw him during the robbery. Pw 2 had known the Appellant for about three years. There was no need for an identification parade. The Appellant indeed admitted he is a potato dealer in his defence. Evidence of recovery of phone was also relied on.

The Appellant contended in one of his new grounds that the Trial Magistrate convicted him in Criminal Case No 314 of 2009 when the proceeding were in respect of Criminal Case No. 313 of 2009. We have looked at the handwritten judgment of the Trial Magistrate and notice that the case is given as 313 of 2009. However in the typed judgment, the case is given as 314 of 2009. This was a typing error, otherwise the original handwritten record of the Trial Magistrate shows the correct case number.

We find that the Appellant was properly convicted and sentenced. His appeal lacks merit. The same is hereby dismissed in its entirety.

Dated, signed and delivered at Kitale on this19th..... day of November, 2013.

J. R. KARANJA

JUDGE

E. OBAGA

JUDGE

In the presence of:

Appellant:

Respondent: