REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 23 OF 2018

(From SPM's Sirisia Cr.No. 561of 2017 by: Hon.L. Kiniale (SRM)

DENNIS KIPROTICH MOIKUT.....APPELLANT

- V E R S U S –

REPUBLIC.....RESPONDENT

JUDGMENT

Dennis Kiprotich Moikut alias Livingstone (2nd accused in lower court), the appellant, together with another who was acquitted, were jointly charged with two counts of Robbery with Violence Contrary to Section 296(2) of the Penal Code.

The appellant was acquitted on the 2nd count but found guilty on the 1st count. The particulars of the 2nd charge are that on 30/6/207 at Chapkurkur Village of Kopsiro Division, Bungoma County jointly with others not before the court, being armed with dangerous weapons namely; AK-47 rifles, pangas and iron bars, robbed S C N of one radio, make D-light and memory card 2GB, all worth of Kshs.200/= and during the robbery killed her nephew namely M K S.

The appellant was sentenced to 30 years imprisonment.

This is a first appeal and this court is required to examine all the evidence tendered before the trial court, analyze it and the court should make its own findings and determinations, but always bear in mind that this court did not have an opportunity to see the witnesses in order to assess their demeanor. *See* ***Okeno v Republic (1972) EA 32.***

The prosecution case:

The prosecution called a total of twelve witnesses. **S C (PW1)** recalled that she was in her house on 30/6/2017 at Chepkurkur with her husband, D N (PW2) and child, at about 8.30 p.m. when they heard people running outside their house shouting '*kamata*' (catch catch). A person by name Dennis (Denno) called PW2 to go out and he did. After about 3 minutes, there was gun fire and people started knocking on doors. They knocked on her door and broke into the house and entered. Her D-light Solar Lamp was on and she saw three people enter. She knew 2 of them. They had torches and they ordered her to switch off the D-light. When she did not, one of them switched it off.

PW1 said she also recognized their voices; that one was Jetli's brother to Chebarkach also known as Ngeiywo (appellant) who wore a black coat and had a long rifle; that she had known them since she got married in the area, for about a year; that Jetli had a dispute with PW2 over a girl and used to play pool at the market and the other was Denno, who was a tailor and he wore a red long jacket; that the men demanded that she produce her husband; they put the gun to her neck, slapped her and that Ngaywo tore her inner cloths and raped her; that they left as they shot in the air, took the D-light radio with its memory card, PW1's husband did not return that night and so she went to search for him next day; she went for treatment on 2/7/2017, she found that PW2 had been beaten by GSU officers.

PW2 D N T recalled that he was in his house with PW1 about 8.20 p.m. on 30/6/2017 as they listened to the radio when he heard people running outside and a neighbor by name Alex called him and asked him to join them find out what some three strangers wanted. They followed the three people with Alex and Moses and when they reached a corner, the three people sprayed them with bullets and they went to sleep in the maize field that night. When he went home next day, he found a neighbour's cow had been shot. He met GSU officers and he learnt that some people had been killed and he was arrested by the GSU; PW2 said that he had once sued the officers and they had a grudge with him; later PW1 informed her she was reported and they raped the matter to police; that PW1 told her he had identified Ngaiywo and Dennis; that Ngaiywo had taken his first wife at gun point. He moved from the area for fear of his life and his house and all belongings were destroyed.

PW3, Rael Cheptek Tewah of Chepkurkur Village was in her house on 30/6/2017 about 9.00 with her, children and husband, PW4 Alex Kibet when they heard people running outside; that the husband belonged to '*nyumba kumi*' community policing. The husband went out and she heard gun shots, then people knocked at her door until wall which fell. The people entered, attacked her and cut her on the face and both

hands as they demanded that she tells where her husband was.

They threatened to kill both her and her children and cut her on the head as she protected the children; they took her husband's phone and left. Next morning, she discovered her calf had been shot. PW3 was not able to identify any of the robbers. PW4 husband returned next morning having slept in the maize plantation. PW3 said she had slept and switched off the lights and the robbers had torches. She said PW1 and 2 who were also attacked are their immediate neighbors.

PW4 Alex Kibet Beara, a resident of Chepkurkur and member of *'nyumba kumi'* reiterated what his wife PW3 told the court. He said that on hearing noises and going out, he saw some 3 men passing by. He called PW2 to accompany him to follow them. The 3 people had not responded to their greetings and they decided to follow to find out where they were going but the people sprayed them with bullets and they dispersed and he spent the night in the maize plantation only to find his wife had assaulted and his calf had been shot. PW4 went to find out where PW2 was and found he had not returned to the house but the wife PW1 said she was able to identify Ngaiywo and Moikut. He took the wife to hospital and reported the matter to the police.

