



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO. 19 & 20 OF 2013

JOHNSTONE MAKOMERE.....1ST APPELLANT

ROBERT KIPRONO KIRUI alias MOTO.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the convict and sentence of Hon. J.Ndururi, Principal Magistrate, Kericho dated 7th May 2013)

JUDGMENT

JOHNSTONE MAKOMERE and **ROBERT KIPRONO KIRUI** *alias Moto*, hereinafter referred to as the 1st and 2nd Appellants together with **Andrew Kiprotich Langat**, **Daniel Musheba Mlunge**, **Francis Githiga Murithi** and **Hesborn Mohammed Onyoka** *alias Nyoka* were jointly tried on a charge of the following three counts:

Count 1: *Robbery with Violence contrary to Section 296(2) of the Penal Code.*

Particulars:*On the 12th day of June 2012 at Majengo Estate in Kericho District within the Rift Valley Province, jointly with others not before court, while armed with offensive weapons namely pangas, simis and stones robbed BORNES CHEPKOECH of a T.V make Sony 14 inch and a mobile phone make Nokia 1200 both valued at Ksh.1300/= and at the time of such robbery threatened to use actual violence to the said BORNES CHEPKOECH.*

Count 2: *Attempted Robbery with violence contrary to Section 297(2) of the Penal Code.*

Particulars:*On the 12th day of June 2012 at Majengo Estate in Kericho District within the Rift Valley Province, jointly with others not before court while armed with offensive weapons namely Pangas, simis and stones attempted to rob ANDREW LANGAT of a T.V make Aucma 14 inch, a Sony DVD, Ampex Hooper all valued at Ksh.21000/= and at the time of such attempted robbery threatened to use actual violence to the said ANDREW LANGAT.*

Count 3: *Malicious Damage to property contrary to section 339 (2) of the Penal Code.*

Particulars:*On the 12th day of June 2012 at Majengo Estate in Kericho District within the Rift Valley Province, jointly, willfully and unlawfully damaged a woen door the property of ANDREW LANGAT.*

At the close of the Prosecution's Case, the learned trial Senior Resident Magistrate found the

Appellants with a case to answer and placed them on their defence. The Appellants' co-accuseds were acquitted. After undergoing a full trial, the appellants were acquitted in Counts I and III but were convicted in Count II and sentenced to suffer death. Being dissatisfied, the appellants each filed an appeal which appeals were consolidated.

The 1st appellant put forward the following grounds of appeal:

1. **THAT the learned trial magistrate erred in law and fact when he relied on the evidence of identification to convict yet failed to find that:**
 - a. **The same wasn't free from error or mistake as the conditions favouring a positive identification did not prevail.**
 - b. **That the identification parade conducted in my respect was irregular and not proceeded by a cogent and prompt first report describing the assailants.**
2. **THAT the learned trial magistrate erred in law and fact when he convicted me in the instant case yet failed to find that the evidence adduced was incredible and could not secure a safe conviction.**
3. **THAT the learned trial magistrate erred in law and fact when he convicted me in the instant case yet failed to find that the provisions of Section 151 CPC were not duly complied with.**
4. **THAT the Pundit trial magistrate erred in law and fact when he convicted me in the instant case yet failed to find that the charge-sheet is defective.**
5. **THAT the learned trial magistrate erred in law and fact when he rejected my defense relying on weak reasons.**

The 2nd appellant on his part relied on the following grounds of appeal:

1. **THAT the learned trial magistrate erred in law and fact when he convicted me in the instant case yet failed to find that Section 151 of the CPC wasn't duly adhered to.**
2. **THAT the learned trial Magistrate erred in law and fact when he relied on the evidence of identification and identification parade yet failed to find that the same wasn't free from error or mistake.**
3. **THAT the learned trial magistrate erred in law and fact when he convicted me in the instant case yet failed to find that the case wasn't proved beyond doubt as required by the provisions of Section 150 CPC.**
4. **THAT the pundit trial magistrate erred in law and fact when he convicted me in the instant case while relying on incredible testimonies (evidence).**
5. **THAT the pundit trial magistrate erred in law and fact when he convicted me in the instant case yet failed to find that the provisions of Section 212 CPC, 302 CPC and 389 PC.**
6. **THAT the learned trial magistrate erred in law and fact when he convicted me on a defective charge-sheet, contrary to Section 137 (a) of the Criminal Procedure Code.**
7. **THAT the learned trial magistrate erred in law and fact when he dismissed my plausible defense on weak prosecution's case.**

We wish to first set out in brief, the case that was before the trial court before determining the merits or otherwise of the appeal. The prosecution's case is that in the night of 12th June 2012 at about 11.00pm the appellants and their co-accuseds went to the house of **Andrew Kipkorir Langat** (PW1) which is next

to the Catholic Church in Kericho Town. PW1 and his wife **Margaret Kosgei** (PW9) with their children were at home. The intruders broke PW1's outer door but could not access the sitting room because there was a connecting door in between. PW1 and PW9 rushed to the connecting door pushed it back as the robbers pushed it inwards. There was a stand-off as the couple screamed for help. It is the evidence of PW1 that the connecting door had an open space at the top which is covered by a wire mesh. **Stanley Kipkurui Koskei** (PW3), a watchman in the neighbouring school jumped over to PW1's compound when he heard the commotion. The robbers fled when they saw PW3 approach them. PW1 stated that he was assisted by security lights which were on to see the appellants. He said, one was dark and not very tall while the other was with a narrow face. PW9 was categorical that she did not recognise the robbers. **Cpl George Otuoma** (PW6) and **Cpl Stanley Musembi** (PW10) stated that on 15th June 2012 at 7.00pm they were on night patrol when they received information that the Appellants were at Corner Hotel. The duo rushed there and had them arrested. **PC Edward Saruni** (PW7) told the trial court that he together with other police officers visited PW1's house where PW1 informed them that he had been attacked by a gang of six robbers. PW7 also stated that PW1 claimed that he would be able to identify three of his assailants. PW7 further stated that the police later received intelligence reports that three of the gang members had rented a house at Majengo area and on the basis of that report, PW7 said police managed to arrest one of the suspects who led the police to arrest three other suspects. **IP. Abdulrahman Mohammed** (PW4) conducted an identification parade of both appellants on 16th June 2012 at Kericho Police Station where PW1 who is a police officer serving at the same station managed to identify them as part of the gang who attacked his house on the fateful night.

