



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CORAM: D. S. MAJANJA J.

CRIMINAL APPEAL NO. 13 OF 2017

BETWEEN

ROBIN OBARE MWERESA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. E.K Nyutu– PM dated 8th March 2017 at the Principal Magistrate’s Court at Nyamira in Criminal Case No. 205 of 2016)

JUDGMENT

1. The appellant, **ROBIN OBARE MWERESA**, was charged with two counts of robbery with violence contrary to **section 296(2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)** and an alternative count of handling stolen property contrary to **section 322(1) and (2)** of the **Penal Code**. The particulars of the charges were as follows;

COUNT 1 On the night of 7th day of February 2016, at Kapkoiya Village Camp (Monire Estate) Kiangeni Location (Mokomoni) in Nyamira North District within Nyamira County, jointly with others not before court, while armed with offensive weapons namely firearm, pangas, runqus and knives, robbed IKM of travelling bag, three (3) pairs of boots, three (3) pairs of long trousers, an axe and mobile phone make Lorde all valued at Kshs. 14,000/= and immediately before the time of such robbery threatened to use personal violence to the said IKM.

COUNT 2 On the night of 7th day of February 2016, at Kapkoiya Village Camp (Monire Estate) Kiangeni (Mokomoni) Location in Nyamira North District within Nyamira County, jointly with others not before court, while armed with offensive weapons namely firearm, axe, pangas, runqus and knives, robbed HON of his cash Kshs. 8000/= and immediately before the time of such robbery threatened to use personal violence to the said HON.

ALTERNATIVE COUNT On the 16th day of February 2016 at Mokomoni Village, Mokomoni Sublocation in Nyamira North District within Nyamira County, otherwise than in the course of stealing dishonestly retained an axe worth Kshs. 500/= while knowing or having reasons to believe it to be stolen property.

2. The appellant was convicted on the alternative count of handling stolen goods and the second count of robbery with violence. He was sentenced to twelve (12) months imprisonment on the former count and sentenced to death on the latter count with the sentence on the former count being held in abeyance.

3. The appellant now appeals against conviction and sentence. Before I proceed to consider the grounds of appeal, I remind myself the duty of the first appellate court. It is to re-appraise the evidence afresh and reach an independent decision as to whether to uphold the conviction bearing in mind that I neither heard or saw the witnesses testify. In doing so, I shall outline the evidence before the trial court.

4. Isaac Kariri Mautia (PW 1) testified that on the night of 7th February 2016, he was asleep when he heard movements in the house. He was able to see a man coming into his bedroom armed with a knife and rungu. Another man had a panga. He could not identify the men. They ordered him to give them the money he had. One of the men armed with a knife covered him with a blanket and told him to direct him where his money was. He retrieved his wallet and gave it to them. When he told them that he did not have a phone, the men went to the next bedroom, took all his clothes, work boots and an axe. They locked him in the house and took off. After about twenty minutes he retrieved his phone which he had hidden and called his supervisor who arrived with police officers.

5. PW 1 recalled that on 20th February 2016, he went to Ekerenyu Police Station where he identified the axe that had been stolen during the

robbery. He identified it due to the welding mark on the axe head. He was also called for an identification parade but was not able to positively identify any of the robbers.

6. Henry Nyangena Ogana (PW 2) was at home on the material night when he was awoken by people banging the door of his children's bedroom. One of the assailants demanded money while holding his child. He gave them Kshs. 8000/= he had in his pocket. He recalled that the door was slightly ajar and the robbers had spot lights and he was able to see the face of one of the robbers out of the other three. He described the person he was able to identify was wearing a rain coat. The men took the money and left whereupon he raised alarm. Before police came, he was able to run to PW 1's house who had also been robbed. On 19th February 2016, he attended an identification parade where he was and able to identify the appellant.

7. Chief Inspector David Mursoi (PW 3) testified that on 20th February 2016, PW 1 and PW 2 came to the police station to identify some items they had reported stolen on the previous day. PW 1 was able to identify an axe with a marking on the head. PW 1 and PW 2 were able to identify a knife with a blue handle used by the suspects. PW 3 explained that a suspect had been arrested on 17th February 2016 and the knife, axe and a ring found hidden under his mattress. PW 3 also conducted an identification parade where PW 2 identified the appellant.

8. The Investigation Officer, PC Patrick Mureithi Mutego (PW 4) testified that on the 16th February 2016, they arrested suspects while on patrol in Mokomoni area. They proceeded to the appellant's house where they recovered a metal axe, a white marvin, a knife and a rungu and assorted clothes. Once recoveries were done, PW 1 came to identify the metal axe that was recovered which he had reported as stolen. He organized for an identification parade to be carried out by PW 3.

9. When placed on his defence, the appellant in his unsworn statement denied the offence. He stated that he was arrested on 16th February 2012 at about 8.20pm by police officers who searched his house and took his radio, identity card and Kshs. 7,300/=. He denied that after the arrest, he attended an identification parade where he was not identified.

10. The appellant contested the appeal based on the petition of appeal, written submissions and supplementary submissions. He contended that the prosecution did not prove the offence beyond reasonable doubt. He argued that the circumstances prevailing at the time were not favourable for positive identification and that the evidence against him was contradictory and inconsistent.

11. Counsel for the respondent pointed out that the appellant was identified by PW 2 in an identification parade and he was found with stolen items.

12. 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*).

13. Having re-appraised all the evidence, I am satisfied that the prosecution proved the elements of robbery with violence. The testimony of PW 1 and PW 2 is that the assailants were more than one in number, they were armed with weapons and they threatened violence against them while stealing from them.

14. The substantial issue for determination in this case is whether the appellant was identified as one of the assailants. The incident took place at night in circumstances that were less than ideal for identification. In *Wamunga v Republic [1989] KLR 424* the Court of Appeal warned that;

[W]here the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely be the basis of a conviction.

15. Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him (see *Maitanyi v Republic [1986] KLR 198* and *R v Turnbull [1967] 3 ALL ER 549*). The Court of Appeal was categorical in *Kiarie v Republic [1984] KLR 739*, that reliance on such evidence of identification must be "absolutely watertight" to justify conviction.

16. As regards PW 1, it is clear that he did not identify any assailant and he admitted as much hence he could not identify the appellant at the identification parade.

17. PW 2 told the court that the assailants had torches and that when they were demanding money from him as he was looking through the slightly opened door, he was able to see the face of one of the assailants. In cross-examination, PW 2 stated that he was able to identify the appellant from the torch light of one of the other assailants. He also informed the police that he could identify one of the assailants hence when the identification parade was mounted, he positively identified the appellant.

18. Having considered the evidence, I am satisfied from the testimony of PW 2, the assailants were close enough to him as they engaged him in demanding money while holding his four-year-old son given the confined space of the room, the proximity between him and the assailants as he took money and gave to them money, were all circumstances favourable for positive identification. On this basis he was able to identify the appellant which was conducted procedurally.

19. The other basis for implicating the appellant in the robbery was by application of doctrine of recent possession. 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. These include proof that:

- 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.

20. The appellant was implicated when the axe which PW 1 reported stolen was found in his house. The axe had a specific identifying mark which PW 1 identified. I would venture to say that such an axe is not an everyday object that is easily disposable. In his defence, the appellant only confirmed that his house was searched. He did not give any explanation why the axe was found in his house or lay claim to it.

21. Although the trial magistrate found the appellant guilty of handling the stolen property to wit the axe, she ought to have convicted him of the offence of robbery with violence taking to account the totality of the evidence. However, since the State did not cross appeal against this finding, it shall remain undisturbed.

22. The finding of the axe put the appellant at the *locus in quo* and taken together with the positive identification by PW 2, the possibility of mistaken identity was diminished. In light of this evidence, the appellant's defence, which was a bare denial, was properly dismissed. Consequently, I affirm the conviction

23. The appellant was sentence to death on the second count. 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 appellant to make his mitigation on the second count.

24. I do not consider the sentence of 12 months' imprisonment on the alternative count unreasonable, harsh or excessive. It is affirmed.

DATED and **DELIVERED** at **KISII** this 1st day of **NOVEMBER** 2018

D.S MAJANJA

JUDGE

Appellant in person.

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.