



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO. 35 OF 2018

LENNOX PORIOT NAITATUM.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Eldama Ravine Cr. Case no. 554 of 2017 delivered on the 28th day of May, 2018 by Hon. J.L. Tamar, PM]

JUDGMENT

Introduction

1. The appellant who was, as first accused charged with another for the offence of robbery with violence c/s 296 (2) of the Penal Code, on 28th May 2018 convicted for the offence and on 18th June 2018 sentenced to serve imprisonment for forty (40) years. The 2nd accused was acquitted for lack of sufficient evidence.

Grounds of Appeal and Submissions

2. In his amended grounds of appeal, the appellant raised, principally, the issues of identification lack of crucial witnesses and the credibility of the complainant and urged that the prosecution had not proved its case beyond reasonable doubt.

3. The DPP did not oppose the appeal and in submissions before the court urged the court to allow the appeal as follows:

Appellant

I will respond to the DPP's submission. I have filed written submission.

DPP

Appeal is not opposed

*Appellant convicted of robbery with violence contrary to section 296 (2) and sentence to 40 years. **Appeal is conceded on the ground of identification and poor investigation.** Pw1 testified that on the material day 2 people forced their way inside their house. One of them had a gun and his name was Lennox at page 23 line 3, 4 and 5. She testified that she knew the appellant well as he was a boda boda rider at Chemolingot. She had known him for 4 months before the attack.*

She further stated that there was a time when she found the appellant quarrelling with one Mr. Waka who was Hon. Kamama's driver and she had intervened as they wanted to fight. That is when she got to know him.

She stated that the 2 stole from her Ksh. 300,000/= and Lenovo phone with 12,000/=. The assailant took about 5 minutes in her house and although it was at night she said the lights were on and that is how she was able to identify the appellant. Page 25 lines 11-15.

*Pw1 testified that when she reported the matter to the police she said names of 2 assailants and their descriptions. **However, she did not say which names she gave to the police. She was later called on 11/4/2017 and informed that the appellant had been arrested.***

During cross-examination line 10 page 27, Pw1 introduces another name for the appellant and stated that Butere is not her friend and that he operates a boda boda. At same page line 16 she also refers to the appellant as Butere saying that she received a threat

message from Butere who is the appellant.

Pw1 therefore refers to the person who attacked as Lennox and in the testimony in chief and as Butere in cross-examination. It is therefore not clear whether Lennox was the same person as Butere. It is also not clear why Pw1 in her testimony failed to state that Lennox had another name Butere if it is true that the two names referred to the same person.

This could only have been proved by identification parade which was not done.

Pw6, the I.O at page 41 lines 3-6, he testified that when Pw1 reported the matter she said that she had been attacked by a person named Butere which he later learned was an alias for the appellant.

When Pw1 said that it was Lennox who had attacked her it was not clear why she reported it was Butere at the police station and why that another name. It is not clear at what stage Pw1 knew that her attacker when she identified as Lennox was also called Butere.

In order to clarify whether Lennox and Butere were same person the Investigation Officer should have arranged for parade identification.

If he knew that the appellant has also called Butere, it is not clear why he did not put Butere as an Alias in the charge sheet.

Pw2 at page 31 lines 20-21 stated that she gave the money to the appellant herein who was dark skinned and did not give the name at that point. Later at page 32 line 6 he states that the appellant's name was Butere.

At page 33 line 1. She further states that she did not know Butere's name at the time she recorder the statement. It is not clear when she got to know that the attacker was Butere and that Butere is the appellant herein.

Pw3 at page 34 line 11 that he used to see the appellant operating a Boda Boda at Chemolingot. The same page and line 17/18 she said that she saw the appellant who was slender and tall. He did not give a name. Since she identified the appellant by Physical appearance there was need to conduct identification parade for him to clarify that the person she saw that night was the appellant.

Pw6 Investigating Officer, further testified that he got in touch with Cyber Crime Police who helped to locate the whereabouts of the appellant using a phone number that had been given by Pw1 and which allegedly used by the appellant to call Pw1 severally after the attack threatening her. At page 42 line 14-15 Pw6 testified that at first appellant was located at Malindi and later on 9/4/2017 the appellant's number was sighted at Marigat from where he was arrested.

The Investigating Officer did not produce any Safaricom Printout to show that the number she had been given by Pw1 and which he was tracking belonged to the appellant.

The evidence on record shows the appellant was arrested by members of the public and by police. If indeed he had sighted the appellant at Marigat, he ought to have traced the appellant and arrested. It is not clear whether the Investigating Officer was tracking the appellant's number which the number he was tracing was the appellants.

