



**REPUBLIC OF KENYA**

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

**CORAM: D.S. MAJANJA J.**

**CRIMINAL APPEAL NO. 49 OF 2017**

**CONSOLIDATED WITH CRIMINAL APPEAL NO.s 44 & 43 OF 2017**

**BETWEEN**

**MARY MWANGO OKENO ..... 1<sup>ST</sup> APPELLANT**

**JUSTINE NYANDORO NYABUTO ..... 2<sup>ND</sup> APPELLANT**

**KEVIN OINDO OINO ..... 3<sup>RD</sup> APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

***(Appeal from the original conviction and sentence of Hon. N. Wairimu – PM dated 28<sup>th</sup> February 2017 at the Principal Magistrate’s Court at Ogembo in Criminal Case No. 1263 of 2014)***

**JUDGMENT**

1. The appellants, **MARY MWANGO OKENO**, **JUSTINE NYANDORO NYABUTO** and **KEVIN OINDO OINO**, were charged, tried, convicted and sentenced to death for the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The charge against them was as follows;

*On the 6<sup>th</sup> day of August 2014 at about 8.30 p.m at Emesa Sub-location in Gucha South District within Kisii County jointly while armed with dangerous weapons namely pangas and rungus robbed DMA of cash Kshs. 60,000/=, a mobile phone make LG, a jacket, three bundles of washing soap (msafi), a bundle of supermatch cigarette, a packet of sweet and five rolls of sewing thread all valued at Kshs. 66,250/= and at or immediately before or immediately after the time of such robbery wounded the said DMA.*

2. As this is a first appeal, I am required to re-evaluate the evidence and come to an independent conclusion as to whether to uphold the conviction bearing in mind that I neither saw nor heard the witnesses testify [see **Okeno v Republic [1972]EA 32**]. In order to proceed with this task, it is necessary to set out the evidence emerging at the trial.

3. Domnic Miruka Agogo (PW 1) testified that on 6<sup>th</sup> August 2014 at about 8 pm, he was finalizing his accounts at his kiosk at Kabonyo. As he was about to leave, four people came into the shop. As the lantern was on, he was able to recognize the appellants as they came from the neighbourhood. He confronted and tried to fight them off but they overpowered him, tore his pockets and took Kshs. 60,000/= in his pocket. They also took his jacket which had his LG mobile phone and made off with three bundles of washing shop, cigarettes, sweets and sewing thread. They hit him on his mouth, right hand and back. As the second and third appellants continued to beat him with a panga and rungu, his wife, Eunice Kerubo (PW 4), tried to intervene but she was threatened as she raised alarm.

4. PW 4, recalled that on the material night, she was cooking in the house when she heard noise coming from the kiosk. She went there and found her husband fighting with people. Using her torch, she saw four people including the appellant but one of the assailants ran away. She recalled that she saw the 1<sup>st</sup> and 2<sup>nd</sup> appellants with weapons assaulting PW 1.

5. Abel Onderi Onguti (PW 2), the Chief of Nyamarambe Location, was called at night and informed that PW 1 had been attacked. He proceeded to PW 1’s place where he found him bleeding profusely. PW 1 told him that he had been attacked by the appellants and a fourth person who he could only identify by his looks. PW 2 further testified that he proceeded to the 1<sup>st</sup> appellant’s house where he found PW 1’s blood stained jacket, an LG phone, a box of coins and five rolls of thread. The 1<sup>st</sup> appellant told him that the items had been brought to her

house by the 2<sup>nd</sup> appellant. He went to the 2<sup>nd</sup> appellant's house and arrested him.

6. PW 1 was taken to Nduru District Hospital where he was treated. PW 3, the clinical officer, examined PW 1 and noted from the treatment notes that PW 1 had been attended to at the hospital less than 24 hours after the incident. He had a swelling on the head and mouth, a cut wound on the lower lip, tenderness on the back and bruises on the forearm. He concluded that a blunt object was used to inflict the injury which he classified as harm.

7. PC Job Kipyegon (PW 5) produced the exhibits and the report from the Government Chemist which showed that the jacket recovered from the 1<sup>st</sup> appellant contained the blood from PW 1.

8. When put on their defence, the appellants gave unsworn statements. The 1<sup>st</sup> appellant denied the offence. She stated that in 2014, she was called from the school that PW 1 was with her daughter. When she went to find her daughter, PW 1 started beating her. The 2<sup>nd</sup> appellant denied the offence. He gave an account of his arrest and told the court that PW 1 was his step brother who had borrowed Kshs. 10,000/= from him but did not pay him back. He accused PW 1 of framing him on account of sibling jealousy. The 3<sup>rd</sup> appellant told the court that he was arrested by PW 2 and taken to the police station. He stated that he knew PW 1 as they worked together. He alleged that he was being framed as he refused to work with him.

9. The trial magistrate found that a robbery had taken place and that the appellants were identified as assailants. The appellants contest the conviction and sentence based on their respective petitions of appeal and their written submissions. They contended that the evidence of identification was inadequate as the prevailing circumstances were not favourable for positive identification. They submitted that the prosecution failed to prove the elements of the offence of robbery with violence and that essential witnesses were not called.

10. The offence of robbery with violence under **section 296(2)** of the **Penal Code** is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see ***Dima Denge Dima & Others v Republic NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR, Oluoch v Republic [1985] KLR 549*** and ***Ganzi & 2 Others v Republic [2005] 1 KLR 52***).

