



REPUBLIC OF KENYA

IN THE COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 56 OF 2015

(Being an appeal arising from sentence and conviction of Kitale . Principal Magistrate J.A. Owiti delivered on 29/4/2015 in Criminal Case No. 1134 of 2013)

MORGAN KIPLIMO WANANDAAPPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant was charged with the following offence; of **Robbery with violence contrary to section 296(2) of the penal code**. The particulars of the offences were that on the 22nd day of November 2012 at Kipsangam trading Centre in Trans Nzoia County, jointly with others not before court, being armed with dangerous weapons namely AK 47 Rifles , pangas and Rungus robbed LINUS TUWEI SIMATWA cash Kshs 75,000/-, mobile phone make Nokia 1110 valued at Kshs 5,000/- and assorted shop goods immediately before the time of such Robbery used actual Violence to the said LINUS TUWEI SIMATWO.

2. The appellant was charged with the Second count of **Greivous Harm contrary to Section 234 of the penal code**.

The particulars of the offence were that on the 22nd day of November 2012 at Kipsagam trading centre in Trans Nzoia County jointly with others not before court unlawfully did greivous harm to GEOFREY CHEBOI.

3. 9 The appellant was charged with the third count of **Assault causing actual bodily harm contrary to section 251 of the penal code**.

The particulars of the offence were that on the 22nd day of November 2012 Kipsagam trading centre in Trans Nzoia County jointly with others not before court assaulted LEONARD KIPLAGAT thereby occasioning him actual bodily harm.

4. The appellant was charged with the 4th court of **Greivous Harm contrary to Section 234 of the Penal Code**.

The particulars of the offence were that on the 2nd day of November 2012 at Kipsagam Trading Centre in Trans Nzoia County, jointly with others not before court unlawfully did greivous harm to GREGORY CHEPTOT .

5. He was found guilty and convicted in all the offences and sentenced to death in the first offence and 5 years custodial sentence in the other offences. He then filed this appeal citing several grounds.

Before delving into the same it is worthwhile to summarise the evidence as presented during the trial.

6. PW1 testified that he was asleep during the material night when at around 1 am he heard footsteps outside his house which also hosted his shop. He then had people talking in Nandi, Kikuyu and Kiswahili languages. He was ordered to open the door. He hid inside the ceiling as the intruders forcefully opened the door. They proceeded to ransack the house and as they attempted to take them away he confronted them. They then attacked him using pangas and runkus where he sustained serious bodily injuries and he was semi-conscious. Meanwhile the neighbours raised alarm. The intruders who were armed with guns shot in the air. They made away with the items enumerated in the charge sheet.

7. In the process of the robbery he identified the appellant as well as one Kim and Mangusho. Kim was a police officer who apparently was never arrested despite the court order given. Mangusho is still at large. He said that the attackers were armed with powerful torches and he was able to recognise them especially the appellant who was a neighbour and he used to purchase items at his shop. He said that he had not disguised his face.

8. After sustaining the injuries he was rushed to Gutuamba Health Centre and later Cherengani Nursing home where he was admitted for one month. He later recorded the statements.

9. PW2 the uncle to PW1, 3rd and 4th testified that he had visited his relatives that fateful day. As he slept in the house of PW3 he was equally attacked and he sustained injuries on the hand, head and index finger. After they left he went to the house of Pw1 where he found him in a pool of blood and semi-conscious. He however did not identify any of the assailants.

10. PW3 equally was attacked by the assailants that night and he sustained serious bodily injuries including a cut on the back as well as the index finger. He was led to PW1 house where he found him in a pool of blood. The appellant according to him was armed with a panga and he knew him prior to this date. He recognised his voice as well as the face.

11. PW4 the brother of Pw1 was equally asleep when he heard a knock at the door. As he opened the door, he was grabbed from outside and pulled out. He was led to the store where the assailants were searching for PW1. He was cut on the head by both the appellant and one Sammy Kimkung. He knew the appellant who was an employee of one Kiptoo. He said that he recognised the appellant as they had flash lights from their cellphones. There was an identification parade which he participated and picked the appellant.

12. PW5 who was also attacked on that day did not recognise any of the assailant although he knew the appellant.

13. PW6 is a neighbour who was woken up by voices at the neighbour's house and who were saying that they were police officers. He heard 6 gunshots in the air and he stayed in his house. After the assailants had left he went to PW1 house where he found him bleeding profusely and semi-conscious. He didn't see any of the assailants.

