



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 57 OF 2015

ISAAC KAKA ROTICH1ST APPELLANT

JOHN KURIA KINORO2ND APPELLANT

DAVID KIPTOO3RD APPELLANT

VERSUS

REPUBLIC PROSECUTOR

(Appeal from the Conviction and Sentence of the Chief Magistrate's Court at Nakuru Hon. J. N. Nthuku – Senior Resident Magistrate delivered on the 9th March, 2015 in CMCR Case No. 3983 of 2013)

JUDGMENT

The three appellants namely **ISSAC KAKA ROTICH** (hereinafter referred to as the 1st appellant) **JOHN KURIA KINORO** (hereinafter referred to as the 2nd appellant) and **DAVD KIPTOO** (hereinafter referred to as the 3rd appellant) have all filed this appeal challenging their conviction and sentence by the learned Senior Resident Magistrate sitting at the Nakuru Law Courts. The three appellants together with four (4) other co-accuseds (who were eventually acquitted by the trial court) had been arraigned in court on 16/12/2013 facing a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296 (2) OF THE PENAL CODE.** The particulars of the charge were that

“On the 6th day of September, 2013 at Nessuit Village in Njoro District within Nakuru County jointly while armed with offensive weapons namely pangas robbed Johnson Kimutai Cheruiyot of cash Ksh 19,000/= and a mobile phone make BIRD valued at Ksh 3,000/= all valued at Ksh 22,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Johnson Kimutai Cheruiyot”

The appellants all pleaded ‘Not Guilty’ to the charge and their trial commenced on 30/4/2014. The prosecution led by **INSPECTOR KAMAU** called a total of five (5) witnesses in support of their case.

The complainant **JOHNSON KIMTAI** testified as **PW1**. He told the court that on 6/9/2013 at 10.00pm he was asleep in his house at Nessuit Village. He was woken up by a bang outside. **PW1** picked a torch and went outside to check what the problem was. He saw nothing and returned to sleep.

A few minutes later a light was shone into his face. His door was kicked in and a group of men armed with pangas invaded his room. They demanded money and valuables and in the process one of the men cut **PW1** on the head.

The robbers stole cash Ksh 19,000/= and a mobile phone from the complainant. They also demanded his M-pesa PIN number to enable them withdraw the Ksh 10,000/= from his M-pesa account. The men then tried to set out the house alight and ran off. The complainant went to a neighbour's house to seek help.

The matter was reported to police and the complainant fearing for his safety relocated to Narok County. A few days later the complainant was alerted by his neighbours that his assailants were in the area. He went and pointed them out to police and all three were arrested and charged.

At the close of the prosecution case all the three appellants were found to have a case to answer and were placed onto their defence. They each gave sworn statements in which they denied having robbed the complainant.

On 9/3/2015 the learned trial magistrate delivered her judgment in which she convicted all three appellants and thereafter sentenced each to death. Being aggrieved all three have now appealed against the decision of the trial court. **MR OCHANG** Advocate argued the appeal on behalf of the appellants. **MS OUNDO** learned State Counsel opposed the appeal.

This being a first appeal I am obliged to re-examine and re-evaluate the prosecution case and to draw my own conclusions on the same. In the case of **MWANGI Vs REPUBLIC [2014]2KLR** it was held that

“1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate courts own decision on the evidence.

2. The first appellate court must itself weigh the conflicting evidence and draw its own conclusions”

I have carefully perused the record of the trial before the lower court. I have also given careful consideration to the submissions of counsel.

The only witness to this incident was the complainant himself. He told the court that on the material date after retiring to bed he heard a commotion outside his room. He got up to check but saw nothing. No sooner had the complainant gone back to bed than a gang of men broke into his one-roomed house and robbed him.

The complainant has given a very clear concise and consistent narration of the events of that night. He told the court that the robbers were armed with pangas and one of them cut him on the head.

PW3 JACOB CHELIMO is a clinical officer who was attached to Njoro Health Centre. He states that on 9/9/2013 the complainant came to their facility to seek medical attention **PW3** stated that he examined him. Upon examination **PW3** noted that the complainant had deep cuts on the forehead and upper limbs and fingers. The injuries were assessed to be about 3 days old thus could have been inflicted on or about 6/9/2013. The doctor also opined that the injuries were caused by a sharp object such as a panga. **PW3** filled and signed the P3 form which was produced as an exhibit **P.exb 1**.

The testimony of **PW3** corroborates the complainant's evidence regarding the assault to his person and the injuries which he sustained. I have no doubt that the complainant was indeed attacked and injured as he has stated.

The incident occurred at 10.00pm when it was dark. However the complainant has explained that the robbers had a very bright torch which they shone in his room to enable them see and pick out what they wished to steal. The complainant identified the three appellants as amongst the gang who attacked him.

He stated in his evidence at Page 9 line 19 that

***“I was able to identify them because they had not covered their faces and they had the big flash light which was very bright. I could see all the corners of the house [it must be remembered that this was a one-roomed abode]. It is with aid of the light that they saw the jacket and the radio and were even able to write down the M-pesa pin. I recognized only 3 people because I had seen them many times before*”**

Counsel for the appellants had submitted that given the fact that the appellant had been injured, was bleeding and undoubtedly feared for his life, he would not have been in a proper frame of mind to see and identify his attackers. However I find that from the cogency of his evidence, its graphic nature as well as his precision in identifying the role played by each appellant, there can be no doubt that the complainant was fully alert and was able to see and identify events as they unfolded. The fact that complainant was able to state precisely what role each appellant played in the robbery further persuades me that he was able to see them all well. In his testimony at Page 16 line 6 the complainant states

***“After interrogating me the 7th accused (3rd Appellant) cut a piece of my mattress and light fire on it but because my house was leaking being a wooden house the mattress was wet and it didn't burn. They left and I was left bleeding. The 7th accused is the one who cut my head (shows scar)*”**

Given that he was able to give such details, it must be that the complainant saw the appellants very well. I note that the incident took a period of time. The robbers spoke to the appellant; they enquired from him how much money he had in his M-pesa account. They demanded his pin number and even wrote it down on a piece of paper. The complainant was in close proximity with the men in a small room. These circumstances in my view gave him ample time and opportunity to see the appellants well.

Aside from visual identification at the scene there exists evidence of recognition. The complainant told the court that the three appellants were persons whom he knew from before and this aided his identification. The complainant states that the 3rd appellant was a casual worker who had done some work for him before whereas the 1st appellant was a man he had been seeing in the area over a period of 3 months. Thus they were not strangers to him. In the case of **ANJONONI & OTHERS Vs REPUBLIC [1980]KLR 59**, the Court of Appeal held that recognition of an assailant is **“more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other”**.

PW2 WESLEY TOWETT corroborated the identification of the three appellants. He told the court that on the material night he was heading to the complainant's house. At the gate he met three men rushing out. He asked who they were but they threatened to kill him. **PW2** identifies the 3 appellants as the men he saw. He went into the house and found the complainant bleeding from cuts on his head.

Once again the fact that **PW2** met these men at night was raised by the appellants advocate. He submitted that the witness would not have been able to see the men clearly enough to make a positive identification.

PW2 has explained that there was a full moon at the time and in addition he had a torch which he was using to see the way. Mr. Ochang queried why the witness would need to use a torch if there was a full moon. It is common in many rural areas for people to walk about with torches if are moving during the night. **PW1** has explained that with the combined light from the moon and his torch he was able to see a distance of 10 meters away.

Just like the complainant **PW2** was able to explain precisely what he saw. He states that the 2nd appellant was carrying a radio, the 1st appellant was not carrying anything and he identifies the 3rd appellant as the man who ordered him to shut up or be killed. Once again **PW2** is able to recognize the appellants as men he had known about three months prior to the incident. From his clear and concise narration I am satisfied that despite it being night time **PW2** was able to see and identify the men he saw rushing out of the

complainant's compound. Thus the evidence of **PW2** corroborates that of the complainant with respect to identification of the three appellants.

The fact that the three appellants were spotted rushing out of the complainant's house armed with household items, the fact that immediately thereafter **PW2** finds the complainant lying seriously injured inside his house is proof enough that the three appellants are the ones who attacked and robbed the complainant. The complainant in his evidence explained that there was a move to have him vacate the area as the 3rd accused even tried to burn down his house. The complainant did relocate to Narok after the incident.

Later the complainant identified the three appellants to police. Defence counsel argued that the evidence on arrest was contradictory since **PW4 CORPORAL MARK KIBET** the arresting officer stated that 8 suspects were brought to him by members of public yet the complainant only identified some of them. I find there to be no contradiction. The members of public alleged that the 8 suspects they took to the police station had been harassing the area residents for a long time. In their evidence **PW1** and **PW2** only identified the three appellants as those involved in the robbery against the complainant leading to the acquittal of the other suspects by the trial court. The members of public cited by **PW4** were only making a general allegation of harassment by the 8 suspects they took to the police station – they had no evidence to offer regarding the robbery which occurred on 6/9/2013 at the home of the complainant. These members of public were therefore not in my view crucial witnesses in the present case. The appellants when called upon to defend themselves against the charge only offered what amounted to mere denials. The prosecution evidence was not shaken at all and the trial court rightly dismissed their defences. These appellants have been positively identified by two witnesses. The incidents amounted to a robbery with violence as envisaged by Section 269(2) of the Penal Code. There was more than one perpetrator. The assailants were armed with pangas and the complainants was assaulted and injured in the course of the robbery. I find that the appellants were properly convicted and I do uphold their convictions.

After allowing each appellant an opportunity to mitigate, they were sentenced to death. This is the only lawful sentence for this offence. I therefore confirm the death sentence imposed against each appellant. Finally this appeal fails and is dismissed in its entirety.

Dated in Nakuru this 10th day of February, 2017

Mr. Ochang for appellants

Mr Chigiti for State

Maureen A. Odero

Judge