



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

HCCRA NOS. 111 & 112 OF 2012

JACKSON OSIAKO NDIANGUGU

ALIAS DOCTOR 1ST APPELLANT

GEORGE MWEMBERE CHESEREMI..... 2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence of S. M. Shitubi CM, at Kakamega CM'S Court, Criminal Case No. 1529 of 2010)

JUDGEMENT

The appellants herein Jackson Osiako Ndiangugu alias Doctor and George Mwembere Cheseremi were initially charged with offence of robbery contrary to Section 296(2) of Penal Code. Particulars of the offence are that on the 15th day of March 2010 at Kakamega town in Kakamega District within Western Province, jointly with another while armed with dangerous weapons namely; pistol robbed Sudhir Khetia of cash Ksh 7,000/=, 120 US Dollars, a wallet, two alien identity cards nos. 184547 and 234809, a copy of Kenyan identity card No. 2446680, a standard chartered visa card, six passport photographs and assorted business cards all valued at Ksh 20,000/= and at or immediately before or immediately after such robbery, threatened to use personal violence against the said Sudhir Khetia.

On count 2, the appellants were charged with offence of demanding property with menaces. On 15th day of March 2010 at Kakamega town within Kakamega Central District within Western Province jointly while armed with dangerous weapons namely; pistol and with intent to steal cash from Sudhir Khetia, demanded cash Ksh 50,000/= from the said Sudhir Khetia while threatening to kill him.

On count 3, the 1st appellant was charged with demanding property with menaces contrary to Section 302 of the Penal Code. Particulars of the offence are that on diverse dates between 18th March 2010 and 30th March 2010, with intent to steal cash demanded Ksh 50,000/= from Sudhir Khetia by calling him on his phone and threatening to kill him.

Alternatively, the appellants were charged with handling stolen properties contrary to Section 322 of Penal Code. Particulars were that on the 12th day of August 2010 at Lurambi estate in Kakamega Central District within Western Province, jointly otherwise than in the course of stealing, dishonestly handled 1 copy of identity card No. 24466280, two alien identity card no. 184547 and no. 234809 and standard chartered visa card and assorted business cards, the property of Sudhir Khetia which they had reason to believe to have been stolen or unlawfully obtained.

The prosecution called 6 witnesses whose evidence was that, the complainant does business of a super market. That on 15.3.2010 at about 9 am he was driving his pick up KAN 171V driving his child called Burachi to school. He was driving near Golf Hotel junction. He saw 3 people emerge. The vehicle was at a slow speed because of pot holes and the window glasses were down. Three people came to his side and pointed a gun at him and ordered him to move aside from the driver's seat. He moved to the other side and two entered inside the vehicle and one boarded the rear cabin. They drove towards Golf Hotel towards Shinyalu junction. He pleaded with them to spare his life. They robbed him of items as per charge sheet and also threatened him with death. They demanded he pays them 3 million or they kill him. He bargained with them and they proposed he gets Ksh 50,000/= from the super market. They gave him a phone to call a number No. 0719727167. He talked to his manager Peter Wawire asking him to send Ksh 50,000/= as emergency. The manager send him Ksh 35,000/= and secondly Ksh 15,000/=, totaling to Ksh 50,000/=.

The thugs drove towards Mukumu. The 1st appellant Jackson Ndiangu Osiako alias Doctor was the one driving. Another – George Cheseremi Mwembere alias Abu was on PW1's left side. The 1st appellant is the one who gave the complainant the number to send the M-pesa and he is the one who placed the gun on the complainant's head. Complainant could not identify the one at the rear. The other two alighted but he remained with 1st appellant. The complainant drove back in the company of his son to the house and informed his family. In meantime, complainant had been threatened not to report the incident to the police. He was later telephoned on his cell number with people demanding Ksh 50,000/= he sent Ksh 25,000/= on 19.3.2010 on cell phone no. 0728940966. He was given this number by the 1st appellant and he promised to send more money on 20.3.2010 and he sent Ksh 25,000/=. The thugs kept telephoning and demanding money so he decided to report the incident and threaten over his life and family. He was told to make a formal report on the robbery which he did. He took his wife and children to India for safety. On 13.8.2010 he received information about some arrest. He was able to attend an identification parade and identified the 1st appellant on 1st parade. He also identified his recovered items – 6 passports, 2 aliens card, photocopy of his identity card, bundles of business card, cheque leaf Southern Credit bank Lions Club Kakamega, India Papers, the mobile phone calls made receiving the threats.

