REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 94 OF 2007

CONSOLIDATED WITH

CRIMINAL APPEAL NOs. 82 & 84 OF 2007

(From original conviction and sentence in Criminal Case No. 256 of 2003 of the Chief Magistrate's Court at Nakuru - H. M. Nyaga,SRM)

LENGESIO LEKUPE…….....……...…….1ST APPELLANT
BENARD LECHORONO…….....…….……2ND APPELLANT

VERSUS

REPUBLIC……...……..RESPONDENT

JUDGMENT

The two appellants were charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code, *(Cap. 63, Laws of Kenya).*

The particulars were that the appellants on the night of 15th & 16th December 2002 at Bondeni Estate in Nakuru District within Rift Valley Province jointly with another not before the court while armed with dangerous and offensive weapons, namely Samburu swords and rungus robbed ABDALLAH ZUBEDI SAID cash shs 600/=, one mobile phone make Nokia 3310 and a bunch of keys all valued at Ksh 12,600/= and at or immediately before or immediately after the time of such robbery wounded the said ABDALLAH ZUBEDI SAID.

The second appellant Bernard Lechorono, was charged on a second count, of assault causing actual bodily harm contrary to Section 251 of the Penal Code.

The particulars were that Bernard Lechorono on the night of 15th and 16th December 2002 in Bondeni Estate in Nakuru District within Rift Valley Province, unlawfully assaulted Rasmus Noah Etyang, thereby causing him actual bodily harm.

The two appellants were convicted on Count I, robbery with violence, and were sentenced to death. The 2nd Appellant Lechorono was however acquitted of the second count - assault causing actual bodily harm.

Aggrieved with both their conviction and sentence, the appellants have come to this court on appeal under separate Petitions of Appeal, but because their appeals arose from the same conviction and sentence, their appeals were consolidated and were heard as one appeal. It is however necessary to set out their respective grounds of appeal for ease of reference in relation to respective submissions by Mr. Orina, counsel for the 1st appellant, and the 1st appellant himself, and submissions by the 2nd appellant who was not represented.

The 2nd Appellant, Bernard Lechorono contended that -

(1) the learned trial magistrate erred in law and in fact by convicting the appellant on the evidence of recognition yet failed to find that he was not supported by the first report,

(2) The learned trial magistrate erred by convicting him on a pure case of mistaken identity,

(3) the learned trial magistrate gravely erred in law and fact when he acted and convicted the appellant contrary to the evidence,

(4) the learned trial magistrate gravely erred in both law and fact in failing to observe that the chain of events leading to the arrest of the appellant was not affirmatively proved beyond all reasonable doubt,

(5) the trial magistrate erred in law and fact when he failed to exhaustively examine the sworn alibi defence.

And for those reasons, the 2nd appellant prayed that his appeal be allowed, the conviction quashed, the sentence set aside and that the appellant be set free.

The 1st appellant Lengesio Lekupe, contended that -

(1) the pundit magistrate erred both in law and fact in convicting him and yet failed to observe the provisions of Section 200 of the Criminal Procedure Code, (Cap. 75, Laws of Kenya).

(2) the pundit magistrate erred both in law and fact in convicting him on the evidence of identification/recognition which was not supported by a first report.

(3) the learned trial magistrate erred both in law and fact in convicting the appellant on the basis of meager and flimsy evidence which could not sustain such a conviction.

(4) the learned trial magistrate erred in law and fact in failing to note that the charge drawn and hoisted against him was defective and would not warrant a safe conviction as the trial magistrate erroneously found.

(5) the trial magistrate erred both in law and fact when he dismissed, the appellant's defence without giving cogent reasons for its rejection contrary to the provisions of section 169(1) of the Criminal Procedure Code.

And for those reasons the appellant prayed that his appeal be allowed, conviction quashed and the sentence imposed set aside.

In our view, the respective grounds of appeal raise the following issues -

(1) whether the charges as drawn were defective,

(2) whether the learned trial magistrate failed to follow the provisions of Section 200 of the Criminal Procedure Code,

(3) was the 1st appellant identified/recognized by the complainant, and what is the effect of failure to mention the names of the suspects at the first report to the Police? Or whether this was a case of mistaken identity?

(4) whether there was evidence to sustain a conviction of the appellants.

(5) whether the learned magistrate considered the evidence of the appellants.

(6) whether the 2nd appellant's defence of alibi was considered.

We will consider each of these issues together with the well-written submissions of both appellants. We will commence with the procedural issues of whether the charges as drawn were defective, and if not whether the learned trial magistrate failed to observe the provisions of Section 200 of the Criminal Procedure Code.

