REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

HCCR APPEAL NO.20 OF 2018

JOSEPH KALAMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence of Hon. N. Njagi (SPM) Wundanyi SPM'S Court in Cr. Case No.339 of 2017)

JUDGEMENT

1. The appellant was on 16th November 2017 arraigned before Wundanyi Senior Principal Magistrate's court charged with two counts. First count was in relation to the offence of Preparation to commit a felony, contrary to Section 308(1) of the Penal Code. Particulars were that, on the 13th day of May 2017, at around 1.00pm at Kitukunyi trading centre in Wundanyi location, within Taita Taveta County was found armed with a dangerous weapon namely, iron bar in circumstances that indicated that he was armed with intent to commit a felony namely theft.

2. In respect to count 2, he was charged with giving false information to a person employed in the public service contrary to Section 129 (a) of the Penal Code. Particulars were that on 13th day of July 2017, at around 10.00Am, at Mwatate Police Station, in Mwatate township within Taita Taveta County informed No. 106493 Pc(w) Rebbeca Amana a person employed in the public service at the report office personnel that he had been assaulted by some people information he knew or believed to be false intending thereby to Cause No.106493 PC(W) Rebecca Amana to write a report vide OB36/13/7/2017 which she ought not to have done if the true state of facts respecting which such information was given had been known to her.

3. Upon entering a plea of not guilty, trial commenced. Prosecution call three witnesses and closed their case. Having been put on his defence, accused gave sworn testimony thus denying the offence. Consequently, the learned magistrate convicted him of both counts on 8th December 2017. He was treated as a first offender and subsequently sentenced to 9 years and 2 ½ years imprisonment for counts one and two respectively on 20th December 2017. It was further ordered that sentences were to run consecutively.

4. Brief facts as presented before the trial court were that, on the night of 13th and 14th 2017, Emanuel Mwakai (pw1) and his wife Evelyn Muthoni were sleeping in their house when at mid night they heard some footsteps from somebody who touched their door. PW1 woke up and approached the door as he switched on lights. When he got out armed with a panga, he switched off the lights and stood at the door to his Mpesa shop. Suddenly, he saw a man opening his Mpesa shop while armed with a metal bar. As he tried to grab him, the intruder turned against him.

5. Following the attack, pw1 cut the man on the face as well as the hand. The assailant swore to kill pw1 as he threw the metal bar at him while running away. Unfortunately, the attacker fell down as he ran away and Pw1 caught up with him. Consequently, PW1 again cut him on the left leg. However, the man managed to run away having sustained injuries on the face, leg and hand with one thumb chopped off the hand

6. The complainant made a report to P.C David Gitahi of Mwatate Police Station who booked the report and visited the scene from where he picked the panga, metal bar, piece of cut finger. Later, a man seeking medical treatment at Mwatate Hospital for injuries consistent with those suffered by the assailant who had attacked pw1 was arrested and taken to Mwatate Police Station. It was upon commencing investigations that pw4 discovered that the appellant had on the 14th July 2017 at 10.00pm reported to PC Rebecca (PW3) of Mwatate Police Station that he had been attacked and robbed of a motorcycle the previous night.

7. After completing investigations, PW4 concluded that the accused's robbery report was intended to cover up the appellant's criminal act committed against PW1 hence charged him with the offence of preparation to commit a felony and giving false information to P.C Rebecca.

8. In his testimony, PW1 confirmed that he could not identify the accused as the person who attacked him as it was dark in the night and that he had switched off the lights. He however insisted that the injuries the appellant was being treated of were the same ones he inflicted upon him. PW2 corroborated the testimony of her husband that on the material night they were attacked by a man she didn't see. She however confirmed that she heard her husband confront an intruder who had attempted to break into their M-pesa shop and that her husband did inflict

injuries upon the attacker.

9. She further stated that she washed the blood stained panga her husband had used to attack the intruder and that she saw a piece of finger chopped off the assailant's hand the following day. Pw3 confirmed receiving a robbery report from the accused and referred him to the hospital for treatment.

10. Upon being put on his defence, accused gave sworn testimony thus denying the offence. He insisted that he was attacked, injured and robbed a motorcycle on the material night. Upon considering the evidence by both sides, the trial court convicted the appellant and accordingly sentenced him.

