



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO 56 OF 2013

**APPEAL FROM CONVICTION AND SENTENCE IN CRIMINAL CASE NUMBER 266
OF 2012**

**OF THE ACTING SENIOR RESIDENT MAGISTRATE AT HOLA (MR. M. O. OBIERO,
SRM)**

SALIM ADE SAID.....1ST APPELLANT

DHADHO ALIUS AWADH.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Background

Salim Ade Said and Dhadho Ali Awadh, the 1st and 2nd Appellants respectively, were tried by the Acting Senior Resident Magistrate at Hola in Criminal Case No. 266 of 2012 for the offence of robbery with violence contrary to section 296 (2) of the Penal Code. In the lower court, Dhadho Ali Awadh the 2nd Appellant was the 1st Accused and Salim Ade Said appeared as 2nd accused. It was alleged in the lower court that they jointly with others not before the court while armed with pangas and sharp sticks robbed Luhus Shoba Boru two goats and wounded him in the cause of that robbery. The lower court convicted and sentenced them to death.

The Petition of Appeal

The two Appellants were dissatisfied with the conviction and sentence and have come to this court on appeal. Each had filed separate appeals being Criminal Appeal No. 56 of 2013 filed by the 2nd Appellant and Criminal Appeal No. 56 of 2013 filed by the 1st Appellant. On 15th October 2012 the two files were consolidated as one appeal and the court file number became Criminal Appeal No. 56 of 2012. The Appellants appear as indicated above. Both Appellants have prepared two sets of grounds of appeal. The first set was filed on 24th April 2013. They have raised similar grounds of appeal challenging their identification; mode of arrest and claiming the lower court rejected their defence.

With leave of the court the appellants amended their grounds of appeal and filed written submissions which they relied on during the hearing of this appeal. They asked us to consider the same and give a judgement opting not to make oral submissions. In their amended petition of appeal the appellants have

again raised similar grounds of appeal contesting the following:

- a. Defective charge
- b. The mode of arrest
- c. Identification of the appellants
- d. Inadequate and contradictory prosecution evidence
- e. Lack of investigations
- f. Failure to consider alibi defence

Submissions

Both submitted that the charge did not contain sufficient information as required by Section 134 of the Criminal Procedure Code because it left out the word “**offensive**” in reference to the weapons allegedly carried by the robbers and by omitting to state “**and immediately before or immediately after the time of such robbery the offender wounds, beats, strikes or uses other physical violence to any person**”. It is also submitted that the time of the alleged robbery was not indicated in the charge contrary to the provisions of Section 137 of the Criminal Procedure Code.

The mode of arrest is questioned by the appellants. They have submitted that it is incredible that the Mohamed Dhidha Jara, PW3 and Rashid Mkofira Doyo, PW5, lay ambush from 2.00pm to 8.00pm, saw someone allegedly covering the goat carcass with leaves and instead of arresting him they let him go and continue laying ambush; that the two witnesses did not state how far they were from the carcass and how they were able to identify the people who picked the carcass at 8.00pm; that PW3 had a grudge with him as shown by the evidence from him that he had been looking for the appellants for a long time.

The appellants further submitted that PW3 and PW5 contradicted each other. PW3 testified that they lay in ambush from 2.00pm to 3.00pm while PW5 said they waited up to 5.00pm; that the meat was not identified as belonging to PW1’s goat given that many goats are white in colour. They submitted that the trial magistrate failed to consider the co-existing circumstances that could create doubt in the prosecution evidence.

On identification it was submitted that PW1 did not describe to the police the people who robbed him in his first report; that the police did not conduct an identification parade to rule out mistaken identity. Finally the appellants submitted that the trial magistrate failed to consider their defence that they were not at the scene of the crime.

The State through Learned State Counsel Mr. Orwa made oral submissions and opposed the appeal. He submitted that the trial court considered and addressed in detail all the issues being raised on appeal; that the trial court relied on the doctrine of recent possession to convict the appellants and that the appellants did not explain how they came by recently stolen property.

Counsel further submitted that the charge is properly drafted and all ingredients of robbery with violence are clearly articulated and that the appellants misunderstood section 134 of the Criminal Procedure Code. It was submitted that the investigating officer, PW6, carried out investigations into the circumstances of this case and therefore the ground that investigations were not carried out is baseless; that the evidence of the prosecution witnesses was consistent and had no contradictions; that the offence was committed at 2.00pm although the appellants were arrested at night. Counsel submitted that the appeal has not merit and ought to be dismissed.

Evidence

We are alive to the requirement that as the first appellate court we have a duty to re-examine and re-evaluate all the evidence tendered in the lower court to arrive at our own independent finding.

