



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 107 OF 2012

(Coram: Hon. Fred A. Ochieng and Hon. G. W. Ngenye – Macharia, JJ.)

EVANS WAMALWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

AS CONSOLIDATED WITH

CRIMINAL APPEAL NO. 105 OF 2012

PETER MBUGUA MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

AND

CRIMINAL APPEAL NO. 106 OF 2012

ABUBAKAR MUSTAFA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the Hon. Senior Resident Magistrate M. Kasera in Eldama Ravine Senior Resident Magistrate's Criminal Case No. 625 of 2011 delivered on 17th May, 2012)

JUDGMENT

The three Appellants namely Evans Wamalwa, Peter Mbugua Mwangi and Abubakar Mustafa were in the main count charged jointly charged with robbery with violence contrary to Section 296 of the Penal Code.

Particulars of the offence were that on the 8th day of July, 2011 at Eldama Ravine Township in Koibatek

District within Baringo County jointly with others not before court robbed Isaac Kiprop Seurei of his mobile phone make Nokia 2710, one mobile phone battery, one memory card and cash Kshs. 3,500/= all valued at Kshs. 9,000/= and at, or immediately before, or immediately after the time of such robbery beat the said Isaac Kiprop Seurei.

In the alternative count, the 1st Appellant Evans Wamalwa was charged with handling stolen goods contrary to Section 322 (2) of the Penal Code.

Particulars of the offence were that on the 8th day of July, 2011 at Eldama Ravine Township in Koibatek District within Baringo County, otherwise than in the course of stealing dishonestly received or retained one mobile phone make Nokia 2710 knowing or having reason to believe it to be stolen property.

All the three Appellants were found guilty in the main count and were sentenced to death as per the law prescribed.

The 1st Appellant, Evans Wamalwa has raised the following issues in the Petition of Appeal filed on 14th June, 2012.

- (a) That the prosecution's case was based on unsupported evidence.*
- (b) That the robbery having been committed at night, the conditions of identification were unfavourable.*
- (c) That although he was arrested in possession of the alleged stolen exhibit, he had given a reasonable account of how he came into its possession.*
- (d) That the defence outweighed the prosecution's evidence.*

The 2nd Appellant raised the following issues for consideration.

- (a) That the death sentenced is unconstitutional and contravenes Articles 26 (1) and 24 (a) of the Constitution.*
- (b) That his identification by PW1 was not positive.*
- (c) That the identification parade was conducted contrary to the Police Force Standing Orders as the witness had seen him before the parade.*
- (d) That nothing was recovered from him that linked him to the offence.*
- (e) That the trial Magistrate failed to consider his defence.*

The 3rd Appellant raised the following issues:-

- (a) That the identification parade was conducted contrary to the Police Force Standing Orders.*
- (b) That he was convicted based on uncorroborated evidence.*
- (c) That although he was allegedly arrested in the company of the complainant, the complainant had not reported the incident to the police.*
- (d) That he was convicted on the strength of evidence of a single witness which did not support either direct or circumstantial evidence.*

SUBMISSIONS

The 1st Appellant submitted that the identification parade was conducted contrary to the Police Standing Orders, and in any event, was of no evidential value as the complainant had already indicated that he knew him (1st Appellant) prior to the incident.

He stated that investigations were conducted by an unqualified police officer who was below the rank of an Inspector of Police.

On identification, he submitted that the robbery is alleged to have taken place at night. He said that PW2 told court that the scene had no security lighting as asserted by the investigating officer. As such, it was difficult for him to state he identified his attackers.

He submitted that it was erroneous of the trial Magistrate to rely on unsworn statement of his co-accused, which amounted to complicity.

It was his submission that the trial court failed to consider the manner in which the police conducted the search from his person which led to loss of money.

On the whole, the 1st Appellant submitted that his conviction was based on uncorroborated evidence.

The 2nd Appellant, to a large extent, replicated the submissions of the 1st Appellant. On identification he emphasized that, since the robbery took place in darkness, PW2 would not have been able to identify his attackers.

Furthermore, the complainant was frightened at the time of the attack as a result of which he could not identify the robbers.

The 2nd Appellant argued that the injuries inflicted on the complainant were not caused by a weapon as no blood stains were seen on his clothes.

He also submitted that the prosecution's evidence was not corroborated, and the trial court ought to have acquitted him.

Similarly, the 3rd Appellant's submissions were a duplicate of those of the 1st and 2nd Appellants. In addition, he argued that the only implicating evidence against him was of a single witness which was not corroborated.

Learned state counsel, Miss Ruto conceded to the appeal of the 3rd Appellant. She however opposed the appeals of the 1st and 2nd Appellants.