Both appellants denied the offence when placed on their defence. The 1st Appellant gave unsworn testimony claiming he was arrested on 14th June 2012 at 10.00pm while on his way back home from watching a football match and was taken to custody at Kericho Police Station. He denied residing in Majengo Estate. He stated that he was forced to sign the identification parade forms at gun point. He also alleged that he was personally interrogated by the complainant (PW1). The 2nd appellant on his part stated that he was arrested inside his butchery at Kona area in Kericho Township for an offence he did not commit. The 2nd appellant alleged that the police detained him when he refused to give them a bribe. He also alleged that he was interrogated PW1, with two other police officers serving at Kericho Police Station. He denied residing at Majengo. Both appellants stated that PW1 purported to identify them in an identification parade yet he had earlier interrogated them. The learned Senior Resident Magistrate considered the appellants' defences and had the same dismissed. He further concluded that the circumstances of identification were favourable and free from error and proceeded to convict them.

Having set out in brief, the case that was before the trial court, we now wish to turn our attention to the merits or otherwise of the appeal. We have carefully scrutinized the grounds of appeal put forward by each appellant. Two main grounds have emerged for our determination.

First, it is the appellants argument that there were no favourable conditions for a positive identification which was free from error.

Secondly, that the appellants' defence was not given due attention and consideration.

On the first ground of appeal, both appellants filed written submissions in which they argued that the circumstances of identification were not reliable nor credible. Mr. Lopokoiyit, learned prosecution counsel was of the view that there were favourable circumstances for a positive identification which was free from error. He pointed out that PW1 was assisted by security lights to see the appellants who were between 3 to 4 metres away. He claimed that the evidence of PW3 and PW9 corroborated the evidence of identification of PW1. We have carefully re-evaluated the evidence presented before the trial court. There is no doubt that the offence was committed at night. We are also convinced that security lights were on at PW1's house on the fateful night. The question is whether in the circumstances of this case PW1 was able to recognise the robbers who attempted to break into his house? The evidence indicate that the robbers broke into the outer door but were unable to gain entry into PW1's living room because they could not open nor break the connecting door. It is the evidence of PW1 that the inner door had an opening on top with a wire mesh. PW1 said he peeped through that opening and saw the appellants. The wire mesh was not properly described by this witness. Was the wire mesh with big or small holes? That

description is critical in this case. If the wire mesh had small holes then it was not possible for one to properly see someone outside, particularly during such stressful moments. We have entertained some doubt as to the reliability of the complainant's identification of the appellants. PW1 who is a police officer gave a general description of the appellants. He described one as dark and not very tall and the other as having a narrow face. In our view the features given by PW1 could not be solely attached to the appellants. With respect, we agree with the appellants that they were not properly identified and placed at the scene of crime. We will give the appellants the benefit of doubt.

In the second ground of appeal, the appellants have complained that their defences were casually dismissed without due consideration. Mr. Lopokoityit was of the view that the appellants' defences were considered and properly rejected. We have on our part re-evaluated the appellants defence. We have also looked at the manner the learned Senior Resident Magistrate dealt with those defences. At the trial, the appellants attacked the manner in which their identification parades were conducted. The duo alleged that the complainant (PW1) who was a police officer serving at Kericho Police Station had together with other police officers interrogated them before the identification parade was conducted. They alleged that the identification parade was nothing but a sham. They also alleged that they were forced at gun point to sign the identification parade forms. The learned Senior Resident Magistrate formed the opinion that there was no need for the police to fake the identification parades. He then proceeded to dismiss the appellants' defence as nothing but afterthoughts. After a careful re-consideration of the appellants defence, we think the same were never given due consideration. To begin with, the appellants raised two critical issues. First, they alleged that PW1, the complainant had participated in their interrogation together with other police officers. This allegation is serious and may render the identification parade as a sham. There is no doubt that PW1 is a police officer who served at Kericho Police Station at the time of the offence. The appellants had been arrested and kept in custody at the same police station. It is possible the complainant participated in the appellants' interrogation. The second issue raised by the appellants is that the identification parade was conducted in Kericho Police Station where the complainant worked. We are of the considered view that the identification parade should have been conducted in a neutral police station where the complainant did not serve. It is possible the complainant may have gained access to the appellants. It is also possible that his colleagues who interrogated the appellants may have leaked information regarding the physical appearances of the Appellants to PW1. Faced with the above factors, we think the identification parade cannot be relied upon to identify the appellants.

In the end, we will give the appellants the benefit of doubt. The appeal is allowed. The orders on conviction and sentence are hereby quashed and set aside respectively. The appellants namely: **Johnstone Makomere** and **Robert Kiprono Kirui alias Moto** are hereby ordered set free forthwith unless lawfully held.

Dated, signed and delivered in open court this 17th day of July, 2014.

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J.K.SERGON

JUDGE

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H.A.OMONDI

JUDGE

