



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE
[CORAM: KOOME AND AZANGALALA, JJ]
CRIMINAL APPEAL NO. 11 OF 2010

BETWEEN

LOJEM LONYIDIK ::::::::::::::::::::::::::::::: APPELLANT

AND

REPUBLIC ::::::::::::::::::::::::::::::: RESPONDENT

(An appeal from the Judgment of the Senior Resident Magistrate - T. Nzyoki dated 16/02/2010 at Lodwar in Lodwar SRMC CRC. No. 36 of 2009)

JUDGMENT

Lojem Lonyidiki, the appellant, was charged with three counts of **Robbery with Violence Contrary to section 296 (2) of the Penal Code (Cap 63 Laws of Kenya)**. It was alleged, in count one, that the appellant, while armed with a dangerous weapon namely, an AK 47 rifle, on 29th December, 2008, at Kanyaep Village, Turkana North District, within the Rift Valley Province robbed **Lochuu Ngiro** of food items valued at **Kshs 700/=** and a cash sum of **Kshs 2,300/=** and at the time of such robbery used physical violence to the said **Lochuu Ngiro** (hereinafter “**the 1st complainant**”).

It was alleged, in the second count, that the appellant, in precisely those same circumstances, same place, same date robbed **Lokiyoto Lapur** of food items valued at **Kshs 300/=** and at the time of the robbery, used physical violence to the said **Lokiyoto Lapur** (hereinafter “**the 2nd complainant**”).

In count three, it was alleged that the appellant in the same circumstances while possessed of the weapon specified, on the same date and at the same place, robbed **Awoo Echoto** of food items valued at **Kshs 300/=** and a cash sum of **Kshs 400/=** and at the time of such robbery, used physical violence on the said **Awoo Echoto** (hereinafter “**the 3rd complainant**”).

The appellant also faced two non-capital offences in counts four and five namely, being in **Possession of a Firearm** without a **Firearm’s Certificate** contrary to **section 4 (2) (a) as read with section 4(3)(a) of the Firearms Act (Cap 114 Laws of Kenya)** and being in **Possession of Ammunitions** without a **Firearm’s Certificate** Contrary to the same Sections.

It was alleged in count four that the appellant on the same date and place was found being in possession of an **AK 47** rifle body number **2724147** without a Firearm's Certificate. In count five, it was alleged that on the very same date and at the same place, the appellant was found being in possession of Ammunitions to wit four (4) rounds of **7.62 mm** Special without a Certificate.

The prosecution called eight witnesses and after hearing their evidence, the learned Senior Resident Magistrate [**T. Nzioki** (SPM)], found that the appellant had a case to answer and put him on his defence. The appellant gave an unsworn statement.

Upon analyzing the evidence of the prosecution witnesses and that of the appellant, the court found the appellant guilty on all the five counts. He was accordingly convicted and sentenced to death.

Being dissatisfied with his conviction and sentence, the appellant has appealed to this court on four main grounds which raise the following issues: Contradictions in the prosecution case; unsatisfactory identification; inadequate evidence and failure by the trial court to consider the appellant's statement in his defence.

During the hearing of the appeal, the appellant appeared in person and relied upon his written submissions which he had previously filed. On the other hand, **Mr. Onderi** appeared for the Republic and orally opposed the appeal. The learned counsel for the state submitted that the evidence of P.W.1, P.W.2, P.W.3, P.W.4 and P.W.5 was overwhelming and that the conviction of the appellant was inevitable.

As the first appellate court, it is our duty to re-examine and re-evaluate the evidence upon which the appellant was convicted and reach our independent conclusion bearing in mind that we neither saw nor heard the witnesses testify and must give allowance for that. (See **Okeno –vrs- Republic [1972] E.A 32**).