Miss Ruto submitted that PW2 identified the assailants who attacked him, and those were the 1st and the 2nd Appellants. She said that the 3rd Appellant was drunk and wanted a share of the money stolen. He however fell down as the others ran away. He asked PW2 for leniency and promised him to help him trace the 1st and 2nd Appellants at a fee of Ksh. 1,000/=.

Thereafter, the PW2 and the 3rd Appellant went to Elvin Motel. On their way to the Motel, they met PW4, a police officer and PW5, an Administration Police Officer. The four then proceeded to the Motel where they found the 1st and 2nd Appellants.

It is at the Motel that PW2 identified the 1st Appellant as the person who held him. Police recovered PW2's stolen phone Nokia 2710 which bore PW2's name from the pocket of the 1st Appellant.

From the 2nd Appellant, they recovered Ksh. 1,500/= in Ksh. 500/= and 1,000/= notes.

She submitted that, PW2 who had been injured was referred for treatment.

She said that both the 1st and the 2nd Appellants were only arrested an hour after the robbery. The

stolen items were also recovered an hour after the robbery, and so the doctrine of recent possession applied.

Miss Ruto argued that the identification parade was of no consequence; firstly, because PW4 and 5 admitted that there was lighting at the place they conducted the search on the 1st and 2nd Appellants. Therefore, the witnesses had an opportunity of seeing the suspects before the parade was done.

Secondly, the 1st and 2nd Appellants were identified to the complainant by the 3rd Appellant before the parade was conducted.

Miss Ruto submitted that, it was not established that the 3rd Appellant was part of the gang that robbed PW2. He was drunk at the material time, and all he wanted was a share of the looted cash.

Before we dwelve into the issues for determination, we think it is important we summarize what transpired on the fateful night.

On the 8th July, 2011, at about 9.30 p.m., the complainant (PW2) was on his way home from work. Near Koibatek Building within Eldama Ravine Township, he was accosted by four men who emerged from darkness. They held his jacket, arm-twisted him and boxed him on the neck. They stole Ksh. 2000/= from the jacket and Kshs. 1,500/= from his wallet. His phone, Nokia 2710 was also stolen.

The 3rd Appellant, Abubakar Mustafa who was so drunk approached two of the assailants and asked to be given a share of the stolen cash. But the two ran away, and the 3rd Appellant fell down.

PW2 then got hold of the 3rd Appellant. The latter asked for leniency and offered to lead PW2 to the arrest of his assailants at a fee of Ksh. 1,000/=. Both PW2 and the 3rd Appellant sought the help of police officers (PW4 & 5) who accompanied them to Elvin Motel where they found the 1st and 2nd Appellants in a disco.

The police apprehended the 1st and 2nd Appellants. From the 1st Appellant, PW2's mobile phone bearing his name was recovered. From the 2nd Appellant, Ksh. 1,500/= was recovered.

The 3rd Appellant tried to escape from the hands of the police but he was arrested. All Appellants were taken to Eldama Ravine Police Station and locked up. PW2 was treated at the Eldama Ravine District Hospital where his medical examination report (P3 form) was filled. He had sustained injuries to the face, wrist and right shoulder. His jumper also got torn.

We have accordingly re-evaluated the evidence on record. We have also crystalized all the issues raised by the three Appellants in their respective grounds of appeal. From them, we summarize the issues for determination as follows:-

- (a) *Whether the Appellants were properly identified.*
- (b) *Whether the identification parade was necessary.*
- (c) *Whether the prosecution's case was proved to the required standards.*
- (d) *Whether the trial court considered the Appellants' respective defences.*
- (e) *Whether the death sentence handed to the Appellants was legal.*

IDENTIFICATION

On the issue of identification, it is not in doubt that the robbery took place at night. The time was 9.30 p.m. as PW2 was walking on the road. PW2 was also categorical that the four men “**emerged from darkness**”. PW2 testified that one person flashed a torch on his face. He went on to state that it is the 1st

Appellant who boxed him on the neck and twisted his right arm as he faced him. He said that the 2nd Appellant took money, Ksh. 1,500/= from the wallet as well as his phone. He said that the 3rd Appellant joined the robbers and demanded a share of the loot.

Apparently, PW2 did not state how he was able to know that it is the 1st Appellant who assaulted him and how the 2nd Appellant stole the phone and the money. He did not also state the nature of the lighting that was at the scene that enabled him to clearly see the attackers. For clarity purposes, it is important we duplicate what he told court thus;

“They came from my left, one person flashed a torch on my face. I was near Koibatek and Sachangwan Grocery. I was 15 metres apart. I was 10 metres away. One man held me with straps for my jumpers. He pulled me, took Ksh. 2,000/= which was on my back pocket and extra battery for my phone. Money was in 1,000/= - 2 notes.”

