



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEALS NOS. 265, 299 & 300 OF 2012

(Appeal against conviction and sentence arising from

the judgment of [G. A. MMASI, PM] in

Vihiga Senior Resident Magistrate's Court

in Criminal Case No. 863 of 2011)

WYCLIFFE BARASA 1ST APPELLANT

JUSTUS NGOGOTO 2ND APPELLANT

GEORGE ISAMBE LIBABU 3RD APPELLANT

(Consolidated Criminal Appeals

Nos. 265, 299 and 300 of 2012)

J U D G M E N T

The three appellants were charged with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code**. The particulars of the offence were that the appellants *on the 29.8.2011 at Mangulu village in Vihiga County within Western Province jointly with others not before court while armed with crude weapons namely pangas robbed **KENNETH MUGASTIA EMESES** of his mobile phone make Nokia valued at KShs.5,000/= (Five Thousand shillings only), a bag of maize mauled at KShs.4,000/= (Four Thousand shillings only) Equity ATM card and National Identity card and cash KShs.5,200/= (Five Thousand two hundred only), all valued at KShs.14,200/= (Fourteen Thousand two hundred shillings) all the property of Kenneth Mungatsia Emesses and immediately after the time of such robbery used actual violence to the said Kenneth **MUNGATSIA EMESES**.*

The appellants were convicted and sentenced to suffer death. The grounds of appeal in all the three consolidated appeals can be summarised as that the complainant knew the appellants and the identification parades were unnecessary, that the trial court relied on the evidence on identification by a single witness, that the intensity of light was not capable of positive identification, that the circumstances not also not conducive for positive identification, no first report was made with the appellants' names, no recoveries were made from the appellants, that it took a long time for the 2nd and 3rd appellants to be arrested yet they are the complainant's neighbours and that their defences were not considered.

The appellants filed written submissions which expounded on the above grounds. The 1st appellant further submitted that the complainant alleged to have crawled to the neighbours yet none of the

neighbours testified. Further that the complainant's wife who was with him also did not testify as well as the sub-chief to whom the complainant reported the incident. On his part, the 2nd appellant submitted that it took almost two months for him to be arrested yet he lives 1 ½ km from the complainant and the complainant did not take police officers to his home. Further that the first did not give the appellant's name. The 3rd appellant submitted that the area assistant chief was informed and he did not arrest him.

Mr. Orinda, State Counsel, conceded the appeal and submitted that whereas the complainant knew the appellant, the investigating officer relied on informers to get the identity of the appellants. Further that there was no need for identification parades as the complainant knew the appellants. Counsel submitted that the conviction is not safe as the evidence does not add up.

The lower court record shows that six witnesses testified for the prosecution. **KENETH MUNGATSIA EMMESSE PW1** was the complainant. His evidence was that on the 29.8.2011 at about 10.30 p.m. he was in his house with his wife Harriet, a 7 year old girl and a 3 year old child. His house was broken into and 10 people entered armed with pangas, torches and sticks. He threw stools at them and he was attacked with a panga. The robbers entered his bedroom and cut him on the shoulder blade. He was carried outside and thrown out and told to die there. He crawled to his neighbour's house and the assistant chief was informed. The robbers took KShs.5,000/=, a Nokia phone, one bag of maize, ID card among other personal items. He was able to identify the three appellants who are known to him through the use of the torch light. The torches had medium light. Nothing was recovered. He assisted in having the appellant arrested. When the appellants were arrested he attended identification parade and identified all the three appellants.

PW2, APC DOMINIC KENE was based at the Gisambai AP post in Vihiga. On the 20.10.2011 at about 6.45 p.m. PW1 went to the post indicating that he had seen two suspects at a funeral place. They went there but they did not find them. The complainant took them to the 2nd and 3rd appellants' houses and they arrested them. Nothing was recovered. **PW3, IP KENNETH OGUTU OTIENO** was based at the Vihiga police station. On the 6.9.2011 he conducted an identification parade whereby PW1 identified the 1st appellant. **PW4, CHARLES LEPARA MORITO** is a clinical officer who based at the Vihiga District hospital. On the 29.8.2011 at about 11.00 p.m. the complainant went to the hospital having been attacked and he was treated. PW4 produced the P3 form which detailed the injuries sustained by PW1. **PW6, CIP DAWEL RUKARA** was based at the Vihiga police station. On the 1.11.2011 he conducted an identification parade for the 2nd appellant and he was identified by PW1. He also conducted another parade for the 3rd appellant who was also identified by PW1.

PW6, CPL SAMUEL KIMANGA was based at the Vihiga police station and investigated the case. The complainant informed him that he knew some of the robbers. He looked for some informers who tipped him and arrested the 1st appellant at a car wash place. The 2nd and 3rd appellants were arrested by APs from Gisambai. Nothing was recovered.

The appellants were put on their defence and they denied committing the offence. The 1st appellant testified that he was arrested while washing vehicles at Majengo by police officers. He was later charged with the offence. The 2nd appellant testified that he was arrested on the 29.10.2011 at about 7.30 p.m. in his house. The 3rd appellant was arrested on the 23.10.2011 at 7.30 p.m. in his house. Nothing was recovered from his house.

The main issue for determination in these appeals is whether the appellants were positively identified by PW1. According to PW1 there were 10 robbers who entered his house. He was assaulted with a panga and cut on his fingers and shoulder. PW1 was then taken out of the house and thrown outside. The source of light was torches which PW1 described to have had medium light. From the evidence on record we do find that the identification is not full proof. The number of robbers who attacked PW1 was 10 people and it is doubtful that within that time PW1 could identify three of the robbers using light from torches. It is also not clear how long the incident took before PW1 was thrown out or how long it took before PW1 was attacked with a panga. It is clear that other than the light from the torches there was no other source of light in the house.

PW1 testified that he knew the three appellants who come from the same neighbourhood. We do agree with the appellants and the State Counsel that the identification parades conducted were not relevant as the witness knew the appellants. It is also not clear from the evidence as to whether PW1 gave the specific names of the appellants or description to the police. It would not have been necessary for the investigating officer to rely on informers yet PW1 knew where the appellants lived. There is no evidence that the police visited the appellants' homes and failed to find them. The area assistant chief could have assisted in arresting the appellants shortly after the robberies if indeed PW1 knew them but that was not the case. The prosecution did not prove its case beyond reasonable doubt and we do agree with Mr. Orinda that the conviction is not safe. In the case of **ANJONONI & OTHERS V THE REPUBLIC [1980] KLR 59**, the court stated the following on the issue of identification:-

“The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

In the end, we do find that the case was not proved beyond reasonable doubt. The appellants are hereby set at liberty unless otherwise lawfully held.

Delivered, dated and signed at Kakamega this 9th day of October 2013

SAID J. CHITEMBWE

GEORGE DULU

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