



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 62 OF 2019

(From original conviction and sentence in Hamisi PMCCRC No. 697 of 2017, Hon. ML Nabibya, Senior Resident Magistrate, of 11th December 2018)

KELSON LINYIENGA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

1. The appellant had been convicted by the primary court of robbery with violence in Hamisi PMCCRC No. 697 of 2017. He was jointly charged with others, of robbing the complainant, Maxwell Mwaki, of a mobile phone and of using violence in the course of the robbery. There was another charge of causing grievous harm to another victim, Metrine Kadesa, by chopping off part of her upper leg. After taking evidence, the trial court convicted the appellant, with another, of the two counts, robbery with violence and causing grievous harm. He was sentenced to fifteen years for the robbery with violence and twenty years for grievous harm.

2. He was aggrieved by the verdict, hence the instant appeal. He has listed seven grounds in his petition of appeal. He avers that the circumstances at the scene were not conducive to allow for positive identification, the defence evidence of *alibi* was strong enough and should not have been dismissed, the evidence has full of contradictions and the witnesses were unreliable and inconsistent, the investigating officer barely carried out any investigation, the sentence was harsh and excessive and against the weight of evidence, and the court ought not have relied on the doctrine of recent possession.

3. The first complainant, Maxwell Mwaki, was PW1. He described how four persons attacked him and cut his wife, PW2, Metrine Kadesa, when the pair got outside their house at 11.00 PM, to relieve themselves. They demanded money. They removed a phone from his pocket. He escaped and got help. When he and his brothers came to his house, they found that the four persons had disappeared with PW2. They searched for her, and found her in the bush. She had injuries. They rushed her to hospital. He said he was not harassed in any way, and nothing was stolen from PW2. PW2 gave a similar narrative. The difference was that PW1 signaled her so that they could run away to safety, but she did not understand the signal, and so PW1 ran away alone, leaving her with the four. The attackers assaulted her badly, and she ended up being in hospital for a long time. She was later informed by the police that they had arrested the appellant and two others with the phone belonging to PW1. She said that she did not know her assailants before the incident, and no identification parade was carried out. PW3 was a sister of PW2. She asked to see her in hospital after incident. PW4, No. 80056 Corporal James Ouma, was from the Safaricom police liaison office. He stated that the stolen phone was used by the appellant on 3rd November 2017 and 4th November 2017, and by another thereafter. He stated that the phone changed hands between the appellant and a certain Sarah, but he could not tell whether the two were related. PW5, No. 9864 Police Constable David Karanu, conducted the investigations. The appellant was traced from the forensics done by PW4. The appellant mentioned his co-accused as the person who gave him the phone. The co-accused then pointed at the 3rd accused. The appellant was arrested because he was the one who used the phone. He said he did not conduct an identification parade as PW2 was in hospital. PW6, Dr. Mateche, detailed the injuries sustained by PW2. Her leg was amputated.

4. At the end of the prosecution case, the court found that the State had established a case on a balance of probability to warrant putting the appellant on his defence. He gave a sworn statement. He said he was in Nairobi on 1st November 2017. He came home, to Vihiga, on the second evening. He said his co-accused tried to sell to him the phone in question. He put a line on the phone straight away, but his co-accused picked it up later as he had no money to pay for it. He was arrested on 14th November 2017, and he explained to the police how he came to be in contact with the phone. He said no identification parade was conducted, and he did not know the complainant. He denied being part of the robbery. He said he was not found with the phone, and that it was Sarah Ibidi who had it. DW2, his co-accused, who allegedly gave him the phone, denied giving him the phone. DW3, the other co-accused, denied giving the phone to the others, saying that he got it from DW2. He asserted that DW2 owned it. It was recovered from one of the workers of DW3.

5. Directions were taken, for filing of written submissions. The only submissions on record are by the respondent. I will consider each of the

grounds in turn.

6. On the first ground, on the circumstances of identification being not conducive, the trial court found that the circumstances were not conducive for proper identification. Nothing should turn on this ground, the trial court found that the circumstances were not adequate. This what the court said:

“PW2 was the only witness who seemed to have identified the accused person, by use of the moonlight which she described to mean sufficient in the circumstances. However, the time of the incident was at night, the brightness or otherwise of the moonlight has not been described fully and this is a situation where one can be said to have made a genuine mistake considering the difficulties associated at the time. It’s therefore risky to rely on such evidence without elaboration on how the moon was bright to enable identification which is free from error. More so, the dock identification is not considered valid in the circumstances; I feel it would have been proper if an identification parade could have been carried out just as was the finding in the case of Olouch v Republic (1985) 2 KLR 549.”

