



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO.54 OF 2015

FRANCIS KISANGA LIVEDE.....1ST APPELLANT

HERBERT WANJALA MANGOLI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the Senior Resident Magistrate Honourable E. Tanui

in Eldoret Criminal Case No. 3934 of 2012 dated 22nd April, 2015)

JUDGMENT

HERBERT WANJALA MANGULI and *FRANCIS KISANYA LIVEDE* were charged in the lower court with the offence of Robbery with violence, contrary to *Section 296 (2) of the Penal Code*.

The particulars of this offence are that on the 7th day of September 2012 at Chekalini location, in Lugari District, within Kakamega County, they jointly with others not before court robbed *Zakayo Mukwana* of a pair of shoes valued at Kshs.500 and cash 25,000/-, all valued at Kshs. 25,500 and immediately before the time of the said robbery used actual violence to the said *Zakayo Mukwana*.

The prosecution case is that on 7th September, 2012 at about 3.00 p.m *Zakayo Mukwana*, the complainant in this case and who gave evidence as PW-1, was in company of *Nathan Wekesa* the PW-4 in this case. They went to Musioma area where the complainant bought a cow of which he intended to sell in the market the following day. He kept the cow at *Nathan Wekesa's* place. At about 7.00 p.m he commenced on his journey back home. *Nathan Wekesa* escorted him. While at the road a group of five men emerged from a maize plantation which was behind them. They pounced on the complainant and PW-4. There was moonlight which enabled the complainant and PW-4 see and recognize them. The five men were their neighbours. They were recognized as *Herbert Wanjala, Francis Kisanga, Eden Mwikali Solomon, Mueisi Museku* and *James Wahunga Morua*. They knocked the complainant to the ground. He had 25,000/- in his shirt pocket. They took the shirt with the money. They as well took his pair of black shoes worth 500/-. PW-4 intervened asking the assailants why they were attacking the complainant. They turned on him and equally attacked him. He fell down as a result. The complainant took advantage of the change of focus by the attackers. He escaped into a neighbouring house of a man called *Mackenzi*. The wife of *Makenzi* and the children screamed for help. The assailants escaped through the maize plantation. The complainant joined PW-4 and they both reported the incident at Chekalini police station. They were referred to Chekalini hospital where they were treated. The complainant was issued with a P-3 form which was filled by PW-2 on 9th September, 2012. He still appeared to be in pain and had with him a blood stained shirt. He had suffered one broken molar tooth and a loose lower incisor. The neck was painful on movement and had a tender swelling on the back aspect of the neck. There were minor bruises at his inner lower limb. The injuries were about a day old. The injuries could have been caused by a blunt weapon. The degree of injury was assessed as maim.

The case was investigated by PW3. He visited the scene and recovered the shirt the complainant was wearing on the material day. He then wrote a letter to the AP's at Chekalini to arrest the suspects. The two appellants were arrested. The other three were not got. They were then charged.

Each of the appellant gave sworn evidence in defence and called no witness. *Herbert Wanjala Mang'oli* denied the offence and challenged the prosecution case in that it was contradictory. He alleged that the shirt produced in court was not torn and though the complainant claimed was blood stained, what he said he suffered was lost teeth. There was contradiction as to who took the shirt to the police station. *Nathan Wekesa* gave evidence under warrant of arrest and he never saw the 25,000/- the complainant allegedly had. *Mackenzi*, the neighbor in whose house the complainant took refuge, was not called as a witness. He lastly alleged he was at home the whole day on 7th September, 2012 and was not at the scene of crime.

Francis Kisanya Livede on his part as well denied the offence. He also challenged the prosecution case in that it was contradictory. Complainant alleged blows and kicks were used in his attack while PW-4 alleged it's stones. PW-4 also said the complainant took the shirt to the police station while PW-3 said he collected it at the scene.

Mackenzi was not called as a witness. The doctor (PW-2) said the shirt was not torn yet the investigating officer said it was. He alleged that on the date of the alleged offence he was at home and he was not at the scene of crime.

The trial magistrate weighed the entire evidence and found that the offence against the appellants was proved by the prosecution beyond reasonable doubt. He convicted them of the offence and sentenced each to suffer death, as the mandatory sentence for the offence.

