REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 41 OF 2019

ABDULRAHMAN MOHAMED BWANAHERI....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the judgement by Hon. Sitati Tembe (SRM) in Lamu PMCRC No. 81 of 2018 delivered on 4th October, 2019)

Coram: Reuben Nyakundi J

Mr. Mwangi for State

Ms. Marubu for the Appellant

JUDGEMENT

Abdulrahman Mohamed Bwanaheri the appellant herein was tried before Hon. Sitati (SRN) for the offence of robbery with violence contrary to section 296(2) as read with section 295 of the Penal Code.

It was alleged that on the 12/3/2018 at Anisa Mosque area of Lamu West Sub-Location the appellant while armed with dangerous weapon namely a panga robbed Mwanaisha Bakuri of handbag, cash Ksh.60,000/=, assorted golden ornaments worth Ksh.63,000/= and at the time of the robbery used actual violence to the said complainant.

Following upon the trial the prosecution called a total of six witnesses and the appellant was also placed on his defence. The learned trial magistrate on analysis of the evidence convicted the appellant and sentenced him to suffer death.

The appellant now through the Firm of Mwaure & Mwaure Advocates now appeals to this court against the conviction and sentence imposed thereon. The appellant as such crafted five (5) grounds of appeal and they were that:

> **1. That the Hon. Magistrate erred in law and in fact by failing to appreciate that there was no evidence whatsoever by the prosecution that linked the appellant to the offence of robbery with violence as charged.**
>
> **2.That the learned Hon. Magistrate failed in law and in facts by not appreciating that the prosecution evidence did not bring out the standards that can sustain a charge in an offence of robbery with violence.**
>
> **3. That the Hon. Magistrate erred in law and in fact by convicting the appellant from single witness evidence which was not corroborated and which was based on hearsay.**
>
> **4. That the Hon. Magistrate erred in law and in fact by failing to take into consideration the defence evidence and submissions entirely thereby arriving at a misinformed decision.**
>
> **5. that the sentence is otherwise excessive.**

On appeal, learned counsel argued the appellant's appeal by way of written submissions. The substance of the grounds of appeal are that the offence of robbery with violence as known in law was not proved by the prosecution to warrant a finding on conviction against the appellant.

Learned counsel contended that the aforesaid offence if it occurred lacked the necessary ingredients of a dangerous weapon and even the referenced panga was not recovered or produced as an exhibit at the time of trial.

Learned counsel further submitted and raised the issue of the identification that he was not positively identified given the prevailing circumstances when the complainant alleged was robbed. According to learned counsel the prosecution evidence of the complainant stands not clear that she was attacked while looking downwards and therefore unable to identify the appellant on this absence of a proper identification. Learned counsel relied on the principles in **Leonard Kipkemoi v R Cr. Appeal No. 27 of 2017, Hassan Abdalla v R [2017] eKLR, R v Turnbull [1976] 3 ALL ER 549**. Learned counsel relying on the threshold test in the above cases submitted that the single identifying witness without corroboration was weak to sustain a conviction of the charge against the appellant.

Next issue submitted on by the learned counsel was the inconsistencies and contradictions visible in the complainant's evidence. Learned counsel also pointed out that it was at variance with the findings on medical examination in the P3 form. In support of this legal proportion learned counsel cited the authority in **Erick Anyango vs R [2014] eKLR.** Learned counsel also submitted that particulars in the charge as to the property stolen of the complainant remained an allegation asserted been not proved beyond reasonable doubt.

Finally, learned counsel delved into the ground on sentence as not in foundation with the nature of the offence. It was felt by learned counsel that the learned trial magistrate in sentencing the appellant failed to take into account the mitigation and aggravating factors. As such ended up misdirecting himself on the appropriate sentence for the offence that imposition of the death sentence was a misconception and misapprehension of the principles in sentencing.

In a rejoinder by Mr. Mwangi, the prosecution submitted on behalf of the State in which he opposed both the grounds in support of conviction and sentence. Learned prosecution counsel argued and submitted that the evidence against the appellant was overwhelming, and on consideration included the DNA profile. With that exposition learned counsel submitted that the appeal lacks merit to persuade the court to interfere with the judgement of the trial court.

Analysis and Determination

Being a first appeal, the court is bound and obliged to follow the principles in **Okeno v R (19720 EA 32** to reconsider the evidence afresh, evaluate it and to draw its own conclusions in determining whether the trial judgement of the court should be upheld.

