



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 100 OF 2012**

**RASTO EVANS BRUNO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*[From original conviction and sentence in the Chief Magistrate's Court at Kisumu Criminal Case No. 288 of 2012]*

**J U D G M E N T**

**1).** The appellant and 3 others were charged with the following offences.

**Count I:** Robbery with Violence contrary to section 292 (2) of the Penal Code.

**Particulars:** On diverse of 18th of May 2012 at Milimani area Kisumu East District within Nyanza Province, jointly with others not before court while armed with dangerous weapon namely a gun robbed Kinal Shah of cash 20,000/=, ID card valued at 300/= all valued at Kshs. 20,300/= and immediately before the time of such robbery threaten to used actual violence to said Kinal Shah.

**Count II:** Robbery with Violence contrary to section 296 (2) of the Penal Code.

**Particulars:** On diverse of 18th of May 2012 at Milimani area Kisumu East District within Nyanza Province, jointly with others not before court while armed with dangerous weapon namely a gun robbed Sobhagchand Lalji Shah of cash 4000/=, ID card valued at 300/= all valued at Kshs. 20,300/= and immediately before the time of such robbery threaten to used actual violence to said Sobhagchand Lalji Shah.

**Count III:** Attempted Robbery with Violence contrary to section 297 (2) of the Penal Code.

**Particulars:** On diverse of 20th of May 2012 at Milimani area in Kisumu East District within Nyanza Province, jointly with others not before court while armed with dangerous weapon namely a gun attempted to rob Nimishabeen Panchal and immediately before the time of such attempted robbery threaten to use actual violence to said Nimishabeen Panchal.

**Count IV:** Attempted Robbery with Violence contrary to section 297 (2) of the Penal Code.

**Particulars:** On diverse of 20th of May 2012 at Milimani area in Kisumu East District within Nyanza Province, jointly with others not before court while armed with dangerous weapon namely a gun attempted to rob Dinesh Panchal and immediately before the time of such attempted robbery threaten to use actual violence to said Dinesh Panchal.

- 2). The prosecution called a total of 6 witnesses to establish their case. The brief facts were that PW1 on 18-5-2012 at around 2.45 pm was heading to their home with PW2. At the gate as they waited for it to be opened they were accosted by two people riding on a motorcycle. They were armed with a pistol. They did not resist and they took from them a phone, Kshs. 4000/= Identity Card and Posta keys. They were unable to identify the attackers. They reported the incident to the police the same day.
- 3). PW3 on 20-5-2012 at around 7 p.m were returning home after visiting a patient at Aga Khan hospital. At the gate they were accosted by two people riding a motor bike. They raised alarm and they took off leaving the motorcycle behind. They called the police who came and took the motorcycle Reg. No. KMCN 884W away.
- 4). PW4 on 23-3-2012 at around 10.30 pm was going to a friend's party. He took a ride via a motor bike. On the way the rider attacked her and took away her mobile phone, make Samsung. He report to the police who tracked it and recovered after two months. She did not recognise the attacker as he wore an helmet.
- 5). PW5 told the court that he has two motorcycles. He gave one to James Owino who was the 2nd accused who would always hire it and would pay Kshs. 300/= to him per day. He told the trial court that on 20-5-2012 he met him at the stage called "Ahero Mowuok" and he gave him Kshs. 700/= and he promised to pay the balance in the evening. He did not see him again neither did he return the motor bike. He reported to the police and was later called to identify the motor bike.
- 6). PW6 the investigating officer told the court that they received two complaints of robbery on 18-5-2012 and 20-5-2012. They received the motor bike as a result of the robbery that took place on 20-5-2012. Later PW5 the owner of the motor bike came to claim the same and on interrogation he assisted in tracing Mwai the appellant's co-accused. He told the court that the said James Mwai implicated the appellant. He told them that he would occasionally gave him the motor bike. The appellant according to PW6 was arrested with two phones, one of which belonged to the 4th witness Sally Karanja Baraza who was called to identify.
- 7). We have heard the submissions of the parties herein and the duty of this court is to reevaluate a fresh the evidence on record with a view of arriving at an independence finding as enunciated in the case of **Okeno -VS- Republic [1972] EA 32** taking into consideration the fact that it was the trial court which had the benefit of seeing the witnesses.
- 8). First of all it is apparent from the record that non of the prosecution witnesses were able to identify or recognise their assailants. Apparently they were attacked by person who wore helmets and rode on motor bikes. The closest direct evidence adduced by the prosecution is the connection between the 2nd accused and the motorcycle recovered. PW5 the owner of the motorcycle was able to trace the same to the 2nd accused who apparently did not appeal against his conviction.
- 9). It was the 2nd accused who implicated the appellants herein as per the findings of PW6 the investigating officer. In the premises the appellant was found with two phones. PW4 managed to identify the phone by the initial "S.K" which were on the phone.
- 10). The appellant denied the charge in his unsworn evidence. He told the court that while in his house the police came and ransacked the house taking with them a bag which contained a receipt for his phone Samsung No. R. 220.
- 11). A close analysis of the evidence on record shows that there was no charge in respect to the stolen phone of the 4th witness. Apparently the police called her to testify but they failed to prefer a charge against the accused person including he appellant. If truly the phone was traced to the appellant then nothing was difficult in bringing a charge. It even becomes more intricate as the said 4th witness was unable to recognise the assailant.
- 12). The prosecution has submitted on the doctrine of recent possession but from the circumstances of

this case the phone was allegedly found with the appellant two months thereafter. And even then there was no inventory to show that the phone was found with the appellant. In any case the 4th respondent was not a complainant in this matter.

What then is the way forward? We think that since there was no evidence direct or circumstantial linking the appellant to the four counts he should have been acquitted. The count No. V which the court convicted and sentenced the appellant was non-existent.

We do therefore allow this appeal and order the appellant to be released unless lawfully held.

**Dated, signed and delivered at Kisumu this 10th day of March, 2015.**

**H.K. CHEMITEI**

**E.N. MAINA**

**JUDGE**

**JUDGE**