



REPUBLIC OF KENYA



**Lochoingo alias Loko v Republic (Criminal Appeal E009 of 2023)  
[2023] KEHC 23968 (KLR) (23 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23968 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KABARNET  
CRIMINAL APPEAL E009 OF 2023  
RB NGETICH, J  
OCTOBER 23, 2023**

**BETWEEN**

**PETER LOCHOINGO ALIAS LOKO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal against both the conviction and sentence arising from the Judgment of Hon. Ntbuku J.N (SRM) dated 26th July, 2018 in the Principal Magistrate's Court at Eldama Ravine Criminal Case No. 647 of 2017)*

**JUDGMENT**

1. The Appellant Peter Lochoingo Alias Loko was charged together with two others with the offence of Robbery with violence contrary to section 296(2) of the [Penal Code](#). The particulars of the offence being that on the 13<sup>th</sup> day of August, 2017 at about 1930hrs at Katorongot village in Mogotio Sub-County within Baringo County the appellant jointly with another not before court being armed with a pen-knife they robbed Josephat Lowoi of his mobile phone make orange valued at Kshs. 1700 and cash Kshs. 3360 and immediately before the time of such robbery assaulted the said Josephat Lowoi thereby occasioning him actual bodily harm.
2. The Appellant pleaded not guilty to the charge and the matter was set down for hearing with the prosecution availing 6 witnesses in support of the charge against the accused. Upon hearing the prosecution and defence evidence, the trial court delivered judgment on the 26<sup>th</sup> July, 2018 finding the accused persons guilty. They were jointly convicted and each sentenced to thirty (30) years imprisonment.
3. The Appellant having being aggrieved and dissatisfied with the above judgment, appeals against the Judgment on the following grounds:-



- i. That the Learned trial magistrate erred in law and fact by convicting the appellant but failed to note that the Appellant's identification was not proved.
  - ii. That the learned trial magistrate erred in law and in fact by convicting the Appellant by relying on circumstantial evidence to convict the Appellant.
  - iii. That the learned trial magistrate erred in law and fact when he convicted the Appellant yet failed to find that prosecution did not discharge the burden of proof.
  - iv. That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant to a harsh and excessive sentence.
4. The appellant filed amended grounds of appeal under section 350(2) of the CPC and brings forth the following grounds: -
- i. That the learned trial magistrate erred in law and facts by relying on evidence of purported visual identification to convict the appellant but failed to note that the circumstances were not favorable for positive identification.
  - ii. That the learned trial magistrate erred in law and facts by holding that the elements of the offence of robbery with violence were proved but failed to note that the evidence tendered was not sufficient to prove the charge framed under section 296(2) of the Penal Code.
  - iii. That failure to provide the appellant with an advocate at the state's expense was prejudicial to the appellant.
5. The Appellant prays that this Appeal be allowed, conviction quashed, sentence set aside and the appellant be set at liberty or the honourable court be pleased to evaluate the evidence and make an independent findings and proper sentence.
6. The appeal proceeded by way of written submissions.

### **Appellant's Submissions**

7. The appellant submitted that his conviction and sentence of 30 years imprisonment was primarily based on identification evidence given by Pw 1, Pw2 and Pw3 but a close scrutiny of evidence of the three prosecution witnesses are clear that they did not recognize the appellant as one of the assailants who robbed Pw1 and assaulted him. He cited the case of *Kamau vs Republic* [1975] EA 139.
8. The appellant further submits that the element of theft was not proved against him; that the charge sheet shows stolen items as mobile phone make orange valued at Kshs. 1700 and cash Kshs. 3,360 but the evidence of the investigation officer and the arresting officer was that nothing was recovered from the appellant and the evidence of the investigations officer on cross examination was that his statements indicate itel black; that the description of the stolen phone was not clear and no receipts were produced by the prosecution to prove that such a phone existed.
9. The appellant further submit that no cash was recovered from him and it was only the word of the complainant that a phone was stolen; that no serial numbers or IMEI numbers were produced to prove that the phone existed.
10. The appellant further submit that the particulars of the charge sheet indicates that the appellants were armed with a pen knife but does not indicate whether the pen knife was a dangerous or offensive weapon and therefore renders the charge sheet defective and cannot be cured under section 382 of the Criminal Procedure Code.



