



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

Criminal Appeal 166 of 2010

CONSOLIDATED WITH

Criminal Appeal 167 of 2010

(from the original conviction and sentence of the Chief Magistrate's Court at KIBERA in Criminal Case No. 2475 of 2008 – KASERA)

EMMANUEL LEPAPA OLE TOSHA 1ST APPELLANT

JAMES TINKOY KILAMI2ND APPELLANT

Versus

REPUBLIC RESPONDENT

JUDGEMENT OF THE COURT

1. The appellant, Emmanuel Lepapa ole Tosha (1st Appellant) and James Tinkoy Kilami (2nd Appellant) were charged with two counts of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were that on the 6th of August 2008 at Kiserian township in Kajiado District within Rift Valley province, jointly with others not before the court, while armed with dangerous weapons namely panga and rungus, robbed GEORGE WAGURA ALICE of cash Kshs.8000/= a mobile phone make bird 1316, a wallet, Equity bank ATM card and an employment card all the total value of Kshs.5, 4050/=. On the same night and immediately after robbing George Wagura Alice the two appellants jointly with others not before court also robbed SAMSON SENARE of cash Kshs 5,000/= and a mobile phone make Motorola all the total value of Kshs 7,050/= and immediately before and after the robberies, there was use of force and threats to use force and personal violence. There were 5 witnesses called and after a full trial, the appellants were found guilty as charged. Being aggrieved by their conviction and sentence, each appellant filed a separate appeal against his conviction and sentence. At the hearing of the appeals, the two separate appeals filed by the appellants were consolidated and heard as one.

2. The appellants raised more or less the same grounds of appeal in their petitions of appeal. They were aggrieved that they had been convicted by the trial magistrate without considering the circumstances

prevailing to recognise the appellants were not favourable, the prosecution witnesses contradictions and uncorroborated evidence, there was no exhibit produced that was recovered in the possession of the appellants and that the defence was rejected without the learned trial magistrate giving reasons as under section 169(1) of the Criminal Procedure Code. At the hearing of the appeals, the appellants with the leave of the court presented to the court their written submissions in support of their appeal. They urged the court to find these appeals to have merit and allow the same. On his part for the state Mr. Omirera, State Counsel opposed the appeals and urged the court to uphold the conviction of the appellants by the trial court.

Facts

3. on 6/8/08 at about 7.30p.m. George Wagura Alice (PW1) who resides at Kiserian near the Primary school was going home on foot alone, when he reached the junction to Kiserian primary school he saw 4 men in front of him, two were wearing dark coats similar to those worn by police officers and one was also wearing a marvin but the face was not covered. The two others were short, one wore a baseball cap and while 6 metres away shown a torch at PW1 and ordered him to stop. This order was from the man wearing a marvin, he demanded money and phone, they were by then close to him but the two short men stood at a distance and had on them big sticks. The two tall men, one had a panga and a rungu and the other had a metal bar. PW1 was then ordered to seat but he squatted and they proceeded to ransack him and took his mobile phone Motorola Bird 1316 worth Kshs 4,600/=, removed his wallet which had Kshs.400/=, equity ATM card, 2 employment cards and a duplicate of his ID. He realised they were not police officers as a police officer cannot remove things from one's pocket. He stood up and the person holding his wallet hit him. There was bright moonlight and electricity from a nearby building and he was able to identify the person as the 2nd appellant as a person he used to see though he did not know his name, they would meet at miraa dens, he was wearing a marvin and black coat and is the one who removed the wallet and phone while holding a metal bar and also hit PW1. He also recognised the other man who had pierced ears and had not covered his face as the 1st appellant as the person he used to see at Kiserian market who had a rungu and a panga and removed Kshs 400/= from PW1 pocket. PW1 went home and told his neighbours what had happened to him and together with George Wagure, Joseph, Jane Mungai and Joseph Ndungu Mbuthia they went out to look for the robbers but could not see them and hence reported the matter to Kiserian police station. He was later called to Ongata Rongai police station where he identified the 1st appellant.

