



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERICHO**  
**CRIMINAL APPEAL NO.61 OF 2012**  
**Consolidated with**  
**CRIMINAL APPEAL NO.60 OF 2012**

**(An appeal against conviction and sentence of Bomet PM Criminal Case No.844 of 2011**

**– Hon. J. Kwena – Senior Principal Magistrate delivered on 13<sup>th</sup> September 2012)**

**HILLARY KIPROTICH NGETICH - - 1<sup>ST</sup> APPELLANT**

**GILBERT KIPRONO alias RASTA - - 2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC - - RESPONDENT**

**JUDGMENT**

Judgment HCRA No.60 of 2012 (consolidated with HCRA No.61 of 2012) HILLARY KIPROTICH NGETICH (1<sup>st</sup> Appellant) and GILBERT KIPRONO alias RASTA (2<sup>nd</sup> Appellant) were jointly charged with the offence of Robbery with violence contrary to Section 296(2) of the Penal Code; that on the 30<sup>th</sup> day of October 2011 at Bomet Township, jointly with another before court, robbed WILSON KOSKEI of his jacket valued @ Ksh.450/=, a pair of shoes valued @ Ksh.400/=, a cap valued @ Ksh.90/= and a Nokia phone 1112 valued @ Ksh.2000/=, and immediately before or immediately after the robbery, threatened to use violence against the named Victor.

The Appellants denied the charge and after a trial in which five witnesses testified on behalf of the prosecution, and the Appellants were the only defence witnesses, they were convicted and sentenced to death.

WILSON CHERUIYOT KOSKEI (PW1) was going to Koiwa from Bomet, on 30<sup>th</sup> November 2011 at about 9.30 p.m. He boarded a bodaboda motorcycle whose rider he identified as the 1<sup>st</sup> Appellant and whom he did not know before. He intended to alight at Tenwek junction, and informed the 1<sup>st</sup> Appellant as much. At the time there was light. However before getting to Tenwek the 1<sup>st</sup> Appellant branched off and stopped and two people appeared from the junction. The 1<sup>st</sup> Appellant produced a knife from his coat

and placed it on PW1's right side. The other two people ordered PW1 to produce money. They ransacked him and made off with his jacket, shoes and cap plus his two mobile phones which were inside the jacket. The attackers then turned the motorcycle and went back to the stage. PW1 walked back to the stage where he had hired the 1<sup>st</sup> Appellant's motorcycle. He found one Emmanuel Mutai (PW3) whom he asked whether he knew the rider he had hired a few minutes earlier and upon getting confirmation that the 1<sup>st</sup> Appellant had just passed riding his motorcycle without switching on the headlights, and carrying the 2<sup>nd</sup> Appellant as his passenger, PW1 narrated his ordeal to PW3.

PW3 who was a boda boda rider confirmed that while waiting for passengers at Club Gulf, he saw PW1 (whom he knew) being approached by the 1<sup>st</sup> Appellant with an offer to take him to his destination which was Tenwek junction. In fact PW3 who had also got a customer rode on the same direction with PW1, plus 1<sup>st</sup> Appellant but realized that they branched off. So when PW1 reported to him the incident, the boda boda cyclists in that place mobilized themselves and went in search of the 1<sup>st</sup> Appellant who was known to them, as he used to tout for passengers and would also ride the motorcycle. One member of the search team knew where the 1<sup>st</sup> Appellant lived so they traced him to his home where they found him sleeping and they apprehended him.

The 1<sup>st</sup> Appellant led them to the 2<sup>nd</sup> Appellant who was also apprehended and the 2<sup>nd</sup> Appellant led them to the house of a third person who was eventually apprehended who had been charged alongside the two Appellants. From this 3<sup>rd</sup> person was recovered a Nokia phone, and from the 2<sup>nd</sup> Appellant a sword was recovered hidden under his waist.

A search in the house where the 3<sup>rd</sup> accused was found led to recovery of a Motorola phone, jacket and Ksh.605/=. PW1 identified the recovered items. It was PW3's evidence that he used to see all the three persons at the boda boda stage.

As the search party was herding the suspects, they saw Traffic Police Officers on patrol and the 1<sup>st</sup> and 2<sup>nd</sup> Appellants ran to the officers pleading to them for protection. PW3 and other boda boda operators then proceeded to PW1's house and informed him that they had apprehended appellants and handed them over to police. PW1 went to the police station and identified his property. He was also shown the three arrested persons who were in the cells.

On cross-examination PW1 stated that he was attacked at Tenwek junction and there were bright street lights along the road. He explained that during the attack, he did not pay much attention to the attacker's manner of dress, but he concentrated on their faces, as they shouted at him while demanding for money and taking away PW1's various properties.

GEOFFREY KIMWENO ROTICH (PW4), a boda boda rider who was elected to be in charge of boda boda within town service confirmed to the trial court that on 30<sup>th</sup> October 2011, at about 11.00 p.m., he was parked at Traveller's Hotel, and was in the company of PW3 and the 1<sup>st</sup> Appellant (both of whom were known to him as boda boda riders).

Someone appeared from Traveller's Bar while staggering and the 1<sup>st</sup> Appellant called to him to board his motorcycle. He saw the person climb on to the 1<sup>st</sup> Appellant's motorcycle. PW4 heard the 1<sup>st</sup> Appellant call out to one RASTA who was at a nearby shop, and RASTA boarded another motorcycle. The 1<sup>st</sup> Appellant rode off towards Tenwek and was followed by Rasta (identified as 2<sup>nd</sup> Appellant). After a short while, 1<sup>st</sup> Appellant's passenger returned to say he had been robbed by the person who had carried him on the motorcycle. PW4 teamed up with PW3 and other boda riders to search for the 1<sup>st</sup> Appellant and his evidence confirmed what PW3 said regarding the search and eventual recovery of PW1's property. PW4 knew the 2<sup>nd</sup> Appellant because he worked as a watchman.

