



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 169 OF 2016**

**1. OMAR IBRAHIM OTIENO**

**2. COLLINS KIPKOECH LELEI.....APPELLANTS**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the decision and judgment of the Honourable E. Mutunga,*

*Senior Resident Magistrate, delivered on the 15th day of February 2018*

*in Mombasa Criminal Case No. 2496 of 2016).*

**J U D G M E N T**

1. Collins Kipkoech Lelei Accused 1 and Omar Ibrahim Otieno- Accused 2 in Mombasa CMC CR. Case No. 2496 of 2016 were jointly charged with 3 others with the offence of robbery with violence contrary to Section 295 as read with Section 296 (2) of the penal code.

2. The particulars were that Collins Kipkoech Lelei, Omar Ibrahim Otieno, Salim Mwinyi, Andrew Omondi Odhiambo and Brian Maina on the 21<sup>st</sup> day of December 2016 at Mwembe Tayari road in Mombasa Sub-county of Mombasa County, jointly robbed Mahamud Mahad Duko of his 2 mobile phones make infinix 510 valued at Kshs.13,000/= and Wiko valued at Kshs.1,000/=, cash money Kshs.1,000/= thermos flask with tea worth Kshs.470/, Mahamri worth Kshs.100/= all valued at Kshs.15,570/= and immediately before or immediately after the time of such robbery used actual violence to the said Mahamud Mahad Duko.

3. Omar Ibrahim Otieno pleaded guilty in the 1<sup>st</sup> instance when charge was read to him but A1, A3, A4 and A5 pleaded not guilty. Accused no. 2 Omar Ibrahim Otieno was convicted and sentenced to suffer death pursuant to Section 296(2) of the penal code. In his appeal No. 169 of 2016, Ibrahim claimed that his plea was equivocal. That the learned trial Magistrate erred in law & fact by failing to give him time to reflect on the plea he was about to take.

4. That the learned trial Magistrate erred in law and fact in finding his conviction and sentence without proper finding that the appellant did not understand the facts as outlined by the prosecution. That the learned trial Magistrate erred in law and fact in convicting and sentencing him without noting that he had been coached by the police at the station to plead guilty so that he could be forgiven by the court.

5. In his amended Memorandum of Appeal filed on 19<sup>th</sup> October 2020, Omar Ibrahim Otieno said the trial court erred in law and fact by failing to consider the sentence and mitigating factors in the Supreme Court of Kenya in Muruatetu's case. That the court erred in law and fact by failing to consider that he did not waste courts time by pleading guilty. He also said that the court failed to consider that he was a 1<sup>st</sup> offender.

6. In Omar Ibrahim Otieno's submissions he urged the court to consider his sentence and mitigations in accordance to the decision of the supreme court petition nos. 15 & 16 of 2015 – **Francis Kariako Mwaitetu & Another vs Republic**. He also submitted that when he was arrested in 2016 he was 20 years old and had spent over 4 years in custody where he has lived peacefully with other inmates and prison authorities. He said he had reformed while in prison and is very remorseful to the incident and regret a lot what he has gone through in custody. He promised to be a law abiding and not to repeat offence if he is given a chance to reintegrate back into society. He sought for lenient sentence.

7. Collins Kipkoech Lelei – Accused 1 in Mombasa Chief Magistrate's Court CR. Case No. 2496 of 2016 was convicted based on evidence of 4 prosecution witnesses. The evidence against Collins Kipkoech Lelei was that the complainant was attacked by about 20 people near

Mwembe Tayari when he and his wife alighted from a matatu and his phones, money and the wife's thermos flask containing tea and mahamri stolen. He said the attackers held him by the neck from behind and that they were armed with sticks and stones. He said they stole his infinix phone valued at Kshs.13000/= and Wiko valued at Kshs.1000/= and cash Kshs.1000/=.

8. He said County Government askaris came and assisted them to arrest the accused persons. He said that the Appellant was in front of them and he identified him. He said the other 3 accused persons were not at the scene. He said the county government askari took the phones from the suspects.

9. In cross examinations, the complainant said that it is the Appellant, Collins Lelei who picked phones from him. He said the appellant was seen robbing him. The Complainant said one of the robbers had long hair but he was not in court. He said the phones were recovered from the appellant by the county government askaris.

10. He again said he could not tell who had the phones. He said members of public pursued robbers and he saw appellant being arrested. He said there was a boy who led them to where the appellant was and he was arrested. He said Andrew Omondi Odhiambo Accused 3 was not at the scene as well as Accused 4 and Accused 5. He said a knife was placed on his stomach when he was being robbed.

11. The complainant's wife- PW 2 Salet Abdulahi testified that on 21/12/2016 she was from home going to Pandya Hospital with her husband PW 1 and at Sabasaba stage while she was walking behind PW 1 when some men attacked them and took their 2 phones which PW 1 had and also her bag. That they reported to county askaris and some of the men were arrested and taken to Central Police Station.