11. The appellant feeling aggrieved by the said conviction and sentence filed his appeal which was later amended on 1st July 2020 stating as follows;

> **a) That the learned trial magistrate erred both in law and fact when he convicted him in the present case yet failed to find the provisions of Section 214 of the CPC were not complied with.**
>
> **b) That the pundit (sic)when he convicted him in the present case yet failed to find that evidence adduced is contradictory hence unreliable to bare and sustain conviction.**
>
> **c) That the pundit trial magistrate erred both in law and fact when he relied on weak circumstantial evidence to convict him.**
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> **d) That the learned trial magistrate erred both in law and fact when he directed sentences to run consecutively instead of concurrently.**
>
> **e) That the learned trial magistrate erred in both law and fact when he shifted the onus of proof against the defendant, a burden wholly bestowed on the prosecution side.**

12. The appeal was disposed of by way of written submissions.

Appellant's submissions

13. The appellant filed his written submissions in person on 1st July, 2020. He contended that the trial was irregularly conducted by the trial court who granted leave to the prosecution to amend the charge sheet twice after some prosecution witnesses had testified but failed to grant him a chance to recall witnesses who had already testified for further cross examination in compliance with section 214 of the Criminal Procedure Code. He urged the court to find that he was prejudiced hence make a finding in his favour.

14. He contended that the evidence adduced was weak and contradictory hence unreliable to secure a safe conviction. In particular, he cited the contradictory evidence of PW3 and PW4 regarding his identification before his arrest. That the circumstantial evidence relied upon by the learned trial magistrate was inconclusive and could not have been used against him.

15. Further, it was contended that there was no DNA profiling of the blood stains found in the panga produced as an exhibit against his blood to confirm whether indeed he was at the scene of crime at the material time. He further submitted that his defense was received in breach of Section 211 as the court did not discharge its mandate by reminding him the charges he was facing before he could tender his unsworn testimony. Regarding sentence, he contended that the court did not consider the period he had spent in remand custody and that the sentences should have ran concurrently and not consecutively

Respondent's submissions

16. The DPP filed written submissions dated 6th October, 2020 submitting that at no time did the appellant exercise his right to demand for the recalling of PW1 & PW2 after the amendment of the charges pursuant Section 214 of the CPC. Counsel submitted that there are no inconsistencies in the witnesses'' testimonies as claimed by the appellant. That both PW1 &PW2 did not claim to have seen the intruder but only described the injuries inflicted on the intruder by PW1. It was counsel's further submission that the injuries inflicted on the intruder who confronted PW1 in his house on the material night were consistent with injuries sustained by the appellant on the material night and the report made to and confirmed by PW4.

17. Counsel contended that the circumstantial evidence relied by prosecution was sufficient to convict as the inculpatory facts were so incompatible with the innocence of the accused. In support of this position reliance was placed on the finding in the case of **Sawe v Republic [2003] eKLR** where the court of appeal held that in order to draw an inference of guilt based on circumstantial evidence, the court must be satisfied that certain parameters are achieved as follows;

> **"… the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon."**

18. Counsel further submitted that on whether the sentence should run consecutively or concurrently is a discretion of the trial court. That while sentencing the appellant, the trial court explained the reasons for the sentence given. The court felt that the appellant had not changed even after an acquittal on a similar offence.

19. It was counsel's view that the appellant has not demonstrated that the trial magistrate unlawfully applied his discretion in sentencing him. That the appellant was placed on his defence and Section 211 complied with procedurally. That the record does not at any point show that the burden of proof was placed on the appellant as he was never examined by either the court or prosecution.

Determination

20. This is a first appeal. As the first appellate court, I am duty bound to re-evaluate, re-analyse, reconsider and make an independent determination without losing site of the fact that the trial court had the advantage of seeing and listening to the witnesses to be able to assess their demeanour. See **Okeno v Republic (1972) E.A.**

21. I have considered the record of appeal, grounds of appeal and rival submissions by both the appellant and prosecution. Issues that emanate for determination are;

a) Whether Section 214 of the criminal procedure code was complied with.

b) Whether the evidence adduced is contradictory.

c) Whether the trial court improperly relied on weak circumstantial evidence to convict.

d) Whether the learned magistrate shifted the onus of proof against the accused.

e) Whether the learned magistrate erred in law by directing that sentences to run consecutively instead of concurrently.

Whether Section 214 of the Criminal Procedure was properly complied with

22. It was the appellant's submission that after the prosecution amended the charges twice after two witnesses had testified, he ought to have been given an opportunity to recall those witnesses for further cross examination. On their part, prosecution contended that whereas there is no denial that charges were amended as alleged, it was upon the appellant to seek that right and not for the court to do so on his behalf.

23. For avoidance of doubt, I wish to reproduce **Section 214 criminal procedure code** which provides that;

(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case: Provided that—

(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii) where a charge is altered under this subsection the accused `may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.