11. After appraising the evidence, I am satisfied that a robbery was committed on the material night. The testimony of PW 1, who was attacked by four people wielding pangas and rungas and who injured him in the course of stealing from him, satisfies the ingredients of the offence. The fact of the robbery is also supported by the testimony of PW 4 who was present when PW 1 was being assaulted by the assailants and who identified that items that had been stolen from PW 1 and the kiosk.

12. The key issue in this appeal is whether the appellants were identified as the assailants. This case was not one of identification of strangers but one of recognition of persons in difficult circumstances. This requires that the evidence be tested with utmost care to avoid miscarriage of justice due to mistaken identification. However, there is a measure of reassurance when the case rests on recognition as stated in the case of ***Anjononi & another v Republic [1980] KLR 59***, thus:

*The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.*

13. This is a case where PW 1 and PW 4 knew the assailants as they lived in the neighbourhood. The appellants, in their respective unsworn statements, also admitted that they knew the witnesses. PW 1 testified that he was in his shop and the lantern was on. He was confronted by the appellants who fought with him. The fact that PW 1 knew the assailants, their proximity when they interacted and fought coupled with the light from the lantern were all circumstances favourable for positive recognition. In addition, PW 4 also identified the three appellants when she went to see what was happening at a kiosk. She was able to see them with a torch. Since the appellants were known to both PW 1 and PW 4, it was not necessary to conduct an identification parade.

14. PW 1's testimony on the issue of identification was further reinforced by PW 2's testimony. When he arrived at the scene, PW 1 told him that the three appellants were the ones who attacked him and PW 2 proceeded to go and effect their arrest. The fact of the identity having been given gives credibility and weight to the testimony of PW 1 (See ***Simiyu and Another v Republic [2005] 1 KLR 192***).

15. The prosecution also relied on the doctrine recent possession to implicate PW 1. The essence of the doctrine is that when an accused person is found in possession of recently stolen property and is unable to offer any reasonable explanation how she came to be in possession of that property, a presumption of fact arises that he is either the thief or receiver. In ***Arum v Republic [2006] 1 KLR 233***, the Court of Appeal set out conditions that must exist before a court can rely on the doctrine of recent possession as a basis of conviction in a criminal case as follows:

- (a) The property was found with the suspect;
- (b) The property was positively the property of the complainant;
- (c) The property was stolen from the complainant;
- (d) The property was recently stolen from the complainant.

The proof as to time will depend on the easiness with which the stolen property can move from one person to another. Once the elements of the doctrine are established, the evidential burden fall on the accused to show how he or she came into possession of the stolen goods (see **Malingi v Republic [1989] KLR 225**).

16. When PW 2 went to PW 1's home immediately after the incident, he was able to recover PW 1's blood stained jacket, the LG mobile phone, thread for stitching, three boxes of soap and one packet of cigarettes which PW 1 and PW 4 identified as their items. Although no receipts were produced, both witnesses identified these items as theirs and there was no reason to disbelieve them. Further, the 1<sup>st</sup> appellant could not explain how these items came into her possession or she lay any claim to any of the items. The evidence of possession of PW 1's property placed DW 1 at the scene of the incident on that night. In addition, it reinforced the eye witness testimony of PW 1 and PW 4 that she and her co-accused were present at the scene.

17. The appellants raised the issue that an essential witness was not called. In **Sahali Omar v Republic MSA CA Crim. App No. 44 of 2016 [2017] eKLR**, the Court of Appeal discussed whether the failure to call a witness was fatal. It observed as follows:

*The prosecution reserves the right to decide which witness to call. Should it fail to call witnesses otherwise crucial to the case, then the court has the mandate to summon those witnesses. But should the said witnesses fail to testify and the hitherto adduced evidence turn out to be insufficient, only then shall the court draw an adverse inference against the prosecution. This is because the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt (see. Keter v Republic [2007] 1 EA 135).*

18. It is true that one Moi Onserio is the one who called PW 2 to the scene but his evidence would neither add to nor subtract from the prosecution evidence as he is a person who merely responded to the alarm. PW 2 is the one who came and as a person in authority received PW 1's statement that the appellants were assailants and then proceeded to arrest the 1<sup>st</sup> and 2<sup>nd</sup> appellants.

19. The totality of the evidence sweeps away the unsworn statements made by the accused and given the positive recognition, the fact that the appellants were reported immediately to PW 2 and PW 1's property recovered from the first appellant on the very night displaces any notion that the case against the appellant was a frame-up. I therefore affirm the conviction.

20. The appellants were sentenced to death. As the mandatory death penalty was declared unconstitutional (see **Francis Karioko Muruatetu & Another v Republic SCK Pet. No. 15 OF 2015 [2017] eKLR** and **William Okungu Kittiny v Republic KSM CA Criminal Appeal No. 56 of 2013 [2018] eKLR**), I set aside the sentence and call upon the appellants to make their mitigation before passing the appropriate sentence.

**DATED** and **DELIVERED** at **KISII** this 7<sup>th</sup> day of November 2018.

**D.S MAJANJA**

**JUDGE**

Appellants in person.

Mr Otieno, Senior Prosecution Counsel, instructed by the Officer of the Director of Public Prosecution for the respondent.