12. PW 2 said she saw the 1<sup>st</sup> accused person only at the scene. She said they alighted at Saba Saba and there were many people. She said the appellant stole from many others. She said appellant was identified and phones recovered from him.

13. PW 3 Hadija Ali Mwinyi testified that on 21/12/2016 at around 11.00am, she received a call informing her there were a group of men robbing others. That she proceeded for the operation with 2 of her colleagues. This was at Lebanon around about near Mwembe Tayari. They were told the robbers were headed to Mbaraki. That they were like 30 men. They managed to arrest 6 men and on searching them they found Accused 2 with a phone. (Being Accused 2 Omar/Ibrahim Otieno had already been convicted the 2<sup>nd</sup> accused referred to must have been Andrew Omondi Odhiambo – Accused 3). That Accused 4 (Accused 5) was found with 2 phones which were identified and produced Exp 1 & 2.

14. In cross examination, she said she was not told that the appellant robbed but the complainants identified him. She said that the complainants saw appellant getting arrested. She said 6 people were arrested and that police are answerable to the 6 people who were arrested. She also said that Accused 4 was also identified and that 2 phones were recovered from his trouser.

15. PW 4 PC Bernard Tunai received appellant among other suspects from county officers who were in company of complainants. He said 4 suspects were brought to the station. He took over the 2 phones recovered and the produced them as exhibits P1 & 2. According to the investigating officer the appellant together with the other suspects were identified at the Mbaraki dumpsite by the complainants who lost 2 phones.

16. According to the Investigating Officer the complainant was headed to Agakhan Hospital with his wife when near Ganjoni they met many men who held PW 1 by the collar and another one held a knife and he was robbed of his phones and money while his wife was robbed of a big thermos and mandazi. He said incident happened at 10.00am and the suspects were easily identifiable.

17. In cross examination said incident happened along the road near Casablanca. He said appellant was found with the phones on his pocket. He said other suspects were charged in another case. He said it is appellant who took the 2 phones and also tea and mandazi.

18. Appellant when placed on defence gave sworn statement and said that on 21/12/2016 he had gone town at the dumpsite with the other accused persons in the matter and they went to collect garbage at Kizingo and returned to dumpsite at 10.30am. That at that point county askaris came from the gate and they were asked whether they had seen men running. That he told them he was the manager and that they had just arrived. He said they were arrested and taken to station where Mohamed Bakari who had also been arrested among 4 other suspects was found with ATM and phone.

19. That 2 people came who said the phones belonged to Somali people. They were taken to Central Police Station and they were charged when they failed to raise Kshs.20,000/=. He said no phones were recovered from him. In cross examination, he said he was with 2 people at Mbaraki. He said he didn't know the other accused persons.

20. In the judgement of trial Magistrate appellant was found guilty on the ground the evidence of PW 1 was corroborated by that of PW 2 that he was the one who took the phones and money. The trial magistrate concluded that nothing was recovered from the other accused persons and he acquitted them. The trial Magistrate also said that identification was proper because incident happened during the morning hours. Appellant was sentenced to suffer death under Section 296(2) penal code.

21. The Appellant was aggrieved by the conviction and sentence and he preferred the appeal herein on the following grounds:-

i. That the trial Magistrate erred in law and fact by convicting and sentencing the appellant to suffer death failing to note that the information on the charge sheet contradicts itself.

ii. That the learned trial Magistrate erred in law and fact in convicting the appellant without noting that there was no proper and positive identification.

iii. That the learned trial Magistrate erred in law & fact by convicting him without nothing that the arresting officer did not appear in court to prove the allegation.

iv. That the trial Magistrate convicted and sentenced him based on insufficient and contradictory evidence.

22. The appeal herein was canvassed by way of written submissions. In his submissions, Collins Kipkoech Lelei the 2<sup>nd</sup> Appellant argued that evidence of PW 1 & PW 2 were not corroborated. He argued that since the PW 1 alleged he was attacked by about 20 people the circumstances and conditions of attack could not allow PW 1 to identify his attackers. He said the circumstances must have impaired and impeded PW 1's sense of judgment and identification of the suspects cannot pass the test of being free from possibilities of error. The Appellant also brought out the contradiction between the complainant's evidence and that of his wife where he said they alighted at Mwembe Tayari whereas PW 2 said it was at Sabasaba.

23. The Appellant submitted that PW 1 & PW 2 didn't tell the court how far away was scene of arrest from scene of crime. He argued that it is erroneous that PW 1 & PW 2 didn't lose sight of the robbers and pursued them until they were arrested. He submitted further that PW 1 & PW 2 didn't give description of the assailants to PW 3 the country askaris and that there was a break of chain in the events.

24. He said PW 1 said he was led by a boy to where the arrest took place but they boy was not called to testify contrary to Section 150 Criminal Procedure Code. The appellant relied on the holding in **Peter Sangura Mabae vs Republic Cr. Appeal No. 32 of [2004] KLR** where it was held

***“It would have been very easy to Aseneka PW 1 to say he had seen the appellant during the robbery as Evans and Martin took the appellant straight to Asenekas house after his arrest”.***

The Appellant's said that the boy who led PW 1 & PW 2 to where he was being arrested exposed him and he was thereby incriminated without following legal procedure.

25. The appellant also argued that the prosecution failed to prove he was found in possession of the stolen phones. He said PW 3 said categorically Accused 2 was found with one Samsung phone whereas 4<sup>th</sup> accused was found with 2 mobile phones which were identified as property of PW 1. The appellant relied in the holding in **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs Republic (2006) eKLR** where ingredients of recent possession are spelt out. He also relied on the case of **Malindi vs Republic (1989) KLR 225**. He said complainants did not also prove they owned the 2 mobile phones produced in court and the trial Magistrate had no basis to find that the phones belonged to PW 1 & PW 2 and that they were stolen from them see **Titus Muindi Mukoma vs Republic, Cr. Appeal No. 275 of 2011**.

26. The appellant urged the court to find that his defence as the truth and on sentence the appellant urged the court to rely on the Judgement of the **Supreme Court of Appeal in Francis Muruatetu & Another vs Republic** and reduced the sentence to term already served and period spent in remand.

27. Having considered the evidence on record in the trial court as well as the judgment of the trial Magistrate together with grounds of appeal and the submissions by the respective parties, the issue that appears to be for determination is whether the evidence as to identification of the 2<sup>nd</sup> appellant was sufficient and safe to find the appellant guilty for the offence of robbery with violence.

28. When Omar Ibrahim Otieno pleaded guilty in the trial court facts read to him showed that he is the one who threatened the complainant with a knife, ransacked his pockets and stole phones and money.

29. PW 3 said that a group of men were causing mayhem in Ganjoni area and they pursued them and arrested 6 of them in Mbaraki dumpsite. That the complainants arrived when the suspects had been arrested.

30. According to PW 1 there is a boy who led them to where the suspects were being arrested. PW 3 does not say how she knew the suspects who were arrested, particularly Collins Kipkech Lelei was one of the people who caused mayhem in touch since she did not say they were identified by the complainants.

31. The complainants allege they identified the appellant at scene of crime but they have not given a description of his physical appearance or even how he was dressed to confirm that they positively identified him at the scene. If it is true they identified him and pursued the suspects without losing sight or being obstructed from seeing them until they were arrested, then they are the ones who ought to have led the county askaris to where the suspects had escaped to.

32. In the contrary PW 1 said that there is a boy who led them to where the suspects had escaped to and they found PW 3 or other county askaris had arrested 6 suspects, 5 suspects were arraigned in court where Accused 2 Omar Ibrahim Otieno pleaded guilty and was convicted. No explanation is given how the 6<sup>th</sup> suspect was released.

33. Although PW 1 insisted that Accused 1 was the one who attacked and placed a knife on his stomach and stole his 2 phones and cash money as well as PW 2's handbag in which she carried thermos flask and mahamri, facts read when A2 pleaded guilty indicated that it is Ibrahim Omar Otieno who actually threatened to cut the complainant with a knife, ransacked his pockets and stole phones and money.

34. PW 3 on the other hand said that Andrew Omondi Odhiambo who was now Accused 2 during trial was found with one phone make Samsung and that Accused 4 Brian Maina was found in possession of the 2 phones that were stolen from the complainants. It was therefore erroneous for the trial Magistrate to conclude that the appellant herein Collins Kipkoech Lelei was positively identified or even that the phones stolen from PW 1 were recovered from him when evidence as to identification was very sketching and recovery of phones was from other suspects.

35. I do find that the appeal by Collin's Kipkoech Lelei succeeds. The conviction is quashed and sentence set aside and the appellant is set at liberty unless otherwise lawfully detained.

36. As regards an appeal by Ibrahim Omari Otieno although he claimed the plea was equivocal, the record shows that accused persons were warned about the seriousness of the offence but he went ahead to plead guilty to the charge and even when facts were read out to him he again pleaded guilty. This court finds that the plea was unequivocal.

37. In his submissions the appellant abandoned all the other grounds of appeal and asked that his sentence be revised in consideration of the Francis Kariatu Muruatetu and Another Petitions No. 15 and 16 of 2015. He urged the court to consider that he has been in custody for over 5 years and has reformed and that he would not repeat the offence. In consideration that the Supreme Court of Kenya decision in Petitions No. 15 and 16 of 2015 declared mandatory death sentence as unconstitutional, I do find that the Appellant Ibrahim Omar Otieno plea is valid and therefore set aside the death sentence and substitute thereof imprisonment for 10 years to run from 22/12/2016 when he was arraigned in court.

38. Ibrahim Omar Otieno appeal fails in that conviction is upheld and succeeds as far as sentence is concern.

**Dated, signed and delivered at Mombasa this 05<sup>th</sup> day of February 2021.**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**