PW5 SSP Lawrence Ndhiwa, a firearm examiner of CID Headquarters received 28 spent cartridges from PC Johnson Wanjohi Ex.A1-A28 of Calibre 7.62 x 39mm on which he carried out a comparison microscopic examination in comparison with others of equivalent caliber from the laboratory. He found them to have sufficient breach face and ejector markings which made him form an opinion that they were fired from same rifle (and included other cases) and that the rifle had been used in other cases in Mount Elgon area and the likely weapon was an AK-47 rifle.

PW6, Moses Robei Omar of Chwele was heading to Kipsigon on 19/6/2017 when he was stopped by a lady called Tipwim Tambaret, a neighbor, who informed him that one Toboi and Denis had been paid Kshs.60,000/= to kill his brother Robert Omar. He informed the brother but he was already aware of it and said he had reconciled with Toboi. On 30/2/2012, he was in a club meeting with Robert Juma (his brother), Sicheke and Zacharia and when leaving for home, he decided to use a different route while his brother followed Sicheke and Zacharia.

Next morning he received a call that his brother Robert had been killed, he went to Chepkurkur and found Toboi arrested. He informed police what he knew. He said that Denis who was paid to kill was not before the court but it was D N T who was arrested later released.

PW7 Simon Machas Sangora recalled the 30/7/2017 about 3.00 p.m. he went to visit his sick mother together with his brother Moses Sangira. They went back home in the evening. About 9.00 p.m., he heard gunshots and others at 11.00 p.m. Next morning he went to Kipsigon Centre where he learnt that his friend Pastor Robert Omar had been killed. He proceeded to Chepkurkur, found a crowd at the brother's house and was informed that one bullet strayed and hit him but when he found the body, Moses had gun shot wounds, cuts on the legs and body was wounded and in the maize. PW7 identified PW1 as a neighbor to his brother Moses.

Dr. Wafula Edmond (PW8) of Bungoma County Referral Hospital produced three postmortem reports – for Stephen Mwangi who had a depressed scalp fracture wound, 2 deep cut wounds, fracture on left elbow joint, multiple bruises on both lower limbs and cause of death was found to be the deep scalp fracture.

On the body of Robert Juma, PW8 found the body to have lacerations on right ear, a bullet entry wound and left bullet wound (entry and exit) bruises on the right and left, fracture on head. Cause of death was severe head injury from the gunshot wound.

The last report was that of Moses Mutai who sustained a cut wound on the right temporal region and occipital region, a stab wound on left arm; multiple fractures on the head with subdural haemorhage and cause of death was found to be due to severe head injury.

PW9, Rose Ngoron, a Clinical Officer at Cheptais Health Centre examined one Rael on 20/8/2012. She had a scar on the neck and deformed ring finger.

PW10 PC Johnson Wanjohi of DCI Cheptais received a call from DCIO Cheptais on 1/7/2017 informing him of a shooting incident. They went to the scene where they found a body in a maize plantation near a school, photographs were taken of the deceased, M S. They learnt of a robbery incident in the area and visited the scene – houses of Denis Naibei and Alex Kibet. At Denis' house, they found PW1, who reported she was beaten by 3 robbers and raped and was able to identify two, Ngeiywa and Moikut alias Fundi. They took photographs of the scene. The second robbery was at Rael's house but she did not identify the assailants while the 3rd robbery was at Huruma Centre where two people were killed namely: Juma Omar and Stephen Mwangi; that the robbers proceeded to Omar's home and demanded money from his wife. PW.10 collected 28 spent cartridges of 7.6mm which were sent to CID for analysis and later, the Eric Matui and Denis Moikut were arrested on 7/7/2017 and charged.

PW11, Mildred Sabino, a business lady of Kipsigon, was wife to Robert Juma Omar (deceased). She said that on 30/6/2017, after supper, her husband went outside to check on the driver by name Mwangi also deceased, when outside, a pastor called to tell her that attackers had attacked Chepkurkur GSU Camp and she was told to go back into the house while he remained outside with other neighbours. She later heard gun shots outside and hid under the bed. People entered her house with guns, they saw her and ordered her to get out and demanded for money.

