REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HIGH COURT CRIMINAL APPEAL NO. 201 OF 2015

JAMES KAMAU KIOKO...APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

(Being an appeal against the decision of Hon. Mrs. T. Nyagena (PM) delivered on 25th September, 2015, vide Criminal Case No. 1840 of 2014 at Chief Magistrates Court Milimani Nairobi)

1. On the 29th day of December, 2014 the appellant was arraigned in court charged vide Chief Magistrate's Criminal Case No. 1840 of 2014 at Milimani, Nairobi. He was charged with the offence of; robbery with violence contrary to; section 296(2) of the Penal Code, and the offence of; handling stolen goods contrary to section 322(2) of the Penal Code, in the alternative count. The particulars of each count are as per the charge sheet. He pleaded not guilty to both counts and the case proceeded to a full hearing.

2. The prosecution case was led by the evidence of (PW1) – Samson Openda Omwenga (herein "the complainant"), who testified that, on the 24th of December, 2014, he left work at 11.00pm. That he works with Mapadia Security Guards Company as a manager. He then met a friend at; Modern Green Hotel, along Taveta Road for tea and left for home. As it was raining heavily, he stood outside a building for the rains to subside. After the rain subsided, he started crossing the road and suddenly two people held him and he fell down.

3. That, he screamed for help as the attackers ransacked his pockets. The attackers took from him; cash Kshs.6,800.00 three (3) mobile phones; Samsung, Itel and Techno and his driving licence, all valued at Kshs. 25,000.00. However, a Police officer nearby attended to the incident after hearing his scream for help and arrested one of the robbers and the three (3) phones were recovered. The complainant produced a receipt as proof of ownership of the Samsung phone.

4. He further testified that, the scene of the robbery was well lit, with lighting from the street lights and therefore, he saw the robbers well and could identify the appellant as one of them, after he was arrested. He also identified his trouser with torn pockets and the shirt he was wearing.

5. The prosecution's case was further supported by the evidence of; (PW2) No.xxxxx, PC Cyrus Sargutta who told the court that, on 25th December, 2014, he was on duty at the junction of Latema and Taveta Road. He was in the company of PC Hussein Wario. When he heard screams of a male person, from a distance of about 100 metres. He rushed to the scene. He found a person lying down and the other sitting on his chest while another was standing. On seeing him, the one standing ran away.

6. However, he managed to arrest the one sitting on the chest of the other. He identified himself as a Police officer and handcuffed the arrested person. He conducted a quick search and recovered two (2) phones from the rear pocket of his trouser. They were Itel and Samsung phones. He interrogated the man who was lying down and learnt that, he was a victim of a robbery. The suspect was taken to Central Police Station and the report was booked in the OB and he was placed in cells. He was later charged accordingly. The arresting officer stated that there was adequate electricity light at the scene where the incident occurred.

7. PW3 No.xxxxx, PC Sang Philip Bitok told the court that he investigated the matter and recorded the complainant's statement. He took possession of the recovered stolen phones, the clothes the complainant was wearing and the receipt of purchase of the Samsung phone which he produced as exhibits.

8. At the close of the prosecution case, the trial court ruled that, the accused had a case to answer and placed him on his defence. In an unsworn statement, he told the court that, on 24th December, 2014, he went to work and closed work at 11.00pm. That, he had Kshs.13,530.00 and as it was raining a lot, he stayed in the office until 11.00pm. As he left to go home, he found three (3) people arguing

over money. One was screaming. He did not go near. He turned to go back and met another person, who removed handcuffs and handcuffed him. He was where the screams were emanating from. He was searched and Kshs.13,530 recovered. The person searching him identified himself as a Police officer. He was taken to the Police station and charged. He never got his money back.

9. At the conclusion of the case, the court delivered a judgment dated 25th September, 2015, wherein, it found the appellant guilty as charged on the main count and convicted him accordingly. He was then sentenced to suffer death as provided for by the law.

10. However, the appellant is aggrieved by the decision of the trial court and has appealed against it in its entirety vide a petition of appeal dated; 30th November, 2015, on the following grounds:

a. That, the learned trial Magistrate erred in law and facts by convicting the appellant with a single evidence of the complainant;

b. That his fundamental and constitutional rights were grossly violated against by being kept in police custody for over 24 hours as required in law;

c. That his defence was not given due consideration;

d. That the learned trial Magistrate erred in law and facts by convicting him in connection with a case not fully proved;

e. That, he would like to be issued with the court proceedings and judgment to enable him raise more grounds to be adduced during the hearing of his appeal, and be allowed to be present at the hearing of the appeal.

11. The appeal was however, opposed by the Respondent vide grounds of opposition dated 29th October, 2021, in which the Respondents states:

a. That, the prosecution proved its case against the Applicant to the required standard of beyond reasonable doubt;

b. That, the sentence that was meted out by the trial court was legal;

c. That, the Appellant's Appeal lacks merit and should accordingly be dismissed.

