REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 02 OF 2020

PAUL MARWA NCHAMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence dated 21st day of August, 2019

in Criminal Case No. 669 of 2018 at Kilgoris Principal Magistrate's Courts

before Hon. D.K. Matutu (P.M.)

JUDGMENT

1. The appellant, **PAUL MARWA NCHAMA**, was charged and convicted for the offence of robbery with violence contrary to **section 295** as read with **section 296(2)** of the **Penal Code**. The particulars of the offence were that on the night of 8th September 2018 at Mashangwa Location, Transmara West sub-county within Narok County, jointly with another not before court, being armed with dangerous weapons namely pangas and other crude weapons robbed Johannes Mukono cash Kshs. 90,000/= and two mobile phones make Itel valued at Kshs. 6,200/=.

2. He pleaded not guilty and the case proceeded for hearing before the trial court. The complainant, Johannes Mukono (PW1) testified that on 8th September 2018 at around 1:00 a.m. he was at home with his wife PW2. He had had a *harambee* and had a sum of Kshs. 90,000/= in his house. He recalled that he had not locked the house. The appellant whom he identified as "Mando" entered his house with one Mangere and demanded that he give him his money. When PW1 asked him why he was saying that, he hit him on the head and threw bottles at him. PW1 fell down and the appellant and his companion took his money and two phones DOK-201 and Itel valued at Kshs. 1,200/=. He testified that he was unconscious when he was taken to hospital. He was treated at Ntimaru sub- county and later at Angata.

3. PW1 told the court that he had solar light in the house which was bright. He saw that the appellant was armed with a *panga*. He asked him questions for about a minute and stated he had known the appellant for about 2 years as he lived about 800 metres away. PW1 added that when he went home from hospital, he found the appellant's national identification card number 30268483 in his bedroom. He denied having any grudge with the appellant.

4. His wife, Margaret Riobi (PW2), testified that on the material day at about 2:00 p.m. they held a *harambee* to raise school fees for PW1. At 1:00 p.m, PW1 entered the house with the money raised which was a total of Kshs. 90,000/=. He had put the money in a bag. A few minutes later, "Mando" the appellant, entered and hit her husband with a panga on the head causing him to faint. PW2 screamed. The appellant silenced her and ordered her to lie down. She testified that Mangere entered, took the money from the bag, took both their phones and left. She testified that in the process, "Mando" dropped his ID. Her husband was taken to hospital and the villagers managed to arrest the appellant later on. PW2 testified that she had known the appellant for about 3 months. She knew him as "Mando" and saw him very well as there was light in the house.

5. During cross examination, PW2 testified that the appellant lived in her uncle's house but refuted the claim that the appellant had a quarrel with her husband over alcohol or that anyone had planned to fix him. She also insisted that the appellant had dropped his ID in his hurry to escape but acknowledged that she had not recorded this in her statement.

6. Hosea Kiringi (PW3) from Angata Health Centre produced the P3 form dated 8th September 2018 that he had prepared relating to PW1's assault. He testified that PW1 had a blood stained T-shirt and appeared sickly when he went for treatment. He had cut wounds on the face, head and ears and had multiple cuts on his ear lobes and right eye. He also had a cut on his left upper arm and shoulders and his left hand was swollen. The examination indicated that a sharp object had been used and that the approximate age of the injury was 12 hours. He stated that

PW1 was treated and stitched and produced his treatment notes from Ntimaru Sub-county hospital.

7. CPL Erick Nunkushi (PW4) of Angata police station testified that on 9th September 2010, he was instructed to investigate the incident which had been reported by the area chief Mashagwa. He proceeded to Ntimaru hospital where PW1 was admitted with his colleague PC Langat. They interrogated PW1 and visited the scene and met PW2 at home. When PW1 was discharged, he recorded his statement together with the witness' statement. The appellant who had been arrested by the chief was rearrested and charged with the offence. PW4 stated that none of the items had been recovered from the appellant and that no documents were found.

8. When placed on his defence, the appellant gave an unsworn statement. He testified that on 9th September 2018, he was arrested by the chief, assaulted and accused of committing robbery. He testified that the complaint wanted to fix him because he had refused to work for him. He also stated that he had given out his ID to show that he was a Kenyan.

9. The trial court considered the evidence summarized above and came to the conclusion that appellant was guilty of the offence of robbery with violence and sentenced him to 20 years' imprisonment. The appellant challenged both his conviction and sentence in his petition of appeal filed before this court on 8th January 2020. He contended that the charges against him were fabricated and the trial magistrate erred by relying on contradictory evidence. He averred that there were contradictions in time, the amount stolen and his identification by the witnesses.

10. The trial court was also faulted for failing to note that the appellant was never found with any goods linking him to the incident. He claimed that his Identification Card had been taken from him by the police and was never recovered from the scene as claimed by the prosecution witnesses. Further, that he was not the person known as "Mando" and that the other person known as Mungeratinyi was never brought before the court. The appellant also contended that he had not been furnished with the P3 form and medical report and therefore his trial was conducted in violation of Article 50 of the Constitution. He expounded on these grounds of appeal in his written submissions before this court.