She gave them Kshs.330,000/=; they took her bag and all documents and all left. PW11 was not able to see any of the faces save for their legs which were covered in blood. She then went to look for the husband and found two bodies in a corridor between their shop and the chemist and found one was the husband and the driver, Mwangi; that her husband had received death threats from her former husband Eric Matui.

PW11 denied having named any of the accused as the robbers.

PW2 Keya, was a Clinical Officer based at Kapsiro. He examined S C (PW1) on 2/7/2017 with a history of rape. Her pant was ton and had semen and impression of rape was made.

In his defence, the appellant (DW2) stated that he was a tailor by profession and used to teach at the Polytechnic at Kipkikei. He left his place of business on 20/6/2017, went back to his family at Kapsakwon where he stayed till 29/6/2017. He got a job at Kapsakwon SDA Church which he did and on 30/6/2017, he had looked for maize for his family and stayed at the trading centre till 8.00 p.m. when he retired home and slept by 9.00 p.m.

He was arrested while buying fabric in Kitale. He denied raping S; that he was told those who killed his brother were looking for him. He denied having a grudge with PW1; that there is a case in which he had recorded a statement.

DW2 called his wife **DW4 Sona Chepkemoi** as a witness. Her evidence is that DW2 visited home on 20/6/2017 till 2/7/2017 when he left for Kitale. She denied that he ever left the home on 30/6/2017.

The appellant raised the following grounds of appeal:

> ***1. That there is no credible evidence linking him to the offence;***
>
> ***2. That the evidence did not place him at the scene;***
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> ***3. That the conditions under which the offence was committed were not conducive to a positive identification/recongition of the attackers;***
>
> ***4. No identification parade was conducted;***
>
> ***5. That there were contradictions in the prosecution evidence;***
>
> ***6. That the sentence was unlawful.***

The appellant also filed written submissions in which he reiterated the above grounds. He emphasized that there was not sufficient light to enable the victims to recognize the attackers and that the witnesses were coached to implicate him due to the insecurity in the area at the time.

Ms. Njeru opposed the appeal and submitted that the appellant was given a chance to defend himself and testified as DW2, that he never raised the issue of grudge during the trial. On identification, the counsel submitted that the appellant was recognized by PW1 who had a Solar lamp in her house at the time of attack and she described the appellant as a tailor. PW1 also described the manner of dress at time of attack; that he threatened her to reveal where her husband. Upon PW2's return next day, PW1 informed him that she had recognized two of the attackers; that the allegations that he was arrested due to pressure following a spade of robberies in the area is untanable; counsel replied that indeed three people were killed while others sustained injuries in different parts of the area and the appellant was placed at the scene; that the witnesses were injured, were examined by the doctor and all the complainants saw 3 attackers and explained how they were armed and hence the offence of robbery with violence was proved.

As regards the sentence of 30 years, counsel urged the court to uphold it since the magistrate had jurisdiction to pass the sentence.

On the complaint that Joshua Tulei who had recorded a statement was not called as a witness, counsel replied that the appellant should have raised it earlier or should have called him as a defence witness.

I have duly considered all the evidence tendered, the submissions and grounds of appeal.

The appellant faced a charge of robbery with violence contrary to Section 296(2) of the Penal Code. Section 296(2) provides as follows;

> ***"If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."***

The Court of Appeal in the case of ***Oluoch v Republic (1985)*** KLR set out the ingredients of the offence of Robbery with Violence when it held:

> ***"Robbery with violence is committed in any of the following circumstances:***
>
> > ***(a) The offender is armed with any dangerous and offensive weapon or instrument; or***
> >
> > ***(b) The offender is in company with one or more person or persons; or***
> >
> > ***(c) At or immediately before or immediately after the time of the robbery the offender wounds, bets, strikes or uses other personal violence to any person….."***

The use of the word or in the definition means that proof of any one of the ingredients is proof of the offence of robbery with violence under Section 296(2) of the Penal Code.

In the instant case, **PW1 S C** and **PW3 Rael Cheptek** were in their houses which were in the same neighbourhood when they were attacked on the night of 30/6/2017 at about 9.00 p.m. Force was used to break into their houses.

PW1 said that they were 3 people who entered her house. PW3 could not tell how many they were because she did not have any lights on but they were more than one.

Further to the above, PW1 said that she was slapped and thereafter raped by one of the men before they took her torch and left. PW3 on the other hand, was cut on the hands and head as they demanded for her husband (PW4). They then took the husband's phone and left. PW11 also saw the legs of several people who entered her house but did not see the faces.

