



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CORAM: D.S. MAJANJA J.

CRIMINAL APPEAL NO. 87 OF 2016

BETWEEN

HILLARY KIPYEGO.....1ST APPELLANT

BONIFACE KIPLIMO.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. G. Adhiambo, SRM dated 25th July 2016 at Kapsabet Magistrate's Court in Criminal Case No. 2191 of 2015)

JUDGMENT

1. The appellants, **HILLARY KIPYEGO** and **BONIFACE KIPLIMO**, were charged, convicted and sentenced to 7 years' imprisonment for the offence of attempted robbery with violence contrary to **section 297(1)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the offence were that on 3rd June 2015 at Serem Village, Nandi County, jointly with another already before the court with intent to rob, while armed with offensive weapons, attempted to rob **MAURINE IMINZA KEYA** of her money by threatening to use actual violence on the said **MAURINE IMINZA KEYA**.

2. The appellants have now appealed against the conviction and sentence on the grounds that there was variance between the particulars of the charge and the witnesses and that there were inconsistencies between the evidence of the witnesses and their witness statements. They complained that the prosecution did not prove the offence beyond reasonable doubt. They pointed out that the manner in which the identification parade was conducted was contrary to the *Police Standing Orders*.

3. It is the duty of the first appellant court to evaluate the evidence afresh and reach its independent conclusion while taking into account that it never heard or saw the witnesses testify. In order to proceed with this task and before I consider the issues raised by the appellant, I will outline the evidence as it emerged before the trial court.

4. The key witness for the prosecution case, Maurine Iminza Keya (PW 1), was at home on 3rd June 2015 at around 8.30pm cooking in the kitchen when she heard assailants come into the kitchen. The three men were armed with pangas, slasher and hacksaw. They stated demanding money from her. She told the court the electric lights were on. She told them that she did not have cash but she had money on her phone in the MPESA as they talked, they took her to the main house where they continued to demand the money. In the meantime, they started breaking the bulbs and ransacking the house. Her sister, Lilian Keya (PW 2), who was in the house with the children, was hiding behind the seats. As they kept searching for the money, PW 1 managed to run away screaming. Her screams attracted the neighbours who managed to arrest one assailant. She reported the incident at Kobujoi Police Station. On 9th June 2015, she attended an identification parade where she identified the appellants at the parade.

5. PW 2 who was in the house, confirmed that after PW 1 raised alarm, the neighbours came and managed to arrest one of the assailants. She did not identify any of the assailants. Andrew Korir, PW 3, is one of the people who responded to the alarm. He confirmed that PW 1's house had been ransacked. He saw two men jump over the fence whom he identified as the appellants. He had known them for a period of 5 years as he used to see them near Serem market. He told the court that he was able to identify them by the lights of a vehicle. He confirmed that one of the assailants was arrested at the home. Elphas Kiprop (PW 4) testified that he responded to the alarm and was among those who arrested one assailant. He told the court that the assailant named the appellants as his accomplices.

6. Joseph Kipyego (PW 5), the Assistant Chief of Mugen Sub-location and Musa Kipkirong Chepwachei (PW 6) both received instructions to arrest a suspect on 7th June 2015. With the assistance of village elders they managed to arrest the 2nd appellant. They both testified that

they did not know the 2nd appellant prior to the arrest. AP Senior Sergeant Harry Kisorio (PW 7) testified that on 5th June 2015, he was deputed and he did arrest the 1st appellant. He stated that he knew him before and had met him previously.

7. PC Isaack Wanjura (PW 8), the Investigating Officer, confirmed that the incident of attempted robbery was reported on 3rd June 2015 and he was instructed to investigate the matter. He visited PW 1's home where he found some broken bulbs. He was informed that one suspect had already been arrested by members of the public. He re-arrested the suspect and recorded statements. PW 3 mentioned the names of the appellants who were also mentioned by the suspect who had been arrested. After the appellants were arrested, he organized an identification parade which was conducted by Chief Inspector Omari (PW 9), the Commanding Officer of Kobujoi Police Station. PW 9 conducted the identification parade on 9th June 2015 where PW 1 identified the appellants.

8. The 1st appellant denied the offence in his sworn testimony. He gave an account of his arrest on 5th June 2015. He told the court that he had been working at the Nyayo Tea Zones and he was called by his wife while he was at his uncle's place and informed that the area chief wanted to talk to him. He alleged that the chief spoke to him about a stolen cow that was at his home. He said he would avail himself to work on the next day after work by the was arrested at night by the Chief and police officers. He confirmed that he attended the identification parade. The 1st appellant called Kipkosgei Sila (DW 3) as his witness. He told the court that the 1st appellant left home on 5th June 2015 at around 3.00pm when he left to go and repair a tractor after receiving a call. He recalled that he received a message at night informing him that the 1st appellant had been arrested for stock theft. He went to the police station in the morning to follow up the matter and was arrested because he was a suspect. He was later charged.

9. The 2nd appellant gave an unsworn statement. He told the court that he was at work on 7th June 2015 at his barbershop when he was arrested at about 11.00am by a person who identified himself as the chief and an Administration Police officer. They told him that they suspected he had stolen his radio, speaker and batteries. He was arrested and taken to the police station. He attended the identification parade on 9th June 2015.

10. The offence of attempted robbery with violence under **section 297(1)** of the **Penal Code** is defined as follows:

297. Attempted robbery

(1) Any person who assaults any person with intent to steal anything, and, at or immediately before or immediately after the time of the assault, uses or threatens to use actual violence to any person or property in order to obtain the thing intended to be stolen, or to prevent or overcome resistance to its being stolen, is guilty of a felony and is liable to imprisonment for seven years.

11. I am satisfied that all the elements of attempted robbery with violence were proved. PW 1 and PW 2 testified that three assailants came into the house, while armed with weapons, started demanding money while issuing threats of violence. They would have completed the act of robbery with violence had PW 1 not gone out of house and raised alarm.

12. The thrust of this appeal is whether the appellants were identified as the assailants. PW 1 admitted that she did not know the assailants hence this was a case of identification of a stranger in circumstances that were difficult for positive identification. The Court of Appeal has given guidance on how evidence of a single witness is to be approached in a catena of decisions (see **Abdalla Bin Wendo & Another v R [1953] 20 EACA 166, Anjononi & Others v Republic [1980] KLR 59** and **Francis Kariuki Njiru & 7 others v Republic NRB CA Cr. Appeal No. 6 of 2001 [2001]eKLR**). In **Wamunga v Republic [1989] KLR 424** the Court of Appeal warned that;

[W]here the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely be the basis of a conviction.

13. Before acting on such evidence, the trial court ought to make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him (see **Maitanyi v Republic [1986] KLR 198** and **R v Turnbull [1967] 3 ALL ER 549**).

14. In this case, PW 1 recalled that the assailants came into the kitchen as she was cooking. She told the court that the electric light in the kitchen was on and she was able to see the three assailants as they demanded money from her. They were not disguised and the demand for money took some time as she told them she did not have cash but had money in her MPESA which she could send to them. Thereafter they escorted her to the main house where they started breaking the bulbs until she decided to run away. Upon my evaluation of this evidence, I am satisfied that PW 1 spent sufficient time with the appellants in the kitchen which had an electric light. The time spent with them in the confined space, the interaction through discussion and the fact that they escorted her to the main house where they started breaking bulbs was sufficient time for PW 1 to have a good impression of the assailants. I am therefore satisfied that the circumstances prevailing that night were favourable for positive identification.

15. Since PW 1 did not know the assailants, the police were entitled to test her capacity for recall by an identification parade. The appellants had been identified independently by PW 4 who stated that he identified them when he shone his vehicle lights as they were trying to escape. The assailant who was arrested by members of the public also named them as accomplices. In the circumstances, the police were entitled to put the identity of the appellants to PW 1 after they had been named and arrested by other parties to test their identity (see **Nathan Kamau Mugwe v Republic NRB CA CRA No. 63 of 2008[2009] eKLR**).

16. To test the identity of the assailant, PW 8 arranged for PW 9 to conduct the identification parade. The appellants complained that the parade was not conducted in accordance with the **Force Standing Orders** and the standards laid down in **Rex v Mwangi s/o Manaa[1936] 3 EACA 29** amongst other cases. Some of the relevant instructions contained in the **Force Standing Orders** are as follows;

1. *The Accused person is always informed that he may have an Advocates or friend present when the parade takes place.*
2. *The officer in charge of the case, although he may be present, does not carry out the identification parade.*
3. *The witness does not see the accused before the parade.*
4. *The accused is place among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself or herself.*
5. *The accused is allowed to take any position he chooses, and he is allowed to change his position after each identifying witness has left, if he do desires.*
- 6.
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10. *The witness is to touch the person he identifies.*
11. *At the termination of the parade or during the parade the accused is to be asked if he is satisfied that the parade is being conducted in a fair manner and a note is to be made of his reply.*
12.

17. PW 9 conducted the identification parade on 9th June 2015. As regards the 1st appellant, he told the court that he arranged 8 members from members of the public from the area. The 1st appellant selected to stand between No. 4 and 5 and PW 1 picked the appellant. At the end of the parade the 1st appellant stated he was not satisfied as he said PW 1 had initially selected one suspect then changed her mind and pointed to the 1st appellant. He prepared the ID parade form and signed it. The 1st appellant commented that PW 1 knew him as she had worked with him at an MPESA shop at Serem. The 2nd appellant chose to be placed between the No. 6 and 7. PW 1 identified him by touching him in the stomach. The 2nd appellant did not raise any complaint and PW 9 signed the ID parade for.

18. The complaint by the 1st appellant is that PW 1 was being nudged by PW 9 to select him. He suggested that in fact the ID parade was not necessary as he had worked with PW 1. This suggestion is an afterthought as it was not put to PW 1 by the 1st appellant when he extensively cross-examined PW 1. Likewise, I do not see any problem with PW 9 informing a witness take time to look at each suspect in order to reflect on the choice and identity of the assailant. Having considered the manner in which the identification parade was conducted, I am satisfied that it was done in line with the ***Force Standing Orders***.

19. The positive identification by PW 1 must be weighed against the alibi defences raised by the appellants. The burden of proving a case against an accused person beyond reasonable doubt always rests with the prosecution and never shifts to the accused even in cases of an alibi defence (see ***Kiarie v Republic [1984] KLR 739***). In ***Uganda v Sebyala & Others [1969] EA 204***, the court stated thus:

The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts.

20. I have tested the alibi defence raised by the accused and I reject it in light of positive identification of PW 1. Both appellants carefully avoided to testify about their whereabouts of on the night of 3rd June 2015. They concentrated on their arrest and when they had the opportunity to question PW 8, the investigating officer, they did not raise any issue about other offences they alleged they were suspected of. I accordingly affirm their conviction.

21. I do not find any error in the sentence of 7 years' imprisonment imposed on the appellants and I affirm it. The appeal is dismissed save that the sentence of 7 years' imprisonment for both appellants shall run from **12th June 2015**.

SIGNED AT KISII

D.S. MAJANJA

JUDGE

DATED and DELIVERED at ELDORET this 3rd day of JUNE 2019.

H. A. OMONDI

JUDGE

Appellant in person.

Ms Mokuu, Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.