The prosecution case was briefly as follows:-

Lochuu Ngiro (P.W.1), Awoo Echoto (P.W.2), and Lokiyoto Lapur (P.W.3), the complainants, were on 29th December 2008, on their way from Kakuma Town where they had gone to buy food heading to their homes at Lopusik, when, at about 10.00 p.m., they were attacked by the appellant. The appellant, according to the three complainants, had a torch and was armed with a gun. He ordered them to stop and drop down any money and the food items they had. They hesitated and the appellant shot in the air. That scared them and they dropped their money stated in the charge sheet which were taken away by the appellant. The complainants then ran to the home of P.W.1 and reported to her husband **Ngiro Akunoit (P.W.5)** who was with **Ekutano Loro (P.W.4)**.

P.W.4 and P.W.5 and their neighbours visited the scene the same night but found no one. The following morning, P.W.4 and P.W.5 returned to the scene and saw foot marks which led them to Lopekereka in Kalopeyai area to a hut which belonged to **Ngilumong. Nangori**, who was in **Ngilumong's** hut, informed the duo that the foot marks they had followed were made by the appellant whom they found resting. He had an AK 47 rifle and 4 rounds of ammunition. They arrested the appellant, took hold of the said rifle and ammunition and commenced their journey back to their village. On the way, the appellant sought forgiveness. The duo obliged on condition that he was to give them two bulls as a compensation for the items and cash robbed from the three complainants.

After a few days, the appellant took to P.W.4 and P.W.5 two (2) goats which he wanted exchanged for the A.K. 47 rifle and as compensation for the items robbed from the complainants. The area chief **Amos Esilon** went to where the bargaining was taking place and informed them that the matter was serious and could not be settled out of court. He took the firearm and the ammunition and escorted the appellant and his mother, the goats, P.W.4 and P.W.5 together with the three complainants to Kakuma Police Station where the appellant was re-arrested and subsequently charged as already stated.

Ag. SSP Laurence Nthiwa (P.W.6), a firearms examiner, produced a report prepared by his colleague **Alex Mwandawiro**. He did so under the provisions of sections 33 (b) and 77 of the Evidence

Act (Cap 80 Laws of Kenya). The report confirmed that the AK 47 rifle mentioned in the proceedings before the trial court was indeed a firearm and the ammunitions allegedly found with the appellant were indeed ammunitions in terms of the Firearms Act (Cap 114 Laws of Kenya).

P.C. Januarius Abwao Otieno (P.W.7) was the Investigating Officer of the case. He received a report from **Amos Esilan**, the Assistant Chief, Pelekech Sub-location that the appellant had been arrested by members of the public in connection with a robbery offence. Accompanied with other police officers, they proceeded to Kenyaep Village where they found the appellant indeed under arrest of members of the public. They re-arrested the appellant and took him to Kakuma Police Station where he was later charged as already stated. P.W.7 produced the A.K. 47 rifle, 4 rounds of ammunitions and the exhibit memo.

Amos Asilan, the said Assistant Chief testified as P.W.8. His evidence was that, on receipt of the report of the robbery of the three complainants, he mobilized youths who included P.W.4 and P.W.5 on 30th December 2008. The youths returned the same day at 3.00 p.m. with the A.K. 47 rifle which alleged had been found in the possession of the appellant who resisted arrest and escaped. He later, on 2nd January, 2009 received a report of the return of the appellant with two goats as compensation for the items robbed of the complainants. He ordered the appellant's arrest and the detention of the firearm. He then made a report to Kakuma Police Station whose officers arranged the arrest of the appellant.

In his unsworn statement, the appellant denied committing the offence. He stated that he had been arrested at a beer drinking out-fit for an offence he did not know and when the charges were read to him, he was shocked. He told the court that he did not even know how to use a firearm. He appeared to suggest that he had been framed.

The above is the summary of the evidence which was presented before the trial Magistrate and upon which the appellant was convicted. The learned trial Magistrate found that the evidence of P.W.1, P.W.2 and P.W. 3 regarding the robbery was consistent and was supported by that of P.W.4, P.W.5 and P.W.8. He however, warned himself that the evidence on identification would be considered with caution given that none of the complainants knew the assailant prior to the attack. In his own words:-

“ I find that in the circumstances of this case, their evidence on identification should be considered with caution and require corroboration. None of the three women knew the accused previously.”

We agree with the observation made by the learned trial Magistrate. The attack on the complainants took place at about 10.00 p.m. in the night. The source of light was a torch which the assailant had and the complainants alleged to have used the light of the said torch when the assailant stooped to collect the money and the food items which had been dropped on the ground. It is significant that the assailant had already scared the three complainants by firing in the air and the complainants had, in panic, dropped their money and food items. The complainants did not also state how long the attack lasted. In the premises, it is quite possible that they could have been wrong about the true identity of their assailant.

The learned trial Magistrate seemed to find corroboration in the evidence of **Ekutano Loro, (P.W.4)** and **Ngiro Akunoit, (P.W.5)**. In his view, the two witnesses, traced the foot marks of the assailant from the scene of the robbery to the home of **Lomilio in Lopetereka** where, according to the learned trial Magistrate, the appellant was found in possession of the A.K. 47 rifle and the ammunition. We have anxiously considered those findings and are not as convinced as the learned trial Magistrate that much should turn on the tracing of the foot marks. We say so, because the alleged foot marks led to the “**Manyatta**” of **Ngilumong** – where P.W.4 and P.W.5 met one **Nangori**. It was **Nangori** who informed them that the footmarks were made by the appellant who had slept at the “**Manyatta**” of **Ngilumong** the previous night. There is no reason why the footmarks could not have been made by **Nangori** or **Ngilumong**. There was no evidence to exclude them or any other “**Manyatta**” occupants from having made the footmarks. After all, according to P.W.4, **Nangori** stated that he was herding animals with the appellant. Notwithstanding what **Nangori** had stated, P.W.4 and P.W.5 continued following foot marks upto the “**boma**” of **Lomilio** where they finally found the appellant. The appellant was at the time, according to P.W.5, talking to a woman. The presence of the woman suggests loudly that there must have been other people in the area. How could P.W.4 and P.W.5 identify the footmarks of the appellant to the

exclusion of other residents of the area. In our view, that was not possible.

In the premises, we have come to the conclusion that it was not prudent for the learned trial Magistrate to place reliance upon the alleged footmarks made by the assailant as in our view, the same would not exclusively lead to the appellant. It does not help matters that **Nangori** who linked the footmarks to the appellant was not called as a witness.

The learned trial Magistrate also found the appellant was linked to the offence by his alleged offer to compensate the complainants. In his own words:-

“The accused person went to the home of P.W.1 and P.W.5 with two goats while in the company of the mother and a brother to settle the matter out of court as earlier agreed between him, P.W.4 and P.W.5. P.W.1, P.W.2 and P.W.3 were able to identify the accused person on 2nd January, 2009 as the man who had robbed them on the 29th December 2008”.

So, the last nexus linking the appellant to the offence is the offer to compensate the complainants. With all due respect to the learned trial Magistrate, we find that link is weak.

We have found that the learned trial Magistrate placed undue reliance on the testimonies of P.W.1, P.W.2 and P.W.3 on the issue of identification. He also rather casually placed undue reliance on the evidence of P.W.4 and P.W.5 on the issue of tracing the alleged footmarks of the appellant. We have given reasons why the learned trial Magistrate should not have accepted the evidence of those witnesses at its face value. Their evidence is therefore discredited. That being the position, we find it difficult to accept the testimonies of the same witnesses with respect to the alleged offer of compensation by the appellant. Our conclusion is reinforced by the fact that the alleged compensation appears to have been a team effort of the mother and brother of the appellant. Yet, the prosecution failed to call, as witnesses, the mother to whom the two goats, allegedly meant for compensation, were released and the brother who allegedly accompanied her on the mission.

In the end, we have come to the conclusion that the appellant was not convicted on sound evidence. We cannot therefore uphold his conviction. This appeal succeeds. The appellant's conviction is quashed and the sentence of death imposed upon him is set aside. The appellant should be released from prison forthwith unless he is otherwise lawfully held.

DATED AND DELIVERED AT KITALE THIS 4TH DAY OF MARCH 2011.

**M. KOOME
JUDGE**

**F. AZANGALALA
JUDGE**

Read in the presence of:-

**M. KOOME
JUDGE**