11. Mr. Otieno, learned counsel for the State opposed the appeal in oral submissions at the hearing of the appeal. He submitted that the evidence adduced in the lower court was sufficient to sustain a conviction. Counsel urged that the complainant knew the appellant, there was light and his Identification Card was found in the complainant's house. PW2 also stated that she saw the appellant who was known to her. Counsel submitted that identification was adequate and urged the court to dismiss the appeal.

12. On re-evaluating the evidence given before the trial court as is required of a first appellate court as well as the record of appeal and the submissions, I find that the issues arising for determination are:

i. Whether the trial court erred in failing to note that there were material discrepancies in the prosecution's case;

ii. Whether the appellant was properly identified as the perpetrator; and

iii. Whether the sentence imposed upon the appellant was harsh and excessive.

ANALYSIS AND DETERMINATION

13. The offence of robbery with violence is proscribed under **Section 296 (2)** of the **Penal Code** thus:

> *"(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or 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."*

14. The ingredients to be proved by the prosecution against an accused person charged with the offence of robbery with violence are that the offender, in the course of stealing anything, was armed with a dangerous or offensive weapon or instrument or; the offender was in the company of one or more persons or; at, or immediately before, or immediately after the time of the robbery, the offender used any form of violence against a person.

15. The prosecution's witnesses, PW1 and PW2 gave direct evidence implicating the appellant of the charges leveled against him. They testified that the appellant had entered their house in the company of one Mangere and stole two phones and Kshs. 90,000/= which had been raised that day for PW1's school fees. PW1 and PW2 testified that the appellant was armed with a panga and bottles which he used to injure PW1 in the course of committing the robbery.

16. The appellant contends that PW1 and PW2 had a grudge against him and fabricated their testimonies because he had rejected PW1's demands to work for him. He pointed out various contradictions in their evidence, which, in his view, demonstrated the fallacious nature of their testimonies. He drew this court's attention to the testimony of PW2, who testified that the attack occurred at 1:00 p.m. which differed with PW1's testimony that the attack took place at 1:00 a.m. He also submitted that PW1 had recorded in his police statement that he only had Kshs. 90/= whereas PW2 recorded that a sum of Kshs. 90,000/= was stolen.

17. PW1's statement to the police was not produced before the trial court nor did the appellant put PW1 to task on this issue during cross examination. This court cannot therefore speculate on what PW1 wrote in his statement to the police. PW1 told the trial court that he had collected Kshs. 90,000/= in the fundraising which statement was corroborated by PW2. The appellant's argument that PW1 stated that he had Kshs. 90/= is therefore rejected.

18. Regarding the discrepancy in the time of the commission of the offence, the record shows that PW2 testified that the *harambee* started around 2:00 p.m. on the material day and that PW1 returned home at 1:00 p.m. with the money raised. It would be logical that if the fund raising begun in the afternoon, PW1 would return home later after the conclusion of the fund raising event. PW2 also stated that the lights were on in the house which meant that the offence occurred when it was dark. This also corroborated PW1's evidence that the house was well lit with solar light when the appellant broke into the house. In my view, the indication in the record that PW2 had stated that the offence occurred at 1:00 p.m. instead of 1:00 a.m. was a typographical error that did not prejudice the appellant and was thus curable under **Section 382** of the **Criminal Procedure Code.** That provision stipulates:

> ***382.*** *Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:*
>
> *Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.*

19. The other issues raised by the appellant were related to his identification as the robber. Since PW1 and PW2 gave eye witness accounts of the incident which took place at night the trial court was required to make inquiries into the presence and the nature of light, the intensity of such light, the location of the source of light in relation to the accused and the time taken by the witnesses to observe the accused to determine whether the appellant's identification was proper. (See ***Maitanyi v Republic [1986] KLR 198.)***

20. The appellant was not a stranger to PW1 and PW2. PW1 testified that the appellant was a neighbour and that he had known him for 2 years while PW2 testified that she had known the appellant for close to 3 months before the robbery took place. They both referred to the appellant by his moniker "Mando". The appellant also confirmed that he was acquainted to PW1. The evidence of PW1 and PW2 was more reliable as it consisted of recognition which is more assuring as compared to the identification of strangers. Moreover, the interraction of PW1 and PW2 with the appellant was lengthy and sufficient for positive identification. Both PW1 and PW2 testified that the lights were on when the appellant entered the house. PW1 questioned the appellant for about a minute when he demanded that he give him the proceeds of the fund raising which caused the appellant to attack him and cause him severe injuries.

21. While it would have been prudent for the prosecution to get additional evidence on the amount collected during the fund raising, I find that the failure to do so did not weaken the prosecution's case. PW1 and PW2 stated that the amount collected that day was Kshs. 90,000/=. Soon after PW1 arrived home with the money, the appellant entered the house which was still unlocked and took the money from the bag where it had been kept and also took two phones from the house with the help of his companion, Mangere.