At Page 43 line 7 Investigating Officer stated that appellant was positively identified by Pw1 and the police station when he was arrested. It does not explain why an identification parade was not conducted for Pw1, 2, 3 who had claimed to identify the appellant on the night of the attack to be able to identify him. Pw1 and Pw2 identified the appellant from the Dock. It is our submission that there were many inconsistencies and doubt in the way the appellant was identified. Considering the offence, the inconsistencies ought to be given to the appellant. I urge the Court to allow the appeal."

4. The court has reevaluated the evidence before the trial court to determine the question whether the offence of robbery with violence has been proved against the appellant as required of a first appellate court. See ***Okeno v. R*** (1972) EA 32.

Identification

5. Pw3, the complainant's tenant and neighbor said that it was 8.00pm on the material day and he was outside the house when he saw 2 people next to the tap and one headed to the complainant's house and there was security light at PW1 Rhoda's house illuminating the compound. He was "ordered to go back to the house by a dark and slender and tall person [and he] went back into the house... peeped from the window [and] saw two people at Rhoda's house [and] heard screams from Rhoda's house". Pw3 said that "after the accused person left, I went to console the complainant. The complainant told me she was able to recognize the 1st accused as she had seen her the previous day on 23.01.2017. The robbers took about five minutes and left". The witness said he had given "description of the 2nd accused [and] said he was light skinned and short. The other was slender dark skinned and tall. The dark and slender one had a gun".

On cross-examination he conceded that he had seen "two people who I did not know".

6. Pw4, the AP Officer who arrested the 2nd accused did not witness the robbery and only testified that he was aware that the two accused had other cases pending against them at Kabarnet Law Court and "there had been a robbery at complainant's house and that the 2nd accused was adversely mentioned". He said that the complainant had told him that she was able to identify the first accused [and] his name was Poriot.

7. Pw5 was the Clinical Officer who examined the complainant and found that there was a local tenderness at the side of the head [but] there was no cut or wound on the right forearm in midrib aspect. The same was tender but no sign of fracture. *"The approximate age of injury is three weeks"*.

8. Pw6 was the Investigating Officer who received a report of the incident on 25/1/2017, a day after the alleged robbery on 24/1/2017 and he said that *"the complainant was categorical that Butere had the gun but the other was not armed and that the people who attacked her could be identified by name Butere which I later realized was an alias. The other suspect could be identified physically"*. The witness said he was able to get the 1st accused arrested at Marigat using his mobile phone number which was traced to Malindi and later Marigat, as the 1st accused's mobile number was given to him by the complainant.

9. Pw1 the complainant testified that it was on 24/1/2017 at around 8.00pm while she was at home with her children, one of whom testified as Pw2, and her sisters Kamachepolin and Felister Lopaki. Her house lights were on and she was able to identify her attackers as follows:

"PW1

My name is R.C.K resident of Chemalingot in Tiaty. I am in business of buying and selling Donkeys.

I do recall on 24th January, 2017 around 8:00 pm I was at home in Chemolingot with my children. My children were Wilkister Rotuma Kewasis, Claire Chepchumba and my sister Kamachepolin also with me was Felister Lopaki. I also had a two year old child called Chelimo Kewasis.

While inside the house I heard screams from outside. I opened the door to check what was happening. My house had lights on. I saw two people approaching my house one had a gun and the other has his head covered with scalf. My house also had security lights it was on.

The two pushed the door inside and forced their way inside my house. The one with the gun pointed it on my chest. The one who pointed a gun at me was Lennox. He then told me that he was a terrorist and that he had come to finish me.

I know him very well. He had a boda boda in Chemolingot. I had known him for four months before the attack. I used to see him in Chemolingot Centre. There was a time I found the accused Lennox quarrelling with Mr. Waka Hon. Kamama's driver. They wanted to fight and I intervened. That was when I got to know him. I got to know him then.

I then heard from a lady friend of mine that Lennox had told her and others that he was going to rob me because I had money. I made a report at AP Camp Chemolingot who referred me to Police in Nginyang. I made a report at Nginyang Police Station. No action was taken against him and I decided to call him through his phone to find why he wanted to rob me. I called him on his cell phone No.0795-947500. He came on 23rd January, 2017 around 8:00 am. He came alone riding a motor cycle. I asked him what his problem was and why he wanted to rob me and hurt me. He asked me how come I don't know him that he is a terrorist and that is how he earns a living. He told me that once his bhang directs him to her, I had no choice. I felt very fearful. I gave him Kshs.10,000 and told him to leave me alone. I thought that he then would leave me.

