



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 133 of 2016 consolidated with HCCRA NO. 134 of 2016

PATRICK MWITA.....1ST APPELLANT

ERICK KIPTOO.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 7033 of 2014

in the Chief Magistrate's Court at Eldoret by H. O. Barasa, Principal Magistrate dated 16th November 2016)

JUDGMENT

1. PATRICK MWITA (the 1st appellant) and **ERICK KIPTOO** (the 2nd appellant) were convicted on a charge of robbery with violence Contrary to Section 290(2) of the CPC and sentenced to death.

The particulars of the charge were that on 7th February 2010 at **ELDORET TOWN** in **ELDORET WEST DISTRICT** within **UASIN GISHU COUNTY**, jointly while armed with offensive weapons, namely stones, robbed **HILLARY KIPLIMO** of a motor – cycle registration No. KMCG 636 BAJAJ valued at Kshs.55,000/- a Nokia 3310 valued @ Ksh.2000/- and cash Ksh. 1,900/- all to the total value of Kshs.58,900/-, and immediately at the time of the robbery, wounded the said **HILLARY KIPLIMO**. Both appellants denied the charge.

2. In the year 2010, **HILLARY KIPLIMO BIWOTT** (PW1) was a boda boda operator riding Motor cycle Reg. 636 G, armed by **ALFRED KIMUTAI**. He was based at **PARADISE** stage. On 07.02.2010, to around 9.00pm he was at Paradise Stage when two men approached him with a request to be ferried to **DOLA** area. He had known the men for about a year, and gave their names as **PARTY** and **KIPSIGIS**. Party sat next to him, while Kipsigis was a t the rear behind him.

3. PW1 obliged, but just before they got to **DOLA**, they rode on a rough road, which forced him to slow down his pace **PARTY** suddenly held PW1 by the neck and he lost balance, and they fell down. **KIPSIGIS** hit him on the head with an object, then held both his hands. He then picked PW1 up and started dragging him into the forest, hitting him on the head once again.

And PW1 pleaded with them to spare his life. **PARTY** was still holding him by the neck, and Kipsigis put his hand in the pocket ad removed a phone make Nokia 3100. He also took away a wallet which contained 1900/-, plus PW1's national identity card. **PARTY** pressed PW1's neck until he lost consciousness, when he regained consciousness, he realised that the motor cycle was nowhere to be seen. He walked upto paradise stage from where he was taken to Moi Teaching and Referral Hospital for treatment. He was admitted in hospital and discharged on 13.02.2010.

4. After being discharged, he was called to the Police Station on 3.4.16 and informed that the people who robbed him had been arrested. He proceeded to the police station where he found **KIPSIGIS** and confirmed he was among those who had robbed him. Upon being asked where he had taken the motor cycle, **KIPSIGIS** said (1st Appellant) Patrick had it.

5. The 2nd appellant directed them to the 1st appellant's residence, and he was traced. On being questioned the 1st appellant said he had sold the motor cycle to someone in Kitale, but the motor cycle was not traced.

6. PW1 stated that there were security lights outside Paradise stage, so he was able to see the appellants clearly, and he even talked to them. Moreover he had known and interacted with them for close to one year.

The stolen items were never recovered and on cross examination he stated he knew the 1st appellant as Patrick or party.

7. ALFRED KIPCHIRCHIR KEITANY (PW2) confirmed he had employed **HILLARY KIPLIMO** to ride his motor cycle. He produced

an agreement respect of the said motor cycle. He confirmed that PW1 used to operate from Paradise stage. On 2.2.2010 at around 1.00am, he received a phone call from one **ELIAS KIBET** who informed him that PW1 had been robbed of the motor cycle and badly assaulted and was in hospital.

8. PW2 visited the PW2 in hospital and confirmed the incident. On 3.4.2018, PW2 received a report that from PW2 that one of the robbers had been arrested in respect of a different offence, and was being held at Eldoret Police Station.

He proceeded to the police station and found the 2nd Appellant who was known to the 1st appellant, under arrest.

He gave them information which eventually led to the application of the 1st appellant.

9. The 1st appellant said he had sold the motor cycle to one Ongae who lived in Kitale, leading to the latter's arrest, but the motor cycle was never recovered.

10. On cross examination PW2 explained that **KIPSIGIS** is the Accused2's nickname, and that has real name is **ERICK KIPTOO**.

11. **ELIAS KIBET (PW3)** a friend to both PW1 and PW2, had just arrived at paradise stage for Moi teaching and Referral Hospital at about 11.00pm when he saw a crowd milling around PW1 who was bleeding from the head. He was among those who accompanied PW2 to hospital. He then called PW1 and informed him about the incident.

12. **Dr. PAUL KIPKORIR RONO (PW4)** who produced medical relating to PW1 on behalf of Dr. Imbenzi that he had injuries which included cuts on the head which also had a crack in the skull, and the probable weapon used was a rock.

13. **JOHN ONGAYA (PW5)**, a mechanic residing in Kitale town explained to this court that one VICTIM and the 2nd appellant approached him while accompanied by man. The pair had the motor cycle which was not in colour on the body and red black on the head. They asked him to help them to market for the motor cycle. PW5 explained that he knew Accused 2 victor. After explaining his interactions with 2nd Appellant he was released by the police officer.

14. He clarified later in his evidence in chief that Appellant 2 was the one who had approached seeking to find someone somewhere to buy the motor cycle. He had known Accused 2 before.

He could not recall the motor cycle's Reg. No. but it was a Boxer Bajaj model.

PW5 did not take the motor cycle then, because he requested for a document which Appellant 2 undertook to buy but left.

15. **PW6 SGT ROBINSON NAITIPA** investigated the matter and confirmed that the motor cycle was never recovered.

16. The 1st appellant in his sworn defence described how while working as a bouncer at **TANGO** bar, a fight erupted between PW1 and another person, and he (1st appellant) dragged him out of the bar and Appellant 1 who was selling eggs followed to demand money for eggs PW1 had eaten. This, apparently upset PW1 who performed to do something 1st appellant would never forget.

17. To his surprise on 5.4.2010. PW1 arrived at his residence accompanied by other men who demanded that he accompanies them in Kitale. That marked the beginning of his woes as he was taken to a man at Koibarak in Kitale. The man was questioned, but he said he didn't know the

1st appellant nor did he know about any stolen motor cycle, saying he only knew **VICTOR** and another man. Eventually the 1st appellant was taken to the police station and crucified.

18. On cross examination he told the court he knew PW1 as a boda boda rider who used to park his motor cycle outside Tango Bar, where he was also a customer.

He maintained that he knew nothing about the robbery.

19. The 2nd appellant in his sworn defence said he was selling eggs inside Paradise Bar before proceeding to Tango bar, where he sold some boiled eggs to PW1. As the 2nd appellant was selling eggs to other customers, he heard a commotion where PW4 was, and PW1 who had not yet paid for the eggs, was ejected from the bar. He followed PW1 outside to ask for his eggs, and as he was placing the money among his merchandise, PW1 heard the curtain which fell, spilling the eggs. The 2nd appellant demanded that PW1 pay for the damage – and he eventually gave him Kshs.800/- but promised to do something that the 2nd appellant would live to remember.

20. Two months later the 2nd appellant was arrested and on being taken to the police station he found PW1 who asked whether he knew the 1st appellant's residence or phone number. He had neither but gave him the Tango Bar supervisor's number. That it was the supervisor who enabled PW1 to eventually reaching the 1st appellant at his residence. 2nd Appellant confirmed he knew PW1 as his customer. He also claimed to be Gilbert Kiptoo and not Eric, although the original identity card he produced was obtained long after he had been charged and the matter proceeded, concluded and a retrial ordered.

21. HILLARY KIPLAGAT KIPYEGO (DW3) who was the supervisor at Tango Bar (Eldoret), was serving a prison term at the time he testified. He confirmed that PW1 was a boda boda operator who used to park his motor cycle outside the pub. He confirmed that a scuffle occurred involving PW1 who was eventually ejected out of the pub. That the 2nd appellant also followed him, he had not paid for effs and in the process damaged his wire, resulting in PW1 having to pay more money for the damage. Since PW1 appeared aggressive DW3 advised him to remain in the bar for his own safety, and he remained there until 4.00am.

Meanwhile the 1st appellant continued with his work as a bouncer until morning.

