REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. 176 OF 2018

ERICK MACHAYO ADEDE …….…….. APPELLANT

VERSUS

REPUBLIC …….…… RESPONDENT

JUDGMENT

1. The appellant, *Erick Machayo Adede,* was convicted in five counts with the offences of robbery with violence contrary to *Section 296 (2)* of the *Penal Code*.

The particulars supporting the five counts alleged as follows:

> **Count I-** On 6th August 2014, at around 1830 hours at Kibera 42 in Langata within Nairobi County, jointly with others not before court, while armed with a dangerous weapon namely pistol, the appellant robbed *Joel Saitoti Ngirubareke* of KShs.10,705, a Samsung mobile phone valued at KShs.6,000, a Canon camera and its two lenses valued at KShs.78,000, one USD S/No. L48606042, one two thousand shillings note S/No. CJ2165994, two five thousand Tanzania shilling notes S/No. AG1186901 and AG1186900 and after the time of such robbery threatened to use actual violence against the said *Joel Saitoti Ngirubareke.*
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> **Count II-** On 6th August 2014, at around 1830 hours at Kibera 42 in Langata within Nairobi County, jointly with others not before court, while armed with a dangerous weapon namely pistol, the appellant robbed *Nathan Davis Wandera* of cash KShs.200, a Samsung galaxy mini 5670 mobile phone valued at KShs.9,000 and after the time of such robbery threatened to use actual violence against the said *Nathan Davis Wandera.*
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> **Count III-** On 6th August 2014, at around 1830 hours at Kibera 42 in Langata within Nairobi County, jointly with others not before court, while armed with a dangerous weapon namely pistol, the appellant robbed *Ezekiel Ojiambo Wandera* of cash KShs.150, a Nokia classic mobile phone valued at KShs.5,500 and after the time of such robbery threatened to use actual violence against the said *Ezekiel Ojiambo Wandera*.
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> **Count IV**- On 6th August 2014, at around 1830 hours at Kibera 42 in Langata within Nairobi County, jointly with others not before court, while armed with a dangerous weapon namely pistol, the appellant robbed Wilberforce *Wilberforce Shikuku Wandera* of cash KShs.5,000, a Tecno T721 mobile phone valued at KShs.6,500 and after the time of such robbery threatened to use actual violence against the said *Wilberforce Shikuku Wandera.*
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> **Count V** - On 6th August 2014, at around 1830 hours at Kibera 42 in Langata within Nairobi County, jointly with others not before court, while armed with a dangerous weapon namely pistol, the appellant, robbed *Esther Mukei Waeni* of cash KShs.220, a Samsung duos mobile phone valued at KShs.8,000 and after the time of such robbery threatened to use actual violence against the said *Esther Mukei Waeni.*

2. Upon conviction, the appellant was sentenced to serve 20 years imprisonment in each count. The sentences were ordered to run concurrently.

3. The appellant was aggrieved with his conviction and sentence. He proffered the instant appeal through a petition of appeal filed on 8th October 2018 in which he advanced six grounds of appeal which can be condensed into three main grounds as follows:

> i. That the learned trial magistrate erred in law and fact by convicting the appellant on identification evidence which was flawed and did not positively identify him as the perpetrator of the offences in question;

ii. That the learned trial magistrate erred in law and fact by convicting him without having made an objective analysis of the evidence on record and failing to appreciate that crucial witnesses did not testify during the trial;

iii. That the learned trial magistrate erred in law and fact by shifting the burden of proof to the defence.

4. In prosecuting the appeal, the appellant appeared in person while learned prosecuting counsel *Ms Chege* appeared for the state.

At the hearing, both parties chose to prosecute the appeal through written submissions. The respondent was the first to file its submissions on 10th June 2021 while those of the appellant were filed on 30th November 2021.

5. This being a first appeal to the High Court, this court is fully aware of the duty of the first appellate court as aptly captured by the Court of Appeal in ***Gabriel Kamau Njoroge V Republic, [1987] eKLR*** as follows:

> ***"It is the duty of the first Appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, but bearing in mind always that it has neither seen or heard the witnesses and make due allowance for this."***

6. The court record reveals that in support of its case, the prosecution called a total of six witnesses.

The brief facts of the prosecution case are that on 6th August 2014 at around 6.30pm, PW1, PW2, PW3, PW4 and PW5 were having a meeting in a church known as Connecting Souls for Christ located at Kibera. The witnesses recalled that they were seated in a circle facing the church's door which was open. They saw two men peeping through the door but they did not enter the church.

7. PW5, the pastor went to the door to find out what the men waned and according to his evidence, he noted that one of them who appeared familiar had a pistol which he cocked twice and ordered him to go back to the church. He complied and the two men followed him. He identified the man armed with a pistol as *Eric Machayo*, the appellant herein. He was unable to identify the second man.

