



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO. 47 OF 2017

[FORMERLY ELDORET HCCRA NO 69 OF 2014]

EKT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence in criminal case no. 726 of 2013 in the Principal Magistrate's Court at Kabarnet delivered on the 14th day of April, 2014 by Hon. E. Bett AG SRM]

JUDGMENT

Introduction

1. The appellant had been charged with another, as 1st and 2nd accused (who for his minor age is referred as “subject” in accordance with the Children Act), with the offence of Robbery with violence contrary to section 296(2) of the Penal Code, the particulars of which were that on the 16th day of September, 2013 at about 8.30pm at Kabartonjo trading centre in Baringo North District, within Baringo County, jointly being armed with a dangerous weapon namely a knife robbed Zakayo Cheruiyot one mobile phone make Nokia 1600 imei 539376/00/890865/0 sim card 0703-584-xxx, one spotlight cash Ksh.510/= all valued at Ksh.2,760/= and at or immediately before or immediately before or immediately after the time of such robbery threatened to use violence to the said Zakayo Cheruiyot.
2. The accused faced an alternate charge of handling stolen property contrary to section 322(2) of the Penal Code, particulars whereof were that on 17th September, 2013 at Kabartonjo township in Baringo North District within Baringo County, otherwise than in the course of stealing dishonestly received one spotlight valued at Ksh.50/= the property of Zakayo Cheruiyot.
3. Upon full trial, the two accused were found guilty of the offence of robbery with violence where upon the appellant was sentenced on 14/4/2014 to suffer death, which sentence the court held was “as per the provisions of section 296(2) of the Penal Code”. The minor accused was on determination of his age assessment placed on Probation for 3 years on recommendation of Probation Officer's presentence Report (POR).

The appeal

4. The appellant being aggrieved by the decision of the trial court appealed to this court against both conviction and sentence to death on the grounds that:
 1. The trial court erred in both law and facts by convicting me without considering that I claimed right of the alleged exhibit or property accused of stealing.
 2. That the trial magistrate erred in both law and facts by convicting me on prosecution case not proved beyond reasonable doubt as the complainant did not prove the alleged torch (spotlight) to be his property as he failed to produce any purchasing receipt.
 3. The trial magistrate erred in both law and facts by convicting me while relying on the evidence of single witness whose evidence are not supported by any direct and material evidence pointing my guilt.
 4. The trial magistrate erred both in law and facts by convicting me without giving any cogent reason for the rejection.
5. Through his written submissions, which he adopted at the hearing, the appellant submitted that:

Ground one and two argued together

The trial magistrate erred in both law and facts by convicting me while relying on the evidence of a single witness marred with a lot of inconsistencies. The evidence of PW1 does not confirm, support or strengthen each other. The allegation that I admitted and led the officers to the recovery of the said torch and phone lacks merit because nothing was tabled in court to probe such allegations.

Admissibility due to contradictory nature

I was convicted and sentenced on the evidence of a single witness. By the alleged time the route PW1 was passing was dark but he claims that he had a torch, it has not emerged in his testimony to whether he was using the torch until when he was attacked that he managed to use the spotlight.

PW1 being the single witness who identified, when he was attacked he identified person by name Jonah and heard the name J being mentioned by the 2nd accused, none of the names are mine. In the circumstances Pw1 might have been honest but, possibly mistaken. In **Kiarie v. Republic** [1984] KLR 739 the Court of Appeal held that:

“It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be water tight to satisfy conviction.”

PW1 failed to give the characteristic features of the suspects he saw with the help of the spotlight, that led him to identify me to the police.

In **Maitanyi v. Republic** [1986] KLR 198 it was held that:

Although it is trite law that a fact may be proved by the testimony of a single witness this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult

When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witnesses was able to ,make a true impression and description.

The court must warn itself of the danger relying on the evidence of a single identifying witness. It is enough for the court to warn itself after making the decision. It must do so when the evidence is being considerable and before the decision is made.

Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.”

Ground four, five and six

It is trite law that evidence of the first report to a person in authority is important as the truth and the accuracy of the subsequent statement may be gauged and provide a safeguard against later establishment or made up case.

Failure by the complainant to make prompt report of the items he was robbed of on the material day renders the charge sheet defective. It was therefore unsafe for the magistrate to convict me on the exhibit not featured in the first report of the complainant. The allegations that I led to the recovery of the torch as mentioned by the co-accused is a made up story. The evidence told by the co-accused cannot be used against the other.

No recorded is admitted by the police to prove that I confessed to have committed the alleged offence and nothing was submitted to court that I submitted below the standards of section 25(A) (2) of the Evidence Act.

6. In reply, Ms. Macharia Ass. DPP for the Respondent made oral submissions opposing the appeal, as follows:

“Ms. Macharia Ass. DPP

The appeal is opposed.

The appellant was convicted and sentenced to death for robbery with violence c/s to section 296(2) of the Penal Code.

Complainant was violently robbed of a phone, torch, 500/- and some coins. The evidence of the complainant was that he was robbed by two people at around 9.00pm on 16/9/2013. He clearly stated that one emerged from the front and the other from behind and that the stretch where he was robbed was dark. However, he directed his torch on the 2 people although he was not able to identify them he saw that there were two people.

Appellant was first accused in the lower court. The 2nd accused was a minor of 16 years. He was sentenced to 3 years probation sentence.

PW1 complainant stated that it was the 2nd accused who got into his pocket and took away his phone, his torch and his wallet. If

the identification of PW1 of the two assailants was that of directing the torch to them in a place which was dark then the identification would have been weak.

However, there is further evidence. The complainant testified that the 2nd accused called his colleague by his name during the robbery and he said “J fanya search nyuma”. This is when the appellant searched PW1 in the back pockets and removed some coins.

PW1 stated that the appellant herein slapped him and that is when he screamed and the police on patrol arrived at the scene. The police found the complainant alone as his assailant fled.

The complainant did not tell the police the names of the attackers as he did not know them. He testified that having been robbed of his money he went to the [particulars withheld] Primary School where he slept.

In the morning he went to kabartonjo town in search of the person who had been called by name j, the name that he had heard one of the assailants call his colleague. He testified that he found a young man who he asked whether he knew a person by the name J. The young man showed him to a person who was taking tea in the hotel. He called the police and the said J was arrested. On interrogation, the said j identified himself as EKT the appellant and the name japan was a nickname.

It is the appellant who led the police to his house where a torch was recovered. He also led the police to arrest the 2nd accused from whom the phone belonging to the complainant was recovered and also the ksh.10 coin. The 2nd accused was arrested in school and led the police to his house where he handed over to the police a phone and ksh.10 coin. The wallet was recovered thrown away at the place where the complainant was attacked.

The chain of events after the arrest of the appellant clearly shows that it was him and his co-accused who robbed the complainant. There is no way the police could have arrested the 2nd accused if the appellant could not have led them to him. The torch and the phone were positively identified by the complainant as his and they were the ones stolen from him. He was able to identify the torch as one of the battery had a mark which said he had put to prevent his son from interchanging the batteries as it had a crack on the back cover.

PW1 testified that on enquiring on the Ksh.500/- from the 2nd accused, the 2nd accused indicated that they had agreed with the appellant that the appellant keep the money and the 2nd accused the phone. P 19 Lines 14-16 of the proceedings.

The evidence was overwhelming although there was no evidence to show that violence on any dangerous weapon was used on the appellant. There was overwhelming evidence that the attackers were in the company of each other when they robbed the complainant. The appellant was found in possession of the torch while his colleague was found with the mobile phone and Ksh.10/=-.

I refer to **Kamau Nyambura v. Republic** [2013] e KLR it was stated that proof or any of any one of the ingredients of robbery with violence is enough to sustain conviction under section 296(2) of the Penal Code.

It is unfortunate that the appellant robbed the complainant in the company of another who ought to have been guided by him. Section 190 prohibits the minor for death sentence. The appellant sentences is one of death sentence as prescribed.

The appeal should be dismissed.”

Issues for determination

7. The issues that come to consideration in this court are:

1. Whether the offence of robbery with violence was proved;
2. Whether the identification of the appellant as one of the attackers was valid; and
3. Whether the sentence imposed by the trial court on the appellant will be interfered with.

8. The duty of the 1st appellate court as set out in **Okeno v. R** (1972) E.A. 32 the court to re-evaluate the evidence and make its own finding and conclusion before considering whether the finding of the trial court is to be upheld.

The evidence

9. The DPP availed three (3) witnesses who testified as follows:

“PW1 Zakayo Cheruiyot

I come from Molo, I am a business man working as a transporter Kipsereman Kabartonjo-Kabarnet. I know the two accused persons.

On 16/9/13 I left Kipsaram at 6.45pm and arrived at Kabartonjo at around 7pm on arrival at Kabartonjo I failed to get a motor vehicle to Kabarnet I had Ksh.700/= with me and spent Ksh.200/= I then went round town at 9.00pm and I met AP officer who confronted me and I told them I was going to Kabarnet lodge. I headed to the lodge and it had a dark route. I then heard somebody grab my jacket, one emerged from the front and another from the back; they slapped me. The 1st accused who is known as Jonnah slapped me, I directed the torch at the two and saw them. The 2nd accused got into my pocket and also took away the torch from me. The subject 2nd accused took away my phone and the wallet. I scream and the police who were on patrol came. The 2nd accused person told his colleague "j fanya search". The 2nd accused search my back pockets and found some coins. Once I screamed they left and run away. The police came, I told them what had transpired; I went to [particulars withheld] primary school and slept at the field. I went to the stage in the morning met a young man and asked him to show me a person by the name "J", shortly the young man came into the hotel and showed me J who was now taking tea in the hotel. I ran and come with the AP Officer who arrested the 1st accused. The 1st accused said the phone had gone away with the 2nd accused. The police came with the 2nd accused.

The torch was found with J at his house. The house was at the 2nd accused. This phone is mine and it has a crack at the back cover (MFI-1). The torch is mine inside it was a cracked battery which I had to put as a mark to avoid my son from changing my battery (MF-2).

I also recovered the wallet thrown away near the place where I was attacked, it had an electron card. Also this Ksh.10/= coin was stolen from me. The accused was were taken to DO office and later to Kabarnet police station, I also recorded my statement.

Cross-examination by 1st accused

This torch is mine. I was note issued with any receipt when I bought it, you even sought me to forgive you.

Cross-examined by the subject

You assisted the 1st accused to beat and rob me. I directed the torch at you both and saw you clearly. You called out your colleague name "J". You were not wearing school uniforms on that night.

Re-examination

The torch is mine, the battery inside has a marking which I put as to avoid my son from inter-changing my batteries.

PW2 No. 19960611345 AP Isaac Kipkoech Kimutai

I used to know the 1st accused prior to this offence as he resides in Kabartonjo. The subject is also known to me from the incident.

On 16/9/2013 at 10.45pm we went on normal patrol with Alvin, Edwin, Jacob and others within Kabartonjo town. We heard a scream 100 meters and headed to the scene. On nearing the place we found the complainant being beaten and the attackers had left. He told us he had been beaten and robbed of money and wallet. We told him to go to the station as we tried to investigate, on looking around we saw complainant's wallet nearby.

The following day I found J selling milk, the complainant had told us that he had been attacked by J; I arrested him and took him to the station. He also admitted he did the act with a school boy from M K. He also said the school boy had a phone. We went to the headmaster [particulars withheld] Primary School and he gave us the subject. The 2nd subject submitted to having committed the offence and said the stolen phone was at home, we took him home and he gave us the phone. By then the 1st accused was at our offices, we took the 1st accused to his home and we recovered the torch at his place. The boy gave us Ksh.10/= coin that he has stolen from the complainant. On the 500 they agreed that the boy was to remain with the phone and the 1st accused with the cash. The officers from Kabarnet police station came and took away the two as well as the recovered exhibits. I also recorded my statement.

Cross-examination by 1st accused

I come to the scene when the complainant screamed. There were people in the centre especially boda boda operators. I am the one who you took to your house. You were not found with a knife. I arrested you after the complainant identified you. I did not recover you with the stolen money. The Ksh.10/= was recovered at the 2nd subject.

I do not know how the complainant identified the torch is.

Cross-examined by the 2nd accused

When we heard screams we rushed and saw the attackers escaping, I could not identify this people. I did not know [who] it was, I come to know later it was you after J was arrested; he told us you are his accomplice. J said you committed the act with him that is why we come to school to arrest you. The head master said you had attended preps, normally ends at 9.pm. the complainant said he was attacked by two people.

Re-examination

I recovered the torch from J, the phone I recovered it from the school. The complainant identified the two as his property.

PW3 No. 58488 Corporal Nathan Amboga

I am based at the divisional CID headquarters Kabarnet performing investigations duties. I am the Investigating Officer in this case. On 17/9/2013 at around 2.30pm I was in the office when the DCIO called me and told me to proceed to Kabartonjo DC Offices and pick two suspects. I proceeded to Kabartonjo with my colleague Mr. Ogago, on arrival I visited DAPC Officer Mr. Nyaranga, and he briefed me on the case and handed over to me the 1st accused and the 2nd subject.

He also handed me the exhibits recovered, one torch and a Nokia Serial No. 359376008650. The complainant had identified the phone as he said it has a blue paint on the screen, it also had a crack on the back of the cover. The battery is one sided black and the mouth piece missing. The complainant identified the torch, as it had one battery that has a scratch. There was a black Safaricom wallet containing personal document of the complainant. This Ksh.10/= coin was handed to me as the same was recovered from the 2nd subject, part of the money stolen from the complainant.

I recorded the statement of the witnesses and from the statements I come to understand the phone was recovered from the 2nd subject. I charged the two with tis offences.

Cross-examined by 1st accused

I was not there when the offence occurred, I investigated the case and connect the two of you. The complainant identify the torch as his. Nobody else has come to claim the torch, the torch belongs to the complainant the complainant said you had a knife but the weapon was not recovered.

The complainant said you beat him and you were armed with a knife.

Re-examination

The items had been identified by the complainant.”

10. When put on their defence the appellant raised an alibi that on the material day he had supper and slept at around 7.00pm waking up later at 10.30pm to listen to a football match between Liverpool and Everton and the 2nd accused said he had picked the mobile phone at 9.00pm while on the way home from school preps.

Analysis of the Evidence and Determination

11. The ingredients of robbery with violence c/s 296 (2) of the Penal Code in that the appellant was in the company of another person, the second accused, and they had robbed the complainant of his mobile phone one mobile phone, a spotlight and money. The police witness PW2 who responded to the complainant’s screams for help was able to recover the complainant’s wallet near the scene of the attack. The complainant had told the police rescuers that he had been robbed of a torch, mobile phone and money. The complaint identified as his the torch recovered from appellant and the mobile phone recovered minor subject by clear features. Theft of the items was established.

12. The ingredients of the offence of robbery need not all be present for a conviction to be valid. See ***Oluoch v. R*** (1985) KLR 549. In this case, it is immaterial that the appellant was not shown on evidence, as charged, to have been armed with a dangerous weapon or to have struck, wounded, beaten or used other form of violence on any person. That he had been slapped by the attackers brings the incident into the purview of robbery with violence under the third alternative ingredient of robbery with violence of wounding, striking, beating or use of other violence on any person. That he robbed the complainant while in the company of another person is also sufficient to meet the robbery with violence threshold. The offence is committed when one of the characteristic ingredients are proved in this case the company of one or more assailants.

13. Implicit in the submissions of the appellant before the court that there was no evidence of injury on the complainant and of any dangerous weapon is the mistaken belief that the charge of robbery with violence necessarily depends on the evidence of aggravated violence. As observed in ***Oluoch***, supra, robbery with violence is committed when any of the ingredients is established. In this case, the offence was committed when the theft was carried out by the appellant while in the company of one other person, the 2nd accused minor, and the law must keep its promise. Muggers must understand that their acts amount to the offence robbery with violence and will be dealt with as such, in accordance with the law.

Identification of the appellant as one of the attackers

14. In accordance with ***Maitanyi v. Republic***, supra, the court’s test the evidence of the single identifying witness especially in circumstances, as here, that did not favour correct identification as it was at night, the attackers coming one from the front and the other from behind and using only a torch to see the attackers. The court notes the circumstances as not conducive to positive identification and in caution seeks further evidence that may support the identification.

15. The appellant was identified through his nickname when the co-accused called him by the name during the robbery, and the complainant was able to identify him by reference to his nickname, ‘**J**’ and a subsequent search for the person known by that name at the market led to the

appellant. The appellant complained that the person who pointed to him as 'J' was not called as witness. However, the events following the identification of the person nicknamed J were inculpatory against the appellant.

16. I find that the evidence of the PW2 that the appellant had upon arrest led the police to his house where the torch stolen from the complainant was recovered and to the arrest of the 2nd assailant from whom the appellant's mobile phone was recovered is corroborative to the identification evidence of the complainant PW1. The appellant could only have led the police to the 2nd assailant because he was one of the two assailants who attacked the complainant. PW3 the Investigations Officer in further support of the prosecution case confirmed to having received the suspects from the administration police who had arrested the suspects along with exhibits - a torch and a mobile phone which were recovered from the accused persons – the appellant herein and the minor subject.

17. In addition, the nickname is unusual being the name of a country rather than of a person, and there is no reasonable ground for believing that many people are called by that name. I find that the appellant's identity as j who was called out by his co-assailant during the robbery was proved beyond reasonable doubt and that, therefore, the appellant was one of the robbers.

18. When the evidence of the prosecution is weighted against the appellant's alibi defence which was raised as an afterthought the defence stage, the Prosecution's case against the appellant and his co-accused is overwhelming.

Conviction

19. Having been in the company of the 2nd accused during the robbery, the appellant and his co-assailant were guilty of the offence of robbery with violence contrary to section 296 (2) of the Penal Code.

Sentence

20. As clarified by the Supreme Court in *Francis Karioko Muruatetu & Anor. V. R (2017) eKLR*, the penalty of death sentence is only a maximum and not mandatory sentence as held by the trial court in this matter. Taking into account the modest value of the stolen items – a mobile phone, spot-light and cash all valued at Ksh.2,760/= and there having been no aggravated violence used on any person, the court considers the penalty of death as wholly inappropriate for the offence of robbery with violence herein. I consider that a sentence of imprisonment for a term of 10 years fully meets the justice of the case and the object of deterrence of the criminal justice system, having regard to the pre-trial detention of the appellant since arrest on 17/9/2013.

Orders

21. Accordingly, for the reasons set out above, the court pursuant to section 354 (3) (b) of the Criminal Procedure Code makes the following orders:

1. The appellant's appeal from conviction is dismissed.
2. The appellant's sentence of death is set aside and substituted with a sentence of imprisonment for a term of ten (10) years from the 14/4/2014, the date of sentence in the trial court.

Order accordingly.

DATED AND DELIVERED THIS 13TH DAY OF DECEMBER, 2018

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Assistant DPP for the Respondent.