



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D.S. MAJANJA J.

CRIMINAL APPEAL NO. 80 OF 2016

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 83 OF 2016

BETWEEN

CLIFF NYANGAU1ST APPELLANT

BENARD SAGERO.....2ND APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from the original conviction and sentence of Hon. J. Wanjala, SPM dated 14th September 2012 at the Magistrate's Court at Nyamira in Criminal Case No. 627 of 2011)

JUDGMENT

1. The appellants, **CLIFF NYANGAU** and **BERNARD SAGERO** were charged with the offence of robbery with violence contrary to **section 296(2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the offence were that on 4th September 2011 at Nyamira Township Sub-location in Nyamira District of Nyamira County, the appellant jointly with others not before the court while armed with dangerous weapons namely pangas robbed **JKO** cash 20,000/-, one mobile phone make Nokia 1110 valued at Kshs. 2,500/- all valued at Kshs. 23,300 the property of **JKO** and immediately before the time of the robbery wounded the said **JKO**

2. Before I deal with the issues raised by the appellants, I must recall that I am guided by the principle that the duty of the first appellate court is to re-appraise the evidence and reach an independent conclusion as to whether to sustain the conviction bearing in mind that the court neither heard or saw the witnesses testify (*Okeno v Republic [1972] EA 32*). In order to proceed with this task, it is necessary to set out the evidence as it emerged before the trial court.

3. The prosecution case was that the appellants were part of a gang that attacked **JKO** (PW 1). He owned a posho mill where he used to charge phones. He was residing in his house next to the kiosk. PW 1 recalled that on the material night he was asleep with his wife, **JKJ** (PW 2) when he heard people breaking the door and enter the house. The assailants, who had torches and were armed with pangas, started threatening him and demanding money. They also woke up PW 2. When they demanded money, he told PW 2 to give them the Kshs. 800/- which was in the house. One of the assailant cut him on the head with a panga and demanded more money as they blind folded him. He told them where Kshs. 20,000/- was kept. Thereafter they collected the money and proceeded to drag PW 2 out of kiosk while he remained blind folded. He could hear her being beaten with a panga. They also started pulling him out of the house when he heard them say that they had been arrested and started running outside. In a short while, he heard the door being opened and when he was released from the blind fold he realized it was his father, **ZO** (PW 4) and his relatives. They called the police and they took him to the hospital. Although he accepted in cross-examination that he knew the accused, he told the court that the attackers did not allow him to see the, as they blind folded him with a blanket and shining torches on him.

4. PW 2 was awoken by assailants banging the door. She testified that the assailants came in and started demanding money. She recalled that the 1st accused is the one who demanded to know where the money was. She stated that she knew him by his appearance as she used to see him. She gave him the money. She also recalled that she saw the 2nd appellant who also beat her. She gave him Kshs. 800/- first then the Kshs. 20,000/- in notes. She testified that she was beaten with a panga after she had been dragged from the bedroom to the kiosk where

several phones were charging. After taking the phones, 2nd appellant threatened to rape her. The assailants started pulling her outside but were interrupted by a person shining a torch which caused them to run away. Thereafter the neighbours arrived and called the police. They took, PW 1, who had been injured, to hospital. On the next day, she went to record the statement at Nyamira Police Station. She recalled that she saw the 2nd appellant passing along the road and reported to the police that she had seen him whereupon he was arrested. She also attended an identification parade where she identified both appellants as the assailants. She stated that she knew the 1st appellant as he was a motor cycle rider and the 2nd appellant as he used to come to their kiosk to charge his phone.

5. PW 4 testified that on the material night, he heard screaming and went to PW 1's house. As he reached the house, he saw about 10 people running away. When he arrived he found PW 1 had been injured on his head. He assisted in taking PW 1 to the hospital. He admitted in cross-examination that he did not see the assailants.

6. Pius Moseti Maangi (PW 3) recalled that he examined PW 1 on 2nd September 2011. He observed that PW 1 has sustained a cut wound which had been inflicted by a sharp object. He also had a deep cut on the right hand. He classified the injuries as harm in the P3 medical form.

