



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL APPEAL NO. 62 & 63 OF 2013**

**(Being an appeal arising from conviction and sentence in Eldoret Chief Magistrate's Court criminal case No. 3349 of 2012 delivered by E. Tanui Senior Resident Magistrate on 27/3/2013)**

**SAMUEL NDULO .....1ST APPELLANT**

**JOHN NJOROGE KAMAU .....2ND APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**J U D G M E N T**

1. The appellants were 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 9<sup>th</sup> day of August , 2012 at Pioneer estate in Wareng district within Rift Valley Province, Jointly with others not before court being armed with dangerous weapons namely knife and hammer, robbed Fredrick Kwemoi of cash money Kshs 40,000/-, Mobile phone Nokia 2700 valued at Kshs 6,000/=-, Sony DVD valued at kshs 3,000/=-, Sonny remote control Kshs 500/=-, flash disk Kshs 800/=- a total value of Kshs 50,300/=- and immediately before such robbery wounded the said Fredrick Kwemoi.**

2. The 1<sup>st</sup> appellant Samwel Ndulo was equally charged with an alternative count of handling stolen goods contrary to Section 322(1) (2) of the penal code. The particulars of the same was that

on the 9<sup>th</sup> day of August, 2012 at Pioneer estate in Wareng district within Rift Valley Province , otherwise than in the course of stealing dishonestly retained a Sony DVD valued at Kshs 3,000/=-, Sony remote control valued at Kshs 500/=- a total value of Kshs 3,500/=- knowing or having reason to believe them to be stolen goods.

3. Both appellants were convicted and sentenced to death hence this appeal. Before looking at the merit or demerit of the same it is worthwhile to summarise the proceedings at the trial court.

4. **PW1 Fredrick Kwemoi** the complainant told the court that he lived in Pioneer Estate and on 9<sup>th</sup> August 2012 at around 10.00 am he was in his bedroom reading his bible. The accused herein entered the house and forcefully tied him with a rope on both his hands and the legs. They assaulted him using a hammer, a knife and an iron box. He was also pushed under the bed. He bled profusely. In the process they stole the items enumerated in the charge sheet. He managed to see the intruders. When they left he managed to loosen himself and went outside where his neighbors including one Kefa noticed him.

5. The boda boda rider who were outside the compound on the flat he was living told him that they had arrested some people and had been taken to the AP Camp. He went there and identified the assailants. He saw the 1<sup>st</sup> appellant being searched by the AP Officer and a knife dropped from his clothes. They went back to the house with the police from Langas police station. During the hearing the complainant identified the assorted items recovered from the appellant. He further said that the number of people who attacked him were 3 though the 3<sup>rd</sup> person was not arrested.

6. He was later treated at Moi Teaching and Referral Hospital and P3 form filled.

7. **PW2 Morris Muhando Ajenga** from Pioneer estate testified that he was a boda boda rider operating at Voyo Apartments where the complainant whom he knew lived. He said that on 9<sup>th</sup> August 2012 at around 10.00 am while waiting for customers they saw people coming down stairs from the apartments who were strangers and looked suspicious as they knew the occupants of the flat. One of them was carrying a green paper bag. That was the 1<sup>st</sup> appellant. They were 3 in number. On sensing that they were being followed the 3<sup>rd</sup> person escaped through a maize field and they managed to arrest the two appellants herein. They took them to the APS Camp nearby. They went back to the apartments where they found the complainant bleeding profusely. He explained to them what had happened. They went to the Aps Camp where he identified the two appellants. The green paper bag had a DVD Sonny, iron Box and a remote.

8. **PW3 Kibii Simion Koech** a clinical officer from Langas Wareng District hospital filled the P3 form for the complainant. He found the injuries he sustained to be a cut on the left eye, elbow, nose and swollen forehead among others. He said that the complainant visited the facility at 12.00 pm.

9. **PW4 APC Samuel Wang'endo** attached to Pioneer AP Camp testified that he was in his place at Pioneer Chief's camp when he saw a vehicle moving at a high speed. He went to the road and saw many boda boda people frog matching the two appellants towards the chief's camp. They told him that the two were robbers.

