



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 57B OF 2016

(Being an appeal arising from conviction and judgment in Eldoret Chief Magistrate's Court

in criminal case No. 1628 of 2013 delivered by H. Barasa Principal Magistrate on 5/4/2016)

HARON JUMA KHATECHE ALIAS BOY.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

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 19th day of January, 2013 Khaoya estate Eldoret West district within Uasin Gishu County , jointly with others not before court while armed with dangerous weapons namely panga, rungu and stones robbed No. 47271 AG IP Stephen Oloo mobile phone make Sumsung, cash 9,800/=, one pair of Safari Boot, Barclays ATM Card, K.C.B. A.T.M. Card, National Bank A.T.M. Card Credit A.T.M Card, Nation identity card and certificate of Appointment card all valued at Kshs 20,000/= and immediately before the time of such robbery wounded the said No. 47271 AG IP Stephen Oloo.**
2. He was convicted and sentence to death. The rest of his accomplices were set free. He has filed this appeal citing among other grounds that the trial court failed to observe that parade identification was not conducted.
3. The summary of the evidence as presented during trial was that **PW1 Inspector Stephen Oloo** together with his friend PW2 were heading home at around 11.00 pm. Before he reached his gate he was assaulted by several people who were armed with pangas and clubs. He was severely injured and rushed to Moi Teaching and Referral hospital. When he regained consciousness he realised that several of his assorted items listed in the charge sheet had been stolen.
4. Investigation began and through the aid of the tracking devices on his phone, the police succeeded several months later to trace the phone to the several people who were able to trace it back to the appellant. The appellant was arrested in the presence of the complainant. The appellant was identified by the complainant who said that there was sufficient light that night from the security light and was able to see the assailant especially the appellants who had ascar on the ear. He as well identified his mobile phone when it was recovered. A P3 form was filled on behalf of the complainant which he identified.
5. **PW2 Isaiah Lucheli Walushaka** a journalist explained how he was attacked together with PW1. He however took off and was not able to recognise the assailants.
6. **PW3 Peter Waweru Kibande** was in possession of the phone when the police managed to track. He told them that he had been given by one Dennis Obadala who was one of his workers. He called Dennis who came and told the police that he was given the phone by a fellow who sells Mutura.
7. **PW5 Samuel Mukuna Mumbi** sells soup in Huruma. He explained that the appellant who was a tout pledged his phone when he borrowed kshs 1000/= from him. He was not able to immediately pay and that was how he was found with the appellant's phone.
8. **PW6 Dennis Lukhuima Optia** testified that he had given Peter Waweru his phone. He was arrested and told the police that he got the phone from Samson Migira.
9. **PW7 Dr Paul Rono** from Moi Teaching and Referral Hospital produced the P3 form on behalf of Dr. Imbenzi who had since retired. He found that the complainant had sustained deep cut injury above the eye as well as on the face and bones.

10. **PW8 Francis Ingabo** who was involved in community policing within Huruma arrested the appellant's co-accused.

11. **PW9 Inspector Patrick Lumumba** carried out identification parade where the 3rd appellant was identified.

12. **PW10 P.C. Daniel Ndiku** carried out the investigation of the matter and he explained how they traced the mobile phone to the appellant who when arrested the complainant was able to identify.

13. When put on his defence the appellant stated that he was a tout. He said that on the material day he was on duty till evening. He was arrested on 3/3/2013. The police then took his mobile phone and licence. He said that while in custody they brought the 3rd accused whom the officer wanted the appellant to testify against. He alleged that he was beaten up at the police station. He generally denied the charge.

Analysis and Determination

14. The court has perused the proceedings herein as well as the supplementary grounds of appeal together with the written submissions.

15. The robbery incident indeed took place as was proved by the prosecution. There were several people who attacked PW1 and PW2. He said that there was sufficient light from the security light near his gate. He described clearly the assailant which in my view was not challenged.

16. The only issue that enabled the appellant to be traced was the mobile phone owned by the complainant. The chronology of how the same was traced back to the appellant was clearly described.

17. Although the appellant suggested that there was no documents to establish that it was owned by the complainant, the tracing device which enabled the police to trace the same was clearly in favour of the complainant's relatives. In any case it has not been denied that the phone was traced to PW3 who then enabled the police to trace the same backward.

18. Clearly I do not see how PW5 would simply fix the appellant maliciously. They were people who apparently knew each other by virtue of their daily activities.

19. More importantly, the complainant was able to describe the appellant very well. He explained that with the use of security light and his training as a police officer, he managed at least to identify the assailants.

20. Consequently his submissions that an identification parade should have been conducted may not have elicited much as the complainant participated in arresting the appellant.

21. In the premises the appeal herein is devoid of merit and the same is dismissed.

22. The appellant has however raised a prayer concerning the sentencing pursuant to the now well known decision of the **Supreme Court of Kenya case *Petition No. 15/2015. Francis Muruatetu & Another Versus Republic*** concerning the efficacy of the death penalty. It must be noted that contrary to the submissions by the appellant, death penalty was never outlawed. The same is still in the statutes.

23. However pursuant to the directions given by the Supreme Court of Kenya which is binding to this court I shall order that the matter be heard afresh in respect to the sentence and thereafter this court shall issue an appropriate sentence.

Orders accordingly.

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

H.K. CHEMITEI

JUDGE

12/10/18

In the presence of:

Mr. R. Karanja for Respondent

Appellant – present

Court Assistant – Christine

Judgment read in open court.