



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT LODWAR

CRIMINAL APPEAL NO. 2 OF 2018

JOSEPHAT EKULAN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No. 38 of 2017

by the Senior Resident Magistrate - Hon. J.M. Wekesa

delivered on 19th December, 2017 at Kakuma)

JUDGEMENT

1. The Appellant was charged with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code** the particulars of which were that on the 6th day of February 2017 at Kakuma Refugee Camp in Turkana West sub-county within Turkana County robbed **GEORGE KIMALO** of a mobile phone make Nokia valued at Kshs.2,000/=, and cash Kshs.700/= and immediately before the time of such robbery used actual violence to the said **GEORGE KIMALO** by hitting him from behind with a walking stick.

2. He faced an alternative charge of handling stolen property contrary to **Section 322 (2)** of the **Penal code** the particulars of which were that on the 7th day of February 2017 at Kakuma Refugee Camp in Turkana West sub-county within Turkana County otherwise in the course of stealing dishonestly handled a Nokia mobile phone valued at Kshs.2,000/=, the property of the said **GEORGE KIMALO** knowingly or having reason to believe it to be stolen property.

3. He pleaded not guilty to the charges, was tried, convicted on both counts and sentenced to death and fourteen (14) years respectfully. Being dissatisfied with both conviction and sentence, he filed this appeal and raised the following summarized grounds of appeal:-

a) Vital prosecution witnesses were not called to testify.

b) The prosecution case against him was not proved beyond reasonable doubt.

SUBMISSIONS

4. When this appeal came up for hearing before me, the Appellant who was unrepresented filed written

submissions and substituted grounds of appeal while the state was represented by Mr. Mong'are who opposed the appeal.

5. On behalf of the Appellant, it was submitted that he was framed of the charges and was not subjected to identification parade. On behalf of the Respondent it was submitted that the prosecution was only duty bound to call witnesses who were relevant to its case.

6. This being a first appeal the court is under a duty to re-evaluate the evidence tendered by the prosecution while giving allowance to the fact that unlike the trial court it did not have the advantage of seeing and hearing witnesses. See **OKENO v REPUBLIC [1972] EA 32** which I will do herein under:-

7. The prosecution case against the Appellant was that on 6/2/2017 at 12.30 p.m. while **PW1 GEORGE KIMALO** had parked his motor cycle registration number KMDH 950W at the ration center in Kakuma, the Appellant approached him to be ferried to Kakuma II and at JRS he asked to use PW1's phone to call his sister which he gave him when the Appellant suddenly turned against him and hit him on the left side and face and cut him causing him to fall down unconsciously. When he woke up he found that he had been robbed of Kshs.700/= which was in his pocket. He was hospitalized for two (2) weeks during which time the Appellant was arrested by police with PW1's mobile phone. He confirmed having not known the Appellant before the incidence.

8. **PW2 ABDI FATAH's** testimony was that he was a N.P.R. who was called on 6/2/2017 and informed that the Appellant had robbed someone at the refugee camp. He searched for the Appellant who was arrested the following day where a search was conducted upon him and the complainant's phone found on him. This evidence was corroborated by **PW3 LOKALE LOKABU** that they arrested the Appellant who was identified by **PW1**. In cross-examination he stated that the Appellant on interrogation admitted to had beaten **PW1** and was found hiding in a homestead at Nalemsekon.

9. **PW4 CORP. FRANCIS MUIGAI** investigated the case and recorded the statement from **PW1** at IRC Hospital Clinic where he was admitted. In cross-examination he stated that the Appellant's name had been recorded in the O.B. **PW5 SIMON IRUNGU** produced a P3 form on **PW1** on behalf of **DR. WANGWE** confirming that the complainant had injuries on the head and neck, superficial wound on the left ear, bruises on left ear and swelling on the left visual side.

10. When put on his defence the Appellant stated that on 7/2/2017 he was at home with his sick nephew and at 8.00 a.m. two KPR's and two policemen came and asked him whether he knew a person named R Kay and he said he did not. They then arrested him and took him to the police station before charging him with the offence of robbery with violence.

11. From the record and submissions herein I have identified the following issues for identification in this appeal:-

a) Whether the Appellant was properly identified?

b) Whether the prosecution proved its case against the Appellant to the main count or the alternative count.

c) Whether the trial court was right in convicting the Appellant on both the main and the alternative charge.

d) What order should the court make herein?

12. I will start with the issue of whether the court was right in convicting the Appellant on both the main and the alternative charge as this is a legal issue that goes to the foundation of the decision appealed against. In her judgment the trial court had this to say:-

“ . . . for the above reason I find the prosecution to have proved its case against the accused

herein on both charges against him as they have demonstrated the ingredient forming both charges against the accused herein beyond reasonable doubt. In the circumstances therefore, I find the accused herein guilty as charged in both the main and alternative charges against him respectively and convicted . . .”

13. In so holding the trial court fell into error as it is trite law that a conviction cannot be made on both the main charge and the alternative charge. This position was stated by the Court of Appeal at Nyeri in **Criminal Appeal No. 272 of 2012** reported in [2013] eKLR thus:-

“On the issue of the alternative charge we find that nothing turns on the fact that the trial court did not make a pronouncement on the same. In M.B.O. –VS- REPUBLIC, CRIMINAL APPEAL NO. 342 OF 2008, this Court held,

“The practice of charging offences in the alternative is one of abundant caution and that is why no finding is made on such charge once there is ample evidence to support the main charge.”

14. The charge is alternative to and not addition to and therefore once the trial court had found that the prosecution had proved the main charge of robbery with violence she had no business in proceeding to convict the Appellant on the alternative charge and for that reason I will allow the appeal on both conviction and sentence which I hereby set aside.

15. This being a first appeal as stated herein, and being alive to my role under **Section 354 (3)** proceed with evaluation of the evidence on record to come to my own conclusion as herein under. On the main count of robbery with violence, the evidence of **PW1** was that he was attacked by the Appellant who robbed him after he lost consciousness. He was rescued by two Turkanas who took him to the hospital. However these Turkanas were never called to testify. **PW2 ABDI FARAH** who together with **PW3** who arrested the Appellant was called by **SERGEANT LALIM** of AP who was also not called to testify. When the Appellant was arrested he was taken to the hospital where the complainant **PW1** allegedly identified him. Based on the evidence on record I find that the conditions prevailing for the identification of the Appellant were not ideal and this was therefore a case where an identification parade should have been conductive so as to eliminate the possibility of mistaken identity. It therefore follows that the conviction of the Appellant on the main charge of robbery with violence was not safe and would quash and set aside the trial court’s finding on the same.

16. On the alternative charge of handling stolen property I find that there was enough evidence to convict the Appellant thereon. The mobile phone was found in his possession. It was identified by the complainant to had been his and was recently stolen from him. Mobile phones being an item that can change hands very fast I am persuaded that the Appellant was a handler therefore having given him the benefit of doubt based on the gap as to how he was identified as the robber.

17. I am therefore satisfied that the conviction of the Appellant on the alternative charge of handling stolen property was safe and would therefore allow the appeal on the main charge of robbery with violence which I hereby quash and set aside the sentence but affirm the conviction and sentence on the alternative charge of handling stolen property.

18. The Appellant has right of appeal.

Dated, delivered and signed at Lodwar this 5th day of December, 2018.

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J. WAKIAGA

JUDGE

In the presence of:-

_____ *for the Respondent*

_____ *for the Appellant*

Accused - _____

_____ - *Court assistant*