The appellants dissatisfied with the said conviction and sentence appealed to this court on the grounds that:-

- (1) They were convicted on evidence of a single eye witness.
- (2) The evidence of PW-4 ought not to have been admitted as he testified under warrant of arrest.
- (3) Defence was not involved in the process of compelling PW4 to give evidence.
- (4) The contradictions in the prosecution case were not properly evaluated.
- (5) The offence was not proved against the appellants beyond reasonable doubt.
- (6) Issues raised by appellant in their written submissions were not considered.
- (7) The offence was of assault rather than robbery with violence.
- (8) It was not considered that appellants were not armed during commission of the alleged offence.
- (9) The allegedly stolen money and shoes were not recovered.
- (10) Neighbours who turned up at the scene were not called as witnesses.

After filing of the appeal, the appellants were allowed to call further evidence of which was given by PW-5 on 19th December, 2017, in the lower court. The OB of 7th September, 2012 was produced in court. It reveals that the report the complainant made was that he was attacked by 5 male persons known as *Kisanya Oti, Wanjala Herbert, James Maina* and other known by faces, and robbed 23,000/- cash and shoes.

Mr. Okara while arguing the appeal on behalf of the appellants collapsed the grounds of appeal into one, that the prosecution case was not established beyond reasonable doubt. He averred that the particulars in the charge sheet are not consistent with the evidence adduced. Complainant alleged he was robbed 25,000/- and a pair of shoes worth 500/-, while the evidence of PW-5 shows he reported of 23,000/- and a pair of shoes. The evidence of PW-5 also shows that at the police station the complainant gave two names of his attackers of which do not agree with the names of the appellants in the charge sheet. No identification parade was conducted. The arresting officer did not testify on how he rested on the appellants as the suspects. Other relevant witnesses like *Mackenzi* and his wife were not called to give evidence. The only other eye witness (PW-4) gave evidence under Warrant of Arrest. He said he heard complainant say his 30,000/- had been taken away.

The complainant allegedly said he reported the case the same day it happened while PW-5 stated it was reported on 9th September, 2012 of which is 2 days after the alleged incident.

It's averred the injuries the complainant alleged he sustained did not agree fully with those recorded in the P-3 Form.

The appellants backed their position in the appeal with four decided cases as follows:-

- (1) ***Criminal Appeal No. 1 of 1983 of Jason Akumu Yongo -vs- Republic***, where the Court of Appeal held that the fact that the evidence is given differently to the particulars in the charge can still render the charge defective so as to bring *Section 214* into operation.
- (2) On the issue of identification parade they relied on the case of ***Moses Moseti Oloo and Another -vs- Republic, Criminal Appeals No. 72 and 73 of 2011***. In it the Court of Appeal observed that:-

“The evidence of the complainants, who were also the identifying witnesses, suggested that the identification parade was not conducted in strict conformity to the requirements of the force standing orders. For all these reasons, it was unsafe to convict the appellants on the evidence of identification by PW-1 and PW-2”.

- (3) On the issue of lack of the evidence of the Arresting officer, they relied on the ***Lodio Nawei -vs- Republic HCCR Appeal No. 77 of 2009***, in which the court observed that:-

“None of the prosecution witnesses testified as to how the appellant was arrested. The only police officer who testified, PC

Alfred Mwarabu, PW-4, merely stated that on 23rd August, 2008 the appellant was taken to Lodwar police under arrest. The investigating officer was unable to tell the trial court the circumstances that led to the appellant's arrest. In a case of this nature, and given the kind of defence advanced by the appellant, we think that it was necessary to have the arresting officer testify. This court similarly held in Kambo -vs- Republic [2005] eKLR that, without the arresting officer's evidence, there was a critical gap in the prosecution case that rendered the appellant's conviction unsafe".

(4) Still on the same point the case of Republic -vs- Pattni, Criminal case No. 229 of 2003 was relied on, where the court held that the only inference that could be made from the failure by the prosecution to adduce evidence surrounding the arrest of the accused and his subsequent release had to be that such evidence would have adversely affected the prosecution case. There was a serious doubt as whether the accused had the opportunity to commit the offence charged".

The state opposed the appeal. Ms Kegehi for the state averred that the evidence by the five prosecution witnesses was reliable, credible, consistent and well corroborated. It established all the ingredients of the offence of robbery with violence. It was at 7.00 p.m and there was moonlight. PW-1 was able to recognize his attackers who were neighbours and disclosed their names to court. He was injured and his 25,000/- taken as well as shoes worth 500/-. The evidence is corroborated by that of PW-4. The P-3 form corroborates the fact that the complainant suffered injuries in the attack. The record in the investigation diary that complainant was attacked by five unknown persons must be a typographical error as it's against the rest of the evidence.

I've weighed the evidence adduced by both sides in the lower court, judgment passed and sentence, petition of appeal and submissions by each side.

