



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL APPEAL NO. 108 OF 2017**

**JOHN KEMBOI BIRGEN.....APPELLANT**

**=VRS=**

**THE REPUBLIC.....RESPONDENT**

**{Being an appeal against the Judgement of Hon. D. A. Alego – SPM Kapsabet dated and delivered on the 31<sup>st</sup> day of October 2017 in the original Kapsabet Principal Magistrate’s Court Criminal Case No. 1552 of 2016}**

**JUDGEMENT**

The appellant was charged with two counts of robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code and one alternative charge of handling stolen property contrary to Section 322 (2) of the Penal Code.

In Count I it was alleged that on 26<sup>th</sup> April 2016 at Mberere village of Songhor Location in Tinderet Sub-county within Nandi County jointly with others not before court while armed with dangerous weapons namely rungunus, bows and arrows they robbed Dickson Nyakach one solar panel and seven rabbits all valued at Kshs. 59,500/= and immediately after the time of such robbery threatened to use actual violence to the said Dickson Nyakach.

In Count II the particulars of the offence were that on the same date and place and armed with the same weapons as in the first charge they robbed Fredrick Otieno Ondiek one mobile phone make Techno valued at Kshs. 3000/= and one mobile phone make ITEL valued at Kshs. 1600/= and immediately after the time of such robbery threatened to use actual violence to the said Fredrick Otieno Ondiek.

In the alternative charge the appellant is alleged to have on 27<sup>th</sup> April 2016 otherwise than in the course of stealing dishonestly received or retained one Techno mobile phone cover knowing or having reason to believe it to be stolen goods. The appellant pleaded not guilty to the charge whereupon the prosecution called three witnesses to prove the charges and the appellant made an unsworn statement in which he maintained his innocence. However, after evaluating the evidence, the trial Magistrate found the appellant guilty on the first count of robbery with violence, convicted him and sentenced him to death. She however proceeded to suspend the second count on the ground that the complainant therein did not testify for fear of his life.

Being aggrieved by the conviction and sentence on the first count the appellant preferred this appeal. He relied on the amended petition of appeal. The grounds of appeal are: -

- “1. THAT the learned trial magistrate erred in both law and facts by convicting me the evidence of identification by recognition without finding out that my names were not given.**
- 2. THAT the trial magistrate erred in both law and facts by convicting me while misdirecting himself that I was found with Techno mobile cover exhibit 8, without observing that the exhibit is not included in the particulars of the offence and I was not charged with.**
- 3. THAT the trial magistrate erred in both law and fact by convicting me without observing that the Appellant was not positively identified and recognized for it is not specified was the complainant from the source of light and to whether suspects directed light to their faces.**
- 4. THAT the trial court erred in both law and facts by convicting me on prosecution case which was poorly investigated and not proved beyond reasonable doubt.**
- 5. THAT may the Honourable court consider that the conviction and sentence awarded to me by the trial court is unconstitutional.”**

The appeal is vehemently opposed.

At the hearing the appellant relied on written submissions in which he elucidated each of the above grounds. The gravamen of his appeal is that the evidence of identification by the complainant (Pw1) was neither safe nor reliable as to form the basis of his conviction. He also faulted the trial Magistrate for convicting him on account of items allegedly found in his house but for which no evidence was adduced to connect them to the robbery. He submitted that the Techno cover produced in evidence was not recovered from his house. He also wondered how there could have been visible foot prints on the ground that night yet it had rained heavily. He contended that in any event it was not proved that the footprints were his and stated that the alleged recovery of muddy gumboots in his house was a weak link to the commission of the offence. He contended that the case was poorly investigated and urged this court to find that the prosecution had not proved its case to the required standard.

On the sentence, he submitted that the same was unconstitutional given the decision of the Supreme Court in the Muruatetu case which declared the **“death penalty unconstitutional.”**

On her part, Learned Prosecution Counsel Miss Busienei submitted that all the elements of the offence of robbery with violence were proved beyond reasonable doubt. She reiterated Pw1’s evidence that the assailants were four and that they were armed with rungas, bows and arrows and pangas. She submitted that of the four assailants Pw1 identified the appellant using a torch. She submitted that since Pw1 knew the appellant his was evidence of recognition and hence the best evidence. On this, she relied on the case of **David Ndolo & another v Republic [2019] eKLR**. She further submitted that police were called to the scene immediately and because it had rained they followed footprints and gave up when the same led to the sugar plantation. The next day the appellant was found with crude weapons in his house. She argued that the appeal on conviction has no merit.

On the sentence, she left it to the court to consider the circumstances of the case before deciding whether to adopt the Muruatetu decision. In reply, the appellant maintained that the death penalty does not exist in our law. He pointed out that the solar panel and rabbits were not produced as exhibits and stated that he was not arrested in the sugar plantation. He also reiterated that those who were robbed did not testify and further that the Chief and elders of his village were not called to testify that the crude weapons and gumboots were recovered from his house.

I have considered the rival submissions carefully. However, as the first appellate court I have a duty to re-analyse and evaluate the evidence before the trial so as to arrive at my own independent conclusion while bearing in mind that I did not see or hear the witnesses – **Okeno v Republic [1972] EA 32**.

Whereas there is no doubt that a robbery occurred in Osamo Farm on the night of 26<sup>th</sup> April 2016 and whereas two elements that constitute robbery with violence contrary to Section 296 (2) of the Penal Code - that the attackers were more than one and were armed with dangerous weapons were established - the evidence linking the appellant to the commission of the crime was weak and insufficient to prove the charge against him beyond reasonable doubt.

