REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION - MILIMANI COURT

CRIMINAL APPEAL NO. 59 OF 2016

BOYSEAN OKUMU OWARO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the original conviction and sentence

in Criminal Case No. 57 of 2014 at the Chief Magistrates Court –Milimani

by Hon. J. Gandani – SPM on 16th May 2016)

JUDGMENT

1. **Boysean Okumu Owaro**, the Appellant, was charged with two (2) counts of robbery with violence contrary to **Section 295** as read with **Section 296(2)** of the penal code.

Particulars of Count 1, were that on the 12th January 2014 at about 9.30 am along Uhuru Highway in Nairobi within Nairobi County, jointly with others not before court while armed with dangerous weapons namely knives robbed Peter Musyoki Mbuvi of Kshs. 10,000/- and a bag containing clothes and shoes valued at 7,000/- all valued at 17,000/- and at the time of such robbery used personal violence against the said **Peter Musyoki Mbuvi.**

2. Particulars of Count 2 being that on the 12th January, 2014 at 9.30 am along Uhuru Highway in Nairobi within Nairobi County, jointly with others not before court while armed with dangerous weapons namely knives robbed Emmanuel Makokha a pair of shoes valued at Ksh.1,000/- and a National Identity Card No. 311*** all valued at Ksh. 2,000/- and at the time of such robbery used personal violence against the said **Emmanuel Makokha.**

3. The case as presented by the prosecution was that on the 12th January,2014 at 10.00pm, **PW1 Peter Mbuvi** was on his way to work and while along the road he encountered three men who attacked him and took from his Ksh 10,000/-, a bag that contained clothes and shoes. The individuals were armed and that the Appellant in particular cut him on the head. He struggled with him and he was arrested by the police on patrol. But, his mates fled.

4. **PW2 No.83129 Chief Inspector David Odero** together with his colleague **P. C. Kairongo** who were on patrol duties on the material date moved to the scene of the incident when they heard screams. On seeing three people on the road they hid. Two of them escaped but he arrested the Appellant. Three people, among them, the complainant were injured. The complainants having identified him as one of their assailants, he was taken to Parliament Police Station where he was booked and placed in custody by **PW3 No. 58242 Cpl. John Nzive,** as the three complainants were taken to hospital. Thereafter, **PW4 Dr. Kizzy Shako** examined the complainant, Peter Musyoki Mbuvi, and assessed the degree of the injury sustained on the head as harm.

5. Upon being put on his defence, the Appellant who described himself as a tout, stated that on the material date he went to GPO with a view of getting passengers to board buses when he was arrested by PW2, a police officer that he knew and another. They demanded for Ksh.500/- being protection fee and although he gave them Ksh.550/- they arrested him. When they heard screams that emanated from Serena area they took him with them since they had handcuffed him. They found other police officers and members of public who did not testify. He saw clothes that were scattered on the ground and shoes near Serena hotel. The items were picked by the police who led him to Parliament Police Station. He was surprised to see two people who were injured. The following day he was taken to the Central Police Station and subsequently charged.

6. The trial court considered evidence adduced, acquitted him of the 2nd count but found him guilty, convicted him for robbery with violence on the 1st count and sentenced him to death.

7. Aggrieved, he appeals on grounds that: conditions that prevailed could not have favoured correct identification; the mode of arrest did not link the crime to the scene of crime; vital witnesses were not availed to testify; the standard of proof required was not established; and, that his constitutional rights were contravened by the trial court through failure to observe **Section 216 and 329** of the Criminal Procedure Code(CPC)

8. The appeal was canvassed by way of written submissions. The appellant does not dispute the fact of the offence having been committed. His contention is the fact of having been involved in the commission of the offence. He questioned the time taken by robbers who were strangers which could not have enabled the complainant to identify the attackers, even if it was alleged that there were street lights.

9. He cited the case **of *Wanjohi & Others V Republic (1989) KLR 415*** where it was stated that:

> ***"It is at least essential to ascertain the nature of light available. What sort of light, size and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are unknown because they were not inquired into."***

10. It was also urged that having been suspected, however strong the suspicion, guilt should not have been inferred on the part of the Appellant. He faulted the arresting officer for mistaking him for the assailant which may have called for organizing an identification parade.

11. That following scanty evidence adduced, there was need for corroboration. In particular, the Appellant faulted the prosecution for not calling two other complainants who were injured on the material date.

12. What transpired in the opinion of the Appellant was a miscarriage of justice. To support his argument, the Appellant relied on the case of ***Zahira Habibullah Sheikh & Another Vs State of Gujarat & 8 Ors Cr.App. No.446-449 of 2004***, where the Supreme Court of India held inter alia that failure to accord fair trial either to the accused or the prosecution violates the minimum standards of due process.

