



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CRIMINAL APPEAL NO. 36 AND 39 OF 2010

EBOKON EREGAE}
ERUPE LOKOE} APPELLANTS

VERSUS

REPUBLIC..... RESPONDENT

(Appeal arising from the decision of Hon. T. Nzyoki, SRM in Lodwar Senior Resident Magistrate's Court in Criminal Case No. 147 of 2009)

J U D G M E N T

The appellants were charged with two others with three counts of robbery with violence contrary to Section 296 (2) of the Penal Code. The Prosecution however withdrew counts two and three as they were unable to trace witnesses. The particulars of the remaining count are that on the 15th day of February 2009 at Keybase in Turkana North District within Rift Valley Province, jointly with another not in Court being armed with an AK 47 Serial No. 2023 and an AK 47 Serial No. 350007761 robbed Daniel Keleda of his Kshs. 3,500 and at the time of such robbery threatened to wound the said Daniel Keleda.

The appellants were convicted and sentenced to death. They preferred two separate appeals which were consolidated. The facts leading to the conviction of the appellants are that on 15th February, 2009 at about 3.45, Pw 5 Daniel Keleda, the complainant herein who is a driver had delivered soda to Sudan and was driving back. He was driving motor vehicle registration No. KAW 817 B a Mitsubishi Fuso. He was in the company of his turn boy one Kemboi and two ladies. He had crossed the Nadapal boarder. As he drove on, two men who were armed with AK 47 rifles emerged and stood on the road pointing their guns at the driver who was in the cabin with his turn boy and the two women. The crew were ordered to lie down. The two then ransacked them and took Kshs. 3,500 from the driver and his passport.

The complainant drove on and reported the incident at a barrier near an army camp at Lokichoggio. He was referred to Lokichoggio Police Station where he reported the incident. The complainant proceeded to Kalobeyei area. While at Kalobeyei, he was asked to go to Lokichoggio Police Station for an identification parade. He went to Lokichoggio Police Station on 16th February 2009 where he participated in an identification parade. He was able to pick out the first and second appellants.

Pw 4 CIP Peter Njoroge was the OCS Lokichoggio Police Station. On 15/02/2009 at around 4.30 pm, he received a report from Cpl. Maluki who was on duty at Lokichoggio Nadapal barrier that a

robbery had occurred involving crew of motor vehicle registration No. KAW 817 B. The OCS mobilized Kenya Police Reservists to accompany him to the scene after a report by the victims had been made at the Station. He proceeded to the scene at Keybase area which was about 5 Kilometres away from the Police Station. While at the scene, he noticed footprints of people who wore sandals commonly known as “akala”. He organized those who were with him in two groups. He assigned first group of Kenya Police Reservists to follow the footprints. The second group where he was one of them proceeded to a dry river bed near Natiir 1 Manyatta which is known as an escape route for robbers who commit robberies along Kakuma-Lokichoggio-Nadapal area. He kept vigil for a while after which he left. At around 6.00pm, he received a call from one of the Police Reservists who told him that they had followed the footprints which ended at Natiir 1 Manyatta and that they had managed to arrest two suspects and that they had been taken to the Police Station in a taxi. He organized for an identification parade which was conducted by Pw 6 IP Peter Isanda.

The first appellant in his defence in the Lower Court stated that on some unspecified date, he had taken a goat to Lopiding in the company of a young girl. He sold the goat for Kshs. 1,000. He spent the night there and on the following day, he started going back to his home at Anam. While on the way, he found some men drinking beer at a certain manyatta. He ordered for beer of 50 shillings. As he was taking his beer, he saw those who had been drinking fleeing from the manyatta. As he prepared to leave, Police Officers arrived at the manyatta and arrested those who were drinking including himself. Those arrested were taken to the Police Station. On the following day, those who had money were released. The OCS allegedly asked for 500 shillings from him but since he did not have anyone to assist him, he was locked up in the Station. His fingerprints were taken and he was charged for an offence he did not commit.

The second appellant Erupe Lokoe stated in his defence that he is a herdsman from Songot. On an unspecified date, he left his home for Lokichoggio where he was taking a sick person. He spent one night on the way. When he arrived at Lokichoggio, he was directed to Lokichoggio AIC hospital. His patient was admitted. Later in the evening, a doctor gave him 50 shillings to go and buy food for the patient. He went to Lokichoggio town where he had a meal and went back to Lokichoggio AIC Hospital. While at the hotel, he saw a man dressed in Police uniform. The man he had seen outside the hotel came to the gate of the hospital and called him. He asked him to accompany him to Lokichoggio. He was at first reluctant but after the man insisted, he finally accompanied him. The man took him to a house where he found other people. After a while, he asked where the man who had taken him there was. He was told that he was under arrest. After a few days, he had his fingerprints taken and was arraigned in Court.

The appellants' appeals were opposed by Mr. Chelashaw State Counsel, who argued that the evidence adduced at the Lower Court was enough to convict the appellants. The robbery took place in broad daylight. An identification parade was conducted in which the two appellants were identified. The appellants were tracked and arrested as they tried to flee from a manyatta. The appellants led to recovery of AK 47 rifles and some of the monies which was stolen during the robbery. He urged the Court to dismiss the appellants' appeals as the conviction was proper and the sentence lawful.

As a first appellate Court, our duty is to evaluate and analyze the evidence adduced before the Lower Court and arrive at our own conclusions as was stated in the case of **Okeno Vs Republic [1972] EA 32**. We are to weigh conflicting evidence and reach our own conclusions. We are however expected to give allowance for the fact that the trial Court had the advantage of seeing witnesses testify.