11. He submits that there is no suggestion in this matter that he was the one who stole and the fact that theft was not established, this element was not proved; further that Pw 1 testified that it was Samuel who stabbed him with a knife but he does not state the role the appellant played in the actual robbery hence he cannot be guilty of the charge of robbery with violence just because the complainant claimed he was in company of others. He denies participating in injuring and robbing the complainant.

### **Respondent's Submissions**

12. The Respondent submits that Pw1 Josephat Lowoi was categorical in his evidence that he identified the appellant and his co-accused who was the 3<sup>rd</sup> accused at the lower court; that he had known them previously for a period of one year as residents of Athinai; that she said there was presence of half-moon bright enough to positively identify the suspects and there was no possibility of error; and complainant's evidence was corroborated by the evidence of Pw2 Paul Namekwi and Pw3 Francis Lonyas who witnessed the incident and identified the appellant and his co-accused.
13. The Respondent submits that the prosecution proved the case against the appellant beyond any reasonable doubt given well corroborated evidence. That the mode of identification of the appellant by Pw 1, Pw2, Pw 3 and Pw 6 was safe to sustain a conviction and there was no possibility of error.

### **Analysis and Determination**

14. This being the first appellate court. I am expected to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis. This I do while bearing in mind the fact that I never had the opportunity to hear the witnesses and observe their demeanor. For this I give due allowance. The principles that apply in the first appellate court are set out in the case of *Okeno vs Republic* [1972] EA 32 where it was stated as follows: -

“The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala v. Republic* [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See *Peters v. Sunday Post*, [1958] EA 424.)”

15. In view of the above, I have perused trial court's proceeding and submissions filed by parties herein and find the following as issues for determination:-
- i. Whether the charges against the accused were proved beyond reasonable doubt.
  - ii. Whether the failure to provide the Appellant with an advocate at the states expense was prejudicial to the Appellant.
  - iii. Whether the sentence imposed against the Appellant was harsh and excessive.

#### **(i) Whether the Charges Against the Accused was Proved Beyond Reasonable Doubt.**

16. The ingredients of the offence of robbery with violence were clearly set out by the Court of Appeal in the case of *Oluoch -vs - Republic* [1985] KLR where it was held:

“Robbery with violence is committed in any of the following circumstances:

The offender is armed with any dangerous and offensive weapon or instrument; or



The offender is in company with one or more person or persons; or

At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person .....

17. The use of the word “or” in this definition means that proof of any one of the above ingredients is sufficient to establish an offence under section 296(2) of the *Penal Code*. Further, in the case of *Dima Denge Dima & Others vs Republic*, Criminal Appeal No. 300 of 2007, the court stated as follows:-

“...The elements of the offence under Section 296 (2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence.”

18. Further, In *Jeremiah Oloo Odira v Republic* [2018] eKLR the Learned Judge encapsulated the aforementioned sections and elaborated on the offence of robbery with violence as follows:-

“Robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto. Two things must therefore be proved for the offence of robbery to be established: Theft and the use of or threat to use actual violence.”

19. Evidence adduced before the trial court show that Pw 1 testified that on the 13<sup>th</sup> August, 2017, at 7:00p.m he was with Pw3 when four men who included the appellant herein attacked him. He said he had known the appellant and his accomplices for a period of one year as residents of Athinai. He said there was moonlight that night. He stated that they all attacked Pw3 with kicks and blows and Samuel had a knife which he used to stab Pw3 on the ribs and the other three who included the appellant herein beat him up and took his orange phone from his trouser pocket and Kshs. 3360 which was in the back trouser pockets. Pw1 said he was injured and he bled. He screamed for help and was rescued by Pw 2 and taken to his home where he took a motor bike to Mogotio Hospital where he was treated and discharged. He reported the matter to Mogotio police station and was issued with a P3 form which was filled by a Doctor in Mogotio.
20. Pw 2 Paulo Namekwi Lokari testified that on the material day at 7 p.m he was crossing the river when he heard Pw1 scream and on responding, he found Pw1 holding his belly while in pain. At the scene, he saw the appellant and 3 others running away running away.
21. Pw 3 Francis Lonyas testified that on the 13<sup>th</sup> August, 2017, he was with Pw1 crossing the river at Athinai when they met the appellant and 3 others who attacked them. He said he was injured on the ribs and face and Pw1 was stabbed with a knife and was bleeding from his belly. He stated that he saw Kevin remove money from Pw1's trouser and that they also took his phone.
22. Pw 4 Corporal Jackson testified that he was at Mogotio Police station when he received the Complainant Josephat Lowoi who reported that he had been attacked by four people one being Samuel, Chui, Loko and Kevin who beat him up and stole from him. That the complainant was beaten and stabbed on the ribs with a knife, Kshs.3360 and a phone was taken during the robbery. The complainant reported the incident, the report was booked and he returned to Hospital.
23. He further stated that on the 14<sup>th</sup> August, 2017, the complainant went back to the station and he issued him with P3 form which was filled by the Doctor and brought back to the station; he visited the scene



