



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 90 OF 2014

HILLARY KIPYEGO ROTICH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the original conviction in Criminal Case No. 1099 of 2013

in the Chief Magistrate's Court at Eldoret by M. Njagi,

Senior Resident Magistrate, dated 27th May, 2014]

JUDGMENT

1. **HILLARY KIPNGENO ROTICH** (the appellant) was convicted on two counts of robbery with violence contrary to Section 296 (2) of the Penal Code and sentenced to death. The 1st count stated that on 20.03.2013 at **DOLA** in **ELDORET EAST** district **UASIN GISHU** county district area jointly with others not before the court, while armed with dangerous weapons namely pangas, rungas and a hacksaw, robbed **HARON KANDIE KIAYI** of his mobile phone make **NOKIA 1200** and **SAFARICOM VODAFONE** both valued @ ksh.3000/-, a payslip, 3 bank plates, a national identity card, and cash Ksh. 150/- all to the total value of Ksh.3150/- and immediately at the time of such robbery, wounded the said **HARON KANDIE KIYAI**.

2. Count (II) stated that on the same date and place he jointly with others, while armed with self same aforementioned weapons robbed **JACKSON CHERUIYOT KOSGEI** of his shoes valued @ Ksh.1000/- , cash 600/- all valued @ Ksh.1600/- and immediately before such robbery wounded the named victim. The accused denied the charges.

3. On 20.03.2013 at about 8.30pm. **HARON KANDIE KIAYI** (PW1) and **JACKSON** (PW2) were walking from **TAUSI** bar within Eldoret Town towards the Eldoret Prison quarters where PW1, a prison officer resided. When they got near **DOLA** factory area, they were violently attacked and robbed by a gang of 3 people.

4. According to PW1, the people held them and ordered them to lie down and remove all that they had or they would get killed. PW1 stated:

“I wanted to tell them to leave us alone. One jumped on me and strangled me. I raised alarm, the other one hit me on the head with a club and a metal rod.”

5. They took away two phones from him, bank plates – KCB and Family Bank. Pay slips and Ksh.150/-. Officers who were on patrol arrived and the attackers scampered to safety, but one was shot on the leg at the scene – he is the appellant. PW1 then lost consciousness and woke up in hospital. It was his evidence that the appellant was the one who had the club and metal rod(which he identified in court). PW1 explained to the trial court that although there were trees alongside the road, there was a very bright moon and one could see upto about 50 metres away.

On cross examination he narrated;

“It was about 8.30 pm, there was very bright moonlight I saw you before I lost consciousness ... I am very sure I saw you. I did not know you before that day so I have no reason to lie about you.”

6. **JACKSON CHERUIYOT KOSGEY** (PW2) confirmed being in PW1's company when 3 people emerged at Kipchoge near the road to **DOLA**, and ordered them to lie down. One person hit him on the nose – he noted that they had a club, hacksaw, pliers and a metal object.

According to him the appellant had pliers, a rungu, hacksaw and a metal object. PW1 grabbed one of the attackers, but another hit him on the face, and he released his grip.

He stated:

“it was not very dark. There was little moonlight, one could see as far away as 100 metres ... it was my first time to see this person. Police came and shot one of them ... the assailants escaped when police came, they chased accused, shot the accused about 20 metres away from the scene.”

He lost Ksh.600/- plus a pair of shoes worth Ksh.1000/-. On cross examination he stated that the people who emerged started advancing towards them – the moonlight was not too much but it was a half moon and he saw the appellant.

7. **CPL ABEDNEGO TONY MWAZO** (PW3) a prison warder at Eldoret G.K Prison was on patrol with **SGT. JOHN KIPRUTO** and **PC LUKA MUTINDA**, within the prison compound, when they heard screams near **DOLA** and ran towards **DOLA**, they saw people struggling and upon realising their presence, some people escaped towards the forest. The officers shot twice in the air, but the people did not stop. A chase ensued and one was shot on the left leg and arrested. PW3 stated:

“He had a bag which had a pliers, panga, hacksaw, a rungu and shoes We searched and found a pay slip in the names of HARON KANDIE, one of our staff The one who was with Kandie was identified as Jackson.”

PW3 described the scene as some sort of field and a forest. It was a bit wet that evening and there was some moonlight. He stated:

“There was some moonlight one could see ... a person but would not know exactly who the persons were.”

8. He explained that he bag fell after the appellant had been shot and upon searching him, PW1’s payslip was recovered from his shirt pocket.

9. **SGT. JOHN KIPRUTO CHERAP** (PW5) who accompanied PW3 in response to the alarm raised stated that the area was notorious for muggings and robberies. When they got to the scene, they round 5 people struggling, “2 were down, and 3 were lifting (?) on them”. When he ordered that each surrenders, two complied but three ran to the forest. He fired a warning shot but they ran on, he aimed a second shot which caught one of the fleeing persons just below the left knee.

10. PW5 explained that the appellant had moved for a distance of about 5 metres before he shot him. He also confirmed that upon searching him he recovered a panga, pliers, hacksaw, a pair of white shoes, a ladies purse and Kandie’s pay slip. The pay slip was in the appellant’s shirt pocket. PW1 confirmed that his payslip was among the items stolen from him. On cross examination he denied suggestions that the appellant was an innocent pedestrian.

11. This evidence was repeated in the testimony of PW6 (**PC LUKE MASINDE**)who also accompanied PW3 and PW5 to the scene in response to the alarm. He confirmed that two people were down and three people were struggling over them. He also confirmed recovery of the mentioned items from the appellant.

