REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL APPEAL NO.58 OF 2019

JACKSON MUSAU MUTUNGA...APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Appeal from original conviction and sentence (Hon. Susan Shitubi, CM),

delivered on 22nd May, 2019 in Criminal Case No.1198 of 2017

at the Chief Magistrate's Court, Kajiado)

JUDGMENT

1. The appellant was charged with robbery with violence contrary to section 295 as read together with section 296(2) of the Penal Code. Particulars were that on 21st day of September,2017 in Kitengela Township, within Isinya Sub-County of Kajiado County jointly with others not before court, being armed with offensive weapons namely; pistol, robbed James Mutinda Mulee Motor vehicle registration Number KCF 910 X, a Toyota Probox white in colour valued at Kshs.875,000, cash Kshs. 10,000, a Co-operative Bank ATM card, a Samsung 322 mobile phone valued at Kshs. 4,500 and Samsung GT 100 valued at Kshs. 1,500 all valued at Kshs.891,000, and at the time of such robbery, used actual violence against the said James Mutinda Mulee.

2. The Appellant denied the charge and after a trial in which the prosecution called 10 witnesses, he was convicted and sentenced to 30 years imprisonment. Being aggrieved with both conviction and sentence, he lodged this appeal and later raised the following grounds in his amended grounds:

> ***(a) That, the learned trial magistrate erred in both law and fact when convicting the him without according him a fair trial in breach of Article 50 of the Constitution.***
>
> ***(b) That, the learned trial magistrate erred in both law and fact in returning a finding of culpability in a case wholly depended on unsatisfactory identification, and convicting him his manner of arrest showed he was just a victim of the circumstances.***
>
> ***(c) That, the learned trial magistrate erred in both law and fact by not evaluating the evidence on record.***
>
> ***(d) That, the learned trial magistrate erred in both law and fact when convicting him by accepting and adopting a defective charge sheet in breach of sections 134 and 214 of the Criminal Procedure Code.***
>
> ***(e) That, the learned magistrate and prosecution entrenched miscarriage of justice by failure to produce crucial witness and exhibits.***

3. This appeal was disposed of through written submissions. The appellant submitted relying on ***Ramadhan Ahmed v R*** (1955) EACA Vol.22 that based on the evidence presented, the trial magistrate's reasoning was wrong. He also relied on Article 50 of the Constitution and ***Abdalla Kitengo Otieno v Republic*** (CR. Appeal No. 175 of 2008) to argue that his right to a fair trial before the trial court was violated due to unwarranted adjournments; that he was not supplied with witness statements for PW9 and that that the trial magistrate's failure to grant him an opportunity to file his submissions was prejudicial to his case.

4. The appellant also relied on ***Juma Nganda v Republic*** (CR. App No.136 of 1983); ***Ali Ramathan v Republic*** (CR. APP No.70 of 1985) and ***Abanga Alias Onyango v Republic*** (Cr. Appeal No. 32 of 1990 (UR), to argue that the trial magistrate relied on un corroborated evidence of PW1, PW5 and PW6 to convict him. According to the appellant, PW1 testified that he identified him through his teeth and eyes

yet he never gave his description to the police.

5. The appellant stated that PW5 told the court that he (appellant) was tall and a bit brown while PW6 testified that he (appellant) was brown, tall and slim which was contradictory. Further, PW1 testified that nothing belonging to him was recovered from him (appellant) and that PW6 also testified that nothing was recovered linking him (appellant) with the crime. The appellant also argued that no member of the public purported to have arrested him was called to testify.

6. The appellant further argued that he was not properly identified because PW5 did not see the registration Number of the vehicle because, or its occupants because it was at high speed. He was also not present when he (appellant) was arrested. He relied on ***Sawe v Republic*** [2003[eKLR to argue that members of the public and the headers acted on mistaken identity that he was one of the robbers.

7. The appellant again submitted that the trial magistrate did not analyze the evidence of PW1 who testified that he was beaten and forced to drink some concoction. According to the appellant, if indeed PW1 was attacked, he ought to have sought treatment immediately and not after 7 days. This, he argued, was because PW7 testified that when she examined PW1, he was found stable with no physical injuries and was not under the influence of drugs as he might have gone to a hospital earlier.

8. The appellant further argued that PW10 was not truthful since he stated in chief that he was told that he (appellant) was arrested, while during cross-examination he stated that he was not aware that he (appellant) was arrested at a different place by headers. The Appellant relied on ***Uganda v Sebyala and Others*** [1969] EA 204

9. He submitted that he was a shoe hawker whose evidence was collaborated by PW8 who testified that some people said he sold shoes near KCB in Kitengela; that PW6 testified that some people said they knew him and that he sold shoes, which was further corroborated by PW3 that being a Kenyan he (appellant) had a right of movement anywhere and PW10 testified that he (appellant) had a right to hawk shoes.