8. All the five witnesses recalled that one of the intruders who was armed with a pistol ordered them to lie down and the two men ransacked their pockets and stole assorted items and cash. PW1 recalled that *Machayo* ordered her to surrender her wallet and mobile phone, a Samsung duos blue in colour which she did. A mobile phone Techno T701 and KShs.5,000 was stolen from PW2 while a Samsung touch screen mobile phone and KShs.200 was stolen from PW3. A mobile phone was stolen from PW4 while KShs.5,600, one US dollar, 17,000 Tanzanian shillings were stolen from PW5 and a camera make Canon which was removed from his car after he surrendered his car keys to the robbers.

9. After the robbery, the robbers locked the witnesses inside the church and left. When the witnesses finally managed to leave the church, they did not immediately report the incident to the police and each of them went to their respective homes.

10. PW3 recalled that on the same evening as he was going to buy vegetables, he met and recognized one the robbers who was wearing the same clothes he had worn about an hour earlier during the robbery. Together with his friend, they followed and arrested him. They took him to Olympic Police Post.

11. At the police post, PW5's camera which he knew before, one USD, Tanzanian and Kenyan currency together with a mobile phone Samsung Duos light blue in colour which belonged to PW1 were recovered from the suspect. All the witnesses who were called and notified about the arrest converged at the police post and identified the appellant as one of the robbers who had stolen from them in the church earlier while armed with a pistol.

12. PW6, the investigating officer in this case testified that on 6th August 2014, at around 10pm, he rearrested the appellant and another person at Olympic AP Camp after receiving information that they had robbed people in a church. The complainants were present and they identified the appellant as one of the persons who had robbed them. They also identified the items recovered from the appellant as their property stolen during the incident. These were a camera and its bag, one USD S/N 448606042, 12,000 Tanzanian shillings in three denominations, white Samsung, light blue Samsung Duos, two safaricom sim cards S/No. 89254028381003088145 and S/No. 89254029571002010175O. These items were produced in evidence as *Pexhibit1 to Pexhibit10*.

13. When put on his defence, the appellant elected to give a sworn statement and did not call witnesses. In his sworn statement, the appellant narrated how he was arrested by PW3 allegedly after alighting from a *matatu.* He denied having committed the offences as alleged or that the items produced as exhibits by PW6 were recovered from him.

14. I have carefully considered the grounds of appeal, the evidence on record alongside the written submissions made by both parties and all the authorities cited. I have also read the judgment of the trial court.

15. In my view, the key issue arising for my determination in this appeal is whether the **prosecution proved its case against the appellant beyond any reasonable doubt.**

16. A reading of *Section 296 (2)* of the *Penal Code* reveals that for the offence of robbery with violence to be established, the prosecution must prove beyond doubt any of the following essential ingredients of the offence. These are:

i. That the accused was armed with any dangerous or offensive weapon or instrument; or

ii. That he was in the company of one or more persons; or

iii. At or immediately before or after the time of the robbery, the accused wounded, beat, struck or used any other violence on any person.

Proof of any of the above ingredients is sufficient to sustain a conviction for the offence. They need not be proved together in order to establish the offence. See: ***Johana Ndungu V Republic, [1995] KLR 387; Jairus Mukolwa Ochieng V Republic, [2013] eKLR.***

17. In her judgment, the learned trial magistrate analysed the evidence adduced by PW1 to PW5 and made a finding that the evidence of these witnesses proved that they were robbed of their properties on 6th August 2014 at around 6:45pm by two men and one of them was armed with a pistol. She concluded, and rightly so, that the prosecution had proved the essential ingredients of the offences of robbery with violence beyond any reasonable doubt.

18. On the issue whether the appellant was identified as one of the robbers, the learned trial magistrate stated as follows:

> ***"The accused submitted that he was not properly identified by the witnesses and no identification parade was carried out. The incident herein happened at around 6:45pm and of course darkness was setting in. it is worth noting that PW1, PW2, PW3, PW4 and PW5 are all eye witnesses. They confirmed there were electricity lights in the church and were able to identify the accused. Their evidence was clear and consistent that it was indeed the accused who was holding the pistol and ordered them to lie down. PW5 also said the accused looked familiar and that the accused even called him by the name pastor. He went out where they had a conversation and the accused told him they were at work. The accused then cocked the pistol and ordered him to enter the church and everyone was asked to lie down and place their property on the floor. It is therefore clear that PW5 recognised the accused at the scene though he did not state how or where he had seen him."***

19. On my own appraisal of the evidence on record, I am unable to fault the learned trial magistrate's finding that the appellant was positively identified as one of the robbers since it was well supported by the evidence on record.

20. The evidence of PW1, PW2, PW3 and PW4 was consistent and straightforward contrary to the appellant's submissions that it was riddled with contradictions which made it unreliable. The witnesses all narrated how they were seated in the church in a circle facing the door when they saw the appellant and another escorting PW5 back to the church. They saw and identified him through electricity lights in the church which were on and noted that he was armed with a pistol and he was the one who ordered them to lie down after which the items described in the charge sheet were stolen.