14. PW7 was a police officer attached to Kipsagam police post. When he heard the distress call they went to the shops which was about 200 metres from the police post. They found PW1 in a pool of blood and with serious bodily injuries. They called for the car which took him to hospital.

15. PW8 produced the P3 forms on behalf of PW1, PW3, and Pw4. He classified their injuries to be

grievous harm and harm for PW4.

16. PW9 went to the scene with PW8 where they found PW1 lying in a pool of blood. He did not know the appellant.

17. PW10 was the investigating officer. He did organise for identification parade where PW1, 3 and 4 identified the appellant as the assailant although from their evidence they already knew him.

18. PW11 prepared the P3 form in respect to PW2 at Kapenguria hospital where he classified the injuries as harm.

19. PW12 conducted the identification parade at Kitale police station where the appellant was identified by PW1, 3 & 4. He produced the identification parade forms as part of the evidence.

When put on his defence the appellant narrated what he did on 21/11/12 including the fact that he heard distress call at 5 pm emanating from the Serena Centre and as he rushed there he found PW1, 3 and 4 having been taken to the hospital for treatment. He continued with his duties till 24/11/12 when he was arrested and ordered to keep peace for 6 months through a peace bond. He was however later arrested and charged with the offences.

He conceded that he knew the complainant as they were people they often met. He also conceded that he participated in the identification parade which according to him was unnecessary as he was well known by the complainants. He denied the charges.

Analysis and Determination

20. The appellant has raised several grounds in his amended petition of appeal. Substantially he argued that there were no sufficient evidence to convict him as the same if any were contradictory. He also alleged that key witnesses were not called by the prosecution and that no exhibit was produced to support the prosecution case.

21. Having read the lengthy hand written submissions by the appellant, the issue in my view inches on the question of identification. The witnesses especially PW1, Pw2 and Pw3 testified that they were able to recognise the assailants with the assistance of torches as well as lights from their mobile phones.

22. The evidence of PW1 is crucial. He said that the appellant had a neck scarf and he had not disguised his face. He said that he saw all these while hiding in the ceiling as the appellant and others ransacked the shop.

23. PW3 Equally saw the appellant who had not disguised his face and he wore a neck scarf. He said that it was the appellant who led him to the PW1's store as well as PW1 shop. He knew the appellant well and he also recognised his voice.

PW4 recognised the appellant while lying on the floor and they had spotlight all the time. He said that it was the appellant who cut him with a panga on the legs while lying on the floor next to the store.

24. This question of identification was well captured in the now famous case of ***Cleophas Otieno Wamunga Vs Republic (1989) KLR 442*** where the court stated that:

“Evidence of visual identification in Criminal Cases can bring about miscarriage of Justice and it is vital importance that such evidence is examined carefully to minimize the danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification....”

25. In *R Vs Turbull (1976) 3 All ER 549 at 552* the court stated

“ Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made...”

26. In this case I do not think that one can fault any of the witnesses. All were able to identify the appellant. He was a village mate and they even knew his employer, one Kiptoo, a fact confirmed by the appellant. The 3 witnesses clearly corroborated each other. The lights from the spotlights as well as the voice recognition in my view sufficiently enabled them identify the appellant. There was no mistaken identify.

27. Infact as correctly stated by the appellant the identification parade was in my view an exercise in futility as the witness knew the appellant.

28. The other ingredients of this offence included the fact that the assailant s were armed. Although no weapons were produced, it is clear that they were armed with guns and pangas. All the witnesses although they differ on the number of shots they heard were able to state that they heard shots in the air. I am therefore satisfied that the appellant and his colleagues were dangerously armed.

29. The injuries sustained by the complainant were clearly established. The trial court saw them physically and they are on record. The two clinical officers produced their P3 forms which backed their assertion.

30. Although its argued by the appellant that key witnesses were not called do not find the same plausible. All the witnesses that testified were able to establish the necessary ingredients to prove the offence.

31. His defence in my view was an after thought. He alleges that he heard the distress call at 5 am yet all the witnesses testified that the incident occurred at 1 am. The appellant defence was not convincing at all.

32. Consequently, I am satisfied that the trial courts findings were sound factual and lawful. The appeal is hereby dismissed.

Delivered this 9th day of March 2017.

H.K. CHEMITEI

JUDGE

In the presence of;

M/s Kakoi for Respondent

Appellant – present

Kirong – Court Assistant