



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CRIMINAL APPEAL NOS. 2 AND 1 OF 2013

JOHNSTONE MWANGI KIAMA.....1ST APPELLANT

STEPHEN MWENDWA KALOKI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The two appellants Johnson Mwangi Kiama and Stephen Mwenda Kaloki were jointly charged in count I with the offence of robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code. The particulars of the charge were that on 10th April, 2012 at Lenana forest, Dagoreti Nairobi County, jointly with another not before the court they robbed Paul Kamau Muchina of cash Kshs. 3,300/= lap top make Compaq value at Kshs. 34,000/= phone sony Erickson W 5801 valued at Kshs. 5,000/= all items valued at Kshs. 45,800/= and immediately after the time of such robbery threatened to use actual violence to the said Paul Kamau Muchina.

Johnson Mwangi Kiama was charged alone in the alternative count of handling suspected stolen property contrary to Section 322 (1) as read with Section 322 (2) of the Penal Code. It was alleged that on 10th April, 2012 at Lenana Forest Dagoreti, Nairobi County otherwise than in the cause of stealing dishonestly received or retained a pair of open shoes, a trouser, a shirt, a t-shirt and a school bag knowing or having reason to believe them to be stolen. He was acquitted of this charge. Both appellants were convicted of the offence of robbery with violence and sentenced to death. These appeals arise from the said conviction.

The two appellants were tried together but there is no order of consolidation which omission however cannot be said to have caused any prejudice to the appellants. We have therefore decided to consolidate the two appeals for purposes of this judgment. Following the charge sheet, Johnson Mwangi Kiama – Criminal Appeal No. 2 of 2013 shall be the 1st appellant and Stephen Mwenda Kaloki Criminal Appeal No. 1 of 2013 shall be the 2nd appellant.

The evidence adduced by the prosecution before the learned trial magistrate was that the complainant Paul Kamau Muchina with his girl friend Wanjiku went for a walk in Lenana forest. As they walked they met the 1st appellant Johnson Mwangi Kiama who told them that he was a scout's officer and on being asked whether he was one, he answered in the affirmative.

The 1st appellant said he was on patrol and as they walked the 2nd appellant Stephen Mwenda Kaloki came along with another person not before the court. They purportedly arrested the complainant and his friend and led them into the forest and ordered them to sit down. They asked them what they were carrying and the 2nd appellant took his bag which had all the items mentioned in count I of the charge sheet.

The 2nd appellant demanded the pass word for the laptop which was given to him and also asked for Mpesa pin number. P.W. 1 complied. The 2nd appellant is said to have transferred some money from the complainant's account to his account. The 2nd appellant then left the scene with the complainant's girlfriend carrying the laptop and the complainant's bag containing his personal clothes.

The 1st appellant asked the complainant if he had more money so that he could be released. The complainant was made to call his mother and ask for Kshs. 10,000/= as they were saying they would kill him. At that point some noises came from some people in the forest and the person who was not charged in court asked the 1st appellant to go and get those people. This other person who was not charged also ran away. The complainant then hurried and met the people who were talking and informed them what had taken place. They gave chase and managed to apprehend the 1st appellant who was still carrying his bag. He identified the bag in court.

1st appellant was then taken to Riruta Police station with the assistance of members of public who included P.W. 2. The 2nd appellant was arrested later by the police. The complainant was able to produce the transcripts for the Mpesa transactions which showed that 3,270/- was sent to a number registered in the name of the 2nd appellant. The two appellants were then charged with this offence.

In their respective defences the two appellants denied the offence. The 1st appellant Johnson Mwangi Kiama told the court that he delt in selling clothes and that on the date of the alleged offence he was on his way to sell some clothes when he met some people who surrounded him and called him a thief. He was matched to the police station and told that he had robbed Paul Muchina. It was also claimed that his bag belonged to the complainant.

The 2nd appellant on the other hand told the court he was a video editor and also shot movies. He said he was being framed and that Ngahu who led the police to his arrest was his enemy because he had failed to pay him his debt. Ngahu had promised to pay him and after some time he went to his home with three friends and alleged that the 2nd appellant had stolen a laptop, phone and money. He was arrested and charged.

The learned trial magistrate believed the prosecution witnesses and convicted the two appellants. The two appeals were argued by way of written submissions by counsel for the appellants and the respondent.

As required of us, we have made an evaluation of the evidence on record with a view to arriving at independent conclusions. The identification of the appellants has been put to doubt. We note that the offence took place during the day and the complainant had ample opportunity to talk with the two appellants. Apart from talking with them, they walked together in the forest before the complainant and his girlfriend were ordered to sit down.

At first it was the 1st appellant who engaged the complainant in the forest to know whether or not he was a scout like him and even told him he the 1st appellant was on patrol. This engagement must have been at close proximity. When the 2nd appellant and the third person who was not charged appeared at the scene, it is the 1st appellant who took the complainant's bag containing the lap top, the lap top chargers and another bag with personal items.

The 2nd appellant demanded the lap top password and Mpesa pin number. It is logical to conclude that the complainant in complying, which he did, addressed the 2nd appellant. This also must have been at

close proximity. The 2nd appellant transferred some money from the account of the complainant to his number. This was confirmed in evidence using exhibit 8 which was a Safaricom transcript showing that transaction. The recipient telephone number was in the name of the 2nd appellant.

After the assailants ran away leaving the complainant and his girlfriend behind, other members of public who happened to be near the scene, and who were approached by the complainant for help, gave chase and apprehended the 1st appellant. This was soon after the robbery. The length of time spent with the assailants and the nature of the conversation that took place was in our view sufficient to confirm the identities of the assailants.

The 1st appellant was arrested soon after the robbery in possession of the complainant's property which was identified. The circumstances and conditions prevailing aided positive identification without error. The recovery of the complainant's items in the possession of the 1st appellant placed him at the scene. The evidence of the transfer of money from the complainant's phone to that of the 2nd appellant was confirmed beyond doubt. From the evidence this was done while in the forest. That also placed the 2nd appellant at the scene. The defences of the two appellants were considered and found to be wanting. We have come to the same conclusion. We are persuaded that the two appellants together with another who was not charged, robbed the complainant of the property set out in the charge sheet. They were more than one. The ingredients of robbery with violence as set out in Section 296 (2) of the Penal Code were satisfied. These appeals lack merit and are therefore dismissed.

SIGNED DATED and DELIVERED in court this 8th Day of July 2014.

A.MBOGHOLI MSAGHA

L.A. ACHODE

JUDGE

JUDGE