In order to discharge this duty, it is necessary for me to set out the evidence upon which the prosecution relied in support of the charge and the velacity of the defence by the appellant in answer to the charge. I contend that such analysis and evaluation can be proportionately dealt with *insitu* the grounds of appeal visa viz the findings made by the learned trial magistrate.

As a starting point the charge of robbery with violence contrary to **section 296(2) of the Penal Code** is stated to be proved when the prosecution proves the following elements of the offence beyond reasonable doubt:

a. That the complainant was robbed of his or her property.

b. That when the offence set out to commit the offence he was armed with dangerous weapon which he used to threaten violence immediately before or during the commission of the offence.

c. Further, that the offender was accompanied with such other people in prosecuting the offence.

d. Finally, the evidence adduced by the prosecution placed his squarely at the scene of the robbery.

It is incumbent upon the prosecution to discharge that burn of proof beyond reasonable doubt therein as illustrated in the case of **Miller v Minister of Pensions [1947] 2 AL 372**. It's against these principles that the court would test the evidence as a whole in consideration of the appeal.

Ground 1 and 2 argued together

The first and second grounds of appeal are that the learned trial magistrate erred in law and fact by failing to appreciate that there was no evidence to proof the charge of robbery with violence and that well settled standard of proof was below the required threshold.

The issues submitted on by the appellant's counsel touched on lack of sufficient evidence to proof the charge and poor quality of identification evidence.

From the record PW1 **Fatuma Ahmed** testified that she owns and operates an Mpesa-shop located at Anisa Mosque next to Lamu Girls School. In her evidence on 12/3/2018 she packed all the necessary tools needed to transact in the Mpesa shop which she handed over to PW3 Mwanaisha Bakuri. According to PW1 everything went on smoothly, until 10.00am when she received a telephone call that PW1 was at the police station to make a report on the robbery which had just happened in the Mpesa premises. Further, PW1 testified that on following up the telephone call she found PW3 in the hospital undergoing treatment for the injuries inflicted during the robbery. She was also informed by PW3 that in the course of the robbery, she lost her personal items like jewelry and cash of Ksh.60,000/=. On recollection of the events of the material day, PW3 gave evidence on oath and explained that the appellant spent quite some time at the shop on and off. In the evidence of PW3, the appellant at all times came up with transactions which appeared to be genuine. For example, seeking for change of Ksh.1000/=, requesting for a loan of Ksh.10,000/=, asking for his phone to be repaired, purchasing of airtime etc.

However, in the course of all that PW3 told the court that appellant turned against her by inflicting harm on the right side of the face.

According to PW3, before she could scream, the appellant drew his panga and menacingly aimed at targeting her head but in her defece the right hand was injured. It was at that time PW3 fell down, which gave the appellant an opportunity to pick up the handbag and took flight from the scene. In that bag PW3 testified that she had in store Ksh.60,000/=, 1 ring gold worth Ksh.18,000/=, chain gold – Ksh.30,000/= and the physical handbag valued at Ksh.2,500/= which here all stolen by the appellant. She also confirmed that as a result of the injuries she was admitted at King Fahad Hospital to undergo treatment.

Next was the evidence of **PW2 – Nicholas Charo** a clinician at King Fahad Hospital who examined the appellant (PW3) who came with a history of having been assaulted during the time of the robbery. In the testimony of PW2 the complainant on examination suffered injuries to the right hand thumb, cut wound on the palm and dorsal surfaces, left wrist cut wound, fracture of the phalanx of the ulna born. Following the examination and injuries, PW2 opined that PW3 suffered grievous harm as per the P3 form produced as exhibit 1.

Last but not least, the prosecution also submitted that the evidence of **PW4 PC Daniel Ole Shaku** of DCI Lamu West Sub-County. He testified as the investigating officer of the incident involving the complainant and the appellant. PW4 told the court that he moved to record statements of witnesses and later apprehended the appellant whom he charged with the offence. From the quick interrogation it was established that the appellant was wearing a blood stained Kanzu. It was thought necessary to secure to secure the kanzu for purposes of scientific analysis with the government chemist. Therefore, the exhibit kanzu was forwarded to the chemist laboratories where on analysis confirmed a march between the blood stain on the kanzu with the blood group of the complainant (PW3). That testimony by PW4 was in material similarities identical with the one given by **PW6 PC Felix Koono**. Further in PW6 testimony he produced before the court the exhibit memo and the analyst report as exhibits in support of the prosecution case.

As regards the evidence of PW5, it was to the effect that on 12/3/2018 he administered first aid to PW3 who allegedly was standing outside her Mpesa shop complaining of injuries to the head. PW5 also escorted PW3 to Lamu Police Station to book a report on the robbery incident.