and was later led by the complaint to the accused persons who they arrested and charged in court after completing investigations.

24. Pw6 testified that one Dickson Kangogo examined Pw1 on 15<sup>th</sup> August, 2017 and confirmed that he sustained soft tissue injuries on the scalp and a stab wound 2cm on the left side of the abdomen. He produced the P3 form as exhibit 1 in court.
25. From evidence adduced by Pw1, Pw2 and Pw3, there is no doubt that the complainant was attacked by more than one person; Pw1 and Pw3 were injured and Pw1's property taken by the attackers. The 4 attackers were known by the three witnesses. It was identification by recognition and the appellant did not dispute that there was moonlight at the material time which enabled the 3 witnesses identify the attackers. The appellant did not dispute that he lived in the same locality with the 3 witnesses. It is the complainant who led police to arrest of the appellant. In *Hassan Abdallah Mohammed v Republic* [2017] eKLR, it was stated that:

“Visual identification in criminal cases can cause miscarriage of justice and should be carefully tested. The court in *Wamunga v Republic* (1989) KLR 424 at 426 had this to say:

“Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it the basis of a conviction.”

26. From the foregoing and in view of evidence adduced, there is therefore no doubt on identification of the appellant.
27. Evidence adduced before trial court confirm that the Appellant was in company of three others while committing the offence and at the time of the commission of the offence had offensive weapon namely a knife which was used to stab the complainant on the left side of the abdomen as narrated by the complainant and corroborated by the evidence of Pw6 who produced the P3 form as exhibit 1 in court. From the foregoing the three ingredients of the offence of robbery with violence have been fully established. The prosecution therefore proved its case against the Appellant beyond any reasonable doubt.

## **ii. Whether the Failure to Provide the Appellant with an Advocate at the States Expense was Prejudicial to the Appellant.**

28. The Appellant asserts that there was no fair trial since he was not represented by an Advocate before the trial court. In the case of *Joseph Ndungu Kagiri vs. Republic* [2016] eKLR: the court state das follows Mativo J as he then was stated as follows: -:-

“Not every accused person is entitled to legal representation at states expense. Each case is considered on the basis of its own merit. The nature of the offence that an accused person has been charged with is instrumental in deciding whether an accused person qualifies or not.

A reading to the provisions of the *constitution* on the right to legal representation reveal that an accused person's entitlement to legal representation at the expense of the state is not automatic but qualified. In other words, an accused person must prove that unless he or she is assigned an advocate by the State, substantial injustice would occur...”

29. Record show that the appellant fully participated in the trial and at no point did he intimate to the court or the court noted that he had any challenge following or participating in the proceedings. His



silence in my view can be interpreted to mean he had no challenge participating in the trial and it is late in the day to allege lack of legal representation at appeal stage. The right to legal representation as observed above is not automatic. Each case has to be considered on its own circumstances. The appellant never raised any issue or demonstrated any difficulty in following proceeding and participating in the proceedings in the trial court herein; in my view raising the issue of representation at this stage is an afterthought.

**iii. What the Sentence Meted upon the Appellant was Harsh and Excessive.**

30. The *Penal Code* prescribes a death sentence for the offence of robbery with violence. The trial court sentenced each of the accused to thirty (30) years imprisonment which to me was reasonable. Accordingly, I find no reason to interfere with the sentence meted upon the Appellant by the trial court.

31. Final Orders : -

1. Appeal on both conviction and sentence is hereby dismissed.
2. Period served in remand to be reduced from sentence imposed by trial court.

**JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 23<sup>RD</sup> DAY OF OCTOBER 2023.**

**RACHEL NGETICH**

**JUDGE**

In the presence of:

Appellant present.

Ms Ratemo for State.