He went on to testify as follows:-

“Accused 1 was facing me as we struggled. He held my arm right and twisted it ... Accused 2 took money Ksh. 1,500/= in wallet and phone. It was Ksh. 1,000/= note and Ksh. 500/= note, phone Nokia 2710.”

It is after PW2 had been robbed that the 3rd Appellant appeared while drunk demanding a share of the loot. In this respect PW2 said;

“Accused 3 came he was drunk he wanted to share the money with the other two. They ran away leaving accused 3 who fell down. He asked for leniency. He told me he would help me trace the 2nd accused persons, accused 1 and accused 2.”

As at this point, it is clear that although PW2 was referring to the 1st and 2nd Appellants as accused 1 and 2 respectively, there is no indication he knew them prior to the incident.

Therefore, the only other reason he would refer to them as such was because the 3rd Appellant helped track them. And when they were arrested by PW4 and 5 at Elvin Motel, the searches conducted from their persons was in the presence of some lighting.

We do, accordingly, and with certainty, conclude that the conditions for identification of the 1st and 2nd Appellants were not favourable. And so, they could only be linked to the robbery through the stolen items.

Both were arrested by PW4, PC Abdi Sora and PW5, APC Benjamin Kipkorir Kemboi from Elvin Motel only about one hour after the robbery.

According to PW4, he recovered from the 1st accused, Ksh. 1,500/= in the form of Ksh. 1,000/= and Ksh. 500/= notes. From the 2nd accused he recovered a phone without a battery and a back cover. He said PW2 identified the phone as his. He also said that the two Appellants admitted they stole the phone plus Ksh. 2,500/= which another suspect fled with.

PW4 also confirmed that they searched the two Appellants outside the Motel where there was sufficient street lighting. He also said there was electricity lighting inside the Motel, and so the two Appellants were easily identified.

PW5 said that PW4 recovered the phone from the 1st Appellant and Ksh. 1,500/= from the 2nd Appellant.

PW6, Corporal Bonface Chebus, who was the investigating officer said that the three Appellants were taken to Eldama Ravine Police Station by PW4 and 5. He said PW4 and 5 handed over to him Ksh. 1,500/= that was recovered from Peter Mbugua (the 2nd Appellant) and a phone that was recovered from Evans Wamalwa (1st Appellant). He produced in court the phone, Nokia 2710 as P. Exhibit 4 and two

notes of Ksh. 1,000/= and Ksh. 500/= as exhibit 5. A torn jumper was produced as P. Exhibit 3.

According to PW6, PW2 lost cash amounting to 3,500/=. Out of this sum Ksh. 2,000/= went with another suspect who was never arrested while Ksh. 1,500/= was the money recovered from the 2nd Appellant.

At this point, we would like to point out a contradiction raised by PW4 with respect to the recovery of the exhibits.

According to PW4, the phone was recovered from the 2nd Appellant while the cash was recovered from the 1st Appellant.

However, all other witnesses, namely PW2, PW5 and PW6 were categorical that the phone was recovered from the 1st Appellant and the cash from the 2nd Appellant. The search was conducted in the presence of PW2, 4 and 5. At the same time, PW6 named the persons from whom these exhibits were recovered in the following words;

“On search phone was recovered from Wamalwa and cash 1,500/= from Peter Mbugua.”

We therefore think that the contradiction by PW4 is not material and should not vitiate the evidence of the majority witnesses which was consistent.

It is therefore clear that the mobile phone which was recovered from the 1st Appellant is what was produced as an exhibit (P. Exhibit 4) by PW6. This was Nokia 2710 which PW2 clearly identified as his bearing the inscription of his name on it. The phone had been stolen only moments before it was recovered. Again, the 3rd Appellant, who was cornered by PW2 offered to help PW2 in the arrest of his assailants. Although it is not clear how the 3rd Appellant knew PW2's attackers, as fate had it, the 1st Appellant was caught with one of the stolen items. This item, being the phone was then positively identified by PW2 as his.

We are, in the circumstances left with no doubts in our minds that the 1st Appellant had a hand in the robbery. After all, he did not give a plausible account of how he came by the phone. His defence that the phone was given to him by a person called Paulo is not authenticated as his defence was unsworn. Moreover, it is outweighed by the strong prosecution evidence in this respect.

