



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CRIMINAL APPEAL NO.22 OF 2019

GALMA ANNA DAMBALA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the original conviction and Sentence of Hon. E.K. Too

Principal Magistrate Moyale in Cr. Case No.103 of 2019)

J U D G M E N T

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. The particulars of the offence for the 1st count are that the appellant on the 16th day of March, 2019 at about 04.35 hours at Laki (Wel-Marer) in Moyale Sub County within Marsabit county, jointly with others not before Court, being armed with AK47 rifles and a stick, robbed MUMIN ABDILLE Ksh.200,100 and immediately before the time of such robbery wounded the said Mumin Abdille.

The particulars of the offence for the 2nd count are that on the same date of 16th day of March, 2019 at about 0435 hours at Laki (Wel-Marer) in Moyale Sub County within Marsabit county, jointly with others not before Court, being armed with AK47 rifles and a stick, robbed MALELE MUKTAR Ksh.46,000 and immediately before the robbery threatened to use violence on the said Malele Muktar.

The trial Court convicted the appellant on both counts and sentenced him to serve 10 years each. The sentence is running concurrently. The grounds of appeal are:

- 1. That the appellant pleaded not guilty to all the concurrent charges throughout the proceedings.**
- 2. That the evidence adduced by the Prosecution witnesses were insufficient to warrant the conviction.**
- 3. That the alleged identification or recognition was not free from possibility of error.**
- 4. That as claimed by the complainant in this instant case the incident occurred at late morning (3.30am) which clearly indicate they were attacked at night, this obviously could not make the victims identify their assailant very well.**
- 5. That the investigation office failed when they never conducted their investigation to the required standard.**
- 6. That the learned trial Magistrate erred in matters of law when he failed to note that the prosecution didn't establish all ingredients of robbery with violence.**
- 7. That there were no exhibits which were produced by the prosecution in support of the charges to the effect.**
- 8. That as alleged by the complainants that they were attacked during the night which to that effect there was no light in the surrounding.**

Mr. Halake appeared for the appellant. Counsel relied on both his written and oral submissions. It is submitted that the prosecution did not prove its case to the required standard. The conviction is based on the identification or recognition of the appellant. The trial court mainly relied on the evidence of PW1, PW2 and PW3 on the issue of identification. The three witnesses gave contradicting evidence of the scene. The incident occurred at 4.30 am under the cover of darkness. There are glaring differences as to what happened on the fateful day.

Whereas PW1 stated that the road was barricaded by tree trunks. PW2 and PW3 testified that the road was barricaded by stones. That evidence shows that it was at night and there was no lighting. The three witnesses testified that light from the vehicle enabled them to identify the appellant. PW1 became unconscious and testified that the vehicle lights were on for just a minute and the armed men ordered them to switch off the lights. On his part PW2 testified that the lights were on for three minutes. None of the witnesses was able to identify the dressing of the attackers or the appellant. The appellant's facial features or clothing was not described. PW1 and 2 alleged that the attackers had a rungu while PW3 alleged that the attackers had a gun. The Investigating officer went to the scene with same witnesses who later attended an Identification Parade.

It is further submitted that the only reason why the appellant was apprehended is that he was not known in the area. He was arrested by the chief. The witness who attended the parade was PW2 and he was present during the arrest and was able to see his appearance and clothing. The Identification Parade was not properly conducted. The evidence does not show that the identifying witnesses had given description of the suspect in advance. It is also submitted that the exact duration of time that PW2 and PW3 had to observe the attackers is not clear. The circumstances were not conducive for positive identification. Counsels made reference to several cases on the issue of identification. Counsel referred to the case of **WANGOMBE -VS- R (1980)KLR -149** where the Court held as follows:

“In this case guilty turned upon visual identification by one or more witnesses.... A reference to the circumstances usually requires the Judge to deal with such important matters as the length of time the witness had for seeing who was doing what is alleged, the position from the accused and the quality of the lights.”

Counsel also relies on the case of **SHABAN BIN DONALD VS R(1940) Volume 7 EACA, PAGE 60** where the Court held as follows:-

We desire to add in cases like this and indeed in almost every case in which an immediate report has been made to the Police by someone who is subsequently called to give evidence details of such report, (save such portions of it as may be at trial), such evidence frequently proves most valuable sometimes as corroboration under the evidence Act, and sometimes as showing that what he now swears in court is an afterthought, or that he is now purporting to identify a person whom he really did not recognize at the time of attack, or an article which is not really his at all.”

Mr. Halake also referred to the case of **R Vs TURNBULL (1946) 3 ALL ER 549 PAGE 552** where the Court stated as follows:

“Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the Jury should be reminded that mistakes of recognition of close relatives and friends are sometimes made.”