22. The money and mobile phones were taken in the presence of the witnesses in conditions of light that were sufficient for them to identify the items stolen by the appellant. The items were not recovered from the appellant, but his identification by PW1 and PW2 was sufficient to establish that he was the assailant and their evidence adequate to ascertain what he had stolen from them. It was not necessary for the prosecution to retrive the stolen items or arrest Mangere in order to prove its case against the appellant.

23. In his defence, the appellant claimed that PW1 had fabricated the charges against him because there was bad blood between him and PW1 due to his refusal to work for him. I am unpersuaded, much like the trial court, that a refusal for employment would escalate to the point where one would hold a grudge and fabricate claims of robbery with violence. If there was such an escalation, no evidence was adduced to prove it.

24. The appellant also contended that the evidence concerning his Identification Card was fabricated, because the Investigating Officer, PW4, stated that no documents were found. PW1 had testified that he had found the appellant's Identification Card in his bedroom when he returned home from hospital after the appellant injured him. PW2 also stated that the appellant dropped his Identification Card at the scene in his hurry to leave after robbing them. The Identification Card was not produced as evidence and PW4 did not testify that he had received the Identification Card from PW1 and PW2. The recovery of the appellant's Identification Card by the witnesses could not of its own sustain a conviction but it played a corroborative role in supporting the evidence of PW1 and PW2. The evidence of PW1 and PW2 was clear and consistent. Their integrity as witnesses was not impeached during the trial and there was therefore no reason to disbelieve their claim that the appellant's Identification Card was recovered after the incident.

25. As to whether it was necessary to call the people who had attended the fund raising, the community policing members and the chief who had arrested the appellant, I find that the decision of the Court of Appeal in ***Sahali Omar vs Republic CRIMINAL APPEAL NO. 44 OF 2016 [2017] eKLR*** sufficiently addresses this issue. In that matter the Court of Appeal held:

> *"The prosecution reserves the right to decide which witness to call. Should it fail to call witnesses otherwise crucial to the case, then the court has the mandate to summon those witnesses. But should the said witnesses fail to testify and the hitherto adduced evidence turn out to be insufficient, only then shall the court draw an adverse inference against the prosecution. This is because the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt (see. Keter v Republic [2007] 1 EA 135)."*

26. The evidence adduced by the prosecution witnesses was adequate to prove the charges that faced the appellant. In addition to the accounts given by PW1 and PW2, PW3 also gave corroborative medical evidence confirming that PW1 had sustained injuries on the night in question. He produced PW1's treatment notes from Ntimaru Sub- County Hospital and also produced the P3 form he had prepared at Angata Health Centre. PW4 confirmed that he saw PW1 at Ntimaru Sub- County Hospital where he was receiving treatment after he was attacked.

27. From the evidence, it is clear that the prosecution proved all elements of the charge of robbery with violence. It established that appellant stole Kshs. 90,000/= and two mobile phones from PW1, it established that the appellant was armed with a *panga* and other crude weapons which he used to attack PW1. It also proved that he was in the company of another when he committed the offence. The prosecution was

only required to call such witnesses as were necessary to establish the charge beyond any reasonable doubt which it did. Consequently, I uphold the trial court's finding that the appellant was guilty of the offence.

28. Next I turn to the appeal on sentence. The discretion of the trial court on sentence is not easily intefered with unless it is demonstrated that in exercising its discretion, the court acted on a wrong principle; failed to take into account relevant matters; took into account irrelevant considerations; imposed an illegal sentence; acted capriciously or that the sentence imposed was harsh and excessive. (See ***Shadrack Kipchoge Kogo vs Republic Criminal Appeal No. 253 of 2003*** and ***Thomas Mwambu Wenyi v Republic [2017] eKLR***)

29. The trial court did not impose the sentence prescribed in the Penal Code for the offence of robbery with violence which is the death sentence. It considered recent developments in law regarding mandatory sentences particularly the case of ***Francis Karioko Muratetu & Another v Republic Petition No. 15 & 16 of 2015 [2017] eKLR*** where the Supreme Court held that the mandatory nature of the death sentence is unconstitutional. The trial court considered the fact that the appellant was not remorseful and imposed a sentence of 20 years' imprisonment for the offence.

30. Having considered the sentences imposed by the courts in similar cases, the fact that the appellant gave no mitigating statement before the trial court, the severity of the injuries inflicted on PW1, the fact that the items he stole were never recovered, I find that the trial court properly exercised its discretion in imposing the sentence on the appellant. *However, the trial court failed to take into account that the appellant was in custody throughout the trial prior to his sentence, in accordance with* ***Section 333 (2)*** *of the* ***Criminal Procedure Code****. Consequently,* I uphold the appellant's conviction and sentence of twenty (20) years' imprisonment which shall run from 10th September 2018 when the appellant was arraigned in court.

Right of appeal within 14 days.

DATED, SIGNED AND DELIVERED AT KISII 30TH DAY OF MARCH 2021.

R.E. OUGO

JUDGE

In the presence of :

Appellant in person

Mr. Otieno Senior State Counsel Office of the DPP

Ms Rael Court Clerk