SGT. ATANDI MOSOTA (PW2) who was on traffic duties that night along Sotik-Bomet road recalled seeing a large group of boda boda operators heading towards him, and the 1<sup>st</sup> and 2<sup>nd</sup> Appellants broke

away from the group, and held on to his arm while pleading with him for protection. He was informed that the two had robbed PW1 and the group was escorting them to go and show where they had hidden the loot.

PC. PATRICK MAINA (PW5) who was at the police station saw PW2 bring in the two appellants. The group which had arrested them handed over the recovered items to PW5 and he produced them in court after re-arresting the appellants.

In his unsworn defence, the 1<sup>st</sup> Appellant said he was employed in a hotel and was on his way home at about 6.00 p.m., while at around Soi Garage while walking, he met many people who said “Ni huyu” and apprehended him.

The 2<sup>nd</sup> Appellant in his sworn testimony said he worked as a watchman at Soko Moja in Bomet. He was on his way to Bomet town at 6.00 a.m. and just as he was crossing the road, the boda boda operators met him, ordered him to board a motorcycle, then informed him that some things had been stolen, and he was being treated as a suspect. He was surprised at being mentioned by the 3<sup>rd</sup> accused whom he did not even know.

The trial Magistrate upon considering the evidence found that the encounter between the 1<sup>st</sup> Appellant and PW1 where they left on a motorcycle was corroborated by PW3 and PW4. Furthermore PW4 heard 1<sup>st</sup> Appellant signal to 2<sup>nd</sup> Appellant and they all left heading towards the same direction.

The trial Magistrate held that due to the constant witness by all the prosecution witnesses regarding the source of light available to the effect that the whole area was illuminated by light from the electricity street lamps, even there was adequate and favourable conditions for identification by the prosecution witnesses.

Further, that all the prosecution witnesses corroborated each other and was constant, and the 3<sup>rd</sup> accused was acquitted on the charge of robbery as he was not at the scene.

These findings are now contested on amended grounds that:

1. The evidence on identification was weak as it was visual identification under difficult circumstances.
2. The evidence was incredible and the defences were rejected without any plausible reason.
3. The first appellant contested the legality of the sentence saying that at the time of arrested he was below 18 years of age.

Both Appellants filed written submissions where 1<sup>st</sup> Appellant described the death sentence meted out as unconstitutional since Article 26(1) of the Constitution recognizes every person a right to life. He seems to have abandoned the issue about the illegality of the sentence based on provisions of the Children Act.

They faulted the opportunity for identification, saying the incident took place in the night under the cover of darkness and so identification was made difficult and that PW1 was drunk. Further that no one gave a detailed description on registration of the motorcycle he purportedly rode that night. Further that the three witnesses were not within one location, they could not have seen him.

It is also contended that since there is a contradiction as to how much money was recovered, with PW3 and PW4 claiming it was Ksh.605/= and PW1 saying it was Ksh.700/= then that contradiction ought to be resolved in his favour by returning an acquittal.

The identification of the recovered items was also faulted on grounds that there was no distinguishing mark singled out on them to prove that they belonged to PW1.

In opposing the appeal, Mr. Mutai on behalf of the State submitted that there was sufficient opportunity for identification, and this coupled with the recovery items from the appellants adequately prove the charge.

As regards constitutionality of the death sentence, counsel has urged us to be guarded by the latest Court of Appeal decision in Joseph Njuguna Mwaura and Others v R (2013) eKLR which stated that the death penalty is legal in Kenya and the Constitution still allow it.

The appeal basically hinges on three issues.

- a. Identification
  - b. Recovery of the stolen items
  - c. The legality of the sentence
- a. All the prosecution witness were consistent regarding the source of light, which was not single, but many street lights which dotted the area.
  - b. The appellants were not strange to the witnesses, except PW1, and the evidence confirmed that PW1 was carried on a motorcycle by the 1<sup>st</sup> Appellant. Issues regarding the motorcycle registration cannot be fatal as at the time of hire no one had any real keen interested on the vessel.
  - c. The 2<sup>nd</sup> Appellant was seen being beckoned by the 1<sup>st</sup> Appellant, to board a motorcycle and head on the one direction as 1<sup>st</sup> Appellant. This is consistent with the evidence of PW1 that 2<sup>nd</sup> Appellant suddenly appeared at the scene.

While we concur that no detailed distinguishing mark was referred to by PW1 in singling out the recovered items, we note that neither of the appellants claimed ownership of the recovered items.

We hold that there was ample opportunity for identification and the source of light available was adequate. See *Charles O. Maitany v R* (1986) KLR page 198. The identification was not just by PW1 but was confirmed by PW3, PW4, and the question of intoxication doesn't arise to affect it. As regards the sentence, we can do no better than reaffirm its legality as has been held by the Court of Appeal in the case of Joseph Njuguna Mwaura v R (2013) eKLR to the effect that the Constitution Article 26 recognizes that where there is a legal provision, the right to life can actually be taken away.

The upshot is that the appeal has no merit and is dismissed. We confirm the conviction as having been safe and the sentence meted is legal.

Delivered and dated this 17<sup>th</sup> day of July 2014 at Kericho.

J. K. SERGON

H. A. OMONDI

JUDGE

JUDGE

In the presence of:

.....for Appellants

.....for Director of Prosecutions.