



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 130 OF 2015

(Consolidated with Criminal Appeal Nos. 131 and 132 of 2015)

1. MOSES CHESOLI NYONGESA

2. NICHOLUS OYOKO

3. MARTIN ADAMBA.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

(Being appeals against the judgment, conviction and sentence of Hon. C. Obulutsa, Chief Magistrate in Eldoret Chief Magistrates Court Criminal Case No. 2255 of 2012 delivered on 02/10/2015)

JUDGMENT

1. The three Appellants herein, **Moses Chesoli Nyongesa** (the first Appellant), **Nicholus Oyoko** (the second Appellant) and **Martin Adamba** (the third Appellant), were jointly charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code, Cap. 63** of the Laws of Kenya. The first and second Appellants were further charged with an alternative count of **handling stole property** contrary to **Section 322(1)(2)** of the **Penal Code** whereas the second Appellant was also charged with two separate counts of **assault** contrary to **Section 251** of the **Penal Code**.

2. They denied the offences and were tried. All the Appellants were found guilty of the offence of robbery with violence, convicted and sentenced to suffer death. The offences of assault were dismissed for want of proof.

3. The particulars of the main count were that ‘*On the night of night of 19th May 2012 at Water Supply village, Turbo Sub-Location, Lumakanda Location, Lugari District within Western Province jointly with others not before court and while armed with offensive weapon namely rungus and pangas, robbed Emily Nekoye Wanjala of her mobile phones make Nokia 2600, One TV Set make GLD, one bicycle make Diamond, three sport lights, one pressure lamp, one radio make Sonitec, one iron box, one calculator, twp curtains, one TV remote control and cash Kshs. 12, 760/= all valued at Kshs. 40,000/= the property of Emily Nekoye Wanjala and immediately before the time of such robbery used actual violence to the said Emily Nekoye Wanjala.*’

4. Six witnesses testified in a bid to prove the charges. They were **Emily Nekoye Wanjala, PW1**, who was the complainant in respect to the first count and was also the wife of PW4. **PW2** was **Benard Mukoma**, the complainant in respect to the third count and **PW4** was **Joseph Wanjala** who was the complainant in respect to the second count and the husband to PW1. **PW3** was a brother to PW4. The investigating officer was **No. 83574 PC Pascal Otieno** attached at Turbo Police Station who testified as **PW5**. **PW6** was a Clinical Officer attached at Turbo Health Centre. I will for the purposes of this judgment refer to the witnesses in the sequence in which they testified.

5. Aggrieved by the convictions and sentences, the Appellants separately mounted appeals which were eventually consolidated with Appeal No. 130 of 2015 being the lead appeal file. The Appellants later engaged the services of **Messrs. Nyambegera & Co. Advocates**.

6. The appeal was canvassed by way of written submissions on the part of the Appellants as the State made an oral response. In a nutshell, the Appellants mainly attacked the conviction on the issue of identification, the recovery of the exhibits and the sentence being unconstitutional. In response Counsel for the State submitted that the charge was clearly and certainly proved as the Appellants were adequately identified by recognition and that all the ingredients of the charge were proved. Counsel prayed that the appeal be dismissed.

7. This being a first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. Republic (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. Republic (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence

and give allowance for that.

8. In discharging the foregone duty, I have carefully read and understood the proceedings and judgment of the trial court as well as this appeal. I will endeavor to deal with the following issues: -

(a) Whether the Appellants were part of the assailants;

(b) Whether the offence was proved as required in law: and

(c) The sentence.

I will consider each of the above issues singly.

(a) On whether the Appellants were part of the assailants:

9. The alleged robbery took place in the night of 19th May 2012 at around 11:00pm at the homestead of PW1 and PW4. It all began at the house of PW2 who lived next to the main house which was occupied by PW1 and PW4. PW2 was an employee of PW1 and PW4. As PW2 listened to a radio inside his house, he was suddenly confronted by a group of around six people carrying torches. They shone the torches on him and he was hit with a panga on the forehead and the knees. He struggled with the one who had the panga as the rest of the people went into the main house. PW2 managed to disarm the person who had the panga. PW2 stated that there was ample moonlight and could clearly see outside of his house. He then saw the people remove several items from the main house after they demanded for money from PW1. With the aid of the moon light PW2 managed to recognize the person he had struggled with as the third Appellant who hailed from their neighbourhood and interacted with.

