



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO. 21 OF 2013

(consolidated with)

CRIMINAL APPEAL NO.8 OF 2013

RONALD KIPTOO.....1ST APPELLANT

JOSPHAT LANGAT.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the convict and sentence of Hon. J.Ndururi, Principal Magistrate, Kericho dated 2nd February 2013)

JUDGMENT

Ronald Kiptoo and **Josphat Langat**, being the 1st and 2nd Appellants herein were tried on a charge of robbery with violence Contrary to **Section 296 (2)** of the **Penal Code**. The particulars of the offence were:

“On the 12th day of March 2012 at about 11pm at Ngariet Village of Kericho West District within Rift Valley Province, jointly robbed LENNY KIPLANGAT of his mobile phone make Nokia 1200. IMEI No.359376/02/047936/0 grey and black in colour valued at Kshs.2400 and cash money Kshs.1000 all totalling to Kshs.3400 and at the time of such robbery threatened to use actual violence against Lenny Kiplangat.”

At the end of the trial the appellants were both convicted and sentenced to suffer death. Being aggrieved the appellants each filed an appeal, which appeals were later consolidated.

The 1st Appellant through the firm of S.G.Ong'anyi Advocate put forward the following grounds:

1. **THAT the learned Principal Magistrate erred in the law and in fact by failing to consider that the circumstances in which the offence was purportedly committed were not favourable to identification of the Appellant.**
2. **THAT the learned trial Principal Magistrate erred in law and in fact by violating the Appellant's Constitutional rights under Article 50(2) (j) of the Constitution of Kenya (2010) thus vitiating the whole Appellant's case and rendering his conviction untenable as he was not afforded a fair hearing.**

3. **THAT the learned Magistrate erred in law and in fact in not finding that the mobile phone exh.1 was not adequately to constitute the basis for the doctrine of recent possession to warrant a conviction.**
4. **THAT the death penalty meted out to the Appellant is too harsh, unwarranted, and unconstitutional in the circumstances of the case.**
5. **THAT the learned trial Principal Magistrate erred in law and in fact by shifting the burden of proof of defence of alibi on the appellant.**

The 2nd Appellant put forward the following home-made grounds:

1. **THAT the learned trial magistrate erred in law and facts in convicting the appellant to serve unconstitutional sentence.**
2. **THAT he erred in law and facts in denying the appellant his constitutional rights under Article 49(a)(h) of the Constitution, Section 150 CPC and at the same time misinterpreting the provisions of Section 240 CPC.**
3. **THAT he erred in law and facts in not finding that the prosecution evidence was marked with a lot of contradictions and inconsistencies.**
4. **THAT he erred in law and facts in not finding that the adduced evidence was barely adequate due to non-availability of essential witnesses.**
5. **THAT he erred in law and facts in not finding that the prosecution side relied on hearsay evidence.**

The brief summary of the facts giving rise to this appeal are short and straightforward. The Prosecution summoned two witnesses in support of its case. It is the evidence of Lenny Kiplangat (PW1) that on 12th March 2012 at 8.00pm he dropped a passenger using his motorbike at Sosiot. While on his way back to Kiptere area PW1 said he met two people who requested him to transport them to Ngariet at a fee of Kshs.50. At Ngariet, PW1 said he stopped as agreed and demanded to be paid the agreed fare. Instead of paying him, the passengers engaged PW1 in argument over various issues. One of them held PW1 by the collar, threw him to the ground while the other held him by the legs. PW1 claimed that the first man emptied the complainant's shirt pocket and took away Kshs.1000, and a mobile phone. PW1 raised an alarm forcing the "passengers" to flee. PW1, after a short ride, met someone who claimed he had witnessed the robbery take place next to his residence. That person claimed he had seen and recognised the appellants as PW1's assailants. That person together with PW1 rode back to Sosiot to report to the police. On the way, the aforesaid person, namely Josphat Kemboi alleged he had seen and identified the two assailants. PW1 and his bossom friend passed those suspects and alerted members of the public who waited for the robbers and stopped them. Members of the public beat the duo. In the process, it is said one of them removed from his pocket PW1's mobile phone. PW1 and the members of public escorted the robbers to Sosiot Police Station where PW1 booked his complaint and recorded his statement. PW1 claimed the 1st appellant sat immediately behind him as a pillion passenger while the 2nd appellant sat behind the 1st Appellant. He claimed the 1st Appellant was the one who held him by the collar while the 2nd appellant is the one who emptied his pockets and stole the mobile phone. PC George Acholla (PW2), the investigating officer recounted the story PW1 had narrated to him.