The facts of this case are simple. Luhus Shoba Boru, PW1, testified that he was herding goats at a place known as Chewani on 25th September 2012 at about 2.00pm when a group of five men armed with sharp

sticks and pangas accosted him. At the time he was seated and he stood up. All the men were strangers to him. In his own words, **“one of them hit me with a stick at the back of my head and the other one hit me with a stick on the left side of my ribs. The other person pierced me using the sharp stick on my left hand. One of them cut one of the goats on the back. It was a she-goat (sic). It was white in colour. I stood up and ran away and went to Matanya. I reported to the chief. The chief told me to go to the police station and make a report.”**

The witness testified further that after treatment he went back home and found the goats at home having been driven there by some people. He found that two of the goats were missing, the female goat that had been injured by the attackers and a male goat.

The circumstances leading to the arrest of the appellants are that PW3 received a report from an informer that some people had slaughtered a goat and he called PW5 and another Police Reservist. They were led to the scene. They found blood and pieces of skin. PW3 said the blood and pieces of skin was an indication that a goat had been slaughtered at the place. They looked around and came across a carcass of a goat. They decided to lay ambush to see if anyone would come to pick it. At around 3.00pm the 1st Appellant emerged, cut tree branches and covered the carcass and went away. He came back at 8.00pm in company of the 2nd appellant and picked the carcass. As they were carrying it away, they were arrested and taken to Chewani village. Police was called to pick them.

Police Inspector Julius Lagat, PW6, confirmed receiving report of the attack and referring PW1 to hospital. He confirmed receiving report from Chewani location chief that some suspects had been arrested. PW6 in company of other officers went to collect the suspects and the goat carcass. He took photographs of the carcass and took it to Abdinazir Hassan Jama a veterinary doctor who examined and confirmed it was carcass of a goat. Dr. Johnson Mwangi, PW1, filled the P3 form in respect of PW1. He confirmed the injuries sustained and formed an opinion that a sharp object had caused the injuries.

The 1st Appellant gave an alibi defence. He testified on oath and explained that he was sent by his mother at 8.00am to a place called Makere; that he went to see his sister Fatuma Said and returned to Chewani at 5.00pm; that at 9.00pm one Suleiman Komora went to his home and informed him that the chief wanted to see him; that he accompanied Suleiman to the chief's where he found the 2nd Appellant inside a house; that he was informed that they had slaughtered a goat with the 2nd Appellant; that police picked them shortly thereafter and charged them with this offence.

The 2nd Appellant testified that he left the mosque at 8.00pm and went home; that PW5 went to his home and informed him that the chief wanted to see him; that he accompanied PW5 and on reaching the chief's place he was put inside a house where he found a goat carcass and after a short while the 1st Appellant joined him; that police picked them after and charged them with this offence. In cross examination, the 2nd Appellant explained that he spent the day working at the home of one Maro Doyo's home at Hola Mission; that he left the place at 4.00pm to Chewani for prayers at the mosque; that he left the mosque at 8.00pm and went home where PW5 found him.

The trial court considered the evidence before him and found that the charge had been proved. He convicted and sentenced both appellants.

Determination

The appellants argue that the charge had defects and offends the provisions of section 134 and 137 of the Criminal Procedure Code. They argue that it failed to state the weapons were offensive and to state the time of the alleged offence. We have considered this ground. We have found that the charge gives the necessary information as to inform the appellants what they were charged with. It contains the statement of the specific offence being robbery with violence and the section of the law that creates that offence. Although Section 295 Penal Code that defines robbery is not cited, this is not fatal because the Section 296 (2) Penal Code qualifies the offence of robbery with violence.

We find that the particulars are given in sufficient detail as to inform the appellants of the circumstances of the offence. They understood those charges and cross examined the witnesses in a way that demonstrated their clear understanding of the charge they were facing. Further, we find that there is no prejudice occasioned to the appellants in respect of the charge. We find this ground has no merit and dismiss it.

On the mode of arrest we have considered all the evidence on this issue. PW1 did not describe the attackers to the chief or to the police. Evidence shows five attackers confronted him and started hitting him. As we have quoted above, it seems three of those attackers hit him on different parts of the body almost at the same time. He ran away from the scene. There is no evidence showing PW1 giving a description of the attackers in respect of their physical appearance or the clothes they wore. All PW1 stated was that the five were all strangers to him.

PW3, PW5 and Suleiman Komora went to the place where it was alleged that some people were seen slaughtering a goat. Evidence is that they were led to the place. The person who led them to the place is not disclosed with PW3 stating that the person was an informer. It is at the alleged scene that the three saw a carcass of a goat and they laid ambush. It is alleged that the 1st Appellant went to the place at 3.00pm and covered the carcass with tree twigs and left; he returned at 8.00pm in company of the 2nd Appellant and as they were collecting the carcass they were arrested. We are aware that the trial magistrate considered this evidence and believed it. We have problems in believing it. Our reasons for this are that if indeed the 1st Appellant was the person or one of the persons who had slaughtered that goat it would be logical that he would have ran off and hid himself in the bushes to wait for PW3 and his team to leave. He would have been aware that they were around. Even if we were to assume this was not the case, it is incredible that PW3 and his team would let a suspect get away and continue laying ambush from 3.00pm to 8.00pm as though they were so sure that suspects would turn up. The logical thing would be to arrest the first person who appears to collect the carcass. They would have arrested the 1st Appellant in the hope that he would disclose who else had been with him failing which they would have had a suspect anyway.