At the close of the prosecution case the appellant's answer to the charge contained the following excerpts. He denied the charge of ever robbing the complainant. The appellant acknowledged visiting the complainant's Mpesa shop to buy airtime. Thereafter he also went to other places on personal errands. It was in the course of those activities that he was informed of a robbery at Mpesa shop. He denied being the perpetrator of the offence.

I have considered the submissions by counsel Mwaure for the appellant and the objection raised by Mr. Mwangi representing the State. A perusal of the judgement of the trial court reveals that the appellant was convicted based on the strong identification evidence that there was consistency between the complainant's testimony with that of the analyst report on the DNA profile match relevant to proof to fact in issue on identification of the appellant. It was the contention by the appellant that complainant's evidence alludes to unfavourable conditions for a positive identification.

In my evaluation the case against the appellant was based on both direct and circumstantial evidence adduced by the prosecution which was never controverted by the appellant. It is trite that the law on identification is now well settled as instructive of the principles in **Warunga v R [1991] KAR 22, Kiiru v R [2005] 1 KLR.** The gist and illumining principles in all these authorities hinges on the following:

> **"Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness, but this rule does not lesser the need for testing with greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult in such circumstances. What is needed is other evidence, whether it be circumstantial, direct, pointing to guilty from which the judge or jury can reasonably conclude that the evidence of identification, although based on the testimony gassing to witness can safely be accepted as free from the probability of error."**

Consequently, given the above guidelines, this court is therefore duty bound to interrogate whether or not the surroundings circumstances in the case at hand were favourable for a positive identification of the appellant. In this regard I have in mind the strands of evidence by PW3 in which she stated that the appellant was a well-known person to her before the robbery. PW4 further alluded to the fact that the robbery took place in broad daylight on or about 10 am and that the appellant had spent a considerable time with her before the subsequent attack accompanied with violence and the theft. Further from the evidence of PW3, there was no impairment, traffic or observation to make it impossible for her to identify the appellant on the material day.

Besides the evidence of PW3 to a large extent the prosecution case was also corroborated with that of the DNA profile carried out by the government chemist analyst. It is important to observe that PW6 PC Koono of Lamu Police Station gave evidence that on interrogation of the appellant he noticed him wearing a blood stained kanzu. That kanzu was a subject of the government chemist analysis for a DNA match. From the analyst report the blood stained sample in the kanzu matched the blood sample of the complainant.

The prosecution therefore not only had watertight evidence on identification from the complainant (PW3) but also of it being corroborated with that of the analyst report on the DNA profile match of the blood stains and that of the complainant.

It is trite as was said in **R vs Taylor Weaver & Donovan [1928] 21 Cr. App R. 20 and Teper v R [19520 AC**:

> **"Circumstantial evidence is very often the base evidence which is evidence of surrounding circumstances which by intensified examination is capable of proving a proportion with the accuracy of mathematics. In my considered view I agree with the learned trial magistrate that the evidence against the appellant was both purely direct and circumstantial evidence where the inculputory facts are incompatible with the innocence of the appellant and not capable of explanation on any other hypothesis than that of the appellant's guilty."** See also **Musoke v Republic [1958] EA 715**.

The other most substantial crux of the judgement appealed against is that the evidence by the prosecution witnesses was inconsistency and contradictory. In this case while weighing the case for the prosecution and that of the appellant, which the question arises which witness is to

be believed rather than another and that question turns on manned demeanor, the appellate court must be guided by the impressions made by the trial magistrate. (See **Ruwala v R [1957] EA 570**). It is therefore not in doubt that there are no contradictions or inconsistencies to affect the outcome of the appeal. (See **Erick Onyango v R [2014] eKLR).**

In light of the foregoing I am satisfied that the appellant was properly identified as the person who committed the robbery. With that evidence of the six witness, the prosecution discharged a case under **section 107(1) of the Evidence Act** to proof theft of the complainant's cash and personal items, unfortunately none of the items stolen from the complainant were recovered. Nevertheless, that does not lessen the inculputory facts that a robbery occurred in which the complainant was forcefully robbed of the properties.

On the second argument according to the complainant initially, the appellant slapped her, but thereafter raged on to use his panga to inflict more serious harm during the robbery. Those injuries so sustained were to be confirmed by the clinical officer PW2. Who examined the complainant and filled the P3. I therefore conclude that the ingredient on immediate or threat or use of actual violence to inflict harm in the cause of the robbery by the appellant against the complainant was proved beyond reasonable doubt.