10. They took the two to the Chief's Camp. They had a green paper bag with some items which were DVD player, remote and one flash disk and a knife.

11. In the process of interrogating them the complainant who was bleeding arrived at the scene and identified the two. He also showed them the receipts which he was given when he purchased the items. They then called the police from Langas who took up the matter.

12. **PW5 PC Joseph Mugo** attached to the Langas police station crime branch carried out the investigations after the two were picked from the Pioneer Chief's Camp. He recorded statements from the witnesses and preferred charges against the appellant. He also produced the identified items.

13. When put on their defences the 1<sup>st</sup> appellant gave unsworn evidence denying the charge. He said that he cleans boreholes and on that day he was heading home on foot through a short cut when a large crowd saw him and they chanted that he was a Mungiki because of his rasta dreadlocks. He was carrying a t short and a shirt and about 50 metres away they arrested another man whom they tied with him. A good Samaritan put them in a pick up. He denied the assorted items allegedly recovered from him.

14. The 2<sup>nd</sup> appellant gave sworn evidence. He said that he was a businessman selling shoes in town and on that day he was heading to town when he saw a large crowd who came towards him. They had arrested one other person whom he did not know. While they questioned him an AP officer came who told them to accompany him to their camp. While at the camp police officers from Langas came and picked them and later the charges preferred against him.

#### **Analysis and Determination**

15. The court has carefully read the proceedings herein as well as the submissions of all the parties.

16. The ingredients of the offence of robbery with violence are clear namely;

**1) The offender is armed with any dangerous or offensive**

**weapons or instrument or**

**2) If he is in a company with one or more other person or**

**persons.**

**3) If at or immediately before or immediately after the**

**time of the robbery he wounds, beats, strikes or uses**

**any other violence to any person.**

17. Having looked at the evidence broadly, can it be said that the complainant failed to notice the assailants? I do not think so. There was no suggestion that they were hooded or tried to conceal their identity. The incident occurred at 10.00 am and so there could be no case of mistaken identity. Even though the complainant was assaulted and his mouth blocked using a towel, there was no evidence that he did not identify the strangers.

18. Secondly PW2 and his bodaboda colleagues were suspicious of the three person's who walked out of Voyo apartments. Their suspicions was confirmed when a 3<sup>rd</sup> person took off towards a maize field and disappeared. They arrested the two who were unable to explain themselves.

19. At the nick of time they traced the complainant who was by then bleeding profusely. PW1 identified the two at the AP Camp. The assorted items although not all were recovered including the cash were found with the appellants.

20. Its my estimation that from the time they left the apartment to their arrest, it must have taken about half an hour (30 minutes) or thereabouts. In short there was no break between the time the complainant was robbed and the period they were arrested.

21. I do not think their defences hold much water. They were found with the assorted items which PW1 was able to prove by production of purchase receipts.

22. Neither was the evidence of the investigating officer faulted when he could not describe well the DVD machine. The bottom line was that the two were arrested with recently stolen items.

23. This court does not buy the idea that the two were simply innocent people walking on a public road who were mistakenly arrested. On the contrary why did not PW2 and his colleague arrest other people whom I suppose were walking on the road.

24. The sum total of my finding are that this appeal is unmeritorious and the same is hereby dismissed.

25. However following the Supreme Court decision in the case of *Francis Muruatetu & Another Vs Republic Petition No. 15 of 2016*, its appropriate that this court sets aside the sentence of death meted against the appellants and grant them a chance to mitigate afresh with a view of sentencing them appropriately.

**Judgement read, delivered, signed and dated at Eldoret on this 12<sup>th</sup> day of October , 2018.**

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**H.K. CHEMITEI**

**JUDGE**

**12/10/18**

**In the Presence of:**

**Mr. R. Karanja for the Respondent**

**Appellants – present**

**Court Assistant – Christine**

**Judgment read in open court.**