12. **PC MATHEWS NDIEMA** (PW7) received the appellant plus the recovered items from the prison officers.

13. **JOSEPH CHESANAI** (PW4) a Senior Medical officer who worked at **HURUMA DISTRICT HEALTH** centre examined PW1 and observed that he had a swollen tender right posterior occipital region with bruises, a swollen tender forehead and anterior neck. The right lateral chest wall and ribcage was swollen and tender and the probable weapon used was a blunt object. He assessed the degree of injury as harm.

14. He also examined PW2 who had an injury, on the head, a swelling and tenderness above the left eye with a cut wound, swollen ribs, bruises and a missing canine on the right upper side. He also had a cracked fracture on the 21 and 22nd tooth which were mobile. The probable weapon used was a blunt object and the degree of injury was assessed as grievous harm.

15. The appellant in his unsworn defence told the trial court that on the material date at 8.30 pm he had left his place of work and was on his way to **KAMKUNJI** when he got to the railway, there were people who ordered him to stop – he defied, as he did not know who they were and it was dark. Suddenly he felt a bullet hit his left leg and he fell down. He was then arrested and the people who had shot him said;

“If we release this person, he may sue us”, so he was taken to the police station. It was his contention that the charges were to cover up for the shooting.”

16. The trial magistrate pointed out in his judgment that the evidence of PW1 and PW2 corroborated each other regarding the attack. Further the evidence of PW3- 6 added weight because when they responded to the distress call, they arrived to find 3 people struggling over 2 people who were on the ground.

17. The medical report confirmed that each of the victims had sustained injuries and on account of that it proved that violence had been visited on them. The trial magistrate also pointed out that the attackers were more than one and were armed with crude weapons.

18. The appellant’s defence was considered and rejected as PW1 and PW2’s corroborated each other, that there was moonlight which

enabled each to observe the appellant. The trial magistrate held that their corroborative evidence as regards the source of light outweighed the appellant. Besides the evidence on identification, there was the pay slip belonging to PW1 which was recovered from the appellant just a few minutes after the robbery, and within the scene.

The trial magistrate pointed out that:-

“As by law required of a person found in possession of recently stolen goods, the accused did not offer any reasonable explanation to rebutt the presumption, in the circumstances, the only plausible conclusion is that he had just robbed PW1.”

19. The trial magistrate also observed that the crude weapons were found in paper bag in the appellant’s possession and the contents included the weapon which PW1 identified as what had been used to visit violence on him. Moreover PW2 also identified the hacksaw and panga as weapons he saw in possession of the appellant – this therefore negated his claims about being an innocent pedestrian who fell victim of circumstances.

20. The appellant contested these findings on amended grounds that the evidence did not prove the case beyond reasonable doubt,

- b) That the exhibits recovered in count II were not produced,
- c) Some of the suspects who surrendered were released unconditionally,
- d) The opportunity for identification was inadequate.

21. The Appellant filed written submissions where he argued that the recovered payslip exhibit was produced as an afterthought because PW1 was recalled to produce. Further, the exhibits identified were in respect of count 1, and it cannot be assumed that they also related to count 2.

22. He also contested the finding on possible identification saying PW1 and PW2 were too drunk to identify anyone, and PW3, 5 and 6 merely claimed he was the culprit to cover up their reckless use of a firearm.

23. In opposing the appeal, Miss Mokuia submitted on behalf of the state that the prosecution witnesses evidence was corroborative and proved the case beyond reasonable doubt. She pointed out that the ingredients of robbery with violence were well established as evidence as was led to confirm that the appellant was in a group of three who were all armed, and they used these very weapons to assault the victims. Not only were these weapons seen and identified by PW1 and PW2, but upon being shot, and immobilized, a bag which the appellant had, was recovered and it indeed contained a pair of pliers, hacksaw, a club (rungu) and a metal rod.

24. I concur with the State that the evidence demonstrated that the attackers were armed with offensive weapons. This limb of the ingredients for robbing with violence was satisfied.

25. Miss Mokuia also pointed that the victims testified how the three people held them and threatened to kill them. One of them strangled PW1, and they inflicted injuries on both using the weapons they had. This was supported by the medical evidence which classified the degrees of injury as harm and grievous harm respectively –

26. Indeed the description of the kind of violence meted on PW1 and PW2 was confirmed by;

- a) the recovery of the weapons they described as being used against them, from the appellant,
- b) The medical findings.

I am satisfied with the trial magistrate’s finding that violence was used. Mrs Mokuia further posed the question as to whether anything was stolen from the victims, and pointed out that PW1 and PW2 were robbed of various items, and to confirm this, PW1’s pays slip was recovered from the appellant just shortly after the incident. Indeed this recovery negated the claim that he was an innocent pedestrian who fell victim of the circumstances. Even without the evidence on identification the trial magistrate invocation of the doctrine of recent possession and the presumption in the absence of a possible explanation placed him;

- a) at the scene of the incident and
- b) placed in possession of the recently stolen item – a peculiar feature of the item being the victim’s payslip.

27. The evidence was watertight and the conviction was safe and is upheld. The sentence was as provided by law, and the circumstances under which the offence was committed and the nature of injury inflicted the sentence meted was merited and I confirm the sentence. Consequently the appeal lacks merit and is dismissed.

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

H. A. OMONDI

JUDGE