



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 181 OF 2014 AND 183 OF 2014

STEPHEN JIRONGO SHICHETI.....1ST APPELLANT

ALEX SHITERO SHIMAMBO.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(an appeal from the original conviction in Criminal Case No. 1947 of 2013

in the Principal Magistrate's Court at Kapsabet, by the Hon. B. Mosiria,

Principal Magistrate, dated 24th November, 2014)

JUDGMENT

The appellants Stephen Jirongo Shicheti and Alex Shitero Shimambo were jointly convicted of the offence of robbery with violence Contrary to Section 295 as read with Section 296(2) of the Penal Code. They have initially filed separate appeals, i.e. 1st appellant's appeal being Criminal Appeal No. 181 of 2014 while the 2nd appellant filed Criminal Appeal No. 183 of 2014. However, on the date set for the hearing of the 2 appeals, with the consent of the appellant and learned counsel for the state, it was agreed that the 2 appeals be consolidated and heard as one. An order of consolidation was accordingly made on 9th February 2017 and the 2 appeals were heard at the same time.

Both appellants filed amended grounds of appeal on 16th February 2016 in which they raised the same grounds of appeal as follows: -

1. That the trial magistrate erred in both law and fact by convicting the appellants considering the variance between the evidence adduced in court and the particulars of the charge sheet, rendering the charge sheet defective.
2. That the trial magistrate erred in both law and fact by convicting the appellants while relying on inconsistent and uncorroborated evidence rendered by the prosecution witnesses.
3. That the trial magistrate erred in both law and fact by convicting the appellants while relying on mode of arrest which was not proved beyond reasonable doubt as required by law.

They both prayed that their appeals be allowed, convictions quashed, sentences set aside and that they be set free at liberty.

The appeals were heard in the court file Criminal Appeal No. 181 of 2014, which is the one filed ahead of the other.

It was submitted by 1st appellant, Stephen Jirongo Shicheti (Criminal Appeal No. 181 of 2014), while relying on his defence, that he had differed with the complainant over a lady called Lilian and that is why the complainant accused him over this incident, which he did not do. Also that the P3 Form shows that the Clinical Officer treated a different person and not the complainant. He wondered where same came from whereas complainant had said he had washed same with his clothes.

For the 2nd appellant, Alex Shitero Shimambo (Criminal Appeal No. 183 of 2014), his submissions were that the complainant in his testimony had said he did not arrest the appellant, nor with anything. And that the investigation officer did not state who he had recovered the pliers and scissors from. Both the appellants submitted written submissions in support of their submissions.

In opposing the appeal, Ms. Oduor for the state submitted that the prosecution had proved the case against the 2 appellants beyond any reasonable doubt and both were placed at the scene of crime. That the 4 witnesses gave consistent and well corroborated evidence. Further, that all the ingredients of the offence of robbery with violence were established i.e that the attackers were 4, that violence was used and the act of robbing complainant of his property was also proved. Also that he attackers were armed with pliers and scissors.

Counsel went on that this was a case of identification by recognition, with PW1 stating that he knew Alex, 2nd Appellant (originally 1st accused) as a caretaker at Kipyegon Market. And that it had been 2nd appellant who had booked the complainant at the lodging facility and issued him with a receipt. That there been sufficient light and both the complainant and PW2 were able to identify the 2nd appellant. That complainant held onto Alex who was caught at the scene, and that it was him on being interrogated who volunteered to stat that he had been with Jirongo, 1st appellant. That PW2 who saw both also confirmed knowing, Jirongo as a neighbour.

She also challenged the alibi of 1st appellant who had not given notice of same as required under Section 235 of the Criminal Procedure Code. Counsel urged that both appeals be disallowed for lack of merit.

I have considered the pleadings filed herein by the 2 appellants ending with the written submissions, and also the oral submissions made by the both sides in court on 9th February, 2017. The 2 appellants were originally charged in the same case with the same offence, jointly. The prosecution witnesses against them were the same. The petitions of appeal they field herein were exactly the same. Even the written submissions they both presented to court are the same. For reasons of similarities of the cases of the 2 appellants, I shall deal with the grounds and issues raised in these 2 appeals together. From both the petitions of appeals filed, oral presentations made in court, and the written submissions, this court is of the view that the following g issues have come up in these 2 appeals: -

- i. Whether the charge sheet was defective i.e. variance between the evidence tendered and particulars on the charge sheet.**
- ii. Whether there was material contradictions on the prosecution's case on the arrest of the appellants.**
- iii. The issue of name of the complainant.**
- iv. The issue of identification of the appellants.**
- v. The issue of the complainant's P3 form.**

I will direct my mind to these issues in the same order.

On the first issue, it was the submissions of both appellants that the evidence given by the complainant and the other prosecution witnesses was not in tandem with and was different from the particulars of the charge. That it was the evidence of the witnesses that the complainant was injured in the process of the incident and had a P3 form filled for him, the charge sheet as drawn was silent on whether the complainant was injured or wounded during the incident. That this renders the charge sheet defective and so the appellant ought to be acquitted of the charge;

I have perused the joint charge that the appellants faced, being a charge of robbery with violence Contrary to Section 295 as read with Section 296 (2) of the Penal Code. The particulars as contained therein reads;

“On 21st day of July, 2013 at Kapsabet town within Nandi County, jointly with others not before court while armed with dangerous weapons namely pangas, iron bars, pliers and scissors robbed Stephen Kipkoech Kener of Cash Kshs. 10,000/=, a Co-operative Bank ATM Card, Military Service Card, and a National ID Card and immediately before or after the time of such robbery threatened to use actual violence to the said Stephen Kipkoech Kener”.

It was submitted that the failure to state that the complainant was injured during the incident renders the charge sheet defective. Appellant were first charged under Section 295 of the Penal Code;

“Any person who steals anything, and at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or to retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery”.

The trial court did not however convict the appellants on this charge. The court convicted both of them Under Section 296(2) under which they were also charged;

“If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or 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, he shall be sentenced to death”.

The submissions of the appellants on this issue was basically on what constitutes the offence of robbery with violence. The answer to this is in the above provision which gives the alternative acts which could jointly or singularly constitute this offence as follows: -

- i. That the offender is armed with a dangerous or offensive weapon or instrument.**
- ii. Or, is in company with one or more other person or persons.**
- iii. Or, that immediately before or immediately after the time of the robbery, he wounds, beats or uses any other personal violence to any person.....’**

From the above provision, this court is of the firm opinion that proof of any one of the above circumstances would be sufficient proof of the offence of robbery with violence. In our present case, it is clear that all the 3 circumstances were proved during trial. I am guided on this issue by the case of **Ganzi and 2 others =vrs= Republic (2005)1 KLR 52**, where the Court of Appeal held that the offence of robbery with violence is committed in any of the 3 circumstances as enumerated above.

So, was the charge sheet fatally defective only because it did not declare that the complainant was injured during the incident? I think not. First, there was evidence from at least 2 witnesses, PW1 and PW2 Raymond Kiptoo Cheruiyot that the attackers were 4 in number and were armed. This in itself would be proof of robbery with violence. The element of violence itself was also proved by the prosecution who

went on to produce both the P3 form and treatment notes. It is for these reasons that I am not convinced by the appellant's submissions that failure to note on the charge sheet that violence was used on the complainant who ended up sustaining injuries (alone) would make the charge sheet defective.

On the issue of name of the complainant, it is clear from the charge sheet that complainant is named therein as Stephen Kipkoech Kener. When he gave evidence in court on 9th September, 2013 and 30th April, 2014, he again swore and introduced himself as Stephen Kipkoech Kener. I cannot see any contradiction in this. It is clear that that witness went on to identify both the P3 form and treatment card bearing the same name. I have no doubt as to the correctness of the complainant's name, and if the trial magistrate went on later in the proceedings (page 20) to note the name as Stephen Kipkorir Kenei, this, to me was excusable error on the part of the magistrate. I say this because whereas that part of the proceedings read;

“The same is in the name of Stephen Kipkorir Kenei”, while referring to the treatment card, a perusal of the same shows it is in the name of Stephen Kipkoech Kener. This was clearly an error of recording on the part of the learned trial magistrate, which to me, is excusable, and which causes no doubt as to the identity of the complainant. I am equally convinced that it is the same recording error that was committed by the learned magistrate by noting the name as Stephen Kipkorir Kemei during the testimony of PW3, Silas Ruto.

On the of arrests of the appellants, it was the corroborated evidence of PW1, and PW2 that PW1 the complainant, managed to hold onto 2nd appellant, (Alex Shitero Shimambo) who was arrested at the scene and later escorted to the police station, and that on interrogation, 2nd appellant volunteered to say that he had been with 1st appellant. The 2nd appellant has not challenged in form of any evidence that he was caught by the complainant with the help of PW2 at the scene, and handed over to the police. If he was caught at the scene in this manner, obviously 2nd appellant must have been one of the 4 robbers.

For 1st appellant (Stephen Jirongo Shicheti), it was the evidence of the complainant that he knew him as a caretaker at Kipyegon market and the one who had sold to him and written to him a receipt on the evening of 21st July, 2013. PW2, similarly gave evidence that he knows both the appellants, 2nd appellant as a caretaker at a construction company, and 1st appellant, as his neighbour. Both of these witnesses testified as to identifying 1st appellant at the scene of the attack before 2nd appellant also later mentioned him as one of his accomplices. This incident took place at night at about 2.00am. So how did these 2 witness identify the 1st appellant? It was unchallenged that the complainant knew the 1st appellant even as the one who had issued him with the receipt the previous evening, and that when he came back at 2:00am, he knocked in vain, only for 1st appellant to appear and the attack occurred. And according to PW2, he first saw 4 men and when he said “You” they hit the bulb. This means that this witness had the opportunity to see and identify the 4 men before the bulb was struck.

What comes out of the testimonies of these 2 witnesses (PW1 and PW2) is that they both identified 1st appellant, whom they both know, as having been one of the robbers. And that later, 2nd appellant, caught at the scene, again confirmed on interrogation that he had in fact been with him.

An issue was raised as to the exact name of the guest house. It is clear from the receipt that it is Dainbora Guest House. Being noted by the Trial Magistrate in the proceedings as Diner Hall Guest House, to me, is one other excusable error of recording. Same, does not create any doubt at all as to which specific guest house was relevant to this incident. Similarly, PW1 may as well have known 1st appellant as caretaker at Kipyegon market. The positive identification was however, that it was 1st appellant who had earlier in the evening issued the complainant with the receipt at the guest house.

The 2nd appellant raised the issue of his arrest. That there is a contradiction between the evidence of PW1 and the other witnesses, on whether PW1 escorted him to the police station, or whether the police went for him at the scene. Reading through the proceedings, I do not see any such contradiction. It was

the evidence of PW1 that with the help of PW2, he caught 2nd appellant at the scene till the police came to collect him. PW2 corroborated this and confirmed he was the one who rushed to call the police. Nowhere in the proceedings did PW1 ever say he alone escorted him to the police station. If he accompanied the police (with the 2nd appellant) to the police station, it was still right for him to say that he escorted him to the police station.

And as to the P3 form produced by the complainant, the same on its face shows it was issued and filled on the same day, 21st July, 2013. This is also the same date indicated in the treatment card produced. I do not see any discrepancy on these 2 documents.

2nd appellant, in his grounds of appeal filed on 3rd December 2014, has raised 2 other issues. First, that he was not given the right to repeat his case. With respect, I did not see any such application on the record. He has also not followed up this ground during the hearing of the appeal. Similarly, at ground 5 2nd appellant has raised the issue that the learned trial magistrate had mixed up the defences of the 2 accuseds with respect, the 2nd appellant did not follow up on this ground or specifically indicate the alleged mix up on the defences of accused.

In view of the above observations, I am not convinced that the appeals filed by 1st and 2nd appellants have any merit. I accordingly dismiss both appeals in their entirety i.e. (Criminal Appeal No. 181 of 2014, Stephen Jirongo Shicheti -vs- Republic, and Criminal Appeal No. 183 of 2014, Alex Shitero Shimambo - vs- Republic)

DATED, SIGNED and DELIVERED at ELDORET, this 16th day of MARCH 2017.

D.O. OGEMBO

JUDGE

Judgment read in open court in the presence of: -

1. The Accuseds and

2. Ms. Kageni for the State.