12. The appeal was disposed of vide submissions. However, I note that, although the court gave an order for the parties to file submissions only, the Respondents submissions are on record. Be that as it were, I note that, the 1st appellate court's role is to re-evaluate the evidence adduced afresh and arrive at its own decision, noting that it did not have the benefit of the demeanor of the witness. In that regard, in the case of Okeno v Republic [1972] EA 32 the East Africa Court of Appeal stated as follows:

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

13. Pursuant to the aforesaid, I find that the appellant was charged and convicted on the offence of robbery with violence. The charge sheet indicates that; the offence is contrary to; section 296 (2) of the Penal Code. However, it suffices to note that, the offence is created under; both section 295 as read with section 296(2) of the Penal Code. The relevant provision of the section 295 states as follows:

"Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery."

14. Similarly, the provisions for section 296(2) states:

"If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death".

15. The ingredients of the offence of robbery with violence are settled by case law as follows:

a. The offender is armed with any dangerous or offensive weapon or instrument, or

b. He is in company with one or more other person or persons, or

c. At or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses *any other violence to any person.*

16. To revert back to this matter, I find that, as regards the 1st ingredient of theft, the evidence adduced indicates that, the complainant's phones and other items listed in the charge sheet were stolen. The phones were recovered immediately. He produced a receipt to prove the Samsung phone was his. The arresting officer corroborated the complainant's evidence, by stating that, he is the one who recovered the stolen phones. Therefore, the element of theft was proved adequately.

17. On the issue of the number of robbers involved in the offence, both the complainant and the arresting officer's evidence indicated that, they were two of them. One ran away and the other was arrested. Therefore, the element of two or more assailants was proved.

18. On the 3rd issue of whether the assailants were armed, I find that, there is no evidence to support the same. The complainant did not state in his evidence in chief whether the appellant was armed. There is also no evidence of any harm inflicted upon the complainant.

19. The learned trial Magistrate in convicting the appellant as charged in the main count, stated as follows:

> "He avers that money was recovered from him but never retained. This is a time for investigation. The complainant argues that he sustained injury when he was attacked and even his wrist was injured as they struggled to forcefully remove the receipt.
>
> I believe the testimony of the complainant and that of the other prosecution witness. The defence of the accused is but a mere show that is not convincing at all. The arresting officer rushed to the scene where a male adult was screaming for help. He explained that members of the public feared interviewing because of fear that the attackers could be around. This was convincing looking at the evidence in totality I find the evidence of the prosecution convincing and find the accused guilty on charged for the main charge of robbery with violence."

20. With utmost respect to the learned Honourable trial Magistrate, the complainant did not testify to the nature of injuries he suffered (If any), and neither was a P3 form produced, to corroborate the same. At most, all that the complainant stated in evidence in chief, was; "one held my neck from the front while the other was ransacking my pockets." Therefore, the elements of being armed and harm were not established.

21. The final issue is, whether the appellant was positively identified as one of the robbers. In that regard, I find that, the complainant testified that, the appellant was arrested in the act. The arresting officer confirmed the same. Therefore, the defence by the appellant that, he was arrested on mistaken identity, or for no apparent reason, fall by the way, as it is a mere denial. In fact, it is an afterthought, as he did not cross-examine the witnesses on the same.

22. Be that as it were, in view of the fact that, there was no evidence of the appellants being armed, nor injury to the complainant, I find this was an appropriate case to find and convict the appellant of a lesser charge of robbery, under section 296 (1) of the Penal Code. I therefore, substitute the conviction of the appellant from the charge of robbery with violence, under; section 296(2), to a charge of robbery under section 296(1) of the Penal Code.

23. Pursuant to the aforesaid, the death sentence imposed upon the appellant cannot be sustained. The sentence imposed by the law for the offence of robbery, under section 296(1) of the Penal Code is fourteen (14) years.

24. The lower court records indicate that; the appellant had no previous records of conviction. His mitigation to the trial court is considered. The trial court did not consider any of these factors before sentencing the appellant, as the mandatory sentence was "death".

25. I further note that, the appellant was on trial from 29th December 2014, to 21st October 2015, when he was sentenced, a period of about one (1) year. He has been serving the sentence imposed for the last about six (6) years. Thus, he has been in custody for the last seven (7) years. In my considered opinion, taking into account the value of the subject matter involved, the fact that some of the stolen goods were recovered and the period the appellant has served, I believe, if he were to reform, he has. If not, he will have chosen a path of crime and every choice in life has consequences.

26. I therefore, order that, the death sentence be and is hereby set aside and the appellant be released on the custodial term served so far. Therefore, he shall forthwith be released unless otherwise lawfully held.

It is so ordered.

DATED, DELIVERED VIRTUALLY AND SIGNED ON THIS 14TH DAY OF JANUARY, 2022

GRACE L. NZIOKA

JUDGE

In the presence of;

Appellant present in person

No appearance for the applicant

Ms Akunja for the Respondent