As regards the 2nd Appellant it is factual that Ksh. 1,500/= was recovered from him. The same was in two notes of Ksh. 1,000/= and 500/= respectively. According to PW2, it is the 2nd Appellant who stole this money. However, it is our view that, since PW2 identified the 2nd Appellant at the time of search, we think, this could have influenced him to give evidence that indeed it is him (2nd Appellant) who stole the said money.

One other aspect we need to point out is, the money recovered from the 2nd Appellant was not uniquely identifiable with PW2. That is to say, it had no special marks of ownership. Thus, it cannot be ruled out that it belonged to the 2nd Appellant as well.

We must note that the serial numbers of the two notes were only recorded at the point of identification and production as exhibits in court. They were not given by PW2 immediately after the robbery. Therefore, it is difficult to rule that that money is what was stolen from PW2.

For those reasons, we think that the recovered cash, of itself, cannot link the 2nd Appellant to the robbery.

THE IDENTIFICATION PARADES

We now address ourselves to the identification parades that were conducted. We have already noted that the conditions of identification were difficult. PW2 only alluded to the fact that there was security lighting at the scene on cross-examination. But we discount this theory given that, even after he went to the Elvin Motel where the 1st and 2nd Appellants were arrested, he was unable by himself to identify the

two Appellants. It is the 3rd Appellant who picked them out from other patrons in the disco.

Suffice it to say, PW2 was present when the 1st and 2nd Appellants were searched by PW4 and 5. He thus had a good opportunity of seeing them including, scrutinizing their physical appearances.

An identification parade is conducted with the purpose of erasing any doubts that the person whom the complainant identified at the scene of robbery is clearly the person who has been arrested or charged.

In the instant case, Since PW2 had had a second contact with the two suspects, any identification parade was of no evidential value.

Equally, in the respect of the 3rd Appellant, any identification parade conducted for him would be a mockery for its purpose. PW2 had arrested him at the scene. He thereafter remained in his company up and until the 1st and 2nd Appellants were arrested. PW2 was not dealing with a stranger any more. So any identification parade in this regard would also not serve any purpose.

Notwithstanding the above, we note that the identification parades were conducted in a proper manner and in accordance with the Police Standing Orders. PW3, Chief Inspector Johnson Bulemi, the then DCIO Eldama Ravine conducted three separate parade for each of the suspects. Each of them was paraded with eight other members of the parade. On cross-examination PW3 emphasized that the members of each parade bore semblances in physical appearances and age as the suspect himself. The respective suspects (Appellants) were, at the conclusion of each parade asked if they were satisfied with the process of the exercise. None raised objection(s) to them. They respectively signed the identification parade forms in conformity with the standing orders.

We do not find that any rules of conducting the parades were flouted. But as we have observed that the parades were of no value, we need not say more.

THE EVIDENCE

We have already evaluated the weight of evidence incriminating the 1st Appellant and exonerating the 2nd Appellant. It is important for us to point out that we agreed with the learned state counsel who conceded to the 3rd Appellant's appeal.

According to PW2, the 3rd Appellant went to the scene after the robbery was complete. All he was interested in was the loot which the assailants had taken from PW2. Probably because of his drunken status, he was unable to flee from the scene. Instead, he fell down and PW2 caught him. He offered to be a good samaritan, and he led PW2 to Elvin Motel where the 1st and 2nd Appellants were arrested.

In those circumstances, it is difficult to tell that the 3rd Appellant was among the gang that robbed PW2. Although he attempted to flee from the hands of the police after the 1st and 2nd Appellants were arrested, that of itself, cannot incriminate him.

We do accordingly find that he was a victim of circumstances.

As regards prove of the charge of robbery with violence, we re-state the particulars of the same as drawn in the charge sheet thus;

“On the 8th day of July, 2011 at Eldama Ravine Township in Koibatek District within Baringo County jointly with others not before court robbed Isaac Kiprop Seurei of his mobile phone make Nokia 2710 , one mobile phone battery, one memory card and cash Ksh. 3,500/= all valued at Ksh. 9,000/= and at, or immediately before, or immediately after the time of such robbery beat the said Isaac Kiprop Seurei.”

In total, six prosecution witnesses testified. PW1, Racheal Aegwa Cherop, is the Clinical Officer who examined PW2 and filled his P3 form (P. Exhibit 1). We shall revisit his evidence soon hereafter.

PW2 is the complainant himself whose evidence we have already summarized.

PW3 conducted the identification parades while PW4 and 5 are the ones who arrested the 1st and 2nd Appellants. On the other hand, PW6 investigated the case.

PW2, 4, 5 and 6 gave consistent testimonies on the date the incident took place, events leading to the arrest of the Appellants and recovery of the exhibits.