4. On the same night of 6/8/08, Samson Samare (PW2), at 8.00p.m. went out to buy milk and on his way back home saw 4 men, 2 tall and 2 short who ordered him to stop and they started bearing him up with runqus and ordered him to sit down but he fell down where they started ransacking him. They tore his jean trousers and as he struggled he managed to jump over a fence and run away but managed to stop and look at his assailant and talked to them in Kimasai demanding to know what they wanted. They pursued him to his gate, it was not dark and he could see them well as at his gate there was a security light. When he entered his house, PW2 realised his cash 5000/=, phone Motorola C113 and personal documents missing. He reported the matter to Kiserian police station. On his way back from the polices station, he went back to where he was attacked and found a wallet and an employment card to Alice Wagura, an ATM card and photocopy of ID. He also found his documents scatted near the fence but the cash and phone were missing and his milk damaged. He later traced PW1 who said he had been attacked the same night. On 28/8/08 he was called at Rongai police station where he identified the 2nd appellant.

5. PW3 police officer I.P. Rodgers Ndoi testified how the 1st appellant was arrested after PW1 called to inform him that he had spotted him at Kiserian shopping centre and with the assistance of OCS the arrest was effected. Upon interrogation, the 1st appellant admitted to have committed the crime and led them to the 2nd appellant at Mathare estate in Ngong. Two officers accompanied the 1st appellant to the arrest of the 2nd appellant from his house. On 28/8/08 Inspector Nyaga conducted an identification parade where PW1 identified both appellants.

6. When the appellants were put on their defence, they gave their unsworn statement and both denied being involved in the robbery. The 1st appellant stated that he was drinking at a bar when he saw

somebody he had a disagreement with and moments later he was arrested. This person identified him from the identification parade. The 2nd appellant said that on 27/8/08 he was in a changaa den and two men came in searched the house and arrested him.

Determination of the issues

7. As the first appellate court, this court can re-evaluate afresh the evidence on record and reach its own independent determination with regard to the conviction and sentence of the appellants. What we have to put into account in this respect is that we never saw or heard the witnesses and we have to keenly consider the grounds of appeal outlined by the appellants. See the case of **Okeno versus Republic [1972] EA 32**. On whether the standard of proof was beyond reasonable doubt, the evidence of the appellants was that circumstances prevailing to recognise them were not favourable as the offence was committed at night and this was a case of one witness identifying them. The evidence of PW1 and PW2 who are the compliant in this case in each of the two counts that the appellants faced at the lower court, is that PW1 knew the 1st appellant as he used to see him in Kiserian at the slaughterhouse and in miraa dens and since there was moonlight and security light in a nearby building, he was able to recognise him. In defence the 1st appellant stated that before his arrest, he saw somebody he knew since they had a disagreement and later police officers came in and arrested him. This is the person who later picked him out in the identification parade, PW1. On the other hand, it is not clear from the records as to how the 2nd appellant was identified and the only link is the evidence of PW3, the police officer who stated that upon the arrest of the 1st appellant, he admitted to have committed the crime and that he was in the company of the 2nd appellant and they proceeded to his house and he was arrested.

8. Is the evidence of identification by PW1 and PW2 sufficient to secure a conviction of the appellants? We have carefully re-evaluated the evidence on record and warned ourselves of the inherent dangers on the reliance of a single witness identification to convict the appellant. PW1 stated that he recognised the 1st appellant as somebody he knew before the robbery, and when he later saw him in bar in Kiserian, he called the police who arrested him and in a subsequent parade picked him out from several other people lined up together with him. He said that even though the incident took place in the night, there were security lights in a building near where he was attacked and the lights were sufficient to enable him recognise the 1st appellant. Even though the 1st appellant was not arrested on the same night and nothing stolen was recovered, when PW1 saw him later, he was able to identify him. So why was it necessary for PW1 to go through the identification parade process if he had already recognised the 1st appellant and was well exposed to him when he called the police? Why had he not been able to describe the 1st appellant immediately after the robbery? We are well aware of the decision in **Abdalla bin Wendo and Another versus Republic 91953) 20 EACA 166**, where the East Africa Court of Appeal held that;

Subject to well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In the circumstances, what is needed is other evidence, whether be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude the the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of any error.

