



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Criminal Appeal 70 of 2006

STEPHEN WANYONYI SIMIYU ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 71 OF 2006

KENNEDY OMONDI OTIENO ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Being an appeal from original conviction and sentence in Eldoret Chief Magistrate's Criminal Case No. 8568 of 2004 of 8<sup>th</sup> August, 2006 by the Chief Magistrate Hon. F. N. Muchemi)

JUDGEMENT

This is a consolidated appeal by the Appellants against the decision of the Chief Magistrate's Court in Criminal Case Number 8568 of 2004 delivered on 5<sup>th</sup> August, 2006. The Appellants Kennedy Omondi Otieno and Stephen Wanyonyi Simiyu had been jointly charged with two counts namely:-

The offence of robbery with violence contrary to Section 296 (2) of the Penal Code.

In Count 1 they were charged that on 21<sup>st</sup> day of November, 2004 at Eldoret Township in Uasin Gishu District within the Rift Valley Province, jointly with others not before the Court and while armed with offensive weapons namely, pangas robbed one MATHEWS CHEPKERES of his bicycle valued at Kshs.

4,000/= and immediately before or immediately after the time of such robbery used actual violence to Mathews Chepkeres.

In Count 2, the two Appellants herein were said to have on 21<sup>st</sup> day of November, 2004 at Eldoret Township in Uasin Gishu District within the Rift Valley Province, jointly with others not before the Court and while armed with offensive weapons namely pangas robbed MAUREEN CHEROTICH of her sweater and cash of Kshs. 5/= immediately before the time or immediately after the time of such robbery used actual violence to the said MAUREEN CHEROTICH.

The Complainant in Count 1 did not appear in Court to testify and both the Accused were acquitted of the said count under the provisions of Section 210 of the Criminal Penal Code.

The Complainant in Count 2 testified together with two other witnesses. After hearing the evidence the Honourable Chief Magistrate F. N. Muchemi, found that the ingredients of an offence under Section 296(2) were not proved. However, she found that the evidence on record satisfied the Court on the identity of the two accused persons which left no doubt that they are the ones who attacked the complainant and robbed her of the property listed in the Charge Sheet. She found that at the time of the robbery they used a panga which was produced in evidence in order to threaten the Complainant. The Learned Magistrate found that the Prosecution had proved the lesser offence of robbery with violence contrary to Section 296(1) of the Penal Code. The Court invoked the provisions of Section 170 of the Criminal Procedure Code to substitute the original charge with lesser offence. The two accused then convicted and sentenced to serve five (5) years imprisonment each.

The accused have appealed against both the convictions and sentences. In their Petitions of Appeal the two Appellants raise five (5) substantive grounds of appeal, namely:-

1. That the Learned Trial Magistrate erred in law and fact in convicting them while relying on the identification evidence of PW 1 a single witness without considering the circumstances under which the alleged identification came to be made were and not conducive for a positive identification.
2. That the Learned Trial Magistrate erred both in law and facts in convicting the Appellants while relying on the evidence of PW 2 that had been collaborated by that of PW 3 without considering that the witnesses contradicted themselves.
3. That the learned Trial Magistrate erred in both law and facts by convicting the Appellants while relying on the evidence of PW 2 concerning the arrest, without considering that a witness may be honest yet mistaken.
4. That the Learned Trial Magistrate erred in both law and facts by holding that the prosecution had proved their case which was not properly investigated.
5. That the Learned Trial Magistrate erred in both law and facts by not intrinsically testing the Appellants defences. Further more, the grounds of objection given by her.

I have carefully perused the proceedings. The Complainant PW 1, a girl of 17 years old and a Form IV student at Kapsoya Secondary School testified that on 12-11-04 at about 6.30 p.m., she was walking with her cousin one Mathew Chepkeres the Complainant in Court No. 1, along Iten Road. They were going to Town from Prison. Five men coming from the opposite direction attacked them after greeting them in Kiswahili. Each removed a panga and ordered them to give them all their money. The PW 1 was ordered to sit down while two of the men beat her cousin.

She said that they removed her cousin's jacket, shirt and mobile phone. They also took his mountain bike. From her they took Kshs. 5/= and a jungle sweater. PW 1 testified prison warders arrived shortly and arrested the two accused persons. One panga was recovered from a nearby bush where the men had thrown it when they saw the police. PW 1 identified the panga in Court. PW 1 said that it was still day light at 6.30 p.m. and she saw the two accused clearly.

PW 2 was a prison warder. He said on the material day, at 6.45 p.m. he was informed that the daughter of a colleague and her cousin had been attacked as they walked from the Prison. He mobilized his colleagues and went to the scene. They saw two men hiding in the bush. They came out and confronted the prison warders. One was armed with a panga. The prison warders were in plain clothes at the time. The warders struggled with the two persons and with the help of reinforcements arrested them. They handed the two to the police. He identified the panga.

PW 3 is a police officer who was on patrol on the material day. He was with one P.C. Muriungi. They heard shouts near a place called Dola. They found the Complainant in Count one lying on the ground. He said that he had been attacked and injured by 5 men. They went towards the prison and found 2 men under arrest. PW 3 identified both the accused as those under arrest.

I have considered the entire evidence on record. I do find that the two accused are part of the gang that attacked PW 2 and robbed her of her sweater. They used a panga to threaten the Complainant. They were arrested at the scene almost red-handed. It was still day-light and PW 1 clearly saw them and identified them. PW 2's evidence corroborated the evidence of PW 1. He arrested the accused persons with the help of other prison warders. They were found hiding in a bush near the scene. The two accused came out and also threatened the prison warders who were in plain clothes. They had a panga which was produced in Court.

I do hereby hold that the findings of the Honourable Trial Magistrate were sound and proper. She had first hand account of the evidence and saw the demeanour of the Court. She was able to determine the credibility of the witnesses. From all the facts and evidence the conviction was proper and in accordance with the law.

The offence is a serious offence and threatened the life and limb of PW 1. A sentence of five (5) years in the circumstance is not excessive or unreasonable.

I hereby uphold the convictions and sentences of both the Appellants. The appeals are hereby dismissed.

**DATED AND DELIVERED AT ELDORET ON THIS 8<sup>TH</sup> DAY OF MAY, 2008.**

**M. K. IBRAHIM**

**JUDGE**

**In the presence of:**

Mr. Omutelema for the State

Accused persons