



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

Criminal Appeal 22, 23 & 25 of 2002

[From Original Conviction and Sentence in Criminal Case No. 2097 of 2001

of the Senior Resident Magistrate's Court at Kericho – Hon. K.O. Ogolla - S.R.M]

STANLEY CHERUIYOT KOECH 1ST APPELLANT

BENARD KIPRONO KOECH 2ND APPELLANT

NAFTALI KIPYEGON KOECH 3RD APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT OF THE COURT

The three appellants *Stanley Cheruiyot Koech*, *Bernard Kiprono Koech* and *Naptali Kipyegon Koech*, the 1st, 2nd and 3rd appellants respectively were charged with the offence of **robbery with violence** contrary to **Section 296 (2)** of the **Penal Code** before the Principal Magistrate's Court at Kericho.

The particulars of the charge as stated in the charge sheet, were that on the 30th day of June, 2001 at Matarmat Farm in Kericho District within the Rift Valley Province, jointly while armed with swords, bows and arrows robbed *Josephine Langat* Kshs.10,500/- cash, one pair of binoculars, one remote control of Television, two long trousers, one sword and a title deed (*photocopy*) all valued at Kshs.15,000/- and at or immediately before or immediately after the time of such robbery used actual violence to the said *Josephine Langat*.

The appellants pleaded not guilty to the charge and after a full trial, they were found guilty of the offence of robbery with violence and the 1st and 2nd appellants were sentenced to the mandatory death sentence while the 3rd appellant was to be held at the pleasure of the President on account of his tender age.

Being dissatisfied with the conviction and sentence, the three appellants have appealed to this court. The three appeals were consolidated for purposes of hearing and determination.

The appellants have raised several grounds of appeal in their petitions, since the grounds raised in each of the petitions are similar, they can be summarized as follows: -

That the learned trial magistrate failed to consider the defence offered by the appellants. The defence evidence clearly established that the appellants were the step children of the complainant.

Finally, the prosecution's case was merely tramped up, and contrived in order to fix the appellants who were involved in a family dispute over land with their father.

The three appellants are all brothers; they are the children of *John Kipkoech Langat*, **PW 2** and the step children of *Josephine Langat*, **PW 1** the complainant.

This appeal was not opposed by the State and rightly so, as the facts of the case will reveal, the appellants ought not to have been convicted, let alone be charged with the offence of robbery with violence.

The whole saga involved a family dispute, it is appalling how the prosecution's witnesses especially the complainant, **PW 1** and her husband, **PW 2** blatantly denied their own children in order to settle their own scores. This being a first appeal, this court is mandated to reconsider and re-evaluate the entire evidence and arrive at its own independent determination. It is therefore important to set out the facts of the case.

Josephine Langat (PW 1) complained that the three appellants broke into her house on 20th June 2001 at about 7.45 p.m. The 1st appellant was armed with a sword, the 2nd appellant was with a bow and arrow and the 3rd appellant a panga. **PW 1** told the court that the appellants slapped her and warned her not to scream, she pleaded with the appellants not to harm her but to take whatever they wanted. The appellants went into the bedroom and took out a briefcase, which they forced open. They carried away the documents which were in the briefcase, they also took with them a sword, binoculars, a remote control button and two trousers.

The complainant went to the District hospital where she was treated. According to **Yego Kiwa, PW 5**, she was treated for a swollen right cheek and an injury of the eye which was discharging pus. He classified the degree of injury as harm.

John Koech Langat, PW 2 testified of how he made the report at the Kipkelion Police Station on 1st July 2001 after he found his house had been broken into and his briefcase and Kshs.10,500/- was robbed with other items. Ten days later after the robbery, he received information that the suspected robbers were at a farm called Baringo. He led the police who raided the farm at 3.00 a.m. where the three appellants were arrested. They recovered the binoculars, remote control button and a sword and documents. Both **PW 1** and **PW 2** attended an identification parade that was conducted by Inspector of Police **Christopher Mukori, PW 4**. The three appellants were identified by the complainant, **PW 1**.

During cross-examination, **PW 1** and **PW 2** denied having met the appellants, or the appellants being the children of **PW 2** or the step children of **PW 1**.

Put on their defence, the 1st appellant gave a sworn statement of defence, the 2nd and 3rd appellants gave unsworn statements of defence respectively. The three appellants narrated how they were arrested at dawn at the instigation of their father (**PW 2**). They were not found with anything but a roll of bhang was planted in their pockets, **PW 2** threatened that they would be charged. In addition to their evidence, they also relied on the evidence of five (5) other defence witnesses. **Samuel Kipchirchir Langat, DW 4** is the uncle of the appellants, he confirmed that the three appellants are the children of **John Kipkoech Langat, PW 2**. He told the court that **PW 2** chased away the appellants and at the time when they were arrested, they were staying with him.

Alice Langat (DW 6) is the mother of the appellants. She told the court that the appellants were arrested and charged because of a land dispute. Similarly, **Esther Chumba, DW 7** identified the appellants as the children of **PW 2** and told the court there was a land dispute between the appellants and **PW 2**.

The above is the summary of the evidence that led to the conviction and sentence of the appellants with the charge of robbery with violence.

In the two page judgment, the learned trial magistrate did not consider the defence that was offered by the appellants. Even the obvious issues that came up during cross-examination such as the relationship between the appellants and the complainant was not considered. The trial court relied on the fact that the appellants were properly identified by **PW 1**. The trial court took into account the fact that the incident occurred at 7.45 p.m. when there was natural light and subsequently she identified them at a parade.

We have perused the record of proceedings and apart from the defence evidence which overwhelmingly identified **PW 2** as the father of the appellants, the trial court failed to find that the evidence of **PW 1** and **PW 2** who purported to deny the appellants is untruthful and unreliable.

Secondly, there was no point of an identification parade, which was done in the presence of **PW 2** and **PW 1** the step mother of the appellants purported to identify the appellants. As it was held in the case of **Ajode Vs Republic [2004] 2 KLR 81**

“Once a witness has been able to see the suspect before the parade is held, then he will be doing no more than demonstrating his recognition of the suspect and not identifying the suspect. That indeed is the reason why no identification parade is required in cases of recognition.”

The Court of Appeal went further to quote with approval the case of **Githinji Vs Republic [1970] E.A 231** a High Court decision by **Mwendwa CJ (as the then was)** and **Simpson CJ (as he then was)**

“Once a witness knows who the suspect is, an identification parade is valueless.”

There are other inconsistencies apparent from the records, for instance **PW 1** says in cross-examination that Kshs.10,500/- was stolen from the pockets of the trouser while **PW 2** said the money was stolen from the briefcase.

If the trial court considered the defence evidence and the evidence of **PW 1** and **PW 2** especially in cross-examination, the trial court would have arrived at a different verdict. It is obvious **PW 1** and **PW 2** lied to the court when they blatantly denied having any relationship with the appellants.

For the foregoing reasons, we think we need not say more, the appeal succeeds and the appellants are released forthwith unless otherwise lawfully held.

Judgment read and delivered this 15th February 2007.

M. KOOME

JUDGE

L. KIMARU

JUDGE