



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CRIMINAL APPEAL NO. 29 OF 2017

COSMAS KIPKORIR NGENO1ST APPELLANT

WELDON KIPROTICH2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Bomet PM's Court Cr Case No. 1052 of 2016 – Hon Pamela– PM)

JUDGMENT

The two appellants were convicted and sentenced to suffer death for the offence of robbery with violence C/S 296(2) of the penal code.

The particulars were that on the 4th day of March 2016 at around 22.00 hours (10.00 p.m) at Bhakita street Bomet Township Bomet County, jointly being armed with dangerous weapons robbed ROP BENSON of his Kshs.35,000/= and shirt all of the value of Kshs.1,200/=.

Being dissatisfied with the conviction and sentence the two appellants have now lodged this appeal on the grounds that:-

1. The learned trial magistrate erred both in law and in fact in finding the appellants to have jointly committed the offence of robbery with violence contrary to the evidence on record.
2. That the learned trial magistrate erred in law and in fact in finding that the offence committed was robbery with violence contrary to the threshold required.
3. That the learned trial magistrate relied on the uncorroborated evidence of PW2.
4. That there was no evidence that the two appellants were armed with dangerous weapons.
5. That the learned trial magistrate erred in law and in fact in finding that the complainant had Kshs.35,000/= when the source of the money had not been established.

This is the first appellate court. It has the duty of re-evaluating and

considering a fresh the evidence on record so as to arrive at its own conclusion.

The prosecution called six witnesses in support of their case whereas the defence called two.

The complainant testified as PW1 and informed the court that he works with General Service Unit and was based at Ruaraka Headquarters Nairobi and further that on the 4th day of May 2016 at about 10.00 p.m he was at Bidii Bar which his sister runs.

She had requested him to assist her with some funds. He went and gave her Kshs.20,000/=.

At about 10.00 p.m. the 1st appellant/accused went and assaulted a waiter by the name of Chebet. He asked him why he was assaulting her. He said that she had seriously wronged him. He told him that they step outside so that he tells him what she had done to him. That day he was manning the bar as his sister was away. He was given the days sales Kshs.15,000/=. He had not yet given his sister the Kshs.20,000/=

he had promised her. So he had with him Kshs.35,000/= as he stepped outside to where he had parked his car a while probox registration number KBS 884J. He leaned on his car. He had put Kshs.15,000/= in one shirt pockets and Kshs.20,000/= on the other. The first accused got hold of his shirt and pulled it forcefully. The second accused joined the first. He was armed with something resembling a small club. He aimed at hitting the complainants head who parred the blow with his right hand which got injured. He hit him again with something which resembled a metal bar. Another person appeared from the sides and tackled him from behind. The complainant fell down. While on the ground the first accused removed complainants shirt and went away with it together with the Kshs.35,000/=. The assailants went away. He was helped by good Samaritans and he went back inside the club. The 1st accused followed him while armed with a knife, hit the wall saying "Bomet ni yetu". He left being followed by some people.

Later the complainant was taken to police station where the matter was reported. He was taken to Tenwek Hospital for treatment and filling of his P3 form. He further testified that the shirt which was taken by the first accused was of the value of Kshs.1,500/=.

PW2 is a clinical officer attached at Longisa Hospital. He testified to have examined the complainant on 7th March 2016 for a history of assault. He had a stitched wound on the left temporal area. The left forearm was swollen. The injuries had been caused by a blunt object. He assessed the degree of injury as harm.

Daniel Kipkorir (PW3) testified that on the 4th day of March 2016 he was working as a bouncer at Bidii Bar whose proprietor is Judy Chepkirui.

At about 10.00 p.m. the 1st accused assaulted Diana Chebet a waiter at the bar. The complainant demanded to know why the 1st accused had assaulted Diana Chebet but he kept quiet. They proceeded outside the gate. He followed the two and stood at the gate. The 1st accused wrested the complainant to the ground and beat him up. Two men were standing by as the 1st accused beat up the complainant. The 2nd accused produced a knife and threatened to stab Kenneth a barman. The 1st Accused tore complainant's shirt and went away with it. He went and helped the complainant back to the bar. The witness testified that it was the first accused who assaulted the complainant. The other two men did not assault him. Later the complainant said that Kshs.35,000 was stolen from Kshs.15,000/- being bar sales and Kshs.20,000/= being his money which he had with him.

Kenneth Kipkemoi Cheruiyot (PW4) testified to have been working as a bar attendant at Bidii Bar belonging to the sister of the complainant when at about 10.00p.m. the complainant told him that he wanted to go home. He gave him Kshs.15, 000/= which was the bar sales for the day. He later saw the complainant talking to three people outside the bar. He knew two of them. They are the accused persons/appellants. The 1st Accused was armed with a metal bar and he hit the complainant with it on the head and he fell down. When he tried to intervene the 2nd appellant chased him away with a knife. He went and got transport to take the complainant to Hospital and police station.

In his defense the accused told the court that he was a matatu driver and that on the day in question he had taken his wife to Kericho Hospital, where he stayed till the 11th day of March 2016. She was discharged on 16/3/2016 and took her home n 17th March 2016 at Keringet. He returned to Bomet on 30th March 2016. In the month of July 2016 he informed Inspector Naomi that he had returned to Bomet as she had informed him that he was required at the police station. He was later charged with an offence he did not commit together with another man.

The ingredients of the offence of robbery with violence are found in S.296(2) of the penal code which provides:-

(1) "if the offender is armed with any dangerous or offensive weapon or instrument or

(2) Is in the company with one or more other persons, or

(3) If at or immediately before or immediately after the time of the robbery, he wounds , beats, strikes or uses any other personal violence to any person".

S. 295 gives the definition of robbery. There must be the elements

of stealing and threats of actual violence.

1st issue – was there theft?

The complainant went at great lengths to explain why he had Kshs.35,000/= with him at the time of the incident. He told the court that he had put the money in his two shirt pockets. Kshs.15,000/= in one shirt pocket and Kshs.20,000/= in the other shirt pocket. He told the court that he did this shortly after he was challenged to go outside the bar to find out why the 1st appellant had assaulted one Diana Chebet a bar tender at the club. That explanation does not appear plausible and smacks of manufacturing of evidence. One does not place money where it can be seen by all and sundry unless it is an invitation to treat.

PW3 is a bouncer at the bar he testified of how he followed the complainant and the 1st accused outside the bar. He told the court that he saw the accused wrestle down the complainant. He did not see him steal any money.

Indeed the complainant did not testify on how the 1st appellant stole his money apart from saying that he tore his shirt and went away with it.

What transpires from the evidence before the court is that some disagreement arose between the complainant and the 1st appellant after which the two went outside and fought. There was no intention on the part of the 1st appellant and his colleague the 2nd appellant to steal. It is alleged that the dispute arose over the assault incident in which the 1st appellant assaulted a bar maid in the bar by the name of Diana Chebet. This Diana Chebet was not available in court to testify.

2nd issue - Was the appellant in the company of another person?

PW3 testified that the complainant was attacked by the 1st appellant only. The other two men stood nearby watching.

PW4 is a bartender at Bidii club. He testified to have seen the complainant talking to three people outside the bar. He further testified to have seen the 1st appellant hit the complainant with a piece of metal on the head and he fell down. When he went to his rescue he was chased away by 2nd appellant.

There is material contradiction between the evidence of PW3 and PW4. PW3 told the court that the 1st appellant wrestled the complainant down. PW4 states that the complainant was hit with a metal on the head as a result of which he fell down. PW3 testified that the other two men did not take any part in attacking the complainant. PW4 testified to have been chased away by the 2nd appellant. I am inclined to believe the evidence of PW3 who was a bouncer in the club, hence the security person. PW4 was a bar man who was at the counter. He may not have had ample time to go out and leave the counter unattended. I am not satisfied that the complainant was attacked by more than one man.

3. Was the attacker armed with a dangerous offensive weapon?

The charge sheet is silent in describing the weapon used. It does not mention the weapon used. The complainant himself in his evidence in chief did not mention the particular weapon used. He merely stated that it could have been a small club or a metal bar. There is no clear evidence as to the nature of the weapon used if at all.

In the present case, the challenge to go outside the bar was to fight but not for purposes of stealing. There was no mens rea for theft but assault. The dispute was between the complainant and the 1st appellant. The 2nd appellant was a mere bystander. It's not clear what kind of weapons were used if at all. The ingredients of robbery with violence were not proved.

The conviction was not safe and the sentence was unlawful. Appeal succeeds. Conviction is hereby quashed and the sentence is set aside.

Both appellants are set at liberty unless otherwise lawfully held.

Judgment delivered dated and signed this 13th 12/2018 in the presence of learned counsel for the prosecution Mr. Barasa, learned counsel for the defence absent, appellants in person.
Court assistant Mr. Rotich.

M. MUYA

JUDGE

13/12/2018