21. PW5 saw the appellant at close quarters and saw him cock the pistol twice and after engaging in a short conversation, the appellant and his accomplice led him back to the church.

All the five witnesses were eye witnesses to the robbery. They did not know the appellant previously except for PW5 who claimed that he appeared familiar and, in my view, they had no reason to give false testimony against him. The appellant in his defence did not allude to any.

22. The identification of the appellant as one of the robbers is further buttressed by the evidence that he was arrested about one hour later by PW3 and one Ouma and was later found to be in possession of a black camera make Canon, money in Kenyan, United States and Tanzania currency and a Samsung duos mobile phone which the witnesses positively identified in court as property stolen from them during the robbery an hour or so earlier before they were produced as exhibits by PW6.

23. Given the above evidence, the learned trial magistrate was right to rely on the doctrine of recent possession in addition to her finding that the appellant was positively identified as one of the robbers as a basis for convicting the appellant.

24. The application of the doctrine of recent possession was well articulated by Court of Appeal in ***Isaac Ng'ang'a Kahiga & Another V Republic, [2006] eKLR*** in which the court stated as follows:

> ***"It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."***

25. The doctrine is however based on a rebuttable presumption of fact that a person found in possession of recently stolen goods is either the thief or a handler of the goods knowing or having reason to believe that the same were stolen or unlawfully obtained unless he can account for their possession.

26. The appellant in his defence though admitting having been arrested by PW3 and being taken to Olympic Police Post and later to Kilimani Police Station did not offer any explanation for his possession of the recently stolen items. Instead, he denied having been arrested in possession of the items.

27. Though an inventory of the recovered items was not produced in court as evidence of the alleged recovery, there was sufficient direct evidence from PW3, PW5 and PW6 who witnessed recovery of the stolen properties from the appellant about an hour after the robbery. Some of the items like the Canon Camera and foreign currencies are not things that would have changed hands within such a short time. were stolen. Besides, the appellant in his evidence in cross examination confirmed that the investigation diary confirmed that he was booked with

a camera, bag and phones.

28. Though the appellant complained in one of his grounds of appeal that the learned trial magistrate made a discriminative evaluation of the evidence adduced during the trial in violation of *Article 27 (4)* and *159 (2) (a) (e)* of the *Constitution of Kenya* and that the trial court shifted the burden of proof to the appellant, my perusal of the learned trial magistrate's judgment reveals the contrary.

29. A reading of the trial court's judgment shows that the learned trial magistrate objectively and carefully evaluated the evidence adduced by both the prosecution and the appellant before arriving at her decision. The appellant in his submissions did not demonstrate how, if at all, the trial court discriminated against him.

Secondly, it is clear from the judgment that the learned trial magistrate appreciated and properly applied the law on the burden and standard of proof in criminal cases.

30. In view of the foregoing, I have come to the same conclusion as the learned trial magistrate that the prosecution in this case proved its case against the appellant in counts 1, 3, 4, 5, 6 and 7 beyond any reasonable doubt.

It is thus my finding that the appellant was properly convicted in each of the above counts. His appeal against conviction therefore fails.

31. Turning to the appeal against sentence, *Section 296 (2)* of the *Penal Code* which creates the offence of robbery with violence prescribes a death sentence upon conviction.

32. In sentencing the appellant to serve 20 years imprisonment in each count, the learned trial magistrate must have relied on the jurisprudence that emerged following the Supreme Court's decision in ***Francis Karioko Muruatetu & Another V Republic, [2017] eKLR*** that mandatory sentences prescribed by the law for all offences were unconstitutional to the extent that they fettered the trial court's discretion in sentencing; that even where the law prescribed a mandatory sentence, the trial court retained its discretion to impose any other appropriate sentence after considering the circumstances of the case.

33. The position has now changed with the directions given by the Supreme Court in the ***2nd Muruatetu*** decision pronounced on 6th July 2021 in which the court clarified that the ***1st Muruatetu*** decision applied to the mandatory death sentence prescribed for the offence of murder only and not any other offence.

34. However, since the Supreme Court's directions in the ***2nd Muruatetu*** decision were issued about three years after the appellant was sentenced, the directions cannot apply to this case since they cannot be applied retrospectively.

35. Taking everything into account, I am satisfied that at the time of sentencing the appellant, the learned trial magistrate properly exercised her discretion after considering all relevant factors including the caselaw then applicable.

In the circumstances, I do not find any good reason to interfere with the sentence of 20 years imprisonment imposed on the appellant in each of the counts in which he stands convicted.

In any case, the respondent did not file a cross appeal against the appellant's sentence.

36. For the foregoing reasons, it is my finding that this appeal is devoid of merit and it is hereby dismissed in its entirety.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this 31st day of March 2022.

C. W. GITHUA

JUDGE

In the presence of:

The appellant

Mr. Kiaragu for the respondent

Ms Karwitha: Court Assistant