PW2 gave an account of how he was accosted by four men. He was held by one of them with straps of his jumper. This robber took away his Ksh. 2,000/= and an extra battery for his phone. The 1st Appellant hit him on his neck and twisted his right arm and stole his phone.

Both the theft and assault took place in one sequence of events.

PW1 testified that he examined PW2 on 9th July, 2011, a day after the robbery. PW2 complained of pain on the right shoulder, neck and back. He had scratch marks on the frontal face and posterior neck was tender. Upper limbs had scratch marks. Left thumb was tender. He assessed the degree of injury as harm.

All the injuries as attested by PW3 were consistent with PW2's evidence. The scratch marks, we think, were inflicted when PW2 and the 1st Appellant were struggling.

The above attests that PW2 lost his personal belongings and that the attack was done by use of force by a gang of robbers. Hence, the ingredients of the offence of robbery with violence were proved. The same were however only proved as against the 1st Appellant, for the reasons expounded above.

Further, we observe that his conviction was not based on the evidence of his co-accused persons as he alluded, but on strength of other evidence as evaluated by the trial court.

Each of the three Appellants gave an unsworn statement of defence. They denied committing the offence.

In their respective submissions, they argued that the learned trial Magistrate did not consider what they said in their defences. But in her Judgment, the learned trial Magistrate noted as follows:-

“I have also looked at the defence by all the accused persons. They are in agreement that they accused 1 and 2 were found in Elvin Motel. They also accept what was recovered on them. Accused 3 did not leave complainant sight as he was arrested a few meters from the scene. Accused 1 and 2 were arrested roughly 1 Km from the scene. Complainant could not have known where they were without the assistance of accused 3. I do not doubt that all accused were involved in commission of the offence.”

We find that the trial court took into account what the Appellants told the court in their respective defences. Our concern, as we noted here above, is that the court's evaluation of the prosecution's evidence failed to meet the threshold of the required standard of proof in respect of the 2nd and 3rd Appellants.

THE DEATH SENTENCE

Finally, we address ourselves as to the legality of the death sentence.

The 1st Appellant submitted that the handing of death sentence contravenes Articles 24 (a) (we opine he referred to Article 24 (1) (a)) and 26 (1) of the Constitution.

Article 24 (1) (a) of the Constitution provides;

“24. (1) A right of fundamental freedom in the Bill of Rights shall not be limited except by law,

and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -

(a) the nature of the right of fundamental freedom;

while Article 26 (1) reads;

“Every person has the right to life.”

The latter Article must be read vis-a-vis the broad provision of Article 24 (1) which is;

“A right to fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, ...” (underlining ours).

For sometime, the case of **GODFREY MUTISO -VS- REPUBLIC (2010) e KLR** was held to be in tandem with the 1st Appellants' arguments; that is to say, that for as long as the Constitution provided for the sanctity of life, no other law would take away that right. But the holding only obtained for sometime and it resulted to hundreds of convicts escaping the death sentence even where the penal law provided for it.

However, in the decision of **JOSEPH NJUGUNA MWAURA & 2 OTHERS -VS- REPUBLIC CR. APPEAL NO. 5 OF 2008**, the Court of Appeal held the decision of **MUTISO -VS- REPUBLIC** *“to be per incuriam in so far as it purports to grant discretion in sentencing with regard to capital offences.”*

It emphasized that, where the penal code provided for the death sentence, the court had no choice but to pass that sentence. That is why under the preamble of Article 24 (1), the fundamental rights and freedoms are subject to other provisions of the law. Such exception include where the death penalty is the mandatory sentence for an offence.

Under Section 292 (2) of the Penal Code, the penalty for the offence of robbery with violence is the mandatory death sentence. We therefore hold that the trial court did not err in passing the death sentence against the Appellant's.

In the upshot, we find that the prosecution did not prove its case against the 2nd and 3rd Appellants beyond all reasonable doubts. Their conviction on the basis of being found with the stolen items and identification respectively was not safe. We quash their convictions, set aside the respective death sentences and order that they be forthwith set free unless they are otherwise lawfully held.

As regards the 1st Appellant, we are of the view that the circumstantial evidence against him was so strong, leaving do doubts in our minds that he was one of the robbers who attacked PW2.

We thus dismiss his appeal. We uphold both his conviction and sentence.

It is so ordered.

DATED and DELIVERED at ELDORET this 12th day of June, 2014.

FRED A. OCHIENG

JUDGE

G. W. NGENYE - MACHAIRA

JUDGE

In the presence of:-

1. 1st Appellant
2. 2nd Appellant
3. 3rd Appellant
4. M/s. Oduor for the State/Respondent