When the evidence of PW3 and PW5 on the mode of arrest is considered alongside that of the defence, doubts begin to emerge that there may be a probability that this is not what happened. We recall the evidence of PW3 who stated in respect of the 1st Appellant, **“I had received several reports about you. This time round we managed to arrest you.”** In respect of the 2nd Appellant PW3 stated, **“I had received several reports about you. It was very difficult to arrest you.”** This to us sounds like evidence of someone who was desperate to arrest a suspect at any cost. When this evidence is weighed against the defence evidence and the other evidence we have analyzed above, ones sees a great danger of basing a conviction on it in the absence of any other independent evidence implicating the appellants. We agree with the appellants that the mode of arrest is questionable.

On identification of the appellants and contradictory evidence we have stated above that PW1 did not describe the attackers to the police or to PW3. It seems from his (PW1) evidence that he was struck by three different people almost simultaneously although he also seems to be saying that the 1st Appellant hit him at the back of the head as well as piercing him on the left hand. We have considered the cross examination of PW1 by the 2nd Appellant. When evidence on identification is taken together with that on the mode of arrest, we are of the considered opinion that it fails to reach the threshold of the standard of proof of identity in a criminal case. The learned State Counsel has submitted that the trial court based the conviction on the doctrine of recent possession. That is true. The trial court was of the view that the prosecution had not proved beyond reasonable doubts that the appellants were identified as some of the people who attacked PW1. He then proceeded to consider the doctrine of recent possession. He was satisfied that all the conditions in this doctrine had been satisfied. The trial magistrate was satisfied that the appellants were found with the carcass; that the carcass was the remains of the slaughtered goat belonging to PW1 and that it had been recently stolen.

We have explained our findings in respect to the appellants. We doubt their identity as the people who went to collect the carcass and also doubted their identity as part of the five people who attacked PW1.

This casts some doubt on the applicability of the principles of the doctrine of recent possession as regards ownership. We wish also to state that white goats are common and identification of the carcass whose only available part of the body left with some skin was the part of the legs is doubtful. Evidence of PW2 shows that the head was missing and that the unskinned legs and skin shows it was white in colour. PW2 also testified that the stomach of the carcass was swollen and had been pierced on the left side. It is instructive to note that PW1 did not identify the carcass as belonging to his goat. He testified that **“I went to the Police Station and saw the accused persons. They are the two accused persons herein. I also saw the carcass of a goat. It had been partly skinned. I can see a photograph of the goat. They are two photographs. The four legs were not skinned.”** That is all. There is no evidence that identifies the carcass as belonging to his goat! We are not satisfied that the carcass belonged to PW1 because of lack of evidence establishing this beyond reasonable doubt.

We have also noted that PW3 and PW5 contradicted themselves on the time they lay waiting in ambush. PW3 stated that the 1st Appellant arrived where the carcass was at 3.00pm, covered it with ‘mukoma’ tree leaves and went away. PW5 stated that the 1st Appellant emerged at 5.00pm checked the meat and left. There is no mention of covering the carcass with ‘mukoma’ tree leaves or any leaves. We agree with the appellants that this evidence contradicts.

We have carefully read the judgment of the trial court and are satisfied that the defence of alibi raised by the appellants has been given due consideration and the proper legal principles applicable properly understood. This ground has no merit and must be dismissed.

Lastly we have read the authorities cited by the appellants including **James Mwangi v Republic [1983] KLR** on circumstantial evidence and taken it into account. We have also considered the cases cited by the Learned State Counsel that is **Fanuel Otieno Omido v Republic, Criminal Appeal No 98 of 2009** on the ingredients of the offence under Section 296 (2) Penal Code. We have also considered **Richard Oduor Adera v R in High Court Criminal Appeal No 49 If 2003** on the doctrine of recent possession. We have indicated above that the prosecution in this appeal did not positively prove the appellants were found with the carcass and that the carcass was from the slaughtered goat belonging to PW1.

While we find that grounds 1 on defective charge and 9 on alibi defence for each appellant have no merit, we agree with them on the other grounds. The bottom line is that this case was not proved beyond reasonable doubt that the appellants or any of them was among the five attackers, took part in slaughtering the goat and collected the carcass. Where doubts exist in a criminal case, the benefit goes to the benefit of the accused or appellant. In this case, the two appellants will benefit from the existing doubts. We proceed to quash the conviction and set aside the death sentence. Consequently, we order that the Salim Ade Said and Dhadho Ali Awadh shall be set free forthwith unless for any other lawful cause they are being held in custody. We make orders accordingly.

Dated and signed this 22nd November 2013.

S.N.MUTUKU

W. KORIR

JUDGE

JUDGE

Dated and delivered this 2nd December 2013.

S. N. MUTUKU

JUDGE