



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL CASE NO. 34 OF 2015

SYLVESTER KIPTOO KEMEI 1ST APPELLANT

DOUGLAS IMWAM 2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the Senior Principal Magistrate Honourable S. Mokua in Eldoret Criminal Case No. 4397 of 2012, dated 20th February, 2015)

JUDGMENT

In the lower court *Anthony Kamau Mwaniki*, *Douglas Imwana* and *Silvester Kiptoo* were charged with three counts of Robbery with violence, contrary to *Section 295* as read with *Section 296(2)* of the *Penal Code*.

The particulars of the offence in the first count are that on the night of 4th and 5th day of July, 2012 at Kabokbok market centre in Keiyo south District in Elgeyo-Marakwet County, the three accused persons together with others not before court while armed with dangerous weapons namely pangas and big sticks and using motor vehicle registration No. KAZ 310 X,

Toyota Vitz and No. KAK 516K Toyota Starlet, robbed *Everlyne Orgut*;- 40 pieces of soap, 26 pieces of Geisha soap, 15 packets of Omo of 500gms each, 30 Ariel soap of 500 gms each, 20 Lido bar soaps, pieces of menengai bar soap, 20 pairs of slippers, 25 kitenge lessos, 20 pairs of white striped bed sheets, one yellow sheet, 30 white striped Bed Covers, 20 white braziers, 20 hair pieces, Blue/Brown brief case, 40 credit cards of Yu- 15 credit cards of 10/- each, 10 credit cards of 20/- each and 15 credit cards each. 30 credit cards of Airtel – 15 credit cards of 20/- each, 10 credit cards of 50/- each and 5 credit cards of 100/- each, 50 credit cards of Safaricom – 15 Credit cards of 10/- each, 25 credit cards of 20/- each, 5 credit cards of 50/- each and 5 credit cards of 100/- . 40 credit cards of Orange – 30 credit cards of 50/- each and 10 credit cards of 100/- each; a mobile phone Nokia 1200 and another mobile phone make Nokia C-2 of IMEI No. 359338041962706 and 359338041962714 and Kshs. 303,110/- all valued at Kshs. 353,110 and at the time of such robbery wounded the said *Everlyne Orgut*.

To this main count, there is an alternative count against *Silvester Kiptoo Kimei*, of handling stolen goods, contrary to *Section 322(1)* as read with *Section 322 (2)* of the *Penal Code*.

The particulars hereof are that on the 5th day of July, 2012 at about 2.00 p.m at Rokocho village in Keiyo South District within Elgeyo-Marakwet County, the accused otherwise than in the course of stealing dishonestly retained one mobile phone make Nokia C-2 IMEI NO. 3593380411962706 and 359338041962714 knowing it to be stolen goods.

The particulars of the second count of robbery with violence against the three accused persons are that on the night of 4th and 8th day of July 2012 at about 12.30 a.m at Kabokbok market centre in Elgeyo-Marakwet County, the accused persons jointly with others not before court while armed with dangerous weapons namely pangas and big sticks and using motor vehicle registration numbers KAZ 310X Toyota Vitz and KAK 516 K Toyota Starlet, robbed *Lilian Tuitoek* her mobile phone make XZ ITEL and of serial No. 860312011741244 and 860312011741236 valued at 2,800/- and at the time of such robbery threatened to use actual violence to the said *Lilian Tuitoek*.

In the 3rd count, the particulars are that on the night of 4th and 5th day of July 2012 at about 12.30 a.m at Kabokbok Market Centre in Elgeyo Marakwet County, the accused persons jointly with others not before court while armed with dangerous weapons namely pangas and big sticks and using motor vehicles Registration Numbers KAZ 310X Toyota Vitz and KAK 516 Toyota Starlet, robbed *Reuben* her mobile phone make Nokia 1616 valued at 1500 and at the time of such robbery threatened to use actual violence to the said *Chelagat Reuben*.

The prosecution case is that PW-1 in this case was living in Kabokbok centre. She was operating a shop at the place. She was living behind the said shop. On 4th July, 2012 she closed her shop at 9.00 p.m using padlocks and went into the house. She was living in the house with her sister *Lilian Tuitoek* (PW-2) and PW-5, her house girl. On the said date PW-8 who is a pastor with AIC had gone to meet her church

members of Flourspar Company. She left her phone charging in the house of PW-1. It was a Nokia C-1. PW-1, PW-2 and PW-5 had supper and went to sleep. PW-1 had her own bedroom while PW-2 and PW-5 were sharing a bedroom.

PW-3 was living in Shauri and was operating a taxi using motor vehicle registration number KAK 516K, a Toyota Starlet. On 4th July, 2012 his mother was unwell and was admitted in hospital. PW-3 went to check on her in the morning. *Anthony Kamau Mwaniki*, a driver at the place who was operating taxi but did not have a vehicle of his own, urged PW-2 to leave him with the vehicle to continue with the business. PW-3 gave him the vehicle as well as his mobile phone so that the customers could be able to reach him.

That day at around 12.30 a.m. PW-1 heard noises from outside, sounding as if someone was cutting the door. She asked who was doing it, but the undesirable activity continued. She put on electric lights. The assailants entered into the table room. They were armed with sticks. They ransacked the house. PW-1 was pushed and fell under the bed. One of the assailants went and started strangulating her. PW-2 and PW-5 had hidden under the bed. The door to their bedroom was broken into using a rock. They were got under the bed and removed. The assailants were armed with a panga, knife and a torch. They said they wanted money. They led PW-2 and PW-5 to PW-1's room. PW-2 and PW-5 were blindfolded using pieces of clothes cut from complainants bed cover. Their legs and hands were tied using a rope. More assailants entered the room. They were about 7. They left the house and went to the shop. PW-1 got out of under the bed and followed them there. The assailant expressed surprise when they saw her and exclaimed, "*ati you have not died.*" She was blindfolded and gagged. They then heard a car get close to the shop. PW-1 told her daughter (PW-2) and PW-5 to raise alarm. They did so. A neighbor called Veronica turned up at the place. She found them locked in from outside. The assailants had escaped. She opened for them. PW-1 went outside and found many people. They were using their contacts to call for help and also trying to pursue the assailants. PW-1 lost many valuable from the house and shop in the incident, as listed in the charge sheet. They include cash Kshs.303,110/-. PW-2 lost her phone as well as PW-5.

PW-4 was called on 5th July, 2012 at 2.00 a.m by Assistant Chief Eresca sub location. He was told that a robbery had taken place in Eresca sub location. PW-4 is a chief of Kibagot location. PW4 called the O.C.S Tambach and reported the incident. He also informed the AP's at Chepsigot AP Camp. He then proceeded to Kabarnet-Tambach road. He saw a car passing heading towards Tambach. He did not pick its registration number.

PW-9 who was at the time an AP attached to Chepsigot Chief's Camp received a call from Chepkoilel who was working with the council at the barrier. He urged PW-9 to go to Tot and Iten Junction and place a barrier for there were robbers who were driving two vehicles that way. He did so. After 15 minutes a vehicle approached at high speed. It stopped.

The driver shot in the air. There was fire exchange. Those in the vehicle got out and ran into the bush. They had a bag. One was injured and left behind a trail of blood stains. They pursued them with help of members of the public. Some other members of the public got to the vehicle and removed mostly shop items which the vehicle was carrying. The vehicle was registration number KAK 516K Toyota Starlet. After removing everything they torched it. Complainant was told of the recovery. She went and identified the goods. OCS Tambach was called for reinforcement. In the pursuit of the suspects, a suit case was recovered which had complainant's money Kshs. 303,110/-.

PW-4 was told the other vehicle was seen at Flourspar area. He was as well told members of the public had chased the person driving it. He went with the OCS to Flourspar. They found the vehicle set on fire.

This was motor vehicle Registration No. KAZ 310X, a Toyota Vitz. They went towards Kerio River. They found a suspect arrested by members of the public and beaten. His name is John Odero and he did not survive. He had allegedly given to the members of the public the phone number of an accomplice by the name of *Sylvester Koech*, phone number 0786645090. This information was followed in pursuit of the alleged suspect. On 5th July, 2012, PW-6 was heading to Rokocho Trading Centre at 2.00 p.m. She met a stranger who asked her for the direction to tarmac road. She showed him the direction. They walked together. The man said he was from Kapkawa and was headed for Chepkoilel. He gave her 200/- and requested her to do the escort upto the time he boards a vehicle. He also told her is asked by anyone should say he is her son. PW-6 suspected the man and when she reached the tarmacked road she sent someone to inform the area chief. PW-4 had been told about this man. The Assistant Chief, one *Philip Kiplagat* joined him. They got the suspect and interrogated him. He said he was *Sylvester Kiptoo*. He was asked for his Identity card. He gave out his wallet. PW-4 called the number they had been given and it rang in his pocket. He drew out two mobile phones from his pocket. All were Nokia C-2. One was off, and the other on. Members of the public were attracted to the place. There was a scuffle in which the suspect was injured. He was taken to Iten District Hospital for treatment and later to Iten Police station. PW-8 was later able to identify one of the two phones as hers which she had left charging in the house of PW-1. It had her photograph as the screen saver.

PW-12, the OCS Tambach Police station on the material night attended the scene which involved motor vehicle registration Number KAK 516K, Toyota

Starlet. While there he received a phone call from a member of the public that motor vehicle KAZ 310X Toyota Vitz had been intercepted at Emseya area. He was informed that one occupant of the vehicle had been killed by members of the public while the others had escaped. He proceeded to the scene and found a body in pool of blood. They took the body to Iten. He then received a phone call from Chemist of Emiseya and was told that a suspect had been seen hiding. He pursued the said suspect at Koron area. He saw a young man and a gentleman. He interrogated them. One had banana leaves and had an injury. There was a trail of blood to where he was. He had a bullet wound on the right hand and right side of the chest. PW-12 suspected he was one of those who escaped during gunshot exchange. He arrested them and conducted a search. The one who was injured had a red mobile phone make Nokia X2. He gave his name as *Anthony Kamau*. The other was *Douglas*. He had Safaricom scratch cards of different denominations valued at Kshs. 10 and 20. He took the two suspects to Tambach Police station. PW-11, a scene of crime officer was called in. He photographed the two torched vehicles before he proceeded to the scene of the crime to take photographs. He took a total of 14 photographs.

PW-13 investigated the case and had the suspects charged with the offences.

The first accused gave sworn testimony in his defence. His defence is that he was a taxi operator in Eldoret. On 4th July, 2012 he was at home when PW-4 called him. He wanted to leave the taxi vehicle with him to operate as he was going to see his sick mother at Moi Teaching

and Referral Hospital. He was given the vehicle at 6.30 p.m. it was KAK 516K Toyota Starlet. PW-3 also gave him his phone so as to be reached by his customers. He was told of a customer called *Teso* who had some goods to be transported from some point. He was told to take the money *Teso* will give him. He took the vehicle and went to Town. *Teso* called him and requested he be picked at KVDA. Two men got him. They inquired as to where PW-3 was. 1st accused said he was left with the vehicle. The 2nd accused, *Teso*, told him to fuel the vehicle as they'll cover a distance. He fueled Kshs. 900.00. They boarded and led him to Flourspar Mining Company. They left him on a feeder and went for a luggage at a place where the vehicle could not reach as there was no road. They returned with a luggage and a brief case. The 1st accused opened the boot and they placed the luggage there. They took Iten-Kabarnet road. Two kilometres

ahead they found the road blocked by vehicles. He stopped at a distance of 15 metres. He hooted and nothing happened. One of the passengers stated it was a trap and urged him to drive away. There and then were gunshots. He was injured. Stones were also thrown towards the vehicle. He escaped into the nearby bush. One of his customers joined him there soon thereafter. 1st accused said they could report to the police. He lost a lot of blood. He wrapped the wounds using maize leaves. He requested his companion to get him water from nearby shops. He went and got back with 2 sacks of charcoal. Police arrived. His companion called *Teso* said he was dealing in charcoal. 1st accused said he was a taxi driver. He said *Teso* was his customer. He had two phones. One was his and the other for PW-3, which the police took. Police said the vehicle he had had been involved in a robbery and said he was a robber. He was taken to the police station. He denied the offences.

The second accused said he was a charcoal dealer. On 5th July, 2012 he left at 6.30 p.m as he had customers who needed charcoal. He was carried by Supa Loaf vehicle upto past Tambach. He went and bought two sacks of charcoal. The police were nearby and he was arrested. He noted there was a man who had been shot at, the first accused person.

They were taken to Tambach. They were questioned about an incident of Kabokbok. He was not aware of it. He was then charged.

The 3rd accused gave unsworn defence. His case is that he was working in Kitale. On 5th July, 2012 at 2.00 p.m he was called by a good friend. A police officer and the chief arrested him. He was told of an incident at Imbogo. On the way to Chief's office he was beaten till he fell unconscious. He was admitted at the hospital. He was later taken to Iten police station and charges preferred.

The trial court evaluated the evidence and found the three accused guilty of the three counts of robbery with violence. They were convicted and sentenced to death on the first count. Sentences in the other counts were held in abeyance.

The first accused appealed and his appeal was heard separately. On 15th day of February, 2017 the court quashed the conviction and the sentence. He was set at liberty.

Douglas Imwana, the second accused, also appealed against conviction and sentence. The same applied to the 3rd accused person. The second accused grounds of appeal are that:-

1. The prosecution witnesses contradicted their statements to the police.
2. The identification parade was not conducted.
3. Dock identification was relied on and is worthless.
4. Exhibits produced in his case were not alleged to had been robbed from complainants.
5. Complainant's name in the charge sheet and P-3 form was at variance.
6. The evidence of a co-accused was relied on.

The 3rd accused grounds are that:-

1. Exhibits relied on were not recovered from him.
2. Recanted statements and contradictory evidence was relied on.
3. No identification parade was conducted.
4. Dock identification was relied on and is worthless
5. Hearsay evidence was relied on.
6. His defence was rejected for no cogent reason.

I have evaluated the evidence adduced in the lower court by both sides, the judgment passed, sentence meted, grounds of appeals by both appellants herein and the submissions.

What is not disputed in this case is that the offences of robbery with violence actually did take place on the night of 4th and 5th day of July

2012 at Kabokbok market, against PW-1, PW-2 and PW-5 as stated in the charge sheet. The offenders were armed according to PW-1 with a stick and or rungu. PW-5 alleged they were armed with a panga, knife and a torch. This shows they were armed with offensive weapons or instruments. They were more than one. According to PW-5 about 7 in number. They assaulted PW-1 and PW-5 and used personal violence against PW-2 of which amounts to the offence of Robbery with violence contrary to *Section 297 (1)* as read with 297(2) of the *Penal Code*.

The second question which the court need to determine is whether the two appellants herein were part of the said or alleged assailants. Prosecution called three eye witnesses to the said incident. These are the victims, who are the PW-1, PW-2 and PW-5. PW-1 said the three are the ones who entered her house. She had put on the lights and was able to see them. During cross examination by the then 1 and 2 accused persons, she said she identified the assailants during the robbery as lights were on. She claimed to had told the police so. On cross examination by 2nd accused she said she was able to identify him during the attack. 2nd accused is *Douglas Imwana*. On Cross examination by the 3rd accused person (*Sylvester Kiptoo*), she said she found him arrested and beaten by members of the public, and he said she was the one he had attacked.

PW-2 said she identified them in the room of PW-1 where there were lights. On cross examination by the 2nd accused person she said that she did not tell PW-1 that she was able to identify anybody. When cross examined by the 3rd accused person she said she had not known him before the attack and saw him at the police station. PW-5 identified the assailants in court. However on cross examination she alleged to had identified 1st accused during the robbery. On cross examination by the 2nd and 3rd accused persons she alleged that she was able to identify the assailants during the robbery and told the police so.

What I have noted about the evidence by the three witnesses is that none of them gave a detailed account of the role each one of the said three assailants carried out during the said robbery. They talked in general about what they did. The witnesses did not also describe them to anyone. They did not tell the court what they noticed about them which would have made it possible for them to identify them if they saw them again. There is no reliable evidence that in the first report in the Occurrence Book they had indicated of their ability to identify the assailants. The same did not come out convincingly that they had said so in their statements to the police. Save for the claim that the lights were put on in the room of PW-1, the intensity of the said light was not stated. The layout of the room, items therein which may have obstructed the light, and the standing of the alleged assailants in relation to the said light and the witnesses was not revealed. The duration of time each witness saw the assailants was also not disclosed. In *Criminal Appeal No. 20 of 1989, Wamunga –vs- Republic @KLR [1989] 424*, the court held that when the prosecution is relying entirely on the evidence of recognition or identification, 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 make it the basis of a conviction. While it is appreciated that recognition may be more reliable than identification of a stranger, it is possible for mistakes in recognition of close relatives and friends, sometimes to be made. In this case the evidence is of identification rather than recognition. The evidence by the three eye witnesses is shaky and unreliable. It is not convincing that the circumstances pertaining during the alleged robberies favoured identification of the assailants and that they were positively identified by any of the three eye witnesses. The trial court was therefore right in rejecting the evidence of identification.

The next issue for consideration is whether the doctrine of recent possession applies in this case, together with the circumstances under which the appellants herein were arrested.

The evidence of PW-12 shows that the 2nd accused person was arrested hours after the alleged robberies in company of the 1st accused person, who was the taxi driver. 1st accused had gunshot wounds. The 2nd accused *Douglas Imwana* had Safaricom cards of Kshs. 10 and 20 denominations. It is known such was robbed from the shop of PW-1.

He was in company of the 1st accused, whose taxi was involved in the said robbery and was torched by members of the public. Considering these circumstances and the time lapse between the robberies and the arrest, it is clear that he was involved in commission of the alleged offence. His explanation that he had a kiosk where he was selling cards and that he had bought them from the market is not convincing as true. The possession of the said cards was positively proved by PW-12 and the 2nd accused did not deny it. It was also proved, given the circumstances that the cards were the property of PW-1. Equally through the evidence of PW-1, PW-2 and PW-5, it is proved the cards were robbed from the complainant (PW-1). They were recovered hours after the said robberies in circumstances that points irresistibly to the guilt of the second accused person. The principles upon which the doctrine of recent possession is invoked or applied, as was laid down in the case of *Isaac Nganga Kahiga alias Peter Nganga Kahiga –vs- Republic, Criminal Appeal No. 82 of 2004*, are well satisfied in this case.

Equally with the 3rd accused person, *Sylvester Kiptoo*, his name was given and the phone number by a suspect called *John Odero* who was killed in the incident. PW-4 pursued him. PW-6 met him. The 3rd accused requested PW-6 to show him the direction to the tarmacked road. This was on 5th July, 2012. PW-6 directed him. The 3rd accused however requested PW-6 to lead him upto the time he'll board the matatu, and incase questioned by anyone to claim that 3rd accused was her son. He gave PW-6 200kshs for that. PW-6 suspected him and sent for the area chief. These circumstances upto this point shows that the accused was hiding something and was therefore a suspect. PW-4 got the report and intercepted him. 3rd accused said he was *Sylvester Kiptoo*. The phone given No. 0786645090 was called by PW-4 and it rang in the 3rd accused's pocket. He had two C-2 phones. One was his and the other was off. Both were recovered. PW-8 later identified one of the phones as hers which was left charging in the shop of PW-1 and was taken by robbers. It had her photo as a screen saver. As expressed earlier the circumstances under which this appellant was arrested points irresistibly to his guilt. The doctrine of recent possession as well applies in the case as he was arrested hours after the robberies had taken place in possession of a phone which had been taken during the robbery from the shop of PW-1. The appellant gave no reasonable explanation on how he got into possession of the said phone. It must be deduced that he took part in the said robberies.

On the foregoing grounds it is evident that the offences against the appellants were proved by the prosecution beyond reasonable doubt and the two were rightly convicted of the offences.

However on sentence, the court expressed that its hands were tied as the offences carried mandatory death sentence. This was the position then but we now know following the Court of Appeal decision in the *Petition No. 15 of 2015 of Francis Karioko Muruatetu and Another – vs- the Republic*, that death sentence is not a mandatory sentence. In this regard I do vary the death sentence and in it's place sentence each

appellant to serve 20 years imprisonment, from the date of sentence by the lower court. This court so orders.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 22nd day of November, 2018

In the presence of:-

The appellants

Ms Kagali for state

Ms. Ann – Court assistant