Citing the Court of Appeal decision in **JUMA VS. REPUBLIC** *(Mombasa Criminal Appeal No. 181 of 2002 - decided on 4th August 2003)*, the 1st Appellant contended at p. 6 of his typed submissions that the charge was defective, and not in conformity with the requirements of Section 296(2) of the Penal Code. An offence under Section 296(2) requires that the accused be armed with dangerous and offensive weapons.

We are satisfied that the particulars of the charge sheet clearly stated that the Appellants were *"armed with dangerous and offensive weapons namely, a Samburu sword."* It was the testimony of PW4 - that a Samburu sword *(panga)* was recovered in the course of investigations. We do not therefore agree with the 1st appellant's contention that the charge was defective or that the particulars were at variance with the charge. This ground of appeal therefore fails and we so hold.

The second procedural contention by the 1st appellant was that the trial magistrate did not comply with the requirements of Section 200 of the Criminal Procedure Code by failing to inform the appellants of their right to recall a witness or witnesses where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor.

The hearing of this case commenced on 25th March 2003 before the Hon. J. S. Kaburu who recorded the evidence of PW1 - PW3 inclusive. Hon. J. Nduna Senior Resident Magistrate took over the case on 9th March 2004, and recorded the evidence of PW4. There is no record that he warned the appellants of their right under Section 200 of the Criminal Procedure Code. However Mr. Cheche Counsel who appeared for the appellants then, applied that the matter be heard de novo and the court ordered that the matter be heard afresh.

Thereafter the Hon. H. M. Nyagah, SRM, heard and recorded the evidence of PW1 on 26th August 2004. On 14th October 2004 after the arrest of the 2nd appellant, the Cr. Case No. 256 of 2003 and Cr. Case No. 2357 of 2004 were consolidated and the charges were read afresh to the appellants who both pleaded not guilty. Yet again, the consolidated charge was read to the appellants on 14th December 2004 and the appellants pleaded not guilty. The appellants were then represented by Counsel Cheche for 1st accused, and Orina for 2nd accused.

Although there had been a lapse of non-compliance with the requirements of Section 200 of the Criminal Procedure Code before the Hon. J. Nduna on 9th March 2004, and who recorded the evidence of PW4, however because of the subsequent order that the matter do start afresh, and were upon further amendment of the charge sheet on 25th August 2005, and the appellants pleading not guilty, Mr. Cheche and Mr. Orina, counsel for the appellants then told the court that they did not wish to recall any witness. There was therefore no question of violation of Section 200 of the Criminal Procedure Code. The appellants contention otherwise fails, and we so hold.

Issues 3 and 4 were *(whether the appellants were identified/recognized by the complainant and whether there was evidence to convict the appellants with the offences committed).* Allied to this issue is also the question of what importance the court should attach to the evidence of a first report to the Police.

The appellant contended in his submissions that PW1, the complainant, did not mention the appellants' names when he made his complaint or report to the Police, and that such failure clearly showed that the appellants were not identified by recognition by the complainant PW1. The appellants relied on the Court of Appeal case of **PETER OCHIENG OKUMU VS REPUBLIC [1983]** Cr. Appeal No. 185 of 1987 - that failure to make a prompt report and giving names of the assailants in the first instance casts doubt in the evidence of the witness.

According to the Shorter Oxford English Dictionary 9th Edn. 49 the word *"Recognition"* means *"the action or fact of perceiving that something, person is the same as one previously known, the mental process of identifying what has been known before, the fact of being this known or identified."*

In this case, it was the evidence of PW1 that he was attacked by his three watchmen two *"Samburu", "Maasai"* and *"a Teso"***.** It was later clarified in the evidence of PW3 that it was the 3rd watchman PW2 who alerted PW6 that the complainant *(PW1)* had been attacked *"by his 2 samburu watchmen".* It was also the evidence of PW2 that it was 1st appellant who pushed him into the compound, while the 2nd appellant hit him with a *"rungu"* till he fell down. PW1 was bleeding from the head. In the words of his evidence in-chief after stating that he was working with the appellants guards, and that PW1 had gone to see his father and returned at about 11.30 p.m., PW2 stated -

"He had left accused 1, to guard the house from inside. Accused 2 and I were outside. When he came back Accused 1, blocked the complainant. He was holding a stick. I had opened the gate for Sande. I heard noise from outside and as I was trying to see, the guard I was with pushed me into the compound. Accused 2 hit me with a rungu. I fell down. They beat me with a rungu. They beat me while I was on the ground. The complainant was bleeding from the head. They then left us. Mzee managed to call a neighbor, I went to and got a vehicle to take him to hospital. Mzee lost his mobile and cash. Accused 1 had worked for ½ month, and Accused 2 for 1 week. Accused 1 was Lekupe, Accused 2 was Lechorono."

