



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NUMBER 150 & 152 OF 2014 (CONSOLIDATED)

ELISHA MAIYA OMULAMA.....1<sup>ST</sup> APPELLANT

CHARLES AMBOKO ANEMBA ALIAS CORPORAL.....2<sup>ND</sup> APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Appeal against conviction and sentence in Criminal Case Number 632 of 2013 in the Senior Resident Magistrate's Court at Hamisi delivered by Hon. E.W.Muleka (SRM) on 27<sup>th</sup> August, 2014)*

#### JUDGMENT

##### Background

1. **ELISHA MAIYA OMULAMA** and **CHARLES AMBOKO ANEMBA alias Corporal**, the appellants herein have filed this appeal against conviction and death sentence on two charges of robbery with violence contrary to Section 295 as read with section 296 (2) of the Penal Code allegedly committed against Jane Mwhiki Muchiri and Allan Eboya Muzame on 24<sup>th</sup> January, 2013.

##### The prosecution's case

2. The prosecution called 5 witnesses in support of the charges. **PW1**, Allan Eboya Muzame, the 2<sup>nd</sup> complainant herein stated that on 24<sup>th</sup> January, 2013 at about 2.30 am while he was asleep with his wife Jane Mwhiki, the 1<sup>st</sup> complainant, robbers gained entry in their bedroom armed with panga and an iron bar. He stated that one was wearing a Barcelona shirt and the other a dust coat. robbers stole the items named on the 2<sup>nd</sup> count and one of the robbers ordered him to transfer Kshs. 1,200/- from his Mpesa account to a number that bore the name of Elisha Omulama, which sum he caused to be reversed after the robbers left. In court, he identified the 1<sup>st</sup> appellant as the one who was wearing a Barcelona shirt and was armed with a panga and the 2<sup>nd</sup> appellant as the one that wore a dust coat and was armed with an iron bar. **PW2**, Jane Mwhiki Muchiri, the 2<sup>nd</sup> complainant explained how she and her husband, **PW1**, were robbed on the night of 24.1.13. Both witnesses said that lights were put on when the robbers were in the house and that they had been able to identify both appellants. **PW3** CIP Judith Nyongesa conducted stated that he conducted identification parades for both appellants on 12.6.13 and both were identified by **PW2**. **PW4** IP Mumo, a Safaricom Enforcement Officer produced print out for phone numbers 0722551364 in the name of **PW1** and for 0701677749 in the name of the 1<sup>st</sup> appellant which showed that **PW1** had sent Kshs. 1,200/- to 1<sup>st</sup> appellant's phone on the night of the offence and the same had been received the same night. **PW5** **Ssgt Bosco Kisaa**, stated that upon arresting the 1<sup>st</sup> appellant, he recovered from him a techno dual sim phone and that it contained line number 0701677749 to which the 2<sup>nd</sup> complainant had sent money on the night of the robbery. He produced the inventory of recovery dated 4.6.13 as PEXH. 9.

3. When put on his defence, both appellants denied the offence and stated that they were arrested and charged for offences that they did not commit. The 1<sup>st</sup> appellant further denied that any phone was recovered from him.

4. In a judgment dated 27.8.14, both appellants were convicted and sentenced to suffer death in both counts.

##### The Appeal

5. The conviction and sentence provoked this appeal. In their separate grounds of appeal filed on 10.10.14, both appellants raised 6 grounds of appeal which I have summarized into 6 grounds as follows: -

**1) That they were detained in police custody for one month before they were charged thereby breaching their right under Article 49(1)(f) of the Constitution**

2) *Were complainants robbed*

3) *Identification of the appellants*

4) *Is there evidence that appellants robbed the complainants*

5) *That their defences that they had lost his ID cards were not considered*

6) *That they were exposed to the witness before the identification parade was conducted*

6. When the appeal came up for hearing on 6.9.18, appellants relied wholly on the grounds of appeal and their submissions filed on 14.6.18.

7. Mr. Juma, learned State Counsel opposed the appeals and relied on the evidence on record.

#### **Analysis and Determination**

8. This being a court of first appeal, I am expected to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I neither saw nor heard any of the witnesses and have to give due allowance. I am guided by the Court of Appeal's decision in the case of Issac Ng'ang'a Alias Peter Ng'ang'a Kahiga V Republic Criminal Appeal No. 272 of 2005 where the court stated as follows:-

*“in the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same.*

10. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions for both parties.

11. In dealing with this appeal, I will address the 3 grounds summarized above as follows:-

#### **Was the appellants' right under Article 49(1)(f) of the Constitution breached ?**

12. Article 49. (1) of the Constitution provides that an arrested person has the right—

(f) to be brought before a court as soon as reasonably possible, but not later than—

(i) twenty-four hours after being arrested; or

(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day

13. Contrary to the appellant's claim that they were in police custody for one month before they were charged, the court record shows that they were arrested on 4.6.13 which was a Tuesday and arraigned in court on 7.6.13 which was a Friday.

14. The appellants had an opportunity to question the investigating officer regarding the delay but they did not. I therefore find that this ground has no merit.

