



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO
CRIMINAL APPEAL NO.48 OF 2014

SWALEY MUHAYA LUBANGA.....1ST APPELLANT

VITALIS SHIKOLI MAHINDU.....2ND APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in criminal case No. 1595 of 2012 Chief Magistrate's Court Kericho, Hon. Kiniale(Senior Resident Magistrate).

JUDGMENT

The two appellants above mentioned were convicted and sentenced to death for the offence of robbery with Violence Contrary to Section 296(2) of the Penal Code.

In the second count the 1st appellant was sentenced to serve 20 years imprisonment. On the 3rd count the 2nd appellant was sentenced to 20 years imprisonment.

The trial magistrate ordered that the death sentence was to supercede the sentences on the 2nd and 3rd counts.

The particulars in respect to the first count were that, on the night of 13th and 14th August 2012 at [particulars withheld]of Kericho County, with others not before the court and while armed with dangerous weapons namely pangas and clubs robbed J C C of cash Ksh.2300/= 4" x 6" blue cloth mattress of the value of Ksh.7,000/=, two kerosene lamps valued at Ksh.1200/=, one white plastic bucket of the value of Ksh.210/=, 4 light brown metal cups valued at Ksh.160/= two mobile phones, make Nokia n.1280 imei-3555955043611439 valued at Ksh.3500/= and Samsung B3410 imei unknown of the value of Ksh1,500/= all of the value of Ksh.32,520 the property of J C C.

In the alternative count the two appellants were charged with handling stolen property Contrary to Section 322 of the Penal Code.

The particulars being that on the 19th day of September 2012 at [particulars withheld] Kericho County, otherwise than in the course of stealing dishonestly retained a 4" x 6" blue cloth mattress of the value of Ksh.7,000, two kerosene lamps of the value of Ksh.1,200/=, one white plastic bucket valued at Ksh.150/=, three alluminium sufurias of the value of Ksh.3,000/= 7 light green metal cups valued at Ksh.210. 4 light brown steel cups valued at Ksh.160/=, two mobile phones Nokia and Samsung valued at

ksh.3,500 and Ksh.15,000/= respectively all of the value of ksh.30,220/= the property of J C C knowing or having reason to believe them to be stolen property.

Counts two and three are in respect of gang defilement which took place against H C a child aged 13 years. This is the first appellate court in regard to the conviction and sentence in this case. It is therefore the duty of this court to re-evaluate and consider the evidence on record so as to arrive at its own conclusion bearing in mind that it did not have the opportunity of observing the demeanour of the witnesses. *Keino -vs- Republic 1993 EALR.*

Brief facts

The complainant in the Robbery with Violence count testified on how on the night of 13th and 14th August, 2012 at about midnight she heard some noise at the main door which was a steal one but with a panel glass at the top front. She woke up and proceeded to the toilet inside the house. She went to front door. She heard her nephew called C crying from outside and begging her to open the door for him. He was in the company of men who were beating him. She decided to open the door so as to save him. She opened the door and sat on the floor.

At page 22 line 9 of the proceedings this is when the complainant told the court “Two men entered with C and my watchman called J A T. The two were strangers to me. One of them was wearing a jungle jacket. He was black slightly tall and stout. He was abit taller than me. His jacket had a hood which he had passed over his head. The jacket was inside the jungle jacket. Yes he was wearing two jackets. He had a panga. He also had stuck a piece of iron bar on his belt. He was also holding a stick with which he was beating C. The other man was also wearing a jacket that was blackish in colour. He was a bit brown. He was of medium height and built. He did not come near me so I did not note his features very much...The one who was wearing jangle jacket held me by the chin and tried to twist my neck. I cried “oh my God.” He released me. He then bound my hands with a manila rope. He led me to my bedroom. All of us went to my bedroom. They demanded that I give them money. I told them that I did not have any money but they insisted. The man with the jungle jacket struck C and ordered him to tell me to give them money. I had cash ksh1,200/= in my dress. I removed it and gave them. There was another Ksh.1450/= in my purse. The dark man took the money....They opened the wardrobe and removed my clothes and took blouses, skirts and dresses...The brown man was removing utensils from a cupboard that was in the sitting room. He removed tea cups and sufurias, bowls thermos flask, radio, umbrella, a coat mattresses, a bucket, enamel cups, 3 luminarc lamps, a phone make Nokia, another phone belonging to her son K.” She further told the court that the tall black man was armed with a torch and that he is the one who stayed with her throughout the operation which took place from midnight to about 2.00a.m. She was able to identify him by the light emanating from the torch when he went near her so as to tie her hands. She further told the court that there were security lights outside. After removing the household goods the two men left with C. They had ordered the watchman to lie on the floor after binding his hands behind his back. C returned after some considerable period in the company of the men who took the watchman and him to other houses in the compound. The complainant was locked up in the bedroom. After a short while they left. This is the time the complainant found the opportunity to scream and ask for help. Neighbours went to their rescue. Police were called. C told police that he had been sodomized and beaten on the head. The watchman said that he had been injured on the head which was swollen. They were taken to hospital for treatment.

Later the complainant was summoned at Kericho police station so as to identify her stolen items. She was able to identify two lamps one of which was being used in the chicken pen marked chicken lamp with the word “kuku” scratched on the bottom. The other one was being used in the main house and had the words “mum” inscribed at the bottom. She also identified three sufurias, a bucket, cups, a mattress with a clue cover, a phone belonging to K make Samsung black in colour. She was able also to identify a phone belonging to her watchman, jungle jacket resembling the one the thugs wore, a white manila rope, a screw spanner and two steel cutters.

Complainant’s watchman, J K T testified as PW2 and told the court that he was guarding the compound when he was suddenly bounced on by two people near the fate. He was beaten and bound with ropes and

frog matched to the complainant's house and that of C where he was interrogated on security issues. The men went and took C as hostage beat him up and told him to ask the complainant to open the door to her house which he did and they proceeded to forcefully demand money and carried away household goods therein. They later left. Close to one month later he was called at the local police station where he was asked to identify some of the stolen items as belonging to the complainant. This witness was not able to identify the attackers. His explanation being that he had been given strict orders not to look at them.

At the time he presented himself in court to testify, the witness (C) was aged 14 years. He testified to have been at his Aunt's compound on the night of 13th and 14th day of August, 2012 when at about midnight he was hit with a club. He woke up and his hands were tied from the back with ropes and taken out of the house he was sleeping in. He found their watchman while in company of another person. He was taken to his Aunt's house and ordered to call her out so as to open the door which he did. They proceeded to ask for money. They were given ksh.1,200/= . At some stage they led him to his room, took off his clothes and proceeded to sodomise him(the two thugs). They penetrated his anus with their penises. They later carried away household goods. The witness told the court that he was able to identify two of the robbers. They were wearing clothes which resembled police uniform. He was able to see them from light emanating from security lights outside his room windows. When they were called at an identification parade he was able to identify the two appellants. He was also able to identify some of the household goods that were stolen and been recovered. He was later issued with a P3 form which was later filled by a Doctor.

Corporal Beatrice Chebet(PW4) was the investigating officer. In the cause of here investigation she visited the scene and took statements of the witnesses. They gathered information that there were some strangers who had rented a house near [particulars withheld] school. During the night of 19th September 2013 while in the company of other police officers they commenced an operation and raided the said house. Therein they found two men who they arrested. Inside the house were assorted household goods which they ferried to Kericho police station.

Thereafter they summoned complainant to go and identify their stolen items if any. The complainant in this case managed to identify eleven cups(Exhibit 7) (Exhibit 8) and a bucket(Exhibit 6) two lamps(Exhibit 1 and 2) sufurias(exhibit 3, 4 and 5) mattress(Exhibit 6), jungle jackets(Exhibit 12 and 13). Also recovered wee two pairs of iron cutters(Exhibit no. 15 and 18) two mobile phones (exhibit 10 and 11).

An identification parade was conducted and PW3 managed to identify the two appellants.

The identification parade was conducted by PW6 Justus Burudi PW3 was the witness who was to do the identification. PW3 managed to identify the 2nd appellant by touching. Another parade was conducted for the 2nd appellant. He was identified by PW3.

The mother of PW7(H C) has rentals at [particulars withheld]. She testified to the effect that on the 31/8/2012 at about 10.00a.m two men proceeded to her compound and requested to be allowed to rent a room. They rented one for ksh.1,000/=. The same date they moved in during the afternoon carrying their goods in a pick-up. That on the 19th day of September 2012 police officers made a visit on the two and arrested them and carried away assorted household goods. When called to offer their defence the first appellant gave a sworn statement and told the court that he is a businessman and sells pipes. That police officers went to his house on 19th September 2012 entered and carried out a search and took away his clothes one bale, 10 jackets, other items were recovered from other houses and they were taken to police station Kericho. The following day he was told to identify his belongings. Later he was placed in an identification parade forcefully after he was thoroughly beaten by one of the police officers.

The second appellant in his sworn statement told the court that he was a businessman and was selling clothes at [particulars withheld] trading centre. Further that on the 19th day of September 2012 at around 8.00p.m men claiming to be police officers forcefully entered into his house. In the company of the 1st appellant and others were taken to Kericho Police Station together with household goods. Later at the

police station each was asked to identify his goods. He was also ordered to participate in an identification parade by the DCIO.

The appellants grounds of appeal in a nutshell are:

1. There was no proper identification owing to the fact that the incident took place at midnight and there was no proper illumination.
2. The identification parade was not properly conducted
3. The learned trial magistrate relied on the doctrine of recent possession but did not take into consideration that there was no sufficient proof that the items recovered from the appellant belonged to the complainant.

In her judgment the learned trial magistrate framed the issues for determination thus;

1. Whether there was a robbery at PW1's house
2. Whether force and or violence was used and if the suspects were armed with dangerous weapons.
3. Whether PW3 was defiled whether age and penetration had been proved
4. Whether the suspects were properly identified.
5. Whether the suspects were found with recently suspected stolen property
6. Whether prosecution had proved its case beyond reasonable doubt.

The 2nd issue was more relevant to this case. Whether there was violence, whether the accused persons were armed with dangerous weapons and whether they were more than one.

At page 12 of her judgment paragraph 3 she did observe that "it was clear that the suspects were armed with a panga, a rungu an iron bar and a stick. The stick was used on PW3. PW2 was hit with a metal bar. that both PW2 and PW3 were injured and PW3 was defiled in the process and P3 forms were produced in court to confirm the injuries. The learned trial magistrate was of the view that actual violence was meted out on PW2 and PW3 and that the attackers were armed with dangerous weapons.

On identification

The learned trial magistrate did warn herself on the danger of relying on uncorroborated evidence on identification and relied on the case of **Lorie -v- R[1967]EA 503** where it was held that (ii) a conviction resting entirely on identity invariably causes a degree of uneasiness".

She also placed reliance in the case of **Kiarie -v- R** and the case of **Regina -v- Turnbull[1976]3WLR 445** which gives the guideliness on identification.

She was satisfied that there was proper identification. She noted and observed that PW3 had ample opportunity to clearly see the attackers as he was in close contact with the two from the time they flushed him out of his room to the time they left after locking him in the room. PW3 had testified to the effect that there was security light outside the houses. This fact was corroborated by PW1.

PW3 testified that it was the first appellant who beat him up and woke him up from sleep. The two attackers were also armed with torches. They later defiled him in turns. He stayed with them for close to three hours. That was ample time in which his eyes could have acclimatized with the surroundings and provide the proper conditions for identification.

An identification parade was conducted at the police station and PW3 was able to identify the two appellants. Apart from the identification of the two appellants there was recovery of some of the stolen items in the house the two had rented. The arresting officers found the two appellants in the said house. The house was rented to them by PW7. Household goods including sufurias, cups, lamps, mattresses were produced in court and PW1 and PW2 were able to identify them from special marks they had placed on them. Apart from claiming that the household goods were theirs, the appellants were not able to explain how they came by the same. The robbery took place on the night of 13th and 14th of August 2012. The recovery was on 19/9/2012 at [particulars withheld] in Kericho. The period of one month is deemed as recent for purposes of this case.

I am satisfied that there was overwhelming evidence against the two appellants.

The conviction on the counts of Robbery with Violence Contrary to Section 296(2) of the Penal Code was safe and the sentence was lawful.

However, the conviction on the 2nd and 3rd counts was uncalled for. The gang rape was part of the violence meted out on the complainants and formed part of the ingredients of robbery with violence.

The conviction on the 2nd and 3rd counts is hereby quashed and the sentence set aside. Both conviction and sentence on the 1st count are upheld.

Judgment delivered, dated and signed this 19th day of July, 2017, in the presence of learned Counsel for the prosecution Ms Mwangi, the appellants present, Court assistant, Hillary.

HON. M. MUYA

JUDGE

19/7/2017