In cross-examination by Mr. Cheche for the 1st accused, PW2 reiterated the above testimony, and added that there were electric lights on, he had a torch, that the 1st accused was arrested first.

In cross-examination by Mr. Orina for the 2nd accused PW2 testified that he knew the appellants as he had worked with them and did not know how the 2nd appellant was arrested.

It was also the testimony of PW3 that she was awakened by noise at about mid-night on the night of 15th - 16th December 2002 from a neighbor's compound, shouting and asking for her. PW3 testified that she responded after sometime, and on the way to the complainant's compound, she met Accused 1 and Accused 2 and did not think anything wrong. PW3 testified that she knew the guards well, they were watchmen, but did not know their real names and were walking away fast when she met them, and refused to respond to her greeting.

PW4 testified that the 1st appellant was arrested, in Nakuru Town but the 2nd appellant was traced and arrested in Maralal at a place called Boro Centre, from whom nothing was recovered. PW4 testified that he had come to know the 2nd appellant and his family when his family at Boro was raided by the Pokot. He had visited the 2nd appellant's home, while he was then stationed at Maralal Police Station, and he used to meet the 2nd appellant and even his mother was a family friend *(to PW4).*

In cross-examination PW4 testified that the 2nd appellant had given different names, and had not given his ID to the complainant and the 1st appellant had given his photograph to the complainant.

In cross-examination by Mr. Orina, PW4 further testified that the 2nd appellant's family and his are friends. He knew the 2nd appellant's mother, brother and sister, and the 2nd appellant's mother even used to supply them with milk. He knew the 2nd Appellant as **"Lechorono"** although he had used the name **"Letiopa"** to get employed which was a fictitious name, as the mother brought the ID which had the name **"Bernard Lechorono."**

PW6 an employee of PW1 testified that he knew the appellants and it is he who led the Police *(PW5)* to the arrest of the 1st appellant at Free Area, Nakuru. He testified that he knew the appellants to whom he referred to as **"2 samburu"** and that he knew **"him very well"** and a sword was recovered from under his bed, he had tried to flee but was arrested. He knew the 2nd accused as **"Lipataiye".** The 2nd appellant was drunk when he was arrested.

From that evidence, it is quite clear that both appellants were clearly recognized as the persons who violently robbed by PW1 of some money, between shs 500 - 600/= and also his mobile phone - Nokia none of which were recovered. PW2 a fellow watchman described in detail how the attack was executed by the appellants, he opened the first gate, for PW1 the complainant. While entering his house, the 1st appellant blocked PW1's entrance and hit him on the head. On hearing noise from outside, PW2 tried to find out what had happened. He was hit on the head by 2nd appellant. PW3 met the appellants, who refused to return his greetings. They were walking away fast. PW4, the investigating officer knew the 2nd appellant from his earlier service at Maralal Police Station when the 2nd appellant would volunteer to assist them *(the Police)* in tracking cattle stolen by the *Pokot*. Besides his and the 2nd appellant's family were friends, and he knew him well. The names *"Letiopa", "Lepataiye"* were both fictitious. The 2nd appellant's name was *"Robert Lecherono"* which was also confirmed by his ID card, which was submitted by the mother of the 2nd appellant to PW4.

For those reasons we find and hold that the appellants were identified by recognition, and the contention otherwise fails.

The 2nd appellant led evidence by DW1 and DW2 of an alibi. DW2 an Assistant Chief testified that he was with the 2nd appellant on 13th December 2002 when he was allegedly hired as an observer, and that he was with the 2nd appellant on 15th December 2002, on the day of the robbery and that the appellant could not have been in Nakuru on the night of the robbery as it takes several vehicles from Maralal to reach Nakuru. DW1 also testified that he knew William Lepataiye, also his clansmen who was arrested and later released.

DW1 a village elder from Boror Centre, testified that he was with 2nd applicant from 13th December 2002 to 27th December 2002, as the 2nd Appellant was an observer with the Catholic Diocese *(of Maralal)* and that he was with 2nd Appellant all the time until the time of his arrest.

DW3 was the 2nd appellant himself. He denied completely that he had even been employed by the complainant or by any one else. He is a poultry farmer. To demonstrate that he had never been anywhere in Nakuru, or the scene of the robbery, the 2nd appellant told the trial court on oath that he had celebrated Jamhuri day *(12.12.2002)* at his home. He had sought a job with the ECK without success but was secured an observer status with the Catholic Church at Maralal through officers of the Church, **Anne** and **Lizadone,** and that on 15.12.2002, he had got a up lift from Fr. Lesaiyo and obtained favourable results, he got himself a T. Shirt and commenced work on 27th December 2002. He submitted that it was a case of a mix-up of the names William Lepatoiye. He denied ever meeting officer *Keny* at home or at the Boror Centre.