On the use of dangerous weapon, PW1 stated that the appellant was armed with a panga that was used to inflict the grievous harm. The appellant counsel submitted that the alleged panga was neither recovered and therefore raised suspicion whether the appellant was indeed armed at the time of the robbery.

In my view, the sense of non-recovery of the weapon used at the time of commission of the offence does not by itself affect the velacity or cogency of the evidence establishing existence of that fact. Its observed that a deadly weapon includes any instrument made or adopted to be used in inflicting physical harm to commit a felony or to cause death or to do grievous harm. According to PW3 she was attacked by the panga in possession of the appellant. The form and nature of injuries suffered were confirmed by PW2 on examination of the complainant (PW3).

In particular, this ingredient was also proved beyond reasonable doubt on the other hand as discussed elsewhere in this judgement. There is no misdirection on the part of the learned trial magistrate that identification or recognition of the appellant by PW3 was for all intents and purposes. Qualitative and the alibi defence never assailed it to cast a doubt as to his presence at the scene of the crime.

In summary the appellant participation in the robbery was by way of direct and circumstantial evidence proving the elements of robbery beyond reasonable doubt. As I have evaluated the evidence, the prosecution witnesses PW1-PW6 served to lay the foundation that the appellant was the assailant and robber against the complainant in her Mpesa shop. Accordingly, the grounds canvassed by the appellant against the judgement of the trial court fails.

Finally, I would refer to submissions relating to sentence made by the appellant's counsel. The appellant's learned counsel arguments are that the death sentence imposed by the learned trial magistrate was punitive and manifestly excessive. on the issue of sentence, its trite that the sentence meted out against an offender must be commensurate to the moral blame worthiness of the offender. The Court of Appeal in **Thomas Mwamba Wenyi v R [2017] eLKR** citing the decision of the Supreme Court of India in **Alister Anthony Perdira v State of Maharashtra** held as follows:

> **"Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportional sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles; with objective of sentencing policy is deterrence and correct. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court's must keep in mind the gravity of the crime, motive for the crime, nature of the offence, and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entranced in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer."**

The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence. Further in **Francis K. Muruatetu [2017] eKLR** the Supreme Court held interalia as follows **"that mandatory death penalty under section 204 of the Penal Code is unconstitutional because it limits the discretion of the trial court in sentencing proceedings and final verdict."** The court went ahead to lay down the following sentencing guidelines:

> **a. Age of the offender.**
>
> **b. Being a first offender.**
>
> **c. Whether the offender pleaded guilty.**
>
> **d. Character and record of the offender.**
>
> **e. Remorsefulness of the offender.**
>
> **f. The possibility of reform and social re-adoption of the offender.**

The traditional rationale behind mandatory sentences is based firmly on rehabilitation, deterrence, incapacitation and denunciation as a means of crime prevention and reducing the crime rate. However, following the Supreme Court in **Muruatetu case**, the ratio on mandatory sentence is against the principle of proportionality **"that the penalty imposed be proportionate to the offence in question."** The new thinking therefore in our criminal justice system is to make the punishment fit the crime and the criminal.

In the instant case the difficulty I have is the nature of the death penalty imposed by the trial magistrate. It's possible the learned trial magistrate weighed more on the score sheet of aggravating factors to that of the mitigation of the appellant. However, sentencing is not all about aggravating factors as demonstrated by the Supreme Court in the **Muruatetu** decision. I hold the view that whatever gains are made in the reduction of crime through the imposition of a death penalty or lifetime sentence, as noted from the judgement of the trial court, there are insufficient evidence to support the death penalty. It is obvious that given the current trends in sentencing the appellant's death sentence smirks of discrimination under **Article 27 of the Constitution**. Under the new sentencing regime taking into account the mitigation and aggravating factors of the offence, unfortunately, the learned trial magistrate took the view that the death sentence is still mandatory with no need to consider the mitigation of the appellant and other relevant factors.

In interfering with the decision on sentence I am guided by the principles in **Bernard Kimani Gacheru v R [2002] eKLR**:

> **"It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless. That sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material fact; or took into account some wrong material. Or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless anyone of the matters already states is shown to exist."**

According, I dismiss the appeal on conviction and in respect of sentence of death, I allow the appeal and have it substituted with a term imprisonment of 10 years.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 18TH DAY OF MARCH, 2021

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R. NYAKUNDI

JUDGE

In the presence of:

Mr. Mwangi for State – present virtually

M/s Marubu – present virtually for the appellant

Appellant – present virtually