10. Inside the main house PW1 and PW4 were woken up by the opening of the door to their bedroom. PW1 raised alarm and called for divine intervention. Two people entered and shone torches on them. They assaulted them with iron rods and pangas as they demanded for money. PW1 gave them Kshs. 12,760/= and they also took her Nokia 2600 phone. They turned to PW4 and demanded money as they assaulted him. Shortly, they proceeded out of the bed room and went to PW1 daughter's room where they took away a calculator and other household items. PW1 recognized the first Appellant as one of the two assailants who entered their bedroom whereas PW4 identified the third Appellant. PW4 stated that he knew the third Appellant so well as he used to bring them charcoal.

11. PW2 watched under the moonlight as the robbers took the items out of the main house and leave. PW1 and PW4 reported the matter to the police that night and the police visited the scene. PW1 accompanied the police on the following day to the house of the first Appellant whom he had identified during the ordeal. PW1 knew that the Appellants were caretakers and lived together in the same house in the neighbourhood. It was PW5 who searched the houses of the Appellants and allegedly recovered most of the stolen items.

12. The first Appellant denied the offences and that the items allegedly recovered from his house were stolen. He stated that the police searched him and took away Kshs. 700/= and his identity card from him and contended that the Nokia phone was not proved to belong to PW1 and that PW5 did not prepare an inventory during the search and the alleged recovery. The second Appellant contended that the radio and padlock were his and not among the stolen items. The third Appellant tendered his defence mainly on how he was arrested as he was on his way to his grandmother.

13. I will first deal with the recovery of the stolen items. It is not in doubt that PW1's house was robbed as alleged and that she lost several household items. The recovery of the said items was led by PW5 who was directed by PW1 to the houses of the Appellants. PW5 was in the company of one **PC Mwendwa** and they jointly searched the Appellants' houses and allegedly recovered several items. The Appellants variously challenged the exercise as wanting. It is true that PC Mwendwa did not testify. It is also true that no inventory was prepared and accordingly signed by the requisite parties. Further, PW1 did not state which items were recovered from which Appellant. Therefore, the evidence of PW5 was uncorroborated as far which specific items were recovered from which Appellant.

14. As to whether the items belonged to PW1, the Appellants likewise vehemently objected to. The first Appellant stated that the money and his identity card were retrieved from his body as he was searched and not as alleged. There being no any other evidence on where PW5 found the items, the defence of the first Appellant creates a serious doubt on whether the money and his identity card were recovered in his house and not on himself. As for the Nokia 2600 phone despite the general consensus that the phone type was a common one in the market the prosecution did not endeavor to adduce any evidence to confirm that the phone belonged to PW1. Whereas it is nowadays very possible for one to buy a phone in the flooded markets without being issued with a receipt capturing the necessary details or at all, nevertheless the owner may demonstrate ownership of his/her phone by either stating some unique features thereon or some contacts therein or maybe the security PIN. Holding that the burden of proof does not shift from the prosecution throughout, the prosecution failed to prove that the phone belonged to PW1. The upshot is that none of the items allegedly recovered from the first accused person were proved to belong to PW1. The same position avails to the radio and padlock allegedly recovered from the second Appellant's house. Given that there was no evidence that the keys to the padlock were lost PW1 would have at least availed them and unlocked it. The same position rendered the items allegedly recovered from the third Appellant's house.

15. The foregone analysis reveals that there was no cogent evidence to the effect that the allegedly items were either variously recovered from the Appellants' houses or belonged to PW1.

16. The only evidence which now tends to connect the Appellants with the offence is that of recognition which in view of the prevailing circumstances I must cautiously deal with as laid bare in case law. (See **Wamunga vs Republic (1989), KLR 426 Nzaro vs Republic (1991) KAR 212, Kiarie vs Republic (1984), KLR 739 R –vs- Turnbull & Others (1973) 3 ALL ER 549** among others). The evidence of PW1 on the identification of the first Appellant was not corroborated. PW1 was woken up by the entry of the assailants into the room and shouted calling for help as she was assaulted. In such a state of shock, as she confirmed, it was not likely that PW1 was able to recognize the

first Appellant without error. The second Appellant was not identified by any witness as his connection to the offence was on the recovered items. The third Appellant was identified by PW2 and PW4. PW2 narrated how he struggled with the third Appellant until he disarmed him of the panga he had. He further saw him under the bright moon light as the attackers removed items from the main house. PW2 knew the third Appellant so well and immediately gave his name after the ordeal and to the police. It is the same third Appellant who was also identified by PW4. When the two attackers entered the bedroom in the main house they first dealt with PW1 and only turned to PW4 after they had finished with PW1. The attackers flashed torches and PW4 managed to see the third Appellant with the aid of the torch lights. PW4 stated that he was quite familiar with the third Appellant as he used to bring charcoal to their home more so given that the assailants spoke as they demanded for the money.

