



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT LODWAR**

**LODWAR CRIMINAL APPEAL NO.17 OF 2015**

**SIMON LOCHEBI ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**(An appeal from conviction and sentence in original Lodwar PM CR 51/2015 delivered on 26/3/2015 by RW WASHIKA Senior Resident Magistrate)**

**JUDGMENT**

The appellant **Simon Lochebi** was charged in the Magistrates Court with the offence of Robbery with violence contrary to section 296 (2) of the penal code. The particulars are that on the 26<sup>th</sup> day of January, 2015 at Kakuma refugee camp in Turkana West District within Turkana County jointly with others not before court while armed with crude weapons namely stones, robbed **Adan Ali Abdi** of his mobile phone make Nokia C11 valued at Kshs.6,000/= and the time of such robbery used actual violence against the said **Adan Ali Abdi** thereby causing him actual bodily harm.

After full trial in which he gave unsworn evidence, he was found guilty and convicted of the offence and sentenced to life imprisonment. Dissatisfied with the conviction and sentence, he preferred this appeal. In his grounds of appeal, the appellant faulted the finding and conviction in the grounds that no identification parade was conducted, the prosecution evidence was inconsistent and not corroborated that he was not found in possession of any of the stolen property, that no exhibit was produced in court and the source of lighting the moon was not sufficient enough to identify him.

The case for the prosecution was that **PW1 Adan Ali Abdi** who works for **Norwegian Refugee Council (NRC)**. On 26/1/2015 at 8.00pm was heading home from work. He saw five people coming as he was heading to camp from in front. One took a stone and threw on him. It missed him. There was moon so he saw the attackers. He lost a mobile Nokia C11 valued at 6000/=. Police vehicle came and they ran away. One suspect's shoes fell. He told police pointing they were running. So police chased them. Police arrested one. He identified the appellant as one of the robbers through the shirt he wore. Accused was arrested and brought to police station. There was no recovery. He went to Kakuma mission hospital. He was given a P3 form. He showed court as **P3 form – MFI – 1** dated 27/1/2015.

**PW2 Peter Lokuta** identified himself as a KPR at Kakuma and that he recalled that day they left work. They found the complainant who told them he had been robbed. He pointed the direction the thieves were going. They gave a chase and found one – the appellant. The rest took off. The complainant identified appellant. There was no recovery made

On being placed on his defence the appellant gave unsworn evidence he stated that he lived in Lokichogio. Was the only child and that he recalled that on that day after he left work as he was

employed, he was heading home. On reaching the oil place he was arrested and brought to police station. Then to court, the charge was read, he pleaded not guilty and stated that he was 17 years.

It is upon this evidence that he was found guilty and convicted on the offence of robbery with violence.

The appellant filed written submissions in support of the grounds of appeal. He submitted that this was a case of mistaken identity and that he was falsely identified to be part of the gang that robbed the complainant. He submitted that he was innocent as none of the stolen property was recovered from him. He faults the source of lighting used by the complainant to identify him. He submitted that the complainant stated that there was moon light which cannot be said to be sufficient lighting. He submits that he was not subjected to an identification parade and that no exhibits were produced.

Mr. Kimanthi for the state opposed the appeal. He submitted that the appellant was identified by the complainant as there was moon light. He submitted that immediately after the offence police officers who were on patrol gave chase and appellant was arrested immediately. He submits that the contention by the appellant that he was not given opportunity to defend himself is not true. Finally he urges the court to correct the error in the sentence and met out the correct sentence under section 296(2) which is a mandatory death sentence.

This is a first appeal. The duties of the first appellate court is to review the evidence in the trial court weigh conflicting evidence and draw its own conclusion to determine if the Magistrate finding should be supported but at all times given allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses (**Ekeno vs R 1972 EA 32**).

The ingredients of the offence of robbery with violence which must be proved by evidence are that there was theft of an item, or property, that the robber was armed with a dangerous or offensive weapon, or was in company of one or more people or immediately before or immediately after such robbery he used actual violence on the complainant. (**See Oluoch Vs R 1983 KLR**). The prosecution must also tender evidence of identification of the accused as the person who committed the offence.

The appellant in his submission raised the issue of his positive identification as among the person who robbed the complainant. In **Wamunge –vs – Republic 1989 KLR 424** the court of appeal stated

**“ it is trite law that where the only evidence against a defendant is evidence of identification or recognition a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it a basis for conviction”.**

The complainant in his evidence testified that he was able to the appellant from the moonlight which was on at 8pm on the material day. Before a court can act on visual identification of the robbers, it must satisfy this conditions that favour positive identification existed. Before acting in such evidence the court must make inquiries as to the presence and source of light intensity on such light, location of the source of light in relation to the accused and the time taken by the witness to observe the accused so as to be able to identify him subsequently.

The complainant in his evidence did not indicate whether he had known the appellant before. Indeed there is no evidence that he had done so. This is therefore a case of identification than recognition. The court when acting on identification must before relying on the evidence interrogate how long the interaction took, the distance between them, the source of light the brightness of the light or as in this case where the moon was the source of light, how far would a person see. Those are aspects which must be brought out in the evidence to enable the court to make a finding whether there existed favourable conditions for identification considering the evidence in the trial court; it is evident that the trial magistrate did not address her mind to those aspects of the evidence.

The only witness who testified that he saw the appellant as one of the robbers is the complainant. In his evidence he stated

**“I was heading home from work. I saw five people coming from the front as I was walking to the camp. One took a stone and threw at me. It missed me. There was moon so I saw the attackers. I lost mobile Nokia all valued at Shs.6000. Police came. They ran away”**

The evidence of PW2 Peter Lokule only related to how the complainant pointed to them the direction the robbers had gone. They followed that route and arrested the appellant. In essence therefore the complainant was the only identifying witness. He was the only single witness who identified the complainant.

**In Robivs Republic 1967 EA 583 the court of Appeal had this to say about identification by a single witness**

**“subject to certain well known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule 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 condition favouring correct identification was difficult. In such circumstances what is needed is other evidence whether in circumstantial or direct pointing to guilt from where a judge or a jury can reasonable conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from possibility of error”**

In the present appeal none of the stolen property was recovered from the appellant. The complainant had not known the appellant before and in my view the conditions for positive identification free from error did not exist. I am not therefore satisfied that the conviction of the appellant was premised on sound and credible evidence.

In the result, I allow the appeal, quash the conviction of the appellant for the offence of robbery with violence and set aside the sentence of life imprisonment imposed.

I order the appellant **Simon Lochebi** to be released forthwith unless otherwise lawfully detained.

**Dated at Lodwar this 15<sup>th</sup> day of June, 2017.**

**S N RIECHI**

**JUDGE**