13. That the burden rests on the prosecution and where vital witnesses are not called, it is presumed that evidence not called would have been adverse to the prosecution. He cited the case of ***Juma Ngodia vs Republic (1882-1988) KAR 454.*** Where it was stated that:

> ***"The prosecutor has, in general, a discretion whether to call or not to call someone as a witness. If he does not call vital reliable witness without a satisfactory explanation he runs the risk of the Court presuming that his evidence which could be and is not produced would, if produced, have been unfavourable to the prosecution."***

14. The trial court was faulted for relying on the doctrine of recent possession without taking into consideration what was stated in the case of ***Isaac Ng'ang'a Kihiga vs. Rep. Cr. App. No.272 of 2002 t***hat:

> ***"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 the 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 to the other."***

15. Further, he faulted the trial court for not considering his defence and mitigating factors that would have moved it to exercise discretionary powers as held by Supreme Court in the case of ***Francis Karioko Muruatetu, Petition No.15 of 2015.***

16. Although learned Counsel for the State, Ms. Ndombi, stated that she was relying on written submissions that had been filed, no such submissions were filed.

17. This being a first appellate court, it has a duty imposed on it by law to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing and hearing the witnesses and observing their demeanor and so the first appellate court must give allowance of the same. This was well put in the well-known case of ***Okeno V. Republic [1972] EA 32*** where the court stated as follows:

> ***"The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala Verses. Republic (1975) EA 57). 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."***

18. What constitutes the offence of robbery with violence is well captured in the case of case of ***Johana Ndungu vs. Republic CRA 116/1995*** thus:

> ***"In order to appreciate properly as to what acts constitute an offence under Section 296 (2) of one must consider the subsection in conjunction with Section 295 of the PC. The essential ingredient of robbery under Section 295 is use of or threat to use actual violence against any person or property at or immediately after to further in any manner the act of stealing. Thereafter, the***

existence of the afore described ingredients constituting robbery are presupposed in the three sets of circumstances prescribed in Section 296 (2) which we give below and any one of which if proved will constitute the offence under the subsection:

(a) If the offender is armed with any dangerous or

offensive weapon or instrument; or

(b) If he is in company with one or more other person or persons; or

(c) If at or immediately before, or immediately after the

time of the robbery, he wounds, beats, strikes or uses

any other violence to any person.".

19. In the case of ***Dima Denge Dima & Others vs. Republic, Criminal Appeal No. 300 of 2007***,it was stated that:

"…The elements of the offence under Section 296 (2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence."

20. This being the case, to secure a conviction, the Prosecution was required to prove only one of the ingredients of the offence beyond reasonable doubt. It is not in dispute that the complainant herein was attacked by three individuals who injured him using a probable sharp object whereby one of his assailants took from him his properties.

21. The contention of the Appellant is that the identification in issue was not positive. The complainant stated that he struggled with the assailant after he cut him. And, as they struggled, the police on patrol arrived and arrested him. On cross examination he stated that streetlights enabled him to see the Appellant.PW2 who went to aid people who were screaming saw three people run from the scene of the incident. Two of them jumped over the fence and ran towards Serena Hotel, while the one he identified as the Appellant, walked towards him and he stopped him by pointing at him the gun that he carried. The Appellant was carrying a bag that contained shoes and clothes, items that the complainant identified as the ones that the attackers took from him. In his defence, the Appellant stated that the encounter with PW2 was at GPO as he went about his touting engagement. However, on cross examination he only suggested that the witness used to go to the stage where he worked to solicit bribes. It was not stated or implied that the locus in quo was at GPO.

22. Evidence against the appellant was of identification that has been called into question by the Appellant. In ***Wamunga vs. Republic [1989] KLR 424*** the Court of Appeal considered the issue and being of the view that caution had to be taken where the only evidence against an accused was of identification expressed itself thus:

"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of mere identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification".

23. The trial court having been seized of that fact accordingly administered the caution. It appreciated the fact of there having been sufficient lighting that enabled the complainant to see the Appellant.

24. The Appellant also complains that the trial court relied on the doctrine of recent possession without taking into account the set judicial precedent. In the case of ***Eric Otieno Arum vs. Republic KSM CA Criminal Appeal No. 85 of 2005 [2006] eKLR***, the court stated as follows:

"In our view, 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 the 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. Identification of the property as belonging to the complainant was not in question. The stated property was stolen from the complainant and recovered immediately thereafter. According to PW2, the Appellant was carrying the property that belonged to the complainant. Possession is defined by **Section 4(a)** of the Penal Code as:

"be in possession of" or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;"

26. PW2 testified to have seen and found the Appellant in his own personal possession of the items. In that regard possession was positively identified. Therefore, essential elements of the doctrine of recent possession were established.

