



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 130 OF 2014

(Being an appeal arising from conviction and sentence in Eldoret Chief Magistrate's Court In criminal case No. 2399 of 2012 delivered by A. Alego Principal Magistrate of 30/7/2014)

BILLYSMUS OMALA KHASAKHALA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

1. The appellant 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 the 31st day of May, 2012 at Chepkanga Trading Centre In Eldoret East District within Rift Valley Province, jointly with others not before court while being armed with dangerous weapons namely knives robbed Moses Kiprotich Lagat of Mobile phones make Nokia, Samsung and M.I. and cash Kshs 50/- all valued at Kshs 6,050/- the property of Moses Kiprotich Lagat and immediately before time of such robbery threatened to use actual violence to the said Moses Kiprotich Lagat.**
 2. The appellant was equally charged with the **second count of Robbery with violence contrary to Section 296(2) of the Penal Code**. The particulars of the charge were that **on the 31st day of May, 2012 at Chepkanga Trading Centre In Eldoret East District within Rift Valley Province, jointly with others not before court while being armed with dangerous weapons namely knives robbed Daniel Kiprono Chelal of Mobile phone make Nokia 1208 valued at Kshs 2,300/-, the property of Daniel Kiprono Chelal and immediately before time of such robbery threatened to use actual violence to the said Daniel Kiprono Chelal.**
 3. The appellant was charged with the **third count of Robbery with Violence contrary to Section 296(2) of the Penal Code**. The particulars of the offence were that **on the 31st day of May, 2012 at Chepkanga Trading Centre In Eldoret East District within Rift Valley Province, jointly with other not before court while being armed with dangerous weapons namely knives robbed Raphael Morogo James of Mobile phone make Nokia 1615 and Kshs 5000/= all valued at Kshs 10,000/-, the property of Raphael Morogo James and immediately before time of such robbery threatened to use actual violence to the said Raphael Morogo James.**
 4. He was convicted and sentenced to death. He has appealed citing several grounds.
 5. The brief facts and evidence as they were presented during trial were that **PW1 Raphael Morogo James** who lives at Chepkanga trading centre had closed his shop at around 9.30 pm on 31/3/2012. As he went through the corridor of his shop, he was accosted by someone who held his jacket and managed to steal from him Kshs 5000/- as well as a Nokia phone. Three of the attackers had masked except the appellant. He was ordered to open the shop and to switch off the security lights. In the process a knife they were holding dropped and he took off.
 6. He rushed to Chepkanga AP Post and raised distress call. The following morning they recovered the black jacket at the scene as well as a knife, akala shoe and kshs 50/- burned note.
- On cross-examination he said that the appellant was his regular customer.
7. **PW2 AP Kenneth Wangai Mwangi** is based at Chepkanga AP Camp. He narrated how 3 people came to the station who included PW1 and had a jacket and akala shoe. They reported the incident and stated that it belonged to the appellant who apparently have no mask. He took them to the appellant's house where they arrested him outside together with his friend.
 8. **PW3 Daniel Kiprono Chelal** testified that he was having dinner in his house when his door was forcefully banged. Someone came in and switched off the lights and held a knife on his neck and told him not to scream. The pen knife had a torch which he identified in court. He took his phone and left.

9. PW1 then came and he told him what had transpired. Outside his house they found the jacket and the sandals which belonged to the appellant.

10. **PW4 Joseph Chesenai** from Huruma District Hospital produced the P3 form he filled on behalf of the complainant PW1. His findings was that he had suffered injuries on his head and right hand swollen tender right thumb and cut wound on the same.

11. **PW5 P.C. Wycliffe Lumadiwa** from Kapsoya police post received the appellant from the hands of the AP Officers who had arrested him. He went to the scene and recovered the exhibits. When cross-examined he stated that the shoes and the jacket belonged to the appellant.

12. When put on his defence the appellant gave sworn evidence. He admitted that he was a mason and stays at Chepkanga. He was preparing to go on his duties on 1/6/2012 at 8.50 am when he was arrested by the AP officer. He was not aware of what had transpired in the area especially the robbery incident. He denied that the sandals and the jacket belonged to him.

Analysis and Determination

13. The court has read the proceedings herein as well as the parties written submissions. The entire appeal is based on the argument surrounding lack of recognition or identification of the assailants as well as the fact that the evidence so far presented did not establish that it was the appellant who committed the offence.

14. What runs across the evidence of PW1 and PW2 was that they were both attacked and robbed almost at the same time. PW2 together with PW1 and PW3 managed to arrest the appellant that night.

15. Were the conditions to recognise or identify the assailants appropriate? Was he known to the complainant? It appears that both PW1 and PW3 knew the complainant PW1 in particular knew him as his regular customer. He managed to recognise him through the assistance of the lights from the shop.

16. PW3 equally stated that he knew the appellant whom he saw before he was ordered to put off the lights.

17. More significantly, the arrest by PW2 was made almost at the same time. PW1 and PW3 described the robbers to PW2 who happened to have known the appellant too and they then arrested him outside his house.

18. Was there any malice or collusion by his witnesses? I do not find any. Infact the appellant in his sworn evidence did not deny that he knew the complainants.

19. Even if the issue of the recovered jacket, sandals and pen knife was to be assumed that they never belonged to the appellant, I find that he was squarely placed at the scenes of robbery. The complainants did not identify the rest of the assailants but at least they did the appellant.

20. In the premises I find that the case against the appellant was properly proved. He was at the scene that night together with his hooted accomplices.

21. This appeal is hereby dismissed.

22. On sentencing and pursuant to the case of *Francis Muruatetu & Another Versus Republic Supreme court petition No. 15 of 2015* I am inclined to allow the appellant opportunity to rehear the sentence afresh and thereafter pronounced appropriate sentence. The appeal is otherwise dismissed.

Delivered, signed and dated at Eldoret on this 12th day of October, 2018.

H.K. CHEMITEI

JUDGE

12/10/18

In the presence of:

Mr. R. Karanja for the Respondent

Appellant – present

Court Assistant – Christine

Judgment delivered in open court.