10. It was the appellant's case that PW5 did not positively identified or describe him since he testified that he was 70 m away. He relied on section 63(3) of the Criminal Procedure Code to argue that the alleged stolen motor-vehicle was not produced and that PW9 only produced photographs as exhibits.

11. The appellant also relied on section 143 of the Criminal Procedure Code to argue that the charge sheet was defective as PW1 testified that he never saw a pistol pointed at him nor were exhibits like walkie talkie, ropes, cap and bottle of certain concoction included on the charge sheet. Further, PW1 never produced his stolen phone whose prices differed from those in the charge sheet. The appellant maintained that the trial magistrate convicted him without considering evidence of crucial witnesses and that crucial exhibits were never produced.

12. Prosecution did not file their submissions although given time to do so.

13. I have considered this appeal; submissions and the authorities relied on. I have also considered the trial court's record and the impugned judgment. This is a first appeal and this court as the first appellate court, has a duty to re-evaluate, reconsider and re-analyze the evidence and draw its own conclusions on whether the conclusions of the trial court should prevail or not and give reasons for it. The court should however bear in mind that it did not see the witnesses testify and, therefore, give due allowance for that.

14. In ***Okeno v Republic*** [1972] EA 32, the Court of Appeal set out the duties of a first appellate court, thus:

> ***An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion... 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 finding and conclusion; 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.***

15. In ***Kiilu & Another v Republic*** [2005]1 KLR 174, the Court again stated that:

> ***An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. 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; 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.***

16. In **Naziwa v Uganda** [2014] UG CA 28 (10th April, 2014, the Court of Appeal of Uganda observed that it is the duty of the first appellate court to re-evaluate all the evidence on record and make its own findings of fact on the issues while giving allowance for the fact that it had not seen the witnesses as they testified, before it can decide on whether the decision of the trial court can be supported.

17. This view was reiterated by the Supreme Court of Uganda in ***Fr. Narsensio Begumisa & 3 others v Eric Tibebaga*** [2004] UGSC 18 (22 June 2004), that:

> ***It is a well settled principle that on a first appeal, the parties are entitled to obtain from the court of appeal its own decision on issues of fact as well as of law. Although in a case of conflicting evidence, the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions.***

18. PW1, the complainant testified that he was employed as taxi driver of motor vehicle registration No KCF 910X Probox by Philip Musau (PW2). On 21st September 2017 between 12 noon and 1pm, he was approached by a customer to taken him and 3 others to Kitengela and agreed charges of Ksh.3000. On their way, the customer purchased two ropes which he was to use for tying a luggage. They branded towards a rough road where they were stopped by 3 men they thought were police officers because one of them, the appellant, had a walkie talkie. The appellant told him that the vehicle had been reported stolen. The appellant attempted to take the keys from him while the man who hired him hit him on the face which made him feel dizzy.

19. He was thrown to the back seat where he felt something like a gun on his left side. He was tied on his legs and hands with the ropes and ordered to lie between back and front seats. His head was covered with his jacket, beaten and threatened to with death. He was also forced him to drink some liquor. He was later thrown out of the vehicle near a dry river. He ran to the opposite direction screaming, stopped a motorcyclist and informed him what had happened. They followed the vehicle as the motorcyclist hooted while he screamed attracting other motorcyclists and members of the public who responded to their call.

20. The robbers abandoned the vehicle and ran away with his 2 Samsung phones worth Kshs, 4,500 and Kshs. 2,500 respectively; cash Kshs.10,000 and his Co-operative and Equity ATM cards. Members of the public chased the robbers and apprehended the appellant who was hiding. He borrowed a phone and called his wife who called his employer and informed him what had happened. None of his stolen items was recovered.

21. **PW2, Philip Musau,** owner of the vehicle, testified that he bought the vehicle Toyota Probox Reg. No. KCF 910X at Ksh.875, 000 on 6th February 2016 from Yaya Car Sales and it was financed by Co-operative Bank Ltd. He produced an electronically generated copy of the logbook for the vehicle from National Transport Safety Authority (NTSA). He told the court the vehicle was jointly registered in his name and the bank and he was still serving the loan. He testified that in August, 2017, he gave PW1 the vehicle to conduct tax business. On 21st September 2017, he was informed that the vehicle had been hijacked. He called the complaint but he could not reach him. He later found the vehicle at Kitengela Police Station and identified it. He stated that he did not know the appellant and had never seen him.