In the present case, when Pw 4 CIP Peter Njoroge the OCS Lokichoggio Police Station received a report of the robbery from Cpl. Maluki who was manning a barrier. He mobilized Kenya Police Reservists and went tracking the robbers. One of the Police Reservists was Pw 3 Adam Lotiira a Senior Sergeant In-charge of Police Reservists in Lokichoggio. He testified that once they arrived at the scene of the robbery at Keybase area, he assigned some KPR Officers to track the footprints. He, and the other KPR Officers took a different direction. He later received a call from one of the KPR Officers Emanuel Ekuyen who told him that the footprints were leading to Natiir 1 Manyatta. One group of the KPR Officers went into the manyatta as he took the opposite direction. He saw three men running away from the manyatta. He chased after one of them and arrested him. He is the second appellant who was the first

accused in the Lower Court. Another KPR Officer who was in the company of Pw 3 chased after the first appellant who was second accused in the Lower Court and arrested him. The two appellants were then escorted to Lokichoggio Police Station where they were placed in cells.

While the two appellants were at Lokichoggio Police Station, the OCS Pw 4 interrogated them and they offered to take him to where they had hidden the guns which they had during the robbery. Pw 4 CIP Njoroge was accompanied by Pw 1 Lolim Ekiyeya and Pw 3 Adam Lotiira both KPR Officers. The two appellants led the Investigating Officer and the two KPR Officers to the home of Topos Erukwon who was the third accused in the Lower Court. Topos Erukwon was then asked to produce the guns which the appellants had left with him. Topos Erukwon first produced an AK 47 which was hidden among posts. He also produced another AK 47 which was hidden at the fence.

The appellants then revealed that they had kept some money at Jerusalem in a house of a woman. They led the Officers to the house of a woman called Ewesit Losiru who was the fourth accused in the Lower Court. This woman produced Kshs. 2,000. She also produced some two knives kept in army belts. The recovery of the two rifles and the money as well as the knives were recovered on 16/02/2009. The appellants were returned to Lokichoggio Police Station where an identification parade was conducted by Pw 6 IP Peter Isanda of Lokichoggio Police Post.

The two AK Rifles were taken to a ballistic expert who examined them and found them to be in good mechanical condition and that they were firearms as known in law. The report of the ballistic expert was produced by Pw 2 Ag. SSP Lawrence Nthiwa on behalf of Lindsay Kipkemoi.

We have evaluated the entire evidence adduced in the Lower Court. We have to decide based on evidence whether the appellants were involved in the robbery. There is no doubt that a robbery occurred involving Pw 5 who was one of the victims. The robbers were armed with AK 47 rifles. During the robbery, personal items were lost including money. Subsequent to the robbery suspects were tracked and arrested. The arrest led to the recovery of some money and 2 AK 47 rifles.

A properly conducted identification parade was conducted by Pw 6 IP Peter Isanda of Lokichoggio Police Post. This parade was conducted according to the then Chapter 46 of the Force Standing Orders. One of the victims of the robbery Pw 5 Daniel Keleda was able to identify the two appellants. The robbery occurred at broad daylight. Evidence from Pw 5 is that the whole episode took place 10-15 minutes. The assailants stood in front of the vehicle which Pw 5 was driving. He therefore had ample time to observe the faces of the appellants which enabled him to pick them out during an identification parade carried out on 16/02/2009.

The Trial Magistrate was alive to the fact that, he was convicting the appellant on the basis of identification of a single witness. He nevertheless went ahead to find that robbery took place at daylight and as such the conditions for identification were proper. The two appellants were subsequently identified in a properly conducted identification parade.

We find that the evidence of recovery of some monies through the assistance of the appellants and the recovery of two AK 47 rifles went to confirm the fact that the appellant's were the ones involved in the robbery. The appellants tried to escape on seeing the KPR Officers. They were chased and apprehended. They assisted in recovery of the weapons seen during the robbery. The Trial Magistrate considered their defence and dismissed it. Both appellants contend in their grounds of appeal which are identical that the Trial Magistrate did not consider their defence. We have looked at the record and find that the Trial Magistrate considered the appellants' respective defences which he found had no truth.

The appellants contend that they were convicted on the evidence of a single identifying witness. We have said before in this judgment that the Trial Magistrate was aware that he was convicting on the evidence of a single witness. He went ahead to state that the conditions at the time of the robbery were conducive for proper identification. Besides this, the appellants led to recovery of two rifles and some money.

Though the firearms were not found in the possession of the appellants, the fact that it is the appellants who led to their recovery shows that they had connection to the two rifles and they were kept at the home of Topos Erukwon for their benefit. Even if the appellants were to be charged for possession of firearms, that charge would have stood based on the definition of possession.

The appellants contend that they were convicted without any medical evidence being produced. There was no need for medical evidence. There was no harm done to any of the robbery victims. It was enough to either prove that the robbers were armed during the robbery or were in a group of two or more. There is evidence that the robbers were armed with 2 AK 47 rifles.

The appellants also contend that no crucial witnesses were called. There is no crucial witness mentioned who was never called. There was the complainant in count one. There was the Arresting Officer and Investigating Officer called. The Prosecution did not require to call any other more witnesses. The Prosecution had called all their essential witnesses. The evidence of the witnesses was consistent. There is no single witness who gave evidence contradictory of any other witness.

We find that the conviction of the appellants was proper. The Trial Magistrate properly analyzed the entire evidence. The sentence given was lawful. We find no merit in the appeals which we hereby dismiss.

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

J. R. KARANJA

JUDGE

E. OBAGA

JUDGE

In the presence of:

Appellants:

Respondent:

Court Clerk: