



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO.94 OF 2015

1. JACKSON KIPROP YEGO
2. PIUS KIPROTICH KOSGEI
3. CHARLES KIPNYANGO BWALEI.....APPELLANTS
4. CLEOPHAS KIPCHIRCHIR
5. PHILLIP KIPKIRUI ROTICH

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

1. The appellants were jointly charged with the following offence:

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE

PARTICULARS: JACKSON KIPROP YEGO, PIUS KIPROTICH KOSGEI, CHARLES KIPNYANGO BWALEI, CLEOPHAS KIPCHIRCHIR, PHILIP KIPKIRUI ROTICH: On 27th day of October, 2013 along Miwani Kisumu road at Mau Mau area in Kisumu county within Nyanza Region jointly, being armed with offensive weapons namely rungus and pangas robbed Kevin Onyango and Calvin Otieno of his bicycle make Hero valued at Kshs.6000 and or immediately before or immediately after the time of such robbery used actual violence to the said KELVIN ONYANGO and CALVIN OTIENO

2. All the appellants were convicted and sentence to suffer death hence the appeal.

F A C T S

3. In proving its case the prosecution called 6 witnesses. Their evidence can be summarised as follows: PW1, PW2 and PW3 were students at Miwani Secondary School in Form 111

4. In the evening of 27.10.13 they were going back to school each using their bicycles. On the way they were accosted by 7 people who were armed with pangas and rungus. Both PW1 and PW2 managed to escape. PW3 was unfortunately injured. He sustained serious bodily injuries. Both PW1 and PW2 managed to reach the school courtesy of a good Samaritan. They reported the matter and thereafter went to Nyangeta Police Station. Apparently both PW1 and PW2 were not able to identify their attackers as it was already dark.

5. PW3 who was the star witness narrated the same incident just as PW1 and PW2. He said however that he could not stop as his bicycle did not have breaks. He said that the attackers then bounced on him and hit him on the head. When the assailants left he managed to get his bicycle back He cycled to school

although he was still bleeding. He was taken to Nyangeta Police Post where the incident was reported. He was later taken to New Nyanza Hospital for treatment. He sustained injuries on the head, chest and hands.

6. After 2 weeks the said witness was called to identify some suspects in an identification parade. He told the court that he succeeded in identifying all the appellants herein. He did so because all of them were with him for a period of about 10 minutes during the ordeal.

7. **PW4 DR. MBOYA** produced the P3 form on behalf of Dr. Muchela whose findings were that the complainant had a fresh wound on the scalp and he assessed the degree of injury as harm.

8. **PW5 CPL. HERMAN OMUNGA** was the investigating officer in this case. He told the court that on 27.10.2013 he received a report concerning an attack upon 3 students at Miwani High School. He went to the scene but were however unable to make any recoveries. On 1/11/2013 the OCPD Kibigori Division together with the administration police officer managed to arrest the appellants for an offence of stock theft. They confirmed that in the process of going to steal the livestock they committed the robbery.

9. He then conducted an identification parade where the 4 appellants were picked by PW3. He then proceeded to prefer charges against the appellants.

10. **PW6 I/P JACKSON GITONGA** conducted the identification parade. He said that he did so at Kibos police station and the witness was able to identify successfully all the 4 appellants. He produced the parade forms as exhibits. According to him the same was done procedurally and as per the force standing orders.

11. When put on their defence the appellants each gave unsworn evidence denying the offence. The 1st appellant Jackson Kiprop Yego told the court that he was arrested in his house at night and taken to Kibigori Police Post. Later police officer from Muhoroni Police station picked him and later charged him at Ahero for an offence of Stock Theft and later the robbery charge.

12. **DW2 PIUS KIPROTICH KOSGEI** told the court that he was in a drinking den when the police pounced on them. He was arrested with 5 litres of changaa but was unable to pay Kshs.2000 his colleagues were paying. The police came and picked him later and took him to Miwani. He was equally charged with the offence of stock theft. He said that on 2.1.2013 some youths came and saw them at the cells and were advised to say that they were the ones who had 'stole the cows.' An identification parade was conducted and according to him forced to sign the parade forms.

13. **DW3 – CHARLES KIPNYANGO BWALEI** also denied the charge. He said that he was arrested with 1 litre of the changaa. He was taken to Miwani police station and later to Chemelil police station. He was charged with stock theft and later the robbery charge which he maintained that he was not aware.

14. **DW4 CLEOPHAS KIPCHIRCHIR** denied the charge. He said that on the 31.11.2013 he accompanied two administration officers to trace some lost cows but unfortunately he was arrested and charged with the offence of stock theft and later the robbery charges were preferred against him. He denied the charge.

15. **DW5 PHILIP KIPKIRUI ROTICH** said that on 31.11.2013 he went to his farm and afterwards came home. At around 11 p.m. he was woken up by police officers from Kibigori police station who accused him of being a cattle rustler. He was charged with that offence and later, the robbery with violence charge. He said that while at the cells some children went there and they were instructed to say that they were the thieves.

16. The appellants record of appeal has several grounds which Mr. Onsongo counsel for the appellants reduced them into two headings namely:

a. identification;

b. arrest of the appellant.

17. On identification Mr., Onsongo argued that the evidence available was that of PW3 only. The rest of the complainants were unable to see the assailants. PW3 said that he was able to identify the assailants as they spent 10 minutes with him during the ordeal. Mr. Onsongo argued however that, that was not sufficient time for the complainants to recognise the appellants as it was already dark. In any event the witness said that he was hit on the head and felt dizzy though he later recovered.

18. On the identification parade he argued that the same was not sufficiently done as provided. He said that several participants were in one parade severally which was contrary to the forces standing orders. He submitted that David Okoth was in 4 parades out of 5, Boniface Oluoch was in 3 parades out of 5 and Patrick Yogo was in 2 parades. This according to him compromised the whole exercise.

19. On the question of arrest he submitted that the appellants had not been arrested with the offence of robbery but stock theft. It was therefore an afterthought to suggest that they had participated in the robbery case.

20. Madam Osoro the learned state counsel opposed the appeal. She submitted that all the ingredients of the robbery with violence had been fulfilled and that the appellants were positively identified by the witness.

Analysis and Determination

21. The court is required to evaluate the evidence afresh and arrive at an independent finding with full knowledge that it did not participate at the trial – see **OKENO VRS REPUBLIC (1973) E.A.32.**

22. The first issue is the question raised by the appellants on identification. It is clear that the only witness who saw the appellants was PW3. The rest PW1 and PW2 clearly told the court that they were unable to see them. From their testimonies its clear that it was already dark. PW1 for instance stated as follows:

“.....I heard Kevin also asking them to give him his shoes. Suddenly I saw a vehicle approaching me. I stopped it thinking it would illuminate on the people but I did not see.....”

23. PW2 said on the same issue that:

“.....They approached us from a head of us. I could not identify them because there was some darkness and they were a bit far from us....”

24. In such a case of single identifying witness his evidence must always be treated with a lot of caution. This was clearly stated way back in the now famous case of **ABDALA BIN WENDO & ANOTHER VRS REP (1953) 20 EACA 166** where the court stated that:

“.....the need for testing with the greater care the evidence of a single witness respecting, identification, especially when it is known that the conditions favouring a correct identification were different. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness can safely be accepted as free from the possibility of error.”

25. If PW1 and PW2 were unable to identify any of the 7 attackers when they were told to stop is there then a possibility that PW3 fell on the same error? PW3 was assaulted at the same time when PW1 and 2 managed to escape. How possible was he able to identify the assailants, yet his colleagues spoke of light from the passing vehicle and tractors. How sufficient was the light where PW3 was being attacked.

26. Apparently PW3 did not say that he recognised them with the help of any light. He simply said that

he was with them for close to 10 minutes. Those 10 minutes includes the time when he was hit, felt dizzy and fell to the ground. Is it possible that in the 10 minutes he was talking about he managed to recognise the assailants without the help of any light?

27. Our difficulty in believing the witness's testimony is compounded by the fact that when he reported to the police station, he failed to describe even a single assailant to the police. PW5 the investigating officer said that:

“On 11.1.2013 at 11.00 a.m. the OCPD Kibigori Division in conjunction with the administration officers arrested the appellants and handed them over to us. They were handed to us for having stolen two herds of cattle from Mumbei. We took the issue and confirmed that the accuseds on their way to steal the cattle committed the robbery. There was an identification parade which was conducted. The complainants had indicated in their report that the assailants looked like they were going to steal cattle and that is why we suspected them to be attackers and we decided to conduct the identification parade.”

28. Clearly their arrest on robbery offence was a by the way. The complainant (PW3) did not describe how they were, how they were dressed, what they armed etc. In any case how does livestock thief look like?

29. Our position is strengthened by the decision in **FRANCIS KARIUKI NJIRI & 7 OTHERS VRS REPUBLIC CRIMINAL APPEAL NO.6 OF 2001 (UR)** where the court stated as follows:

“The law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized carefully and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered (See REP. VRS TURNBULL (1976) 63 Criminal Appeal Revision 132).”

30. Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all. This court in **MOHAMED ELIBITE HIBUYA & ANOTHER VRS REPUBLIC CRIMINAL APPEAL NO.22 OF 1996** (unreported) held that:

“.....It is for prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so, the conspicuous details regarding his features given to anyone and particularly to the police at the first opportunity. Both the investigating officer and the prosecution have to ensure that such information is recorded during identification and elicited in court during evidence. Omission of evidence of this nature at investigation stage or at the time of presentation in court was, depending on the particular circumstances of a case, proved fatal this being a proven reliable way of testing the power of observation and accuracy of memory of a witness and the degree of consistency in his evidence.”

31. We hold therefore that given the surrounding circumstances namely the insufficient light and the injuries already sustained by PW3 including dizziness after being hit and later recovery, it could not be accurately said that he recognized the assailants. As found above he did not even at the point of reporting to the police describe how his attackers were not even one of them. We find that based on the insufficient identification it shall be a waste of precious judicial time to determine the issues of parade identification as submitted by Mr. Onsongo.

32. Unfortunately, this is another case based purely on suspicious. The appellants were arrested for another offence and not robbery. Infact had the trial court determined and warned itself on the danger of relying on one identification witness perhaps it would have arrived at a contrary position.

33. In the premises we do allow the appeal. The appellants are hereby set free unless lawfully held.

Dated, signed and delivered this 8th day of March, 2016.

H, K. CHEMITEI

E. N. MAINA

J U D G E

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In the presence of

.....for state

.....for appellants