7. On the dismissal of the defence evidence of *alibi*, I have scrupulously gone through the judgment of the trial court, and I have not come across any reference to it. It was not taken into account. The appellant’s case was that he was not in the area on 1st November 2017, and that he only came into the area after the event. He did not provide any concrete proof of this. He mentioned about his mother having secured him a job, he could have called her as witness to the fact that he travelled later on 1st November 2017, or produced a bus ticket of that date. He provided no proof of his alleged *alibi*. Burden of proof, of course, lies with the State, but it was stated, in *Karanja vs. Republic* [1983] KLR 501 (Hancox, Chesoni JJA & Platt Ag. JA), that the *alibi* defence should not be mentioned in passing, some evidence should be given. See also *Ekai vs. Republic* [1981] KLR 569 (Law, Potter JJA & Simpson Ag. JA). As no evidence to support the *alibi* defence was presented, the trial court was justified in not giving it much attention.

8. The third ground is about the prosecution case being saddled with contradiction and inconsistency. The appellant did not file any submissions, and, therefore, there is nothing that points me to the inconsistencies and contradictions that he talks about. I have gone through the record and I have not noted any.

9. The fourth ground is about the investigating officer not having conducted any investigations. I am not too sure what is meant by that. The record is clear that investigations were carried out. The IMEI number of the stolen phone was obtained, and PW4 was engaged to track the use of the phone. Thereafter, the identity card numbers of the persons who used the phone were tracked and identified, and that is what led to the arrest of the appellant and his co-accused. Statements were recorded from witnesses. The only shortcoming was that no identification parade was mounted for PW1 and PW2 to pick out the suspects. That alone does not mean the case was poorly investigated, or was fundamentally flawed.

10. The fifth ground is on the sentence being harsh and excessive. The appellant faced two charges. The first was of robbery with violence. The evidence presented brought the matter within the threshold of section 296(2) of the Penal Code. There was a theft, of a phone from PW1. There was physical violence, meted out on PW2, immediately after the theft, so vicious that her leg was eventually amputated. The second element, under section 296(2), was that the perpetrators of the crime were more than one. They were four. So, robbery with violence was established. The penalty for it is mandatory death. The appellant escaped the death sentence, as the court exercised discretion under *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), to give a sentence of fifteen years’ imprisonment instead of mandatory death. As fate would have it, *Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae* [2021] (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Ndung’u & Lenaola SSJJ) ruled that *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ) was limited to murder cases, and the trial courts had no jurisdiction or discretion to award sentences other than the mandatory sentences prescribed in legislation. That would mean that the trial court herein exercised a jurisdiction or discretion that it did not have, and it should not have imposed any other sentence apart from mandatory death, for that is what is prescribed under section 296(2) of the Penal Code, for the offence that the appellant faced and was convicted for. The sentence imposed was not lawful, in the circumstances, for it was founded on discretion which was not available, and amounted to exercise of jurisdiction which, did not exist.

11. On grievous harm, PW2 was cut on her left leg, so badly that the legs had to be amputated. The offence of grievous harm, as defined in section 234 of the Penal Code, attracts a maximum of life imprisonment. PW2 lost her leg from the harm inflicted on her. That called for a stiff penalty and twenty years cannot be said to be excessive. It was even lenient. Given the loss of a leg, life imprisonment should have been considered.

12. The last ground is on the doctrine of recent possession. This is the principal basis upon which the conviction was based. The appellant used the phone stolen from PW1. PW4 testified that the appellant was identified as having put his SIM card on that phone on 3rd November 2017, the first time it was used after the theft. Then from that date it moved to the hands of someone else. He was the very first person to use the phone after the theft, or at least, it was traced to him from phone data. He explained that he got it from his co-accused, who denied it. The very fact of the possession placed him at the scene of the crime.

13. Overall the appeal herein is not merited and I hereby dismiss the same. The sentence on the robbery with violence charge is unlawful as stated above, there was no jurisdiction to impose it, and I accordingly substitute the sentence of fifteen years’ imprisonment with one of mandatory death. I shall not interfere with the one on the grievous harm charge, but I shall order that it be held in abeyance on account of the death sentence. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 18th DAY OF February 2022

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Mr. Mwangi, instructed by the Director of Public Prosecutions, for the Republic.

Kelson Liyienga, appellant.