22. PW3, Agnes Saya Assistant Chief, of Koromboi Sub-Location, Isinya location, testified that on 21st September 2017 at 6.30pm she was informed that some people had been arrested with a motor vehicle. She rushed to the scene and found members of the public with the people arrested who were in a Toyota Probox registration No KCF 910X. She rescued the appellant from irate members of the public and called police officers from Kitengela Police Station who came and re arrested the appellant and the other suspect. She stated that nothing was recovered from the appellant. In cross examination, she told the court that she did not know the appellant.

23. **PW4 No.53811 CPL Michael Sifuna** of Kitengela Police Station, testified that on the material day, he was on patrol when PW3 called him to the scene where he found a Probox registration No. KCF 910X, and the appellant inside the vehicle. The other suspect who was 200m away had been beaten and badly injured. He arrested the suspects and took them to police station and later to hospital where the injured man died. Nothing was recovered from the appellant or the other suspect. He denied torturing the appellant. He stated that he was not aware maasai youth had taken the appellant's shoes or money.

24. **PW5, Francis Sivuli Mudegu** testified that on 21st September 2019, he met white Probox vehicle which was at high speed and, therefore, he was not able to note its registration Number. A motorcycle and a pillion passenger were following it. They chased the vehicle and apprehended two men including the appellant but one person escaped. The two were beaten by members of the public. PW3 was called and she came to the scene.

25. **PW6, Douglas Meeli Sumare** testified that on 21st September 2017 at 5.00pm he was herding goats with 6 others near the old railway line, when they saw a motorcycle chasing the appellant towards their direction shouting "thief" "thief" and wanted him arrested. They arrested the appellant but he had nothing in his hands. They took him to where the Probox vehicle was at the river. He stated that there were many people, including PW3 and police officers. They arrested the appellant and another person but the third man escaped.

26. **PW7, Cynthia Sitati**, a clinical officer at Kitengela Sub-County hospital, testified that she examined PW1, but he had no physical injuries. He was clinically stable and not under influence of drugs though he complained of abdominal discomfort, diarrhea and general body fatigue. He produced a P3 form dated 29th September 2017 as an exhibit.

27. **PW8 No.90925 PC George Jaber** of Kitengela Police Station, testified that on 21st September 2017 at 8.20pm he received a call that thieves had been arrested at Kimalat. They proceeded to the scene with CPL Sifuna where they found PW3 and many people surrounding a white Toyota Probox vehicle registration No. KCF 910X and the appellant who was in the boot. One other suspect had been beaten and badly injured and was bleeding from the head unable to talk. They learned that PW1 had been hired by one of the suspects from Nairobi to Kitengela. PW1 was assisted by motorcyclist and members of the public to chase and arrest the robbers but one escaped. They booked the suspects at the station and later took them to hospital for treatment. The one man was transferred to Kenyatta National Hospital where he died. He stated that nothing was recovered from the appellant.

28. **PW9 No.78066 CPL Johanna Tanui**, a scenes of crime officer based at Homa bay testified that on 22nd September 2017 at 11.30am, while at Kitengela Police Station, he was requested to take photographs of a white Toyota Probox registration No. KCF 910X at Kitengela Police Station. The photos were processed and he produced them as exhibits. In cross examination, he stated that he never dusted the vehicle for finger prints nor did he know to whom it belonged.

29. **PW10 No.78538 PC Felix Wabomba,** the investigating officer, testified that on 22nd September 2017, he was instructed to investigate a robbery with violence case. Two suspects had been arrested and the stolen, a white Toyota Probox vehicle Reg. No. KCF 910 X was at the station. PW1 informed him that he was hired to take 3 people to Kitengela. On the way, he was stopped by 3 men who pretended to be police officers. PW1 was tied with ropes and forced to drink some liquid. He was robbed of cash Ksh.10, 000, phones and ATM cards. He was later thrown out of the vehicle and the robbers sped off. PW1 stopped a boda boda rider who assisted follow the vehicle while screaming. Members of the public joined in the chase forcing the robbers to abandon the vehicle and run away. The appellant and one other man were

apprehended while the third man escaped. Those apprehended were later handed over to the police together with the vehicle. He later charged the appellant while the other man died in hospital. He produced a copy of the log book of the vehicle which was in the joint names of Co-operative bank of Kenya and **PW2** and copy of deed of indemnity for purchase of the said vehicle by PW2 from Sakai Trading LTD/Yaya Cars Sales (K) LTD. In cross examination he stated that the appellant never brought people he claimed he used to sell shoes with despite being asked to do so.

30. In his sworn testimony, the appellant denied committing the offence. He told the court that on the material day he left his home at Kwa-Njenga, Nairobi at 9 am and went to his shoe hawking business at city Cabanas. When he reached street children's home which is opposite Saitoti, a vehicle approached