It's correct as submitted by the appellants that the prosecution case was riddled with contradictions which makes it hard to tell which of the prosecution witness told the truth. To start with, the complainant said his 25,000/- was taken in the robbery. He gave no details of how much he had before he bought the cow and how much remained, in order to give credence to his claim. His witness, the PW-4 in the case said he heard him saying after the robbery that his 30,000/- was taken. The OB of 7th September, 2012 which was produced by PW-5 indicated the amount was 23,000/-. The question which arises is, how much money was robbed from the complainant? The particulars of the charge sheet discloses it was 25,000/-. That was not established and settled in the prosecution case. Regarding the complainant's shirt, he said he's the one who gave it to the police. PW-3 examined him on 13th September, 2012 and said in his evidence in chief that he had carried with him a blood stained shirt. PW-3, the investigating officer said they went to the scene of crime on the same day and at the scene recovered his shirt which he was wearing during the incident. It's not clear from the evidence when and how the shirt got to the police. The evidence is contradictory. While PW-1 did not disclose whether any object was used as a weapon in the attack as he said, "They knocked me down. They hit me all over the body."; PW-4 the only other witness said the assailants used stones and bricks on the road to attack him. Complainant also said the attackers emerged from a maize plantation behind them and they eventually escaped into it after the ordeal. However, PW-4 said they emerged from a forest and escaped into it after the ordeal. A forest and a maize plantation or farm are two different things.

PW-1, the complainant in his evidence was very explicit that they were attacked by five men namely *Herbert Wanjala, Francis Kisanga, Eden Murikali Solomon, Mueisi Muteku and James Walunga Morua*. However, in the OB of 7th September 2012, the persons he named as having attacked them were *Kisanya Oti, Wanjala Herbert, James Maina* and indicated the rest were known by the faces. The O.B report was made immediately after the alleged robbery. The only name that was given right in the OB and in evidence in-chief of the complainant is of *Herbert Wanjala*. For the rest, one would wonder whether *Francis Kisanya* is the one and same person as *Francis Oti*. *James Maina*, named in the O.B, was not disclosed in court. It also appears the complainant had not known the other two suspects by names but only physically. That's what the O.B discloses. It is therefore vivid that complainant was not entirely truthful when he said he knew the assailants well as his neighbours and proceeded to disclose their names. If he did as he claimed, his evidence in-chief would have well agreed to his first report in the OB. It's interesting to note that the only other eye witness, who's PW-4 simply claimed in his evidence in chief that the accused persons at the dock were among the attackers. This suggests the attackers were more than five. He said he recognized them as he knew them well before. He however never disclosed how he knew them and their names. It's only during the cross-examination that he said they were his neighbours. The complainant and PW-4 do not give details of what each of the said assailants did during the incident. This suggests the scenario was confused for one to pick such details or it was dark to an extent that one could not see and register such details. The lacunas in the evidence and the inconsistencies, raises doubts on the truth of the prosecution case, which questions its credibility, and the correctness of appellants as assailants. Apart from the mere claim that they took part in the commission of the offence, there is no any other evidence that connects them to it. The witnesses could have guessed on them or mistaken them for the real culprits. They were not properly recognized and deserved the benefit of doubt and an acquittal. Probably the trial magistrate got it wrong when she observed that, "it was not very dark and there was moonlight. He recognized the accused persons very well. They were his neighbours. He made a report to the police and explained that he had been beaten and robbed by people well known to him", because she never had the benefit of the evidence of PW-5 and the contents of the OB of 7th September, 2012. However, she got it wrong when she dismissed the inconsistencies in the prosecution case without properly weighing them in relation to veracity of the prosecution witnesses. She simply observed that, "the inconsistencies that have been identified by the accused person in the prosecution case are not material; they do not cast any doubt on the fact that the two accused persons while with other three persons not brought before court, attacked and robbed the complainant who is their neighbor of Kshs.25,000/- and a pair of shoes".

The inconsistencies raises doubts as to the veracity of PW-1 and PW-4, the only eye witnesses to the alleged incident, and consequently to the credibility of the prosecution case. There exists reasonable doubts as to whether the appellants took part in commission of the alleged offence. The said doubts are resolved in their favour. I therefore do find the appeal merited; it's allowed; the conviction and sentence are hereby quashed and the appellant set free unless otherwise lawfully held.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 12th day of July 2018

In the presence of:-

(1) Mr. Okara Advocate for the appellants

(2) Ms Kegehi State prosecutor

(3) Mr. Mwelem Court clerk