Mr. Ochieng, Prosecution Counsel, opposed the appeal. Counsel relied on his written and oral submissions. It is submitted that the main issue on the appeal is that of identification. The identification was sufficient. The distance between the appellant and the witnesses at the time of the incident was quite close. The duration of engagement during the incident was between three to twenty minutes. That is enough time for identification. The incident occurred at around 4.30am and it was not very dark. There was a vehicle whose lights were on. The Identification Parade was proper. The trial Court lightly cautioned itself of the issue of identification and was satisfied that the appellant was properly identified. The proceeding did not show that the Investigating officer went to the scene with the parade witness.

This being a first appeal the court is required to evaluate the evidence afresh before drawing its own conclusion. **PW1 Mumin Abdille** was the complainant in the first count. On the 16.3.2019 at about 4.30am they were travelling from Basir in a land cruiser heading to Moyale. They were about six (6) people in the vehicle. He was seated at the front of the vehicle with the driver. When they reached a place called Lai he saw a road block made of tree trunks. He alighted and remove the logs. After about 2 km he saw another road block. He saw four people three of whom were armed with a gun and the 4th one had a rungu the robbers were in civilian clothes. He was hit with a rungu on the head and lost consciousness. It took less than a minute for him to see the attackers who told them to switch off the motor vehicle lights. He regained consciousness at Moyale Police station. He could not identify the robbers. He realized that his Ksh.200,000 had been taken by the robbers.

PW2 Sadik Abey Abkar is a business man and was with PW1 in the same car heading to Moyale from Basir. He was seated on top of the vehicle. They saw the road block and four people ordered them to stop. Three people were armed with guns while the fourth one, a small boy, had a rungu. The small boy hit PW1 on the head and he fell down while bleeding. It was the appellant who hit PW1. The appellant had a white shirt and a gun. The shirt had green markings on the pocket. The robbers took money from PW1. The Motor vehicle lights were not switched off. It is his evidence that the lights were on for about three minutes. He later attended an Identification Parade and identified the appellant.

PW3 Malele Muktar was the complainant on the 2nd count. He was also travelling with PW1 and PW2. They saw the road blocked with stones. Somebody blew a whistle and four people came out. Three of them had guns. PW1 was hit on the forehead and his money was taken. PW3 lost Ksh.46,500. The robbers told them “BYE” and they left. They identified one person who had a black trouser and white shirt. He had not covered his face. According to him the incident took about twenty (20) minutes. He had not seen the appellant before.

PW4 Inspector Arthur Sangoro was based at Moyale Police station. He was requested by the Investigating officer (PW6) to conduct an Identification Parade. He conducted two Identification parades and the appellant was identified by PW2. One of the suspects was not identified and was released. The identifying witness identified the appellant from his expression and the clothes that were produced in court namely a white shirt and a black trouser. **PW5 Dr. Marsa Hassan** produced a P3 form in relation to PW1. PW1 had a cut wound on the left temporal region and tenderness on the chest. The injuries could have been inflicted by a blunt object

PW6 Sgt Mohamed Hassan was based at Moyale Police station. He investigated the case. On 16.3.2019 the complainants and four other people were travelling in Motor Vehicle Registration Number KAW 706Y heading to Moyale for business. On the way they found the road blocked with logs and were attacked. The case was reported at the Police station by the complainants. He went with other police officer to

the scene together with one of the complainants. He saw the logs used to block the road. They followed foot marks upto the centre where they met assistant chief by the name Jirmo. The assistant Chief had also notified the area MP and also the chief about the incident. The two chiefs held a meeting with the elders and the youth. The meeting concluded that one Qumbi Boru who was in the meeting be arrested and another boy who was later released. The chiefs called the appellant who was chewing miraa and he was told to arrest him because he did not belong to the location and they were suspicious about him. He went to Badarero to look for another suspect and when he returned the elders told him to release the other suspect (Kumbi Boro) as he was innocent. The appellant was taken to the Police station and was later identified in an Identification Parade. The appellant was wearing a white shirt and a black trouser at the parade. It is his evidence during cross examination that it is the information from the elders that led to the arrest of the appellant and he was later identified in the parade.

The appellant tendered unsworn evidence. He stated that on the 15.3.2019 he went to Lai to look for his donkey. On 16.3.2019 he heard about the robbery. He was arrested by CID officer because he was a stranger in the area. He went with the CID officer in a vehicle upto Badarero where they did not get one Abdi Gollo. He was taken to the Police station and put in a parade with Eritreans who did not resemble him. The witness told the police officer that he thought one of the robbers was him. He was told to sign the parade form and he signed. He did not know what was happening.