(3) Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary.

24. From the plain reading of the wording of that provision, the role of the court was to read the charges afresh to the accused and then invite him to plead afresh a duty that the court faithfully discharged. It was upon the appellant to apply to exercise his right under the said Section to recall the witnesses who had testified to testify a fresh or for further cross examination. Therefore, the appellant should not fully apportion his failures to the court.

25. Although as a matter of good practice the court ought to remind an accused person of his rights under Section 214 of the CPC, such omission cannot perse where substantial injustice is not caused automatically result to an acquittal of an accused person. I do not find any injustice suffered as a consequence of the amendment of the time the offence was committed which did not fundamentally alter the substance of the charges and the evidence already adduced and the omission by the court to explain such rights. For those reasons that ground fails.

Whether the Evidence adduced was contradictory

26. According to the appellant, the court convicted him on inconsistent evidence. In particular, he took issue with the evidence of PW3 and PW4 which evidence he claimed was contradictory as it was not clear as to how and who arrested him. In his submission he claimed that, PW3 stated that he arrested him from members of the public yet pw4 stated that he was arrested at Mwatate Hospital but failed to specify the

person who arrested him.

27. It is true that PW3 P.C Rebecca stated that she re-arrested the appellant from members of the public who had arrested him. Although none of those members of the public ever testified, the fact remains that he was arrested by citizens who had information of the attack against pw1.

28. I do not see any prejudice against the appellant by failure to called the arresting person when the arrest itself is not in dispute. The discrepancy between PW3 and PW4 is quite negligible such that it does not affect the substance of their testimony in proving the charges. The second alleged contradiction is that between PW1 and PW5. From the record, only four witnesses testified hence PW5 is a non-existent witness.

29. Regarding the evidence by pw4 that the complainant was hit by the assailant while the complainant did not say so, that is not a grave contradiction as the complainant stated that he was attacked by the assailant who threw a metal bar at him. The bottom line is the attack which evidence is consistent. Any difference relating to the attack and being hit is not such a serious discrepancy to warrant dismissing the otherwise strong evidence in proving the act complained of. Justice is not determining matters on undue technicalities.

30. In any event, human beings are prone to forget and there is no 100% accuracy in consistency when two or more human beings testify over the same subject matter. It all depends on the facts of each case and the impact of such inconsistency towards the attainment of substantive justice.

31. In the case of **Kazungu Katana Ngoa v Republic [2017] eKLR** the court addressed itself on the issue of contradictory evidence as follows;

> **"This Court had occasion to address this issue recently in Phillip Nzaka Watu vs. R** (2016) e KLR, where it expressed;
>
> > **"However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, it has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and couching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."**

32. Similar position was held in the case of **Peter Ngure Mwangi vs Republic [2014] eKLR**, where the Court of Appeal, when dealing with the question of alleged inconsistencies in evidence, stated as follows;

> ***"We, therefore find that on the totality of the evidence before us, any difference there may have been in the evidence adduced by the prosecution consisted of minor discrepancies and inconsistencies. We find that these were not material and did not weaken the probative value of the evidence tendered by the prosecution in support of their case."***

33. From the above analysis, I do not find any glaring inconsistence in the evidence of the prosecution case hence that ground fails.

Whether the court improperly relied on circumstantial evidence to convict.

34. It was the appellant's case that none of the witnesses ever identified him hence reliance by the court on the nature of injuries sustained to convict was erroneous. It is true that the court relied on the evidence of PW1 to the effect that he inflicted injuries on the intruder who attacked him on the material night on the leg, face and hand including chopping off one finger. These evidence was corroborated by PW2 his wife who heard her husband (PW1) chase an intruder and thereafter retired with a blood stained panga which she washed. That later in the morning, she saw a piece of finger cut off the assailant's hand the previous night.

35. Further, PW4 the investigating officer visited the scene and recovered a metal bar used by the alleged assailant on that night, a panga used by pw1 to attack the assailant and a piece of finger chopped off the assailant's hand. The court also recorded during the plea date the visible injuries the appellant was bearing with bandages still intact. PW3 also confirmed that when the appellant made a report of robbery he bore injuries which were allegedly inflicted on him by robbers.

36. It is not in dispute that the appellant did sustain injuries on the material night. PW3 dismissed the appellant's robbery report as a cover up as he could not produce any evidence that he ever owned a motor cycle. There was no bad blood between the appellant and PW1. They did not know each other before. Was it a coincidence that PW1 was attacked on the same day the appellant was also attacked? Was it also a coincidence that the appellant suffered similar injuries PW1 inflicted on an intruder who attacked him on the same night outside his house? I do not think so.

37. The fact that there was no positive identification does not mean that an offence was not committed. Failure to do DNA sampling of the blood stained panga used to cut the intruder against the appellant's blood on its own is not aground to dismiss otherwise other available strong evidence. Circumstantial evidence taken with proper caution is as good as direct evidence.

38. In the case of **Republic v Richard Itweka Wahiti [2020]e KLR the court made reference to the case of Ahamad Abolfathi Mohammed and Another v Republic [2018]e KLR in which** the Court of Appeal had this to say regarding admissibility of circumstantial evidence:

"However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -

> **"It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial."**

39. The Court of Appeal proceeded to lay down the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated thus;

"Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Accused person, and to no other person, as the perpetrator of the offence. In Abanga alias Onyango v R Cr. App. No 32 of 1990, this court set out the conditions as follows:

> **"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Accused; (iii) the circumstances taken cumulatively, should from a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and none else.**

40. Similar position was held in Sawe v Republic (supra). It's my finding that the prosecution satisfied the three requirements of having a case rest entirely on circumstantial evidence as per the guidance in the above quoted case law. It is also my holding that the court properly addressed itself on the admissibility of circumstantial evidence to convict.

41. It was not by sheer coincidence that the appellant sustained injuries similar to the ones PW1 inflicted on the intruder. The facts and circumstances of the case irresistibly points a guilt finger at the appellant as the person who attacked PW1 on the material night. The available circumstantial evidence proves beyond reasonable doubt that the appellant was involved in the attack hence his robbery report was a cover up thus giving false information to P.C Rebecca (PW3).

Whether the court shifted the burden of proof to the accused

42. It is trite law that the burden of proof in criminal cases does entirely lie on the prosecution. See **Okethi OkaleV Republic (1965)E.A 55.** The applicant did not elaborate the extent to which the court shifted the burden of proof to him. I do not find any evidence to suggest that the court shifted the burden of proof to the respondent or at all.

Whether the court improperly acted by ordering sentences to run consecutively.

43. It was the appellant's contention that the court illegally ordered him to serve the two sentences consecutively. Section 14 of the Criminal Procedure code is clear. Offences that are not committed in a chain of or common transaction can run consecutively. In this regard, I am guided by the holding in the case of **Bashir Nyangweso Wanzetse v Republic[2013]e KLR where the court** stated that;

"A court has power to pass and combine sentences as authorized by the law. Section 12 of the Code in this regard provides that;

> ***"court may pass a lawful sentence combining any of the sentences which it is authorized by law to pass"***

On consecutive sentences, Section 14 of the Code provides that,

> ***(1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed thereof which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.***
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> **From the above provision, it is clear that: firstly, the Court can order sentences to run consecutively where the accused person is convicted of two or more distinct offences and secondly, the Court can exercise discretion to order that sentences do run concurrently even where it is proper to issue consecutive sentences."**

44. From the above cited provision and case law, it's clear that the court has the discretion to order sentences to run consecutively or concurrently. See the case of **Shedrack Kipkoech Kogo vs Republic Cr.Appeal NO.253 OF 2003** where the court of appeal held that sentencing is an act of discretion by the court and an appellate court can only interfere if the sentencing court took into account irrelevant factors or applied wrong principles or generally the sentence is excessive. To that extent, the court did legally order for sentences to be served consecutively as the offences were distinct.

45. As to whether the sentence of 9yrs for count one was excessive, the court has to consider a number of factors interalia; seriousness of the offence, past record of the accused, his mitigation and period held while in custody. The appellant was charged in July 2017 and sentenced on 20th Dec.2017. He was therefore held in remand for about 5 months. He is a first offender.

46. However, the offence has a penalty prescribed as not less that 7yrs or more than 15yrs. Considering the period held in custody and the fact that the appellant is a first offender, I am inclined to find that the sentence of 9yrs is rather excessive hence I do substitute it with a sentence of 4yrs to be calculated from the period he started serving sentence.

47. Equally, in respect to count two which is a misdemeanour carrying a maximum sentence of 3yrs, I find that the trial court did impose an excessive sentence by not taking into account the period held in remand custody. Accordingly, that sentence is substituted with an imprisonment term of 1yr to run consecutively with the term of 4yrs in respect of count one; The substituted sentences to commence from the date the impugned sentences started running.

48. Accordingly, the DR shall cause to be amended the committal warrant to reflect the substituted period of imprisonment.

DATED, SIGNED AND DELIVERED ON 27TH THIS DAY OF JANUARY 2022

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J.N.ONYIEGO

JUDGE