Both PW1 & 3 were examined by PW9 and PW12 who confirmed they were injured and PW1 raped. No doubt all the three ingredients that constitute a charge of robbery with violence were proved though only one ingredient was sufficient to prove the offence.

The offences were committed in the night. There is only one identifying witness, PW1. Being night, the conditions were under unfavourable to identify. The law is settled that where there is only one identifying witness in unfavourable conditions, the court has to warn itself of the dangers of relying on such evidence and has to apply extra caution.

In the case of ***Abdala Bin Wendo and another v 20 EACA pg.168 v Republic***, the EA Court of Appeal said:

> ***"Subject to certain well known exceptions, it is trite law that a fat 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 respectively identification especially when it is known that the conditions for owing a correct identification were difficult. In such circumstances what is needed is other evidences, whether it be circumstantial or direct, pointing to the guilty, from which a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness, can safely be accepted as free from possibility of error."***

In ***Roria v Republic (1967) EA 583***, the court observed:

In ***Roria v Republic (1967) EA 583 (P584)***.

> ***"A conviction resting entirely on identity invariably causes a degree of uneasiness as LORD GARDNER L.C. said recently in the House of Lords in the course of debate on S.4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts.***
>
> ***`There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten - if there are as many as ten - it is in a question of identity.'"***

I note that the trial court never warned itself of the dangers of relying on the evidence of PW1 alone. PW1 told the court that she had a Solar Lamp in her house; that the robbers had torches which were not lit when they entered. They demanded that they wanted her husband, slapped her and that they demanded that she switch off the light but she did not but one of the robbers did switch off and that is when they put on their torches which they shone at her.

The case of ***Republic v Turnbull (1971) QR 227*** provides useful guidelines in so far as identification is concerned. That court stated:

> ***"... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?.... 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 in recognition of close relatives and friends are sometimes made."***

Guided by the above case, PW1 did not tell the court for about how long she had the robbers under observation, where her solar lamp was still on, she said her house is a three roomed house and the lamp was hang on the room. She did not say which part of the house the lamp was hang and in what roof she was when the robbers entered the house in which the lamp was.

PW1 went on to state that she in fact identified two of the robbers, Ngeiywa and Dennis Moikut the appellant whom she described as a tailor who lived in the neighbourhood and tailored their clothes. However, she did not tell the court how she managed to recognize their voices. PW1 kept referring to the robbers as 'they' apart from saying that Ngaiywo raped her. She never specified what each of them did or what the appellant said that would enable her recognize his voice.

I find that the identification of the appellant was not full proof. There may have been possibility of an error, owing to the circumstances described by PW1.

Further to the above, the appellant raised an alibi in his defence that he had gone back to his home in Kapsakwony from 20/6/2017 till he was arrested in Kitale while buying fabric for his business. When one raises an alibi defence, it is not upon him to prove the truth of the said alibi. The burden of proving the case to the required standard always remains with the prosecution and never shifts to the defence. In ***Kiarie v Republic (1984) KLR 739*** the Court of Appeal held:

"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate's findings on the alibi because the finding was not supported by any reasons."

In the instant case, the trial court never interrogated the appellant's alibi defence in light of the whole prosecution evidence. The court was not told how the appellant was arrested save for what he told the court.

During the testimony of the 1st accused, he wanted the statement of one Joshua Tutei who had recorded a statement to be called as a prosecution witness but was not called. The prosecution opposed the calling of the said witness. The appellant also made reference to the same person in his defence. In ***Mwangi v Republic 1984 KLR 595,*** the court said that it's the discretion of the prosecution whether or not to call a particular witness and the court should not interfere with that discretion unless it is shown that the prosecution's failure to call the witness was influenced by some oblique motive. In ***Bukenya v Uganda (1972) EA 349***, the court said:

> ***"(ii) The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent;***
>
> ***(iii)…….***
>
> ***(iv) where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."***

In this case, the court has found that the evidence on identification to be weak. The defence had wanted Joshua Kibet to be witness called as a witness. He was initially listed a prosecution witness. The question is why the State was reluctant to call him and the failure to call him imputes an oblique motive on the prosecution.

In the end, I find that sufficient doubt has been created in the court's mind that the identification of the appellant was not watertight. I resolve that doubt in the appellant's favour. I quash the conviction, set aside the sentence.

The appellant is set at liberty, unless otherwise, lawfully held.

Signed and **Dated** at ***NYAHURURU*** this ***23rd*** day of ***November,*** 2018.

Abida Ali-Aroni

JUDGE