The prosecution evidence does prove that PW1 and PW3 were robbed of their money. The incident occurred at around 4.30am. There were six people in the vehicle. The victims later proceed to Moyale Police station and made a report. The issue for determination is whether the appellant was one of the robbers. According to the trial Court, the appellant was properly identified and was placed at the scene of the crime.

The conviction is based on identification of the appellant by PW2 and PW3. PW1 was hit with a rungu and was not able to identify any of the robbers. He became unconscious after he was hit with a rungu on the head. According to PW1 the robbers asked them to switch off the lights. PW1 was seated at the front of the vehicle with the driver. The driver did not testify.

PW2 testified that he marked the person who hit Mumin with a rungu. It was the small boy who had a white shirt with green marking on the pocket. It is his evidence that that person is the appellant. The lights were not switched off and were on for three minutes. On his part PW3 testified that the robbers took like 20 minutes to rob them. PW3 did not testify that throughout those 20 minutes the vehicle lights were on.

The scenario presented by the evidence is that soon after the vehicle was stopped someone moved on the side where PW1 was. PW1 was immediately hit with a rungu and lost consciousness. One of the robbers removed money from PW1's pockets while he was unconscious. PW1 realized that his money had been taken when he became conscious at the Moyale Police station. Thereafter, PW3 was robbed.

It is not clear whether the robbers were standing at the front of the vehicle so that it could have been quite easy for the victims to have clearly seen the robbers. PW3 testified that after the robbers took the money, they left. According to PW2 the vehicle lights were on for about three minutes. It is quite doubtful that within those three minutes PW2 and PW3 could easily concentrate on one of the robbers out of four people. PW3 did not testify on how his Khs.46,500 was removed from his pocket. There is no explanation as to what the other robbers did.

The investigation officer went to the scene. He testified that he went to the scene with one of the complainants. The name of that complainant was not given. PW6 further testified that he arrested the appellant on the information from the elders and that the appellant was later identified at an identification parade. The information from the elders is that the appellant did not belong to that area and the elders were suspicious about him. In essence therefore there is no evidence that PW2 and PW3 gave the appellant's physical description or mode of dressing to the Police. Equally, the arrest of the appellant was not as a result of PW2 and PW3 pointing him out to the investigation officer. It cannot be a mere coincidence that after the appellant was arrested then PW3 proceeded to identify him at the parade. The appellant was not arrested because he was wearing a shirt which had a green pocket but was arrested due to the suspicion by the elders. PW4 who conducted the parade testified that the witness identified the appellant from his facial appearance and clothes. The parade form indicate on the section for remarks as follows:-

“The complainant identified the suspect positively by facial appearance, hairy chest, height and black jeans trouser.”

PW2 did not testify that the appellant was either tall or short or that he had a hairy chest. There is no evidence that the appellant's shirt was open during the robbery so as to enable PW2 see the hairy chest.

The appellant testified that he was put in the parade with Eritreans. The parade form has the names of the parade attendants without their identification numbers or address. Some of the attendants' names are Tsegabhan Hagos, Grishina Elemo, Mesfin Shanko, Brhane Mego and Abenet Selemon. Although this court did not have the advantage of seeing the parade attendants, the appellant's contention that those who attended the parade are Eritreans who do not resemble him cannot be wished away. The names of five of the parade attendants appears to be those of either Ethiopians or Eritreans. The parade officer did not inform the trial Court where he got the parade participants from. The only other person was one Ibrahim Hussein and the appellant. In the absence of the parade participants identity card numbers or address, I do find that the appellant's identification is doubtful. The other evidence which led to the appellant's arrest is the suspicion by the elders that the appellant was not from that location. Suspicion alone cannot be the basis of conviction. None of the elders testified so as to explain why they thought the appellant was involved in the robbery.

From the evidence on record, I do find that the prosecutor did not prove its case beyond reasonable doubt. The conviction is not safe. The identification of the appellant by PW3 cannot be held to be free from error. PW3 did not attend an identification parade and his description of the appellant while testifying in court cannot amount to positive identification that can lead to a conviction. PW6 did not testify that the victim's gave the description of their attackers when they went to report the case. PW6 only mobilized other Police officers and went to the scene with one of the complainants. It is not that complainant who went to the scene who pointed at the appellant as one of the attackers. It is the elders who were not at the scene who caused the appellant to be arrested. The entire prosecution evidence leaves doubt on the identification of the appellant which doubt should benefit the appellant.

In the end, I do find that appeal is merited and is hereby allowed. The conviction and sentence is set aside. The appellant shall be set at liberty unless otherwise lawfully held.

Dated, signed and delivered at Marsabit this 8th day of July, 2020

S. CHITEMBWE

JUDGE