



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL NO. 98 AND 98A OF 2017

MORE OLE SARITE.....1ST APPELLANT

MUSA IKOTE NKURUN.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being appeals from the original Criminal Case No 1138 of 2013 dated 4th August 2017 in the Chief Magistrate's Court at Narok, republic v peter Mugomathu, More Ole Sarite & Musa Ikote Nuruna)

JUDGEMENT

INTRODUCTION.

1. The appellants have appealed against their conviction and sentence of death in respect of robbery with violence contrary to section 296 (2) of the Penal Code (Cap 63) Laws of Kenya
2. The state has supported both the conviction and sentence.
3. The appellants were convicted on the circumstantial evidence of the complainant (Pw 1), the investigating police officer (Pw 5 and the Safaricom expert (Pw 6).
4. The law requires the appeal of each appellant to be considered separately. I will therefore start with the appeal of the first appellant.

Appeal of 1st appellant, More ole Sarite

5. The 1st appellant has raised four grounds in his amended petition appeal to this court. In a coalesced form, grounds 1 and 2 the appellant has faulted the trial court for convicting him on circumstantial evidence that fell short of proving the offence of robbery. In this regard, the evidence of Stephen Wanaina Kigundu (Pw 1) was that about five robbers broke open his house at night and demanded cash money from him. As a result, he handed over to them cash shs 35,000. They then forced him to transfer the float cash in his nokia phone for mpesa business in the sum of shs 27,500, after entering his pin in the said mobile phone. He did not recognize any of the robbers. The Nokia phone was produced as exhibit 1.

6. The complainant (PW 1) reported the robbery to his employer, Samuel Tumate Soit (Pw 2). Pw 2 found that the money stolen by way of transfer was shs. 27,500. Pw 2 also found that the beneficiary of the lost money was Musa Ole, the 2nd appellant, whose phone number was 0700 701 909, according to the mpesa data money transaction statement, exhibit 2. *The 2nd appellant pleaded with Pw 2 that he "should not let him hurt. We had previously know each other his home is Sakutiek. He said I do not finish him."* Thereafter they went to Maa Mahiu after the 2nd appellant called his friend, the 1st appellant that they go for work at Narok. They then proceeded to Maa Mahiu police station, where they were given one police officer and two police men from Narok police station. Upon arrival at that police station, he 2nd appellant pointed out the 1st appellant to the police. Upon seeing them, the 1st appellant ran off. The Police shot in the air and the boda boda taxis chased and arrested him.

7. While under cross examination by the 1st appellant, Pw 2 testified that the lost money was sent to 2nd appellant, who was the 3rd accused in the lower court. Pw 2 confirmed that the 1st appellant ran off upon sighting the police at Maa Mahiu. Pw 2 also confirmed that the 2nd appellant was also called Musa Ole. If the 1st appellant was innocent, why was he running away from the police?

8. Furthermore, there is supporting evidence from the investigating police officer, PC Ronald Chemosit (Pw 5), who testified that the stolen

money (shs. 27,500 less shs. 100) was transferred from the phone of the 2nd appellant to that of the 1st appellant within nine minutes of the robbery. This evidence is further supported by the evidence of the safaricom expert, Martin Wekesa (Pw 6). Pw 6 testified that he extracted information from the safaricom account number 0700 701 909, which was held by Musa Ole of identity card number 256 385 596. According to the evidence of Pw 6 shs 27,500 was deposited in that account of Musa Ole on 19th August 2013. Nine (9) minutes later a sum of shs. 27,400 was transferred into the account number 0706 434 925 of More Sarite.

9. In his sworn evidence the 1st appellant testified under cross examination that his identity card number is 21220577, which appears in both statements namely defence exhibit D 2 and prosecution exhibit exh 12. He also confirmed that the picture in the prosecution exh 10 (b) was his picture. Additionally, he also confirmed that the identity card number in both the prosecution exh 12 and his defence exh D 2 is the same. It is therefore clear that More Ole Sarite and More Sarite is one and the same person. Furthermore, I also find that shs. 27,400 is the same stolen money, which was originally shs. 27,500, that he received within nine minutes of it being stolen. It therefore follows that the 1st appellant was found in possession of recently stolen property namely shs. 27,500 less shs. 100. I also find that his denial of the offence and that the person who received the shs. 27,500 was Josephat Lolosur and not Musa Ole is incredible and I hereby reject it. Finally, I find that Musa Ole and Josephat Lolosur is one and the same person. Both appellants strengthened the prosecution case by accepting under cross examination that the statements and photographs from the registrar of persons were theirs. These statements and their photographs were wrongly admitted in evidence by the trial court, since their author was not called as a witness. They became legally admissible in evidence after the appellants admitted that those statements and photographs were theirs.