9. PW1 stated that as he walked along the road, he was suddenly attacked by 4 men who forced him to kneel down but he squatted instead and his attackers shown a torch on his face and that there were lights from a nearby building. It is doubtful that with the sharp light from a torch and from his squatting position as PW1 was being ransacked he could well be able to observe the 4 people who attacked him and only recognise the 1st appellant who wore a marvin. PW1 does not state how much of the 1st appellant's face he could see noting that he was wearing a marvin and there was a torch directed to his own face as he squatted. These circumstances and the place of attack and noting that it was early evening made it unfavourable for PW1 to properly be certain that the persons who attacked him; was definitely the 1st

appellant or one of the 4 men who attacked him. We also note that the 1st appellant consistently sustained his defence that he sold cattle at the slaughterhouse, a place where PW1 also worked and that they had a disagreements that may have led PW1 to pick on him as his attacker at the identification parade.

10. in the charge sheet, the offence committed against the complaints is that the persons who attacked PW1 were armed with dangerous weapons being pangas and rungas and in evidence, PW1 gave his sworn evidence that the 1st appellant attacked him using a metal bar that was used to hit him. That the two other men who stood by were holding long sticks but PW1 did not state that these two men used these long sticks to attack him. These were details not outlined in the charge sheet. Could PW1 have been mistaken about the weapons used in his attack and failed to state so to the police? PW1 stated that when he was attacked, he went home and called his friends and relatives and proceed to search the men who had attacked him; he however does not indicate that he described the people he was looking for. He reported the matter to the police station the following day when his memory was still fresh and could remember the events of the previous day well and thus the use of the weapons in the nature of metal bars and sticks should have been highlighted to the police but in drawing up the charge, the police stated that the weapons used were pangas and rungas. This is a fatal omission in a case of robbery with violence.

11. PW2 does not stand out as somebody who could recall clearly as to who attacked him and despite giving evidence that he spoke to his attackers in Kimasai, when he was attacked, he was hit and fell down, he struggled and jumped the fence and at his gate even though he states there was light, he may not have been able to look back as he was running in fright to be able to clearly see the 4 men chasing him. He did not realise that he had been robbed until he got inside his house. His description of his attackers is not as clear as that of PW1. However with regard to the 2nd appellant, PW3 who interrogated the 1st appellant upon his arrested gave evidence that;

I sent Corporal Kithuku to Kiserian police station to collect accused 1. He was brought to Ongata Rongai on the same day. On 27/8/08 I called accused 1 to the office of deputy OCS. I interrogated him with sergeant Mutuku. He told me that he committed these offences with his accomplice who lived in Mathare estate in Ngong. On that day at 7.00p.m. I, corporal Kithuku, corporal Isaack, corporal Sagana and other two officers accompanied accused 1 to Mathare estate ... we found accused2 sleeping. ... We arrested accused 2. ...

12. This was not a person that PW1 or PW2 had described well earlier or said to have known him. He was arrested on the basis that he was implicated by a fellow accused person. His positive identification at the parade is doubtful noting the circumstances of the robbery against PW1 and PW2. Even though PW1 was clearly able to pick out the 1st appellant, this was a person he recognised and knew him before the robbery against him, but this was not a similar case with regard to the 2nd appellant. It is therefore highly probable he could have been mistaken with regard to the 2nd appellant as held in the case of **Tukoye versus Republic Crim. App. No.204 of 1987** where the complaint did not know the appellant before and did not give a description that led to the arrest and may have been mistaken at picking out on the appellant at the identification parade.

13. On the ground of appeal that the prosecution witnesses contradicted themselves and there was no corroboration or any exhibit recovered, Our understanding of section 296(2) of the Penal Code is that a charge drawn under this part should disclose an offence if the following key elements and brought out thus;

- i. *The offender is armed with any dangerous or offensive weapon or instrument, or*
- ii. *The offender is in the company with one or more other person or persons, or*
- iii. *If at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any personal violence to any person.*

14. With the analysis above we find key elements of the offence as under section 296(2) of the Penal Code have not been proved within the required threshold, the charge sheet as drawn is not commensurate

with the evidence adduced in court as the alleged weapons stated to have been used during the attacks against the complaints are not the stated weapons as under the charge sheet. The elements of a robbery with violence charge outlined by the Court of Appeal decision in **Appeal No. 6 of 2011, Abdirahman Ali et al versus Republic**, are not satisfied in the case of both appellants.

15. In conclusion, for the reasons stated the appeals are allowed, conviction quashed and the sentence set aside. The appellant be set free unless otherwise lawfully held.

Dated and Delivered at Nairobi this 19th Day of November 2013.

M. Mbaru

J. Rika

Judge

Judge

In the presence of

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