7. The Investigating Officer, PC Lameck Moroa (PW 5) testified that on 4th September 2011, PW 1 reported to Nyamira Police Station that he had been attacked at about 2.30am that morning. He recorded his statement. PW 5 went to PW 1's home and confirmed that the door had been broken with a stone. He issued the P3 form. On 6th September 2011, he received information that PW 1 was suspecting the appellants. On the same day, the appellants were arrested at the bus stage in Nyamira by members of the public and brought to the Police Station. The appellants were brought to the police station and an Identification Parade (ID) conducted. PW 5 stated that PW 1 is the one who identified the appellants at the Bus Stage and not his wife. The ID was conducted and PW 2 identified both appellants. He told the court that the ID parade forms were lost.

8. In their unsworn statements, both appellant denied the offence. The 1st appellant told the court that on the night of 6th September 2011, he was at home that night, In the morning he came to Nyamira to collect his birth certificate from his sister whereupon he was arrested when he was lured by an old school mate to go with him to collect a letter from the police station whereupon he was arrested. The 1st appellant's mother, DW 3, told the court that 1st appellant was at home and left in the morning to collect his birth certificate. She later heard he had been arrested.

9. The 2nd appellant stated that on 6th September 2011, he left home to purchase firewood and as he passed the Administration Police Camp gate, he met a brother of the complainant who told him about some people who had been arrested for robbery and that he wanted him to go and identify them. He proceeded to the Police Station and was arrested.

10. The offence of robbery with violence under **section 296(2)** of the **Penal Code** is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see ***Dima Denge Dima & Others v Republic* NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR, *Oluoch v Republic* [1985] KLR 549 and *Ganzi & 2 Others v Republic* [2005] 1 KLR 52).**

11. I have no doubt that the prosecution proved all the elements of robbery with violence. The totality of the testimony of PW 1, PW 2 and PW 4 was that more than two assailants, while armed with pangas, broke into the home of PW 1 and assaulted PW 1 in the course of stealing money and mobile phones. PW 1's head injuries were consistent with the evidence of PW 2 and PW 4 and were confirmed by PW 2 who examined and treated him after the incident. The question raised by the appellants is whether they were identified as the assailants.

12. The incident involving the appellant took place at night in less than ideal circumstances for positive identification. The principles upon which the court must assess identification in such circumstances are now well settled in several decisions; ***Anjononi v Republic* [1980] KLR 54, *Regina v Turnbull* [1976] 3 ALL ER 549, *Maitanyi v Republic* [1986] 2 KLR 75, *Karanja & Another v Republic* [2004]2 KLR 140 and *Wanjohi & Others v Republic* [1989] KLR 415.** These decisions hold that evidence of identification must be weighed with greatest care and establish the circumstances of identification and if the incident took place at night as in this case, the court must inquire into the nature of lighting, its brightness or intensity, whether the witnesses view was impeded, the size of the room, the distance of from the light and the time spent with the assailant. This is not an exhaustive list and the court must examine all circumstances and weigh the evidence in order to determine whether the identification is free from error. In addition, the court ought to inquire whether the witness was able to give some description or identification of the assailant to the police or to other persons in order to aid in identification of the assailant. This description and when it was made enables the court to weigh all the evidence in order to come to the conclusion as to whether the identification is free from error.

13. The prosecution case is based on the testimony of a single witness, PW 2. She admitted that she knew both appellants but she knew them only by appearance but not their names. It was thus proper that her capacity to recall the assailants is tested by a properly conducted identification parade. Regrettably the officer who conducted the identification parade was not called nor were the ID parade forms produced to enable the appellants and court test the validity of that parade. This issue is particularly acute because PW 2 testified that she had already seen the 2nd appellant before he was arrested.

14. There is also another piece of evidence that undermines the prosecution case. PW 1 was clear that he did not recognize the appellant as assailants yet PW 5 testified that PW 1 had expressed his suspicion about them. He also testified that it is PW 1 who identified appellants at the stage before they were taken for the ID parade. On the other hand, PW 2 testified that she is the one who identified the 2nd appellant and caused him to be arrested. It was thus not necessary to conduct an ID parade in respect of that appellant.

15. In light of these inconsistencies, I find that identification of the appellants was not positive and free from error and cannot support the conviction and sentence. I allow the appeal, quash the conviction and sentence. The appellants are set free unless otherwise lawfully held on

a separate warrant.

DATED and DELIVERED at KISII this 9th day of APRIL 2019

D.S MAJANJA

JUDGE

Appellants in person.

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions for the respondent.