27. The Appellant faults the prosecution for not calling vital witnesses, in particular, passers by and other individuals who were injured on the fateful date. **Section 143 of the Evidence Act** provides thus:

> ***"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."***

28. In the case of ***Keter vs. Republic [2007] 1 EA 135***, it was held, inter alia, that:

> ***"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses that are sufficient to establish the charge beyond any reasonable doubt."***

29. In the case of ***Bukenya versus Uganda (1972) EA 549 at page 550*** the Court of Appeal stated thus:

> ***"Thirdly, while the Director is not required to call a superfluity of witnesses, if evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case."***

30. The offence was committed at night such that at the point of the police moving to rescue the victims, they saw persons who happened to be passing by the locus in quo running away. The Appellant testified to having seen two other victims at the police station. It is apparent, one of them was a complainant in the second count, but, he did not turn up to testify. In his testimony PW2 stated that there were three complainants. The first person that he described as a university student had been slashed on the ears. The second one, an old man had been cut on the mouth, then the third person, the complainant herein had a cut on the head and they were referred to hospital for treatment. PW3, the Investigating Officer testified to have tried contacting Makokha, the stated university student and complainant in the second count in vain.

31. Although other people who could have testified to the fact of the act of robbery having occurred did not testify, evidence adduced was adequate to prove the charge beyond reasonable doubt. Therefore, failure to call them was not unfavourable to the prosecution's case.

32. The issue of the complainant in the second count having come up, I must point out that the trial court fell into error by calling upon the Appellant to defend himself on that particular count. **Section 210** of the Criminal Procedure Code (CPC) provides thus:

> ***If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him.***

33. No evidence was called in support of the prosecution's case in respect of count 2, this would have called for withdrawal of the charge of dismissal of the same pursuant to **Section 210** of the CPC instead of **215** of the Criminal Procedure Code (CPC).

34. On the question of sentence imposed, as a result of jurisprudence that did emerge following the decision of the Supreme Court in ***Francis Karioko Muruatetu & Another –Vs- Republic Petition No. 15 of 2015 (2017) eKLR*** the court declared the mandatory death sentence for murder unconstitutional

35. In the case of ***William Okungu Kittiny –Vs- Republic Kisumu Criminal Appeal No. 56 of 2013 (2018) eKLR t***he court of Appeal stated thus:

> ***"The appellant was sentenced to death for robbery with violence under Section 296 (2). The punishment provided for murder under Section 203 as read with Section 204 and for robbery with violence and attempted robbery with violence under Section 296 (2) and 297 (2) is death. By Article 27 (1) of the Constitution, every person has inter alia, the right to equal protection and equal benefit of the law. Although the Muruatetu's case specifically dealt with the death sentence for murder, the decision broadly considered the constitutionality of the death sentence in general…… From the foregoing, we hold that the findings and holding of the Supreme Court particularly in paragraph 69 applies mutatis mutandis to Section 296 (2) and 297 (2) of the Penal Code. Thus, the sentence of death under Section 296 (2) and 297 (2) of the Penal Code is a discretionary maximum punishment. To the extent that Section 296 (2) and 297 (2) of the Penal Code provides for mandatory death sentence the Sections are inconsistent with Constitution"***

36. The applicant contends that the court failed to observe the provisions of **Section 216** of the Code which provides that:

> ***The court may, before passing sentence or making an order against an accused person under section 215, receive such evidence as it thinks fit in order to inform itself as to the sentence or order properly to be passed or made***.

37. A perusal of the hand-written record shows that the Appellant was granted the opportunity of adducing evidence in mitigation. What he stated should have made the court to consider reducing the severity of the sentence had it not adhered to the mandatory nature of the sentence.

38. In mitigation the Appellant stated that he is a single father, a tout and musician, but, emphasized that he was innocent. I do take into consideration the 22 months he was in remand custody as provided by **Section 333(2)** of the Criminal Procedure Code (CPC).

39. From the foregoing, the appeal succeeds partially, in that I affirm the conviction, but, set aside the sentence imposed which I substitute with ten (10) years imprisonment, that shall be effective from the date of sentence by the trial court.

40. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 27TH DAY OF MAY, 2021.

L. N. MUTENDE

JUDGE