10. After re-assessing the entire evidence as I am required to do a 1st appeal court, I find that the 1st appellant was convicted on ample evidence. I therefore confirm his conviction. His appeal in that regard is hereby dismissed. I will deal with the issue of his sentence herein below.

Appeal of 2nd appellant, Musa Ole.

11. The 2nd appellant has raised eight grounds in his petition of appeal to this court. In ground one the appellant has stated the unchallengeable fact he did not plead guilty. In a coalesced form the appellant has in grounds 2 and 3 faulted the trial court for convicting him on circumstantial evidence that fell short of proving the offence of robbery. In this regard, there is evidence from the complainant (Pw 1), the employer of Pw 1 namely Samuel Tumate Soit (Pw 2) and the safaricom expert namely Martin Wekesa (Pw 6) that the stolen money was transferred into his account number 0700 701 909 of identity card number 256 385 596. His explanation that he was arrested after being identified by the employer of the complainant (Pw 2), whom he knew before and then taken to Naivasha police station and eventually being charged with this offence was rightly disbelieved. Furthermore, his denial that he did not know the 1st appellant lacks a ring of truth. There is uncontroverted evidence that the stolen money was transferred into his account. Additionally, he testified under cross examination that his name is Musa Ikote Ole Nkuruna, of identity number 256 385 96. And that his name is Musa Ole, who admittedly received the stolen money. He also admitted that the recipient of the stolen money is Musa Ole of identity card number 256 385 96 according to the safaricom statement. Furthermore, he also admitted that the name on the identification certificate exh 8 b is his. He also admitted being the owner of cell phone number 0700 701 909 into which the stolen money was transferred.

12. After re-assessment the above evidence as a first appeal court, I find that Musa Ole and Musa Ikote Ole Nkuruna is one and the same person. I further find that he was in possession of recently stolen property namely the money. I further find that his defence of alibi has been disproved. I further find that the investigating police officer (Pw 5) obtained a court order on 17th October 2013 to investigate the mpesa/telephone accounts of both the 1st and 2nd appellants vide misc app. No 40 of 2013 in respect of account number 0706 434 925 of the first appellant and misc app number 42 of 2013 in respect of account number 0700 701 909 of the 2nd appellant. This is required by law by virtue of the right to privacy that is embodied in article 31 of the 2010 Constitution of Kenya and section 180 of the Evidence Act (Cap 80) Laws of Kenya requires a court order to be obtained before a person's bank account is investigated due to the confidentiality of person's bank account. I therefore find that Pw 5 acted constitutionally. I further find that the appellants acted jointly in committing this offence in terms of the section 21 of the Penal Code. In simple terms, it means that the act or omission of one appellant in furtherance of the commission of the crime amounts to the action or omission of the other appellant (On common intention generally see *Solomon Mungai v R (1965) EA 872*). As a result I find that the offence of robbery was proved beyond reasonable doubt against the 2nd appellant. I therefore confirm his conviction. I now turn to the issue of sentence for both appellants.

13. As regards sentence the Supreme Court in *Francis Muruatetu and Another v. Republic (2017)Eklr* ruled that as a matter of prudence the issue of sentence should be decided upon by the trial court. Consequently, I hereby quash the death penalty imposed upon the appellants. This case is hereby remitted to the trial court to assess the appropriate sentence in the light of the guide lines set out by the Supreme Court in that decision.

14. Judgement signed and dated at Narok on this 17th day of January 2019 in the presence of 1st and 2nd appellants and Mr. Omwega for respondents.

J. M. BWONWONGA

JUDGE

17/1/2019