Incidentally, this incident occurred at about 9 am in the morning and it was within Milimani area which is within private residential area. The 2nd appellant drove complainant's vehicle and he was able to identify him well. The complainant reported the robbery much later as his life was in danger and demands for more money were not ceasing.

PW2 told court that on 1.4.2010 he received a report of a robbery which occurred on 15.3.2010 from the complainant. During the course of robbery, the complainant sent money to the robbers through his manager to secure his release. He confirmed money was sent on two numbers 0719727167 and 0728940966. PW2 requested for information on these two numbers and was able to get the S/Nos of the phones of the persons using the said sim cards. He finally got the sim cards inserted in the said phones. During the day of robbery no. 0718531073 was used to send money to 0719727167 at 9.30 hours and also Ksh 35,000/= was paid to the same number. He also confirmed that on 20.3.2010 at 1552 hours, mobile no. 0718531073 was registered in the name of Halima Were sent cash 24,600/= to No. 0728940966 at 12.29 hours. He identified the telephone numbers the suspects were using. He searched for the person in charge of the number with assistance of safaricom and the signal emanated from Lurambi. He monitored the numbers for over three months. The users were residents of Kakamega.

On 11.8.2010, he called the cell no. 0726516163 using as trick. The owner said he was at the Provincial Hospital Kakamega. He met the owner 1st accused – 2nd appellant at Kakamega General Hospital at Childrens Ward. He arrested the said accused. He recovered from him, a sim card holder of mobile phone no. 0719727167 which was used to receive money from Halima Were. He also retrieved the sim card for tel No. 0726516163 with the help of this 2nd appellant, the 1st appellant and another were arrested. He conducted a search of 2nd appellant and recovered sim card holder for 0728940966 which also received money from Halima Were during the robbery. The firearm use during the robbery was also recovered from the 2nd appellant's homestead in a metal box which he opened. It had 2 rounds of 9mm ammunition.

He produced exhibit to demonstrate receipt of money. The numbers had continued to call complainant as voice calls and short messages between 27.3.2010 to 11.4.2011, 45 times – the complainant's number being 0724966600. He then charged the appellants accordingly.

The fact of sending the money to the numbers in question was confirmed by PW3 who was asked to send the money by the complainant and his manager PW3 is an M-pesa agent. PW4, the complainant's manager also confirmed being asked to send money Ksh 50,000/= by his boss to a number 0719727167 which he did through PW3.

PW5 firearm expert confirmed that the exhibit firearm ammunition he received on 27.9.2010 from Kakamega Police Station was a firearm and ammunition respectively.

PW6 was the parade officer. He confirmed that on 17.8.2010, he conducted 2 parades whereby the complainant identified the appellants positively. He produced the parade forms as Exhibits.

The last witness was the investigating officer. He produced the recovered items as exhibits. He also recovered a pistol from appellants' home and other items belonging to complainant i.e 2 identity cards No. 234809, 184547, visa card, rupee currency S/no 66 – 4830, Business Cards 31 in number, cheque leaf, photocopy of complainants identity card etc.

Put on their defence the appellants denied the charges. The 2nd appellant (1st accused) – George Cheseremi told court that he was arrested while at the Provincial General Hospital on 11.8.2011. The police took him to where he was staying and got a metal box from his landlord's house which landlord said was for her son who had closed school. His house was later broken into and his things taken away. He was then made to record what was taken from him and he saw an Asian in the Sergeant's office. This Asian came to identify him on the parade and he was charged with this offence. He said he was charged in another case Criminal case no. 1527 of 2010.

1st appellant Jackson Osiago said he is a herbalist and a pastor. He said he was called by complainant whom he knew on 6.3.2010 on phone no. 0724966600. He later met the complainant who wanted the appellant to assist him kill another Asian. The appellant declined to participate in such killing and for the work he did complainant paid him through M-pesa and he received Ksh 50,000/= from tel number 0724966600 and this was as per his agreement with complainant. His evidence was that the money he received on M-pesa was for services rendered to complainant as a herbalist.

The appellants were found guilty by the trial court on counts 1 and the 1st appellant on count 3 and were sentenced to serve death. They have now appealed before this court on both conviction and sentence on the following grounds which we summarize as follows:-

1st Appellant:-

- 1. That the charge sheet was defective as it has no OB No nor the date he was brought to court.**
- 2. Prosecution exhibits were never used in evidence.**
- 3. He was denied a chance to make his submission in the lower court.**
- 4. Complainant never made a report in this case as incident occurred on 15.3.2010 and he reported on 1.4.2010.**
- 5. The identification parade conducted was not proper as he was previously known to complainant.**
- 6. That arresting officer and investigating officer were one and same person.**
- 7. There was no evidence that complainant was injured.**
- 8. That evidence of prosecution was contradictory.**

2nd Appellant:-

- 1. That he was charged as a female in the charge sheet.**
- 2. There is no proof that complainant was robbed.**

3. **That prosecution's evidence is contradictory.**
4. **Essential witnesses were not called.**

We shall consider these grounds collectively. On issue of the charge sheet, the allegation by 1st appellant is not true. The charge sheet is signed and dated 18.8.2010. It contains police case number and despite the fact that the OB No is missing, this can be ascertained from the police file number if need be.

The 2nd appellant had stated that he was charged as a female in the charge sheet. Whereas, there is no such proof, there is no indication that he was prejudiced by being referred to as a female. He was not kept in female cells nor in any way treated unfairly by virtue of his gender. This does not in any way prejudice him.

The appellants averred that there was no proof of robbery because complainant did not report this incident. This complainant explained how he was robbed and what was taken from him including the money. There is proof that money was transmitted to the robbers at time of incident. Property stolen from the complainant were also recovered. Failing to report immediately, does not negate the fact that there was a robbery. We do find that there was proof of robbery and the ingredients of robbery were met.

The 1st appellant told court that he was denied a chance to submit in the lower court. A look at the proceedings in lower court show that the appellants had indicated he would wish to put in written submissions which submissions they may not have put in. There is nothing on the court record to show that the trial court rejected their written submissions if they had them. That assertion is therefore not true.

There is no proof that the prosecution's case is contradictory in any way and the contradictions pointed out by the appellants are not material to warrant the reversal of the prosecution's case. It is true that the arresting officer partly investigated the case and this did not also prejudice the appellants. There is also no rule that once an arresting officer, the officer cannot be an investigating officer.

There is also an assertion that the identification parade was not properly conducted. It is the 1st appellant's case that he was in a business of some sort with the complainant which was an afterthought as this was not evidence put to PW1 in cross examination. The appellant only came up with this story in his defence. The complainant also claimed knowing the appellant before this incident. The issue of the complainant knowing the appellants and identifying them on an identification parade does not therefore arise. From the evidence adduced, it was apparent that complainant and appellants didn't know each other before and therefore the identification was properly done and appellants identified on the identification parade.

We make a finding based on these analysis that the appeal lacks merit. We dismiss it accordingly and confirm the conviction and sentence accordingly.

DATED THIS 11TH DAY OF DECEMBER 2013

SAID J. CHITEMBWE

HELLEN S. WASILWA

JUDGE

JUDGE