When placed on his defence, the 1st Appellant gave sworn testimony. He denied committing the offence and alleged that the complainant has a grudge against him and that he is using criminal proceedings to settle a score. He stated that PW1 had separated with his sister. He stated that he was an innocent man. The 2nd appellant on his part gave unsworn testimony. He denied committing the offence claiming he was arrested while on his way home. He categorically stated that he did not know the 1st Appellant whom he was jointly charged. The trial Principal Magistrate considered the evidence tendered by both sides and found the prosecution to have proved its case to the required standards in criminal cases. The

learned Principal Magistrate considered and dismissed the 1st appellant's defence as unreasonable. He also disbelieved the defence set up by the 2nd Appellant.

Having set out in brief the case that was before the trial court, we now wish to turn our attention to the substance of the Appeal. We have already reproduced herein the grounds put forward by each appellant. Though the appellants each put forward a total of five grounds in their respective petitions, two main grounds commend themselves for our consideration.

First, it is stated that the prosecution's case was not proved to the required standard.

Secondly, that the prosecution failed to summon vital witnesses thus prejudicing the appellant's defence and casting doubt as to the veracity of the prosecution's case.

In the first ground, the appellants' are of the view that there was no cogent evidence laid to prove the case against the appellants. It is the submission of Mr. Ong'anyi that the offence was allegedly committed at night and there was no evidence laid to show the complainant recognised the robbers who were strangers to him. Mr. Ong'anyi further argued that there was no reliable evidence to establish who recovered and from who the mobile phone. Mr. Mutai learned Senior Prosecution Counsel argued that the appellants were arrested almost immediately after the robbery and the stolen goods were recovered from them. We have considered the rival submissions. We have also carefully re-evaluated the evidence that was laid before the trial court. It is not in dispute that the alleged robbery took place at night. There is also no dispute that the complainant did not know his attackers. The evidence of the complainant clearly shows that the complainant screamed for help when he was accosted by the pillion passengers. Those assailants fled when the complainant's screams caught the attention of the neighbourhood. The complainant stated that one Josphat Kemboi approached him and told him that he witnessed two people attack him. The duo are said to have headed towards Sosiot Police Station to report the robbery. It is said that on their way they managed with the assistance of members of the public, to spot the robbers. Those robbers were arrested, beaten up and taken to Sosiot Police Station where they were locked up. None of the members of public nor Josphat Kemboi were summoned to testify to explain how they managed to identify the appellants. The complainant did not assist much because he did not give the unique physical description of the robbers. There was an attempt to connect the appellants with the recovery of the appellants mobile phone, make Nokia 1200. The Prosecution, in our view, miserably failed to establish the doctrine of recent possession. To begin with, the person who recovered the mobile phone from the appellant was never called to testify. As it stands now, there is no evidence to show who recovered the mobile phone and from who between the two appellants. The complainant did not even tender credible evidence to establish ownership of the mobile phone. With respect, the prosecution completely failed to prove its case. Consequently, the learned principal magistrate fell into error when he ruled that the prosecution had proved its case beyond reasonable doubt.

In the second ground of appeal, it is argued that the prosecution failed to summon certain crucial witnesses. In the case before the trial court, it is apparent that those who assisted the complainant to arrest the appellants were members of the public and one Josphat Kemboi. The aforesid persons are alleged to have recovered the complainant's mobile phone from the appellants. None of the members of public was called to testify. Even the already named witness i.e Josphat Kemboi was never summoned to testify. **Did those witnesses have evidence which were detrimental to the prosecution's case?** In such a case the court is entitled to make negative inferences against the prosecution. In **Juma Ngodia vs R (1982-88) 1 KAR the court of appeal held inter alia:**

“The prosecutor has, in general, a discretion whether to call or not to call someone as a witness. If he does not call a vital witness without a satisfactory explanation, he runs the risk of the court presuming that the evidence which could be and is not produced would if produced, have been unfavourable to the prosecution.”

We have come to the conclusion, that the known members of public who participated in the arrest of the appellants had vital evidence which was unfavourable to the prosecution's case and that is why they were not summoned to testify. We have also come to the conclusion that the case was poorly investigated

hence it was meant to fail from the start.

In the end, we allow this appeal. The order on conviction is quashed and the sentence of death is set aside. The appellants namely: Ronald Kiptoo and Josphat Langat 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