#### **Were complainants robbed?**

15. Evidence by both complainants that they were robbed by two men one of whom had a panga and the other one an iron bar and that they had threatened to use actual violence on them is well corroborated

#### **Did complainants identify the robbers or anyone of them**

16. It is on record that the appellants were unknown to the complainants before the material date. Both complainant's stated that lights were put on while the robbers were in the bedroom and that they had been able to identify both appellants as the ones that robbed them.

17. The significance of accurate visual identification was underscored in the case of R v Turnbull, (1976) 3 All ER 551 where Lord Widgery CJ observed as follows on identification: -

*“First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have*

***the accused under observation" At what distance" In what light" Was the observation impeded in any way, as for example by passing traffic or a press of people" Had the witness ever seen the accused before" How often" If only occasionally, had he any special reason for remembering the accused" How long elapsed between original observation and the subsequent identification to the police" Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance".***

18. This position was restated in the recent case of **John Muriithi Nyagah v Republic [2014] eKLR**, where the Court of Appeal held: -

***"In testing the reliability of the evidence of identification at night, it is essential to make an inquiry of the relevant circumstances such as the nature of the light, the strength of the light, its size, its position relative to the suspects etc."***

19. In his initial reports, the complainants did not give the descriptions of the persons that robbed them and it is doubtful if they actually identified any of the robbers.

20. The evidence on record shows that neither the investigating officer nor the court made an inquiry of the relevant circumstances such as the nature of the light in the bedroom, the strength of the light, its size and its position relative to the appellants.

21. The learned trial magistrate ruled that appellants had been properly identified without pointing out the salient facts that made the court believe that appellants had been positively identified.

22. From the foregoing decision, I find that the trial court failed in its duty to make an inquiry of the relevant circumstances relating to light, its size, and its position that may have enabled complainants to identify the appellants. Consequently, I find that the identification parade that was conducted by PW3 CIP Judith Nyongesa was an exercise in futility and did not add any value to the prosecution case.

23. That brings me to the question whether there is any other circumstantial evidence that demonstrates that appellants or any one of them committed the robberies complained of.

24. As we know from **Republic –vs- Taylor Weaver and Donovan (1928) 21 Cr. App. R. 20**

***"Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence, to say, it is circumstantial."***

25. In **SAWE –V- REP[2003] KLR 364** the Court of Appeal held:

***"In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused"***.

26. In **Abanga alias Onyango v Republic CA CR. A NO. 32 of 1990 (UR)**, the Court of Appeal set out the principles which should be applied in order to test circumstantial evidence as follows:

***It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:***

- i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,***
- ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused***
- iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.***

27. In order to establish the 1<sup>st</sup> appellant's culpability, the prosecution led evidence that PW1 sent Kshs. 1,200/- from his Mpesa account to a number belonging to one Elisha Omulama, the 1<sup>st</sup> appellant herein. Evidence contained in the inventory of recovery dated 4.6.13 marked PEXH. 9 shows that a techno dual sim phone recovered by PW5 from the 1<sup>st</sup> appellant contained line number 0701677749 which was the number to which PW1 had sent Kshs. 1,200/- on the night of the robbery. Evidence by PW4, a Safaricom Enforcement Officer in the form of print outs confirmed that phone numbers 0722551364 was registered in the name of PW1 while 0701677749 was registered in the name of the 1<sup>st</sup> appellant. The print outs further corroborate PW1's evidence that he had sent Kshs. 1,200/- to 1<sup>st</sup> appellant's phone on the night of the robbery and the same had been reserved the same night.

28. While cross-examining PW5, the 1<sup>st</sup> appellant did not challenge the contents of the inventory of recovery dated 4.6.13 marked PEXH. 9 which shows that a techno dual sim phone containing line number 0701677749 was recovered from him.

29. From the totality of the evidence on record, I find that the circumstances in this case taken cumulatively form a chain so complete that there is no escape from the conclusion that within all human probability 1<sup>st</sup> appellant was one of the persons that robbed the complainants.

**Were defences by appellants considered?**

30. From what is stated hereinabove, I find that the defence by the 1<sup>st</sup> appellant was duly considered and rightfully rejected.

31. There is however no evidence to implicate the 2<sup>nd</sup> appellant. The evidence of his identification tendered by the complainants is so discredited to sustain a conviction. His conviction and sentence is not supported by the evidence on record.

32. From the above analysis, I have come to the conclusion that: -

1) The appeal by the 1<sup>st</sup> appellant has no merit and it is dismissed

2) **In view of the Supreme Court decision in PETITIONNO.150 OF2015(ASCONSOLIDATEDWITHPETITIONNO16OF2015), the 1<sup>st</sup> appellant's is hereby remitted to Hamisi for mitigation and re-sentence**

3) The appeal by the 2<sup>nd</sup> appellant succeeds. His conviction is quashed and the sentence set aside and unless otherwise lawfully held, it is ordered that 2<sup>nd</sup> appellant shall be released and set free forthwith.

It is so ordered.

**DATED AND SIGNED AT KAKAMEGA THIS 7<sup>th</sup> DAY OF September 2018**

**T. W. CHERERE**

**JUDGE**

**In the presence of-**

Court Assistants - George & Erick

Appellant - 1,2 Present in person

For the State - Mr. Juma