He then told me that it was now over and the evil plans he had for me were now over. He left.

On 24th November, 2017 when the two broke into my door and accused No. 1 placed a gun on my chest I screamed and told them to take whatever they wanted and spare my life. I called out Wilkister Rotuno and told her to get a purse that was under the mattress and gave the 1st accused person. I had Kshs.300,000 inside the purse. The 1st accused is known by name Butere. He is also known by that name.

The 1st accused took the money and handed over the gun to the 2nd accused Ekwang Lotodo also known in the village as Kakitiny. The 2nd accused threatened to shoot me in the legs. Lennox ordered me to hand over my phone to him which I did. It was Lenovo worth Kshs.12,000 Serial No.867797020416494. The two then left and we closed the door. I was able to clearly see and recognize the two because the lights were on. They also took time about five minutes attacking me. I was bleeding throughout. They did not order me to lie down. The first accused placed the gun on my chest. I saw him clearly. He was the same person I met the previous day.

Before the two pushed the door to my house I heard them warn anyone who dares to help that they would shoot them dead. There are about eight tenants in my pilot. The rental houses are mine.

When the two left, the tenant came and consoled me. I was crying and shaken. The AP who were called came. They were four of them. They asked me questions and I explained what happened. Then they left.

I moved the children to one of the tenants and I went to sleep at the AP's camp for fear of my life. I thought the two would return to kill us.

The following day on 25th January, 2017 I woke up from the AP camp went home and later to Nginyang Police Station to make a report. The same day again the 1st accused called me using different numbers. He told me that he wished he had killed me because he is being sought by Police. He called me severally and threatened to kill me. He told me that my days on earth are up.

After making a report at Nginyang Police Station took over and started investigation. I gave the name of the two accused person to

the Police. I also gave the Police the physical description of the two; that one was slender tall and dark and the other short and light skinned. I also mentioned the name of Lennox the 1st accused.

After about one month or two I am not sure Lennox called me and told me that he was in Marigat and asked me to go for my phone. I was in Chemolingot by then.

He asked me to forgive him. I reported to the Police that 1st accused had called me.

I was then called on 11th April, 2017 by Police Officers from Nginyang that the 1st accused had been arrested and held up in Marigat.

On 20th May, 2017 I was called in Nginyang Police and told that accused 2 had been arrested. I went and saw the 2nd accused who on seeing me started pleading and saying that he was misled by 1st accused person. He asked for forgiveness and that he didn't know what I was a Pokot lady. The accused spoke to me in Pokot language.

On the day of the attack on 24th January, 2017 I was injured on the left elbow and the back of my head when I was pushed forcefully on the wall.

I was issued with a P3 by Police which I took to Chemolingot clinic 25th January, 2017. I was treated and discharged.

P3 – MFI 1.

Shown photograph one showing a pink purse and one showing generally the plot. The two photos marked MFI 2(a) (b).

I have not gotten my phone and the money ever since. The accused has been calling me and asking me that he wanted to pay me so that I can withdraw the case.

I know that he is in custody but he stills calls. I recognize his voice there has been attempt by accused and his family to force me to withdraw.

I recorded my statement with the Police. The two accused persons are in Court. The accused wanted to kill me. I fear for my life to date.

HON. J.L. TAMAR – PM

Cross examination By Nyagaka for 1st accused

I am Rhoda Chebet Kewasis. I was born in Barbelo. I have four children. I was with Wilkister, Claire and Chelimo. Cherotich was not there. I was in Chemolingot on the dates of the incidence.

I have stayed in Chemolingot for the last two years. The father of my children lives in Barbelo. My husband is not in Court today he is called Kewasis Loweri.

Butere is not my friend. I know Butere he also operate a boda boda in Chemolingot.

I recorded statement twice at the Police Station. I did not record in the statement that 2nd accused sought forgiveness and that the 1st accused not the one responsible.

I know Lorna Chepkorir. She is my tenant. She never recorded statement to the Police. Yes I received a threat message from Butere the 1st accused. I gave the information to Police in Nginyang. I know the Investigating Officer.

Cell phone No.0795-947500 belongs to the 1st accused person. Waka used to be Hon. Kamama's driver.

I do not know Ekwang Lotodo. I know Amket Mukomoi. He is a tenant in my place. He comes from Churo.

The following day I went and obtained a new SIM card and retained my number. I had Kshs.27,000 in Mpesa. I renewed the SIM card and bought a small NOKIA. I had reported to the Police about the loss of my phone that was around 11:00 am. I did not tell the Police that I had renewed the SIM card. I do not know whether the Police wrote to SAFARICOM about the ownership of 0795-947500.