The case against the appellant revolves around the evidence of Dickson Ouko Nyakach (Pw1) the Manager at the farm who testified that he recognized the appellant as one of the four attackers. This is evidence of a single witness. In the case of **Karani v Republic [1985] KLR 290** the Court of Appeal held in respect of such evidence: -

***“1 A fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect of identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances there is need for other evidence.....”***

Even in cases of recognition such as was alleged by Pw1, the **Court of Appeal** extorts: -

***“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 favourable and free from possibility of error before it can safely make it the basis of a conviction.”*** (See **Wamunga v Republic [1989] KLR 424 at 426**).

In the case of **Maitanyi v Republic [1986] KLR 198** the same court while laying down the factors to be considered when testing such evidence stated: -

“ .....

**2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description.**

**3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision. It must do so when the evidence is being considered and before the decision is made.**

**4. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.”**

The trial Magistrate seems to have fallen into the above error as she did not warn herself of the danger of relying on the evidence of Pw1 and did not also carefully test his evidence. If she did she would have realized that the evidence could not safely support a conviction. To begin with, it was Pw1’s evidence that it was at 9pm in the night hence dark. Secondly it was raining and this made the possibility of a favourable

identification even more difficult. Thirdly, a closer consideration of his evidence reflects that he did not make any mention of the kind of lighting that was at the scene. In fact, from his evidence one can safely conclude that there was no lighting at all on his part as the spotlight he referred to was with the attackers. His evidence in examination in chief was that the attackers had a torch (meaning one), panga, rungu and spear and whereas he claimed to have seen the appellant clearly he did not describe or give an explanation of how he saw him when it was raining and dark. In cross examination he stated that he identified him because of the spotlight. The questions one would ask are which spotlight? Who had it and where was it pointed? What was the intensity of the light? One would also want to ask how far from the appellant he was. In her judgement, the trial Magistrate found that identification of the appellant by Pw1 was positive because he had a torch. That finding is not borne by the evidence on record because nowhere did the appellant state that he had a spotlight himself. His reference was to a spotlight in the possession of the attackers. It is my finding that in this case the conditions favouring a correct identification were difficult as it was raining and it was dark. Indeed, Pw1 seems to have merely relied on the appellant's alleged bad character to place him at the scene of this attack. The evidence of recognition was not watertight and he may have been mistaken. The fact that the appellant used to disturb people in the neighbourhood and had attacked the farm before is not by itself proof that he was one of the four attackers that committed the offences at the farm that night. The unreliability of Pw1's testimony is further demonstrated by the fact that he did not tell the police that he suspected the appellant. In **R v Turnbull [1967] 3 ALL ER 549** which is cited by our own Court of Appeal in numerous cases, it was held that one of the tests for a positive recognition of a suspect is whether the witness gave a name and description of the suspect to someone at the first instance. In this case it was Pw1's evidence that police officers arrived at the scene instantly yet he is not recorded as giving them the name or least of all a description of the appellant. He could if indeed he had identified the appellant also have taken the police directly to his home instead of leaving them to follow footprints. It would appear that Pw1 only recognized the appellant upon his apprehension by the police which then brings me to the **"other evidence"** which is recovery of crude weapons and muddy gumboots in the appellant's house. The court heard it was raining so there was nothing unusual about having muddy gumboots unless of course they were matched to the prints on the ground and they fitted which was not the case. There was also nothing unusual about the appellant being sound asleep in his house in the morning and it is even telling that there was no mention of the time the police officers went there. Moreover, whereas it was Pw1's evidence that the attackers were armed with a spear, panga, rungu and a torch what was allegedly found in the appellant's house were a bow, 4 arrows and a rungu. The bow and arrows had no connection to the robbery as Pw1 did not mention them. As for the rungu he was not asked to identify if it was the one he saw the attackers with that night or even asked to give a description of the one he saw. It is my finding therefore that there was no proof that the rungu was connected to the robbery. As for the Techno mobile phone cover, it was never proved to have been one of the articles stolen during the robbery as the complainant in count 2 did not testify. These being articles commonly found in people's houses/homes, it behoved the prosecution to adduce evidence singling them out as the ones used in the commission of the crime and failure to do so weakened the prosecution's case. The appellant's statement may not have amounted to much but again it was never his duty to prove his innocence. The onus lay on the prosecution to prove his guilt beyond reasonable doubt and as I have found they fell short of doing so, I shall allow his appeal.

The trial Magistrate suspended the second charge by stating: - ***the second complainant never testified for fear of his life after the ordeal thus this charge currently will not hold until evidence is adduced.*** I have perused the court record and nowhere did the police indicate the witness failed to attend out of fear. To the contrary the prosecutor initially stated the two witnesses were adamant and finally that they were unable to get them. The trial Magistrate ought therefore to have acquitted the appellant on that count and the alternative charge which I now do.

The conviction herein is quashed and the sentence of death (which I must state clearly exists in our law as only its mandatory nature in certain offences was rendered unconstitutional by the Supreme Court) is set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

**Signed and dated this 17<sup>th</sup> day of January 2020.**

**E. N. MAINA**

**JUDGE**

**Dated and delivered in Eldoret this 21<sup>st</sup> day of January 2020.**

**H. A. OMONDI**

**JUDGE**