22. He confirmed that two months later PW1 called him and sought directions to the 1st appellant's home – so he obliged and directed him. He later learnt that the appellants had been charged.

23. In his judgment, the trial magistrate noted that the appellants and PW1 were not strangers to each other – so the issue of whether the 2nd appellant's name is Gilbert Koskei or Eric Kiptoo is not fatal – I agree. The trial magistrate rejected the appellant's version of what happened and that this was a revenge saying there was proof that PW1 had been injured, saying PW1 could not have self-inflicted the injuries.

24. Further, that it was adequately demonstrated that the motor cycle **KMCGT 636a**, phone and money was stolen from PW1.

That the witnesses were consistent as to the registration number of the motor cycle, which was supported by documents produced by the owner.

Further that PW1 was clear in his testimony that he was assaulted using an object which he could not identify during the incident, which was a clear indication that the attackers were armed with an offensive weapon. That violence was meted, and the 2nd Appellant attempted to dispose of the stole item by approaching PW5 to help him look for a buyer.

Thus the trial magistrate held that all the ingredient for the offence of robbery with violence were met.

25. The appellants challenged the outcome on the following condensed grounds

(i) The particulars of the offence were not supported by the prosecution witnesses' statements.

(ii) The evidence on identification was wanting as PW1 never gave the names of the attackers.

(iii) none of the witnesses saw the 1st appellant with the said motor-cycle, and it was erroneous for the trial magistrate to rely on allegations that his co-accused mentioned him as the other player.

(iv) That the evidence on opportunity for identification was insignificant.

The appellants filed written submissions where they argue that opportunity for identification as not adequate, and the trial magistrate ought to have considered the fact that the alleged victim was drunk. They urge this court to consider the case of Charles O. Mahanyi V R [1986] KLR 198 pg 207 regarding the possibility of error in identification even in daylight, and that the greatest test of care must be exercised.

Further that no evidence was led to prove that the attackers were armed with an offensive weapon.

26. The **DPP** in opposing the appeal argues that there was sufficient evidence on identification, as the appellants were well known to the complainant by name, and they approached her under lights before boarding the motor cycle, so there could be no possibility of an error in the identification. Both appellants confirmed that indeed they too knew PW1, and that he used to park his motor cycle just outside the pub. It was not disputed that the area outside the pub was well lit. This was identification by recognition – it was not just a fleeting glance. In fact it is common ground that on the night and date in question, the appellants and the complainant encountered and interacted with each other.

27. The question is, after leaving the stage for the preferred destination, who else could have accosted the trio, and meted violence which led to PW1's injury.

Miss Busienei on behalf of the **DPP** submits that the 2nd appellant hit PW1 on the head with an object which he held using both hands. They dragged him, and squeezed his neck until he lost consciousness. The P3 form showed the nature of injuries suffered.

Indeed there is no doubt that PW1 was violently assaulted and he suffered injuries. The persons who attacked him were more than one, and used a crude weapon/object to inflict the injuries.

28. PW2 (ALFRED KIPCHIRCHIR) produced documents to confirm that indeed such a motor cycle existed. That motor cycle was never recovered – who took it away after PW1 was attacked? Was it the same motor cycle PW5 was being offered to find a purchaser. If PW5 had not testified, then it would have been easier to believe that perhaps the assault by the appellants was to teach PW1 a lesson for his misbehavior at the pub. But it cannot be a coincidence that the 2nd appellant with a short time after the incident, proceeded to the neighbouring county with a red and black motor cycle looking for a buyer. Admittedly PW5 did not give the motor cycle's registration number, but he explained the circumstances under which the offer was made, and why he ended up not taking the motor cycle. /although this was purely circumstances, I think the chain of events inculpatory pointed to the guilt of the appellants beyond any other reasonable

hypothesis and excludes any other person.

Consequently I hold that the conviction was safe.

29. The appellants were sentenced to death (although I take judicial notice that death sentences in Kenya have been committed to life). I take into account the value of the property involved and the period the appellants had been in remand for 4 years and in prison custody as convicts from 02.08.2010. I think that period of 10 years is adequate punishment and I set aside the death sentence meted, and substitute it with the period served. The upshot is that the appellants shall be set at liberty forth with unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 12TH DAY OF FEBRUARY 2020

H. A. OMONDI

JUDGE