17. On re-evaluation of the evidence I find and hold that the identification of the first and second Appellants in the unique circumstances of this matter was doubtful and not free from error. However, the identification of the third Appellant as one of the assailants was safe and free from error.

(b) Whether the offence was proved in law:

18. The Appellant was convicted with three counts of robbery with violence. The starting point is the legal provision. The offence of robbery with violence is a creation of **Sections 295 and 296(2)** of the Penal Code. For clarity purposes I reproduce the sections as tailored: -

i. ***“295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.***

ii. ***296(2). If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”***

19. From the foregone legal provisions, it can be seen that the offence of robbery with violence is made up of two parts. The first part is the **robbery** and the other part is the **violence**.

20. **Robbery** is committed when a person steals anything capable of being stolen and immediately before or after the theft the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto. Two things must therefore be proved for the offence of robbery to be established: **Theft** and **the use of or threat to use actual violence**.

21. On the other hand, the offence of **robbery with violence** is committed when robbery is proved and further if any one of the following three ingredients are established: -

(a) The offender is armed with any dangerous or offensive weapon or instrument, or

(b) The offender is in the company of one or more other person or persons, or

c) The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person.

22. In this case there is credible evidence that the first Appellant was in the company of other persons and they all executed a common intention. (See **Section 21** of the **Penal Code** Chapter 63 of the Laws of Kenya, the case of **Njoroge v. Republic (1983) KLR 197** and that of **R v. Tabulayenka s/o Kirya (1943) EACA 51**).

23. The attackers also used actual violence on PW1. The P3 Form filled by PW6 vouched for that. There is evidence that the attackers used rungas and pangas. Those were dangerous weapons in the circumstances of this matter.

24. As to whether there was theft, there is as well evidence to that end. PW1 lost Kshs. 12,760/=, a mobile phone among many household items. That evidence was uncontroverted. It is therefore reasonable and believable that PW1 lost their items in the attack and that constitutes theft.

25. The upshot is that all the ingredients of the offence of robbery with violence against the third Appellant were proved. The third Appellant was hence rightly found guilty and convicted.

(c) The Sentence:

26. The Appellants also contended that the sentence was unconstitutional and excessive. I have looked at the sentencing proceedings where the court was then rightly guided by the mandatory nature of the then sentence. The court then had no option but to hand down the death sentence.

27. That legal position has by now changed courtesy of the Supreme Court in **Francis Karioko Muruatetu & Another v. Republic (2017) eKLR**. The Court, rightly so, found and held that the mandatory nature of the death sentence in capital offences is unconstitutional since mitigation is an important congruent element of fair trial. The Supreme Court remitted the matter to the High Court being the trial and sentencing court for purposes of sentence re-hearing. I have no doubt that such remain the only reasonable way forward as the sentencing court may even receive further evidence on sentence including Victim Impact Reports as well as appropriate submissions from the

prosecution and the defence prior to sentencing.

28. One thing which I must clarify is that although the decision in **Francis Karioko Muruatetu** (supra) was on a murder case, the position changes not in the case of robbery with violence cases since **Section 296(2)** of the **Penal Code**, Cap. 63 of the Laws of Kenya provides the only sentence on conviction to be a death sentence.

29. In conclusion this Court makes the following final orders: -

(a) The convictions on the part of the first and second Appellants are hereby quashed and the respective sentences set-aside. The first and second Appellants are hereby set at liberty unless otherwise lawfully held.

(b) The appeal against the conviction of the third Appellant is hereby dismissed, but the appeal against sentence succeeds. The death sentence is hereby set-aside.

(c) The third Appellant shall be produced before the Chief Magistrate's Court at Eldoret for hearing on sentence only and on priority basis.

It is so ordered.

SIGNED BY:

A. C. MRIMA

JUDGE

DATED, COUNTERSIGNED and DELIVERED at ELDORET this 1st day of November, 2018.

H. A. OMONDI

JUDGE