I gave the 1st accused 10,000 on 23.01.2017. shown MFI 2(3).

Amket wife called Sharon was present when I gave the accused 10,000. Sharon house was opposite mine. Sharon is not a witness in this case. The accused had sent me messages before attack demanding money from me else he'll kill me.

The money was in a pink purse. I still have the purse with me. The 1st accused pushed me and I fell down.

I do not know why it took long to arrest the accused persons. I think because they had disappeared.

No identification parade was conducted. I slept at Lucy house at AP camp.

Cross examination by 2nd Accused

I was able to identify you. There was light in my house. Outside the door there was security light. I saw you in Chemolingot.

You had a scarf in your head but your face was not covered.

You even told me that you had been to Prison before. I don't know where you live.

You even threatened to shoot me on the legs. There was only one gun. 1st accused was the one holding it. I know the 1st accused. He operates a boda boda.

I don't know that you've been in Chemolingot for 37 years.

I didn't know your father. I have lived in Chemolingot for two and half years. I heard that you are a good person. I heard this when you and 1st accused attacked me.

I have never done business with you that you told me that you were misled by the first accused.

I don't know that you were arrested when drunk. I did not indicate in the Station that you had sought forgiveness. The Police Officer at Nginyang Station heard you plead and asked for forgiveness.

Not true that I fixed you.

I am telling Court the truth.

I lived in Parbelo before I came to Chemolingot.

HON. J.L. TAMAR – PM

Re-examination

*I slept at AP camp fearing for my life. Accused was arrested on 11.04.2017. I was called by the Police. **No identification parade was conducted.** I knew both accused person. I had seen the 1st accused before. I recognized him. I met him on 23.01.2017.*

The second accused on seeing me apologized. He told me that he didn't know that I was a Pokot.

Sharon saw me give 1st accused 10,000. 0795-947500 belongs to the accused. I got the number from Corna.

Butere 1st accused is not my friend.

My husband is a harder. He came on 25.01.2017 when he heard of the robbery.

I do not know Ekwang Lotodo.

HON. J.L. TAMAR – PM

10. The events related by Pw1 are bizarre, that she had been told by a friend of hers who did not testify that Lennox the 1st accused had told her and thus that he was going to rob her because she had money. She reported the matter to the police who fail to act prompting her “to call through his phone to find out why he wanted to rob me. I called him on his cell phone number xxxxxxxx” the 1st accused allegedly came on 23/1/2017 at around 8.00am and she gave him Ksh10,000/= and told him to leave her alone. Obviously, he does not heed her call as on the 24/1/2017, the very next day he and the 2nd accused allegedly rob her of Ksh300,000/=.

11. The complainant already knew the 1st accused four months prior to the incident. She had met him only twenty four hours earlier when she paid him what appeared to be protection money of the 10,000/=. She had his mobile phone number and she had used it to locate at him to find out why he wanted to rob her. She was able to recognize him and his co-assailant during the robbery. She allegedly gave the names of the two accused persons to the police as well as their physical description giving the name of the 1st accused as Lennox.

12. Pw3 said that his house directly opposite the complainant's and he was able to see what was going on in the landlord's house but his wife

did not witness any of the events of the robbery. However, the complainant stated that Pw3's wife "Sharon was presenti gave the accused 10,000/= Sharon house was opposite mine. She is not a witness in this case". Would Sharon have supported the complainant's evidence that she had met the 1st accused and paid him Ksh.10,000/= the previous day and therefore establish whether the 1st accused was the same person she had seen receive the Ksh.10,000/= as alleged by the complainant. The principle of **Bukanga v. Uganda** (1972) EA 549 applies to this case.

13. No identification parade was conducted if as arrested by the complainant she knew the accused person and had seen the 1st accused before on 23/1/17 and had recognized him during the attack only as there was no identification parade for the 2nd accused who the complainant said she only knew physically.

14. The complainant said she got the 1st accused's mobile phone number from Lorna and Sharon witnessed the giving of the Ksh.10,000/=. These two crucial witnesses were not called to testify. The Court must presume as in **Bukenya v. Uganda** (1972) EA 549 that "where the evidence called is barely adequate,...the evidence of uncalled witnesses would have tendered to be advise to the prosecution."

15. Significantly, when the lead witness appears less than forthright, the Court as in **Ndungu Kimanyi** 1979) KLR 282 considers that "the witness in a criminal case upon which evidence it is purposed to rely should not create an impression in the mind of the Court that he is not a straightforward person or raise a suspicion about his trustworthiness, or do (or say) which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence."