When cross-examined by the Prosecutor *(IP Mwangi)* the appellant admitted that officer *Keny* was present when he was arrested, he reiterated that he had never meet the complainant, and claimed that he could never work as a watchman and maintained that he had been mistaken for some one else.

On his part, the 1st appellant avoided mention of where he was on the day or night of 15th - 16th December 2002. His defence was that he stays in Baragoi, and he came to Nakuru on 20th January 2003 at the invitation of his brother through a friend Geoffrey Anyila Mokabwa *(DW5)* to come and work as a watchman at Holy Church Free Area. He commenced work on 23rd March 2003 but was for reasons unknown to him arrested a week later on 30th January 2003. He denied any knowledge of one Etyang *(PW2)* or of the *"asian"* the complainant. The 1st appellant testified that he had no knowledge of his brother, *"Lebugusa's"* whereabouts after his arrest.

In law, an *"alibi"* is a plea by an accused person that he was not there, *(was not present)* at the place where the crime was committed at the time of the alleged commission of the offence for which he is charged.

Before the abolition of committal proceedings in the procedure set out in Sections 231(2)(d) 235(b) and 307 of the Criminal Procedure Code, the law was that where an accused person intended to rely on the defence of an alibi he was required to give particulars of the place where he claims he was at the time of the commission of the alleged offence, and the names of his witnesses, within a prescribed period of 14 days. In default, he was to be warned by the committal court or magistrate, the he may be denied from pleading the defence of alibi.

In the case of **ANTHONY KINYANJUI KIMANI vs REPUBLIC [2011] eKLR** the Court of Appeal has held that whether or not there is a plea of the defence of alibi, the onus is on the prosecution to prove its case, that "no burden is cast on the accused to prove his alibi **(KIBALE vs. UGANDA [1999] 1 E.A. 148 (SCU)." The prosecution has the burden throughout of negating the alibi."**

The law in the United Kingdom, is different from that of Kenya. Section 11 of the Criminal Justice Act 1967 requires that notice of whether to raise an alibi must be given. And in the case of **R vs LEWIS [1969]2QB1**, the Court held-

"the only evidence of an alibi to which Section 11 applied was evidence relative to the whereabouts of the appellant at the time when the crime was alleged to have been committed." So that even in England, the requirements for disclosure on a defence of an alibi is restricted."

In his judgment the learned trial magistrate said of the -
"1st appellant that he was in Baragoi on 24th December 2002 does not displace the evidence that he was present in Nakuru on 18th December 2002."

Save that reference to *"18th December 2002"* should be *"to 15th - 16th December 2002,"* when the offence was committed, we entirely agree with the learned trial magistrate's conclusion.

Of the 2nd appellant, the learned trial magistrate observed -

"As for accused 2 the witnesses have lied up to put a case to show that he was at Maralal at the time. I am satisfied that he was the person who was employed by the complainant. The issue of different names being used to describe accused 2 actually fits into the complainant's evidence that the Accused 2 did not give his Identity Card. The person called Lepatoiye (William Lepatoiye) was arrested but the complainant and PW3 said he was not the one who was working with the complainant."

Having ourselves examined and re-evaluated the evidence of the prosecution, we are satisfied that the learned trial magistrate came to the correct conclusion. Not less than four witnesses testified that the appellants were working for the complainant, PW1.

PW3 testified that after she heard noises, she went towards PW1's house and she met the appellants walking away. She found PW1 bleeding. PW2 was also injured. This supports the evidence of PW1 and PW2 that it was the appellants who attacked them. There were lights on. These appellants were

people they knew physically as they had worked for a few days with them.

Even though the 2nd appellant introduced the confusion in names, we are satisfied that the appellants were positively identified physically and that they are persons who brutally terrorized and attacked their employer.

We also agree with and endorse the finding of the learned trial magistrate that PW1 was careful not to identify someone by the name Lapatoiye and had the suspect William Lepatoiye released *(as also confirmed by the defence of evidence of DW2).*

We further agree with the learned trial court's observation that the manner in which the appellants were arrested leave us with no doubt that PW1 and the other witnesses knew who they were looking for even if only by physical appearance. The names were certainly a problem and the witnesses confirmed by their evidence that it was the appellants who were employed by PW1 and who attacked him.

For those reasons, we find that the case against the appellants was proved beyond reasonable doubt and the appellants were properly convicted and sentenced. We therefore find no merit in these appeals and dismiss the same. There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 20th day of May 2011

M. J. ANYARA EMUKULE
JUDGE

W. OUKO
JUDGE