



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT LODWAR

CRIMINAL APPEAL NO. 22 OF 2017

PETER EKALALE.....1ST APPELLANT

HUSSEIN NGIKOI LOKAPETEL.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No. 132 of 2016

by the Senior Principal Magistrate - Hon. M.K. Mwangi

delivered on 26th July, 2017 at Kakuma)

JUDGEMENT

1. The Appellants were 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 13th day of May 2016 at Kakuma Refugee Camp in Turkana West sub-county within Turkana County jointly robbed **MOHAMMED ADAN MOHAMMED** of his cash Kshs.2,500/= and during the time of such robbery used actual violence against the said **MOHAMMED ADAN MOHAMMED**.

2. They pleaded not guilty, were tried, convicted on both counts and sentenced to suffer death. Being dissatisfied with the said conviction and sentence they each filed their respective appeals in which they raised the following grounds:-

a) THAT this case against the Appellants as per evidence on record was of assault and not robbery with violence contrary to Section 296 (2) of the Penal Code.

b) THAT the prosecution case was marred by incurable irregularities including the exhibits not being tendered in evidence.

c) THAT there was mistaken identity of the Appellants as no identification parade was conducted.

3. When this appeal came up for hearing both were considered for purposes of trial and determination and the Appellants who were unrepresented each filed identical written submissions which they relied upon while Mr. Mongare learned prosecuting counsel appeared for the state and opposed the appeals.

SUBMISSIONS

4. On behalf of the Respondent it was submitted that the case was not centered on assault as the complainant was violently robbed by the Appellants in joint effort. The medical report produced showed that the complainant sustained injuries caused by blunt object. It was submitted that failure to produce the weapon used was not fatal to the prosecution case since it was not recovered. It was submitted that it is possible to sustain conviction on the evidence of one eye witness if the evidence is credible. It was finally submitted that the incidence took place in broad day light and the Appellants were arrested at the scene so there was no need for identification parade.

5. On behalf of the Appellants it was submitted that they were both framed for the offence as a result of an existing grudge with **PW2** who had a fight with the 1st Appellant at Bulls Eye Club while for the 2nd Appellant it was allegedly over the love of his wife. It was submitted that the prosecution witnesses contradicted each other as to the time, the place and the number of suspects arrested. It was submitted further that both **PW1** and **PW3** did not identify the Appellants who were total strangers to them and therefore there was a possibility of mistaken

identity. It was finally stated that their defence was never considered.

6. It is the duty of the first appellate court imposed by law to carefully examine and analyze afresh the evidence on record and to come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance for the same. See **ERICK OTIENO ARUM v REPUBLIC [2006] eKLR**.

7. In this case the complainant **PW3 MOHAMMED ADAN MOHAMMED** stated that he was working as a boda boda rider when on 13/5/2016 the 2nd Appellant stopped him and agreed on a fare of Kshs.50 and was joined by the 1st Appellant who requested him to take them to buy fuel for his motor cycle which was at IRC before they attacked him and robbed him of Kshs.2,500/= which was in his pocket before running away towards the lagga. He reported the incident to the police at LWF who went searching for the Appellants. He was able to identify the Appellants and upon their arrest Kshs.2,000/= was recovered from the sock of the 2nd Appellant. He confirmed not knowing the Appellants by name but was able to identify them by face.

8. **PW1 SANTO MALUAL** confirmed that the complainant reported to him at 9.30 a.m. that he had been robbed of Kshs.2,500 while transporting the Appellants on his motor bike. They proceeded to Hashi Petrol Station along Kakuma – Lokichogo Road where the Appellants were arrested by **KPR. PW2 PC DUNCAN OKEYO** re-arrested the Appellants from **PW1** having been arrested by **PC EKIDOR**. He searched the 1st Appellant and made no recovery while from the 2nd appellant Kshs.2,000/= was recovered hidden in his left leg sock. **PW4 ROY SITUMA** produced P3 form on the complainant confirming that the same had sustained injuries on the right upper limb, left cheek and behind the leg with type of weapon used being kicks and blows with a heavy blunt object.

9. **PW5 PC MERCY NYAMBURA** corroborated the evidence of **PW2** on how they re-arrested the Appellants from **PC EKIDOR** and **NPRs ETABO** and **ISSA** and stated that security officers **SANTO MALUAL PW1** helped the complainant trace the Appellants whom they spotted along the Highway. She testified that she had seen the 2nd Appellant at the station in 2016 when he had stolen certain envelopes from the office of the OCS Kakuma and had met him before them.

10. When put on their defence the 1st Appellant gave unsworn statement and stated that on 15/5/20156 he was at the refugee camp when he bought water for Kshs.5/=. Afterwards, he saw two police officers in civilian who asked him to accompany them to the police station where he was locked for ten (10) days before he was taken to the OCS who told him that they were still investigating his case. They then threatened him saying that they will file robbery with violence case. The 2nd appellant stated that he was arrested on 10/5/2016 at 8.00 hours over “nothing” and was locked for five (5) – six (6) days before begin charged.

11. In convicting the appellants the trial court had this to say:-

“From the prosecution evidence on record which is well corroborated, the accused persons herein have squarely been placed at the scene of the crime being an isolated place they themselves chose by commandeering the accused herein to suddenly stop at a place far away from any shops or residential houses on the road leading to the Equatorial Community from where they suddenly pounced on the complainant whom they hit and kicked . . . The defence raised and the written submissions on record have not cast any doubt on the prosecution case . . . The suspects were two in number and although they were not armed with any offensive weapon, they immediately before and after the said attack beat up the complainant . . .”

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

a) *Whether the Appellants were positively identified at the scene?*

b) *Whether the prosecution case was full of contradictions?*

c) *Whether the prosecution proved the charge of robbery with violence against the Appellants and if so whether their conviction was safe.*

d) *What order should the court make herein?*

13. I must state from the beginning that the Appellants’ submissions are not in tandem with the record of the proceedings having raised issues which had not been raised by them either in cross-examination of prosecution witnesses or in their defence. They have submitted of an existing grudge between them and **PW2 PC DUNCAN OKEYO** who re-arrested them and from record it is clear that they did not raise these issues either in cross-examination or in their defence. I therefore find no merit in this line of submission as the role **PW2** played was only to re-arrest the Appellant.

14. On the issue of identification, I have re-evaluated the evidence tendered before the trial court and in particular the evidence of **PW3 MOHAMED ADEN MOHAMED** and note that he was attacked by the Appellants in broad day light having been with them from the time when the 2nd Appellant flagged him down and had adequate opportunity to recognize them. **PW2** was called by **PW3** within thirty 30 minutes and together with **PC EKIDOR** were able to arrest the Appellants. I therefore find and hold that the Appellants were positively placed the scene and having been arrested within thirty (30) minutes from the time of the attack it was not necessary to conduct identification parade. The complainant in his evidence stated that he identified the Appellant to the KPR officer who called the police who came and re-arrested the Appellant whom he accompanied to the police station. I am satisfied that identification parade would have served no purpose.

15. On whether the prosecution case was full of contradictions, upon looking at the record, the only issue in controversy are the number of people at the time the Appellants were arrested and not at the time of the commission of the offence. **PW3** the complainant was very clear in his evidence that he was attacked by the two Appellants. **PW1** assisted in arresting the two who were later on re-arrested by **PW2** and **PW5**.

Any contradictions noted were of minor nature which did not go to the root of the prosecution case and therefore find no merit on this ground of appeal.

16. On whether the prosecution proved the charge of robbery with violence as opposed to assault as submitted by the Appellants, it is clear that in connecting the Appellants the trial court was guided by relevant authority which she quoted to wit that the ingredients of the offence of robbery with violence under **Section 296 (1)** of the **Penal Code** are:-

- a) *Stealing anything and,*
- b) *at or immediate before or immediately after the time of stealing,*
- c) *uses or threatens to use actual violence.*

as was stated in the case of **OLUOCH v REPUBLIC [1985] KLR 549.**

17. The other ingredient of the offence is where the offender is in the company with one or more other person. From the record it is clear that the Appellants were two and they meted actual bodily harm on the complainant as per the evidence of **PW4 ROY SITUMA** who produced P3 form on the complainant.

18. Having re-evaluated the evidence on record, I find no fault with the Appellants' conviction herein which I find to be safe and therefore dismiss the appeal herein as lacking in merit and affirm both conviction and sentence.

19. The Appellants have the right of appeal.

Dated, delivered and signed at Lodwar this 6th day of December, 2018.

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J. WAKIAGA

JUDGE

In the presence of:-

_____ *for the Respondent*

_____ *for the Appellant*

Accused - _____

_____ *- Court assistant*