16. The complainant's deliance with the 1st accused in obtaining his mobile phone and calling him to find out why he sought to rob her and in paying Ksh.10,000/= to keep the alleged robber at bay is suspect and contrary to normal cause of things. It would appear to the Court that the complainant and the 1st accused were involved in same way, although the complainant denied that the 1st accused was her friend, which made telephone communication and payment of money between him for whatever purpose possible. In not calling Lorna who gave money the 1st accused's number and Sharon who witnessed the payment of Ksh.10,000/= the complainant denied herself the opportunity to prove that the 1st accused was the same person who she had met the day before the robbery and was therefore able to recognize at the robbery. Sharon and Lorna would have connected the complainant to the 1st accused and make her recognition of him plausible.

17. The complainant's daughter Pw2, a minor aged 14 years testified on Oath, the trial Court upon *voire dire*, finding that "she understands the duty to tell the truth and the nature of the Oath, [and] also intelligent." She said she was with the mother the complainant, her two sisters and the two aunts'. The two aunts were not called to testify. She testified that she had been told by her mother that "the money stolen was Ksh.300,000/= and that the mother had told her to get the money from under the mattress, and she had given it to "first accused". She did not know the accused person and she only got to know their names after the incident. An identification parade was crucial for this witness.

18. In his defence, the appellant denied he was called Butere and asserted that he had knew the complainant for about 6 months when the time were lovers and did business together saying he was a businessman buying and selling donkeys, chicken, honey etc, and that the two had differences and a complain had been lodged by the complainant to the DCIO Marigat.

19. The Court is cautioned by **Roria v. R** (1967) EA 583 to exercise extreme care in dealing with the identification evidence of a single identifying witness, bearing in mind the conditions existing at the time of the purported identification, although the evidence of recognition is more reliable than that of mere visual identification. See **Anjononi v. R** (1980) KLR 59.

20. The Court must, therefore, look for corroboration for the evidence of Pw1 the complainant herein. Pw2 the daughter who was a minor but gave sworn testimony which is in law not subject to corroboration but as counseled in **Oloo v. R** (2009) KLR 416 the court has to warn itself not to base a conviction on the uncorroborated evidence of a child of tender years. She could not corroborate the mother because she relied on her visual identification of the alleged attacks and no identification parade was held for her to point out the persons she alleged to have seen during the attack. Indeed, Pw2 said that she got to know the names of the accused after recording her statement.

21. Pw3, the neighbor did not see the attackers who told him to get back into his house. In fact he said it was PW1 who "told me she was able to recognise 1st accused". Although Pw3 allegedly described the attackers to the police, he was not called to identify them at any identification parade. His identification and that of Pw2 were merely dock - identification which of no much value. See **Oluoch v. R** (1985) KLR 549 that "a dock identification of an accused by a witness where there had been no identification parade conducted earlier and at which the witness is present, is almost worthless."

Evidence of theft

22. The evidence of theft is inconclusive. Pw1 said she called her daughter Pw2 and "told her to get a purse that was under the mattress and gave the 1st accused. I had Ksh.300,000/= inside the purse". Pw2 said she gave the money to the 1st accused, but it was not clear how the purse is still theft with the complainant, and was available. An exhibit in this case. Pw2 and Pw3 only said, that the complainant told them "that morning stolen is Ksh300,000/= " and a phone.

Evidence of Wounding, beating etc.

23. The complainant said that "on the day of the attack on 24/1/2017, **I was injured on the left elbow and the back of my head** when I was pushed forcefully on the wall". Pw5 Clinical Officer confirmed on 10/2/2017 of such injuries which were of approximate age of three weeks. While injury is demonstrated the other ingredients of robbery with violence namely theft and the accused's identification as the robbers are not established beyond reasonable doubt on account of failure to hold an identification parade and the gaps in evidence by failure to call crucial witnesses to the prove the involvement of the accused in the offence.

24. I would, therefore, agree with the DPP's submissions and find that the Prosecution did not prove the charge of robbery with violence

against the accused person to the required standard of proof. The appellant is, therefore, acquitted of the offence of robbery with violence contrary to section 296 (2) of the Penal Code.

Orders

25. For the reasons set out above, the appellant's appeal has merit and the same is allowed. The conviction of the appellant by the trial court for the offence of robbery with violence contrary to section 296(2) of the Penal Code is quashed and the sentence of imprisonment for 40 years set aside.

26. There shall, therefore, be an order for the release of the appellant's from custody forthwith, unless he is otherwise lawfully held.

Order accordingly.

DATED AND DELIVERED THIS 7TH DAY OF NOVEMBER 2019.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent