



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 1 OF 2018

LEYEYIO LENGERTE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**(An Appeal arising out of the conviction and sentence of Hon. H.W. Nyaga - CM delivered on 21st November 2017 in Makadara CM.
CR. Case No.697 of 2012)**

JUDGMENT

The Appellant, Leyeyio Lengerte was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on 5th February 2012 at Mwiki Estate in Kayole within Nairobi County, the Appellant, being armed with a dangerous weapon, namely a sword, robbed Ephantus Waweru Rukenya of cash Ksh.14,000/- and his mobile phone make Nokia 1680 valued at Ksh.4,000/- and immediately before or immediately after the time of such robbery wounded the said Ephantus Waweru Rukenya. The Appellant was charged in the alternative count with the offence of handling stolen goods contrary to Section 322(2) of the Penal Code. The particulars of the offence were that on 5th February 2012 at Mwiki Estate in Kayole within Nairobi County, otherwise than in the course of stealing, the Appellant dishonestly received or retained one mobile phone make Nokia 1680 knowing or having reasons to believe it to be stolen property. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, he was convicted as charged in the main charge and sentenced to death. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of Appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He asserted that the evidence of identification adduced by the prosecution was not sufficient to sustain a conviction. He was of the view that the prosecution's evidence was inconsistent and full of contradictions. He was aggrieved that the trial court failed to consider his defence in arriving at its decision. He faulted the trial court for convicting him based on the evidence from a poorly conducted investigation. He took issue with his conviction stating that his rights to a fair trial as enshrined under Articles 21(1), 25(c), and 50(2)(h) of the Constitution were violated by the trial court. In the premises therefore, the Appellant urged the court to allow the appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to the court written submissions in support of his appeal. He urged this court to allow his appeal. Ms. Akunja for the State opposed the Appellant's appeal. She made oral submissions to the effect that the prosecution had proved its case to the required standard of proof beyond any reasonable doubt. She stated that the robbery occurred at night at about 3.00 a.m. The complainant was coming from a bar. He was walking to the bus stop when the Appellant accosted him. Learned State Counsel asserted that the evidence of PW1, PW2 and PW4 established that the scene of the robbery was well lit. The Appellant was identified by PW1, PW2 and PW5. He was armed with a panga which he used to injure the complainant during the course of the robbery. The evidence of PW6 corroborated the complainant's evidence that he was injured during the robbery. Ms. Akunja submitted that the Appellant was arrested shortly after the robbery occurred. He was arrested in possession of the complainant's phone. She was of the view that the prosecution established the ingredients of the charge to the required standard of proof beyond any reasonable doubt. In the premises therefore, she urged the court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows: PW1, Ephantus Waweru was the complainant. He was at a bar on the night of 4th February 2012. He left the bar at about 3.00 a.m. with two other people. They walked to the bus stop. He was making a call at the bus stop when suddenly a man grabbed his phone. PW1 started running towards a nearby police station. The man chased after him. The said man caught up with him and hit him at the back of his head. PW1 turned to face the man. The man suddenly cut his right small finger with a panga. He also cut him on his forehead. PW1 fell on the ground and lost consciousness. When he woke up, he heard someone say "Take your person. I have killed him". PW1 was taken to St. Francis Hospital and was admitted at the hospital for about a week. He was robbed of his phone, cash Ksh.14,000/- and his wallet. The police visited him at the hospital and informed him that a suspect was arrested in possession of

his mobile phone. He identified the recovered phone as the phone that was stolen from him. PW1 stated that the scene of the robbery was well lit by security lights. He told the court that he was able to identify his attacker.

PW2, Martin Macharia worked at a car wash that was close to the scene of the robbery. He was at the car wash on the night of 4th February 2012. At about 3.00 a.m., he heard a lady screaming nearby. He located the lady. She pointed him to the direction where the Appellant and PW1 were. PW2 stated that the area was well lit with security flood lights. He told the court that he saw the Appellant pin down PW1 on the ground. He was armed with a panga. He cut PW1 with the panga. PW2 testified that he was able to identify the Appellant. The Appellant was known to him. He knew the Appellant by his nickname 'Lolopop'. When the Appellant saw him, he fled the scene shouting that he had cut PW1 and they should get his corpse. He found a man by the name Solomon who helped him take PW1 to hospital. On their way to hospital, they met with police officers who were on patrol. They reported the incident to them.

PW3, Solomon Mutungei worked as a security guard at a hospital. He confirmed that on 5th February 2012 at about 5.00 a.m., PW1 was brought to that hospital. He had cut wounds on his head and hands. PW4, Jacinta Njoki was a bar attendant at Hideout Bar. She stated that she left the bar with PW1 on that fateful night. She told the court that PW1 was making a phone call when a man suddenly emerged from the side of the road and attacked PW1. PW1 started running away. The said man drew a sword and started chasing PW1. After a while she heard a man telling them to go and collect the corpse. She found PW1 bleeding on the ground. PW1 was taken to the hospital.

PW5, Martin Saning'o worked as a night guard. The Appellant was known to him as they came from the same neighborhood. He was duty on 5th February 2012. At about 2.00 a.m., he met with the Appellant. The Appellant became abusive. The Appellant attacked him and took his dagger. The Appellant cut him on his hand and face. PW5 managed to flee from the scene and sought medical treatment. He reported the incident to police officers at Mwiki. He was informed that the Appellant was arrested in possession of a dagger. He identified the dagger as the same one the Appellant had earlier taken from him. He was also told that the Appellant had used that dagger to injure another person. He however did not witness the Appellant attack the complainant.

PW6, Dr. Zephania Kamau of the Police Surgery examined PW1 on 29th February 2012. He stated that the Appellant had scars on the left side of his face, the upper right temporal region, the back temporal region and on the right forearm. He had a plaster on his right hand. PW6 testified that the injuries were caused by a sharp object. He said that PW1 had earlier been treated at St. Francis Hospital. He produced the P3 form into evidence.

PW7, Sgt. Joseph Wambua was the arresting officer. He was based at Mwiki Police Station at the material time. He was on patrol with PC Kennedy Simiyu on the morning of 5th February 2012. At about 6.00 a.m., they met a group of Masaai men who worked as night guards around Mwiki. They informed him that a Masaai man had robbed someone. PW7 and his colleague searched around for the assailant with the help of other night guards. They arrested the assailant forty-five (45) minutes later near Panda Hospital. The man they arrested is the Appellant. He was arrested in possession of a dagger and PW1's phone.

This case was investigated by PW8, PC Joseph Ole Nampaso. He was attached to Mwiki Police Station. He was assigned the case on 5th February 2012. The Appellant was in custody. The complainant was admitted at St. Francis Hospital. He interrogated the witnesses and recorded their statements. The arresting officer informed him that the Appellant was arrested in possession of a knife and the complainant's mobile phone. The complainant was able to positively identify the phone as the same one that had been stolen from him. He availed a receipt for the purchase of the said phone. PW8 later charged the Appellant with the present offences.

When the Appellant was put on his defence, he testified that he worked as a night guard at Mwiki. On the material night, he was at work. He denied robbing the complainant. He denied being arrested in possession of the complainant's phone. He stated that the complainant mistook him for some else. In essence, he was saying that his was a case of mistaken identity.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make comment regarding the demeanour of the witnesses (See Okeno vs Republic [1972] EA 32). In the present appeal, the issue for determination is whether the prosecution established the charge of robbery with violence contrary to Section 296(2) of the Penal Code against the Appellant to the required standard of proof beyond any reasonable doubt.

It was evident from the facts of the case that the prosecution relied on the direct evidence of identification and recovery of the stolen phone to secure the conviction of the Appellant. As regard evidence of identification, PW1 and PW2 testified that they were able to positively identify the Appellant during the night of the robbery. They both stated that the scene of robbery was well lit due to presence of street lights. PW1 told the court that a man attacked him as he was making a phone call at the bus stop. PW1 took off. The man chased after him. The man hit him at the back of his head. When he turned to face the robber, the robber cut him on his face and hand. He fell down and lost consciousness. PW1 stated that he saw the robber's face as he attacked him. This court is not convinced that PW1 was able to identify his attacker in such hectic circumstances of the robbery. The robber hit him at the back of his head. When he turned to face the robber, the robber hit him on his forehead. He fell on the ground and lost consciousness. This court is of the opinion that PW1 did not have enough time to memorize the physical features of his attacker. The Appellant was not known to PW1 prior to that fateful night. When the police arrested the Appellant, they ought to have conducted an identification parade for PW1 to pick out his attacker. PW1's identification of the Appellant in court therefore amounted to dock identification.

However, PW2 was able to positively identify the Appellant and place him at the scene of the robbery. He witnessed the Appellant attack PW1. He worked as a night guard at a car wash in Mwiki. He testified that he heard a lady screaming. When he got to where she was, she pointed him to the direction where the Appellant was attacking PW1. He stated that the area was well lit due to presence of bright security flood lights. He saw the Appellant attacking PW1 who was on the ground. The Appellant cut PW1 with a dagger. The Appellant was known to PW2. PW2 had seen the Appellant around the neighborhood. He called out the Appellant by his nickname "Lolopop". When the Appellant saw him, he fled from the scene. PW2's identification of the Appellant was by recognition. He was able to positively identify the Appellant as the assailant since he witnessed the robbery. The Appellant was positively identified by PW2 and placed on the scene of crime.

The Appellant was arrested a few hours after the robbery incident. The arresting officer (PW7) testified that he was on patrol with PC Simiyu when they met a group of Masaai men who worked as night guards around Mwiki. They informed him that a Masaai man had robbed someone. PW7 and his colleague mounted a search for the robber with the help of other night guards. They arrested the assailant forty-five (45) minutes later near Panda Hospital. The man they arrested is the Appellant. He was arrested in possession of a dagger and PW1's phone. In the case of Arum -Vs – Republic [2006] 2 EA 10, the Court stated as follows:-

“Before a court can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. There must be positive proof; first that the property was found with the suspect; second that the property is positively identified as the property of the complainant; thirdly that the property was recently stolen from the complainant.”

In the present appeal, it is evident that all these three ingredients were proved. PW7 confirmed he arrested the Appellant in possession of a dagger and PW1's phone. PW1 positively identified the phone as one of the items that was stolen from him. **He produced in evidence a purchase receipt for the said mobile phone. It therefore follows that the doctrine of recent possession was properly applied in this case. There was no doubt that the Appellant was found in possession of the mobile phone belonging to the complainant after his arrest. This was immediately after the robbery incident. The Appellant failed to give a valid explanation as to why he was arrested in possession of the complainant's mobile phone so soon after the robbery.**

In addition, PW5 testified that on the material night at about 2.00 a.m., he met with the Appellant. PW5 was a night guard at Mwiki. The Appellant was known to him. They came from the same neighbourhood. The Appellant became abusive. He attacked him and stole his dagger. He cut him on his hand and face using the said dagger. PW5 managed to escape. He ran away and sought medical treatment. When he went to report the incident to the police station, the Appellant was in custody. His dagger had been recovered. He was able to identify the dagger recovered from the Appellant as the same one the Appellant took from him on the material night. He was also able to positively identify the Appellant as the man who attacked him since the Appellant was known to him. The Appellant in his defence statement indicated that he worked as a night guard at Mwiki. The Appellant robbed PW1 at 3.00 a.m., approximately one hour after attacking PW5 and taking his dagger. He used the same dagger to attack and injure PW1.

In the present appeal, the ingredients of the offence of robbery with violence were established by the prosecution. The Appellant was armed with a dagger when he robbed PW1. This is a dangerous and offensive weapon. PW2's and PW6's evidence established that personal violence was occasioned on the complainant by the Appellant. PW6 examined the complainant on **29th February 2012. He stated that the Appellant had scars on the left side of his face, the upper right temporal region, the back temporal region and on the right forearm. He had a plaster on his right hand. PW6 testified that injuries were caused by a sharp object.** This medical evidence corroborated the complainant's evidence in regard to how he was attacked, robbed and injured by the Appellant.

From the above analysis of the evidence, this court is of the view that the prosecution established its case on the charge of **robbery with violence** contrary to **Section 296 (2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt. The Appellant's defence did not rebut the overwhelming evidence adduced by the prosecution. His defence was a mere denial. It did not dent the otherwise strong culpatory evidence adduced against him by the prosecution witnesses. The upshot of the above reasons is that the appeal lodged by the Appellant lacks merit and is hereby dismissed. His conviction by the trial court is hereby upheld.

The Appellant was sentenced to death by the trial court. Following the recent decision of the Supreme Court in Francis Karioko Muruatetu & Another vs Republic [2017] eKLR, this court has discretion to re-sentence the Appellant on the basis of severity of the offence. In the present appeal, the complainant sustained serious injuries occasioned by the Appellant during the robbery. The injuries were classified as grievous harm. In the premises therefore, this court sets aside the death sentence meted by the trial court. The same is substituted with a sentence of this court sentencing the Appellant to serve fifteen (15) years imprisonment with effect from today's date. This court has taken into consideration the period that the Appellant was in lawful custody both before his conviction and after his conviction by the trial court. It is so ordered.

DATED AT NAIROBI THIS 17TH DAY OF JULY 2019

L. KIMARU

JUDGE