



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 167 OF 2012

RODGERS CHETSARA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from Original conviction and sentence in Criminal case No. 3717 of 2011 of the

Principal Magistrate's Court at Kapsabet by Hon. R.Koech – RM delivered on the 4th October, 2021)

Coram: Hon. Justice S.M.Githinji

M/s Limo for the State

Appellant in person

J U D G M E N T

ROGERS CHATSARA, the appellant herein was charged in the lower court with the offence of robbery with violence, contrary to section 295 as read with section 296(2) of the Penal Code.

The particulars of this offence are that on the 8th day of December 2011 at Kaimosi Tea Estate, within Nandi County, robbed Setrick Lunganyi Shiunza of a Motor cycle registration number KMCQ 509J, Focin in make and cash Kshs. 300/- and at or immediately before or immediately after the time of the said robbery, used actual violence with a panga to the said Setrick Lunganyi Shiunza.

The prosecution case is that in the year 2011, the complainant in this case who gave evidence as PW-1, was employed by one Cyrus Majani as a Boda Boda rider or operator, using a motor cycle registration number KMCQ 509J, Focin in make.

On 8/12/2011 of which is the day the alleged offence took place, he had taken a client using the said motor cycle, from Siro Posta to Western. When he returned to the stage at 8.30p.m he found the appellant waiting at the place. There were other Boda Boda operators waiting for clients at the place but when the complainant arrived the appellant addressed him as a young boy and called upon him to take him to an Estate within the Tea Estate. He boarded the motorcycle and they proceeded to the destined place. When they got to the Tea Estate, the appellant alleged that he needed to attend to a call of nature. He urged the complainant to stop the motorcycle, of which he did. The appellant had a maize flour bag with him. He did not attend to the call of nature but produced a panga from the maize flour bag, raised it high up and ordered the complainant to surrender the motorcycle to him or else he kills him. The complainant decided to comply with the demand. The appellant rode on the motorcycle towards a hilly section. As he tried to ascend the hill, the motorcycle engine went off. The appellant resorted to pushing it up hill. The complainant followed him behind at a distance.

PW-4, on the said date and at about 9.00p.m had gone for some things at Chepkumia. On the way home he met his friends Kibet and Wesley. They walked together towards home. Along the way they met the complainant crying. He alleged his motor cycle had been stolen. He showed them the direction the thief had taken. PW-4 ran ahead of the others towards the shown direction. When he got past a corner, he saw the appellant pushing a motor cycle. When the appellant heard the PW-4 pursuing him, he abandoned the motor cycle and ran, in an attempt to escape. PW-4 however still pursued him. The appellant fell ahead and rose. He produced a panga of which he threatened to attack PW-4 with. PW-4 swiftly jumped on him, and the panga fell down. In the process PW-4 was hit on the elbow. He wrestled the appellant to the ground as the complainant and the two friends arrived for assistance. They tied the appellant with a rope and caned him.

PW-2 was at the time attached to the AP's Post at Chepkumia. On the said date and time he was from patrol in company of APC Moses Ruto. When they got near the camp, they heard commotion. They approached the area where it was emanating from. They found an

arrested person who was being beaten. They rescued him. He was alleged to have stolen a motor cycle. The officers were handed a panga in a maize flour bag. It was alleged the suspect had threatened the motorcycle operator with the said panga. They took the suspect and the panga at the Police Post. In less than five minutes the motor cycle was availed. It was registration number KMCQ 509J, Focin in make and blue in colour. The complainant was there. They booked the report and re-arrested the suspect. The following morning he was taken to Kaimosi station.

PW-3 who's an officer who was at the time attached to Kaimosi Police station investigated the case. He recorded witness statements and kept the recovered items as exhibits. The charge against the appellant was then preferred.

The appellant gave a sworn testimony in his defence. His brief defence is that on the material day he had traveled to Nairobi from Nandi County. When he got back he alighted at Tindinyo stage. It was raining and he decided to buy an umbrella. He therefore commenced his walk towards his brother's house. At about 7.00p.m while on the way and while still raining, he met with two men. They addressed him in a language of which he couldn't understand. He argued with them. One of them snatched his umbrella. The appellant decided to just proceed with his journey. The two men followed him. They intended to beat him up. They caught up with him and ordered him to stop. They then told him to sit down and explain why he was on the road at that particular time. They alleged that their cattle had been stolen.

They subdued him and took his 17,500/-. They assaulted him seriously. He cried and urged them to take him to the Police station. He was taken to the AP's Camp. He was booked and the following day he was taken to Chepsonai District Hospital. He was later charged with a strange offence.

The trial court evaluated the evidence and found that the appellant was arrested red-handed at the scene of the offence and he produced exhibits recovered. The Court found that the prosecution proved the offence against the appellant beyond reasonable doubt. His defence was dismissed as a sham. The appellant was then sentenced to death.

The appellant dissatisfied with the said conviction and the sentence preferred an appeal before this Court on three grounds: -

The first one is based on Muruatetu decision in relation to the awarded mandatory death sentence.

The second one is that the ingredients for the offence of robbery with violence under section 296 (2) of the C.P.C were not established by the prosecution to the required standard.

The third one is that his defence was not properly weighed.

I have considered the preferred charge, evidence adduced by both sides, judgment passed by the Lower Court and sentence, grounds of appeal, and submissions by both sides.

The only issue that stands out for consideration is whether the appellant was properly identified as the person who committed the offence of robbery with violence, against the complainant.

The prosecution called two eye witnesses who gave evidence on the issue. The first one is the complainant who gave evidence as PW-1, while the other is PW-4 who allegedly arrested the appellant as he was escaping with the motor cycle.

The incident as alleged by the prosecution witnesses took place at around 9.00p.m. It was at night. Though PW-1 and PW-4's evidence is mostly based on what they allegedly saw, none of them discloses in their entire evidence the source of light that enabled them to see. From the stage where the complainant allegedly found the appellant waiting for him as a customer, up to the Tea Estate where the offence allegedly took place, and eventually to where the appellant was allegedly caught up with and arrested; no source of light is disclosed. The questions that are not answered is how the witnesses were able to see him, what he was carrying, where he was going, and to trail him for arrest. The evidence of PW-4 shows the appellant was not arrested at the scene, and there is a point where they had lost his sight in the trail as he allegedly saw him after going round a corner. He had allegedly abandoned the motor cycle of which even according to the Investigating officer was availed after arrest of the appellant. There's no evidence that he was the only person who had a motor cycle along his alleged path, and that he was the only person present on the road shortly before his arrest. It's not clear who recovered the alleged panga and the maize flour bag and exactly from where in relation to the spot where the appellant was arrested by PW-4. It's not therefore correct that the appellant was arrested red-handed at the scene as was alleged by the trial magistrate and also by the prosecutor in her submissions. The evidence when weighed properly falls short of establishing with certainty that the appellant is the one who committed the alleged offence. In *Nzaro Vs. Republic (1991) KAR 212* and *Kiarie Vs. Republic (1984) KLR 739*, the Court of Appeal observed that;

“Evidence of identification/recognition at night must be absolutely watertight to justify conviction”.

From the aforementioned shortfalls in the prosecution evidence, there's a possibility where the appellant could have been wrongly held as the culprit. I allow the appeal. Conviction and the passed sentence are therefore quashed. The appellant is set free unless otherwise lawfully held.

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S. M GITHINJI

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 23RD DAY OF SEPTEMBER, 2021.

In the presence of:-

1. THE APPELLANT

2. MS LIMO FOR STATE

3. MS GLADYS - COURT ASSISTANT