



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

HCCRA NO. 87 OF 2013

JOTHAM OSILU } 1ST APPELLANT

LEWIS WANYONYI WANYAMA

alias LEWIS WANYONYI NYAKUNDI }. 2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence of P. A. Achieng. AG. PM in Kakamega Criminal Case no 881 of 2012)

JUDGEMENT

The appellants herein Jotham Osilu and Lewis Wanyama alias Lewis Wanyonyi Nyakundi filed different appeals which were then consolidated and heard as appeal No. 87/2013.

The two appellants were initially charged jointly with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. Particulars of the offence were that on the 13th days of April 2012 at Sichirai village in Kakamega Central District within Western Province jointly with others not before court while armed with dangerous weapons namely; knives robbed Emmanuel Kipchumba of his cash Ksh 13,500/= and one mobile phone make TECNO 7656, twin sim S/no 357165025523374 and 35716502553382 valued at Ksh 3,200/= and at the time of such robbery wounded the said Emmanuel Kipchumba.

The prosecution called 6 witnesses who testified that on the 13th April, 2012 at 9.45 pm the complainant while in the company of his wife PW2 were attacked by the appellants and robbed of items as per the charge sheet. The robbery occurred at a blue gate which had security lights and the complainant stated that he was able to see his attackers well. The appellants stabbed the complainant with a knife before robbing him. The complainant's wife PW2 on the other hand was present and witnessed what happened but managed to run away from the robbers. The complainant made a report to the police the following day and was also treated of the injuries he suffered. It is the complainant's case that he told the police that he could identify his attackers if he saw them. On the 27th April 2012, he was at Sichirai market when he saw a man playing cards. The man was the 1st accused (Jotham Osilu) - 1st appellant. Complainant called a police officer called Sang who came but when 1st appellant saw the police officer he ran away. The police arrested him the following day. On 30th April 2012, he attended an identification parade and identified the 2nd appellant whom he had also seen that night of the attack. They were both charged.

PW2 corroborated PW1's evidence in all material aspects and also stated that on 30th April, 2012,

she went to the police station and attended an identification parade where she identified the 1st appellant. PW3 is the officer who arrested the 1st appellant. He informed court that he was called by complainant on 27.4.2012 to go and arrest a person who had attacked him. He went to Sichirai shopping center and saw the 1st appellant. The 1st appellant saw them and ran away when he was about 50 m away. They managed to arrest both the appellants when 2nd appellant led them to the house of the 1st appellant.

PW4 accompanied PW3 on this arrest. PW5 gave evidence and produced the P3 form of the complainant and confirmed that complainant had injuries sustained on 13.4.2012 on the day of the attack. PW6 was the investigating officer in this case and gave evidence that he investigated this case and charged the appellants accordingly. Put on their defence, the appellants defence was they were arrested for no apparent reason. They denied ever committing this offence.

The trial magistrate heard all the evidence adduced before her and found the appellants guilty as charged and convicted them accordingly and sentenced them to death. The trial magistrate based her findings on positive identification of the appellants given that the incident occurred where there was ample security light. An identification parade was also carried out where the appellants were identified but the identification parade officer was never called as a witness and the identification parade form was also not produced in court as exhibit.

The appellants have now appealed before this court on both conviction and sentence on the following grounds:-

1. **That the trial magistrate erred in law and fact in convicting the appellants in the absence of positive identification and even despite her own finding that the result of the purported identification parade were not produced in court as exhibit.**
2. **That the trial magistrate erred in law by narrowing the issues for determination into two contrary to the law in regard to this charge contrary to Section 292(2) of Penal Code and further failed to determine her issues.**
3. **That trial magistrate erred in law by failing to consider the weight of the evidence and this culminated in an unlawful conviction.**
4. **The trial court relied on evidence of witnesses who were not credible.**
5. **The trial court failed to consider the evidence of the appellants and in particular, their *alibi*.**
6. **The trial court shifted the burden of proof to the appellants.**

Through their respective counsel, the appellants made their submissions and reiterated the averments in these grounds. Counsel submitted that the prosecution case was composed of contradictions which were material. The counsel pointed out that PW1 said they alighted at this gate because there was a hill but PW2 said there was no hill but mud.

They also submitted that there was no proof that money or a phone were taken from the complainant. That complainant gave 2 serial numbers of his phone and there were no books of accounts or receipts from the shop to show that money was taken from complainants. The appellants also submitted that they explained to court where each one of them was on the material day and it was the duty of prosecution to rebut this evidence.

The State opposed this appeal and stated that the appellants never called any witness to support their *alibi* allegations. On the nature of the security light where the incident occurred, the State submitted that the intensity of the light must by it's very nature be bright and that is why they are security lights.

We have considered evidence on record and submissions made by both sides. We will consider the grounds of appeal based on the following issues:-

1. **Whether there was proper identification of appellants to warrant the conviction.**
2. **Whether there were contradictions in the prosecution's case.**
3. **Whether the weight of the evidence warranted a conviction.**
4. **Whether the trial court failed to consider the evidence of the appellants and especially their**

alibi.

It is our finding that the PW1 and PW2 did identify the appellants that night of the robbery and there was ample light to do so. They later attended an identification parade where it is said PW1 identified the 2nd appellant and PW2 identified the 1st appellant. However, the officer who conducted the identification parade was never called to confirm that such a parade was ever held nor produce the identification parade form. The authenticity or otherwise of the parade is lacking and we cannot conclusively say that there was proper identification.

On issue of contradiction in the prosecution's case, there were no material contradictions in the entire evidence. What the appellants pointed out as being contradictory as to the reasons as to why the witnesses PW1 and PW2 alighted at the blue gate is not material to warrant rubbishing the evidence of prosecution.

As a whole, the trial court failed in making a finding that there was no identification parade form produced and yet went on to make a finding of proper identification. In the circumstances, we find that it was unsafe to convict. We therefore find that the appeal has merit and we allow it. We order the appellants released forthwith unless otherwise lawfully held.

DATED THIS 10TH DAY OF DECEMBER 2013

GEORGE DULU

HELLEN S. WASILWA

JUDGE

JUDGE

DELIVERED THIS 10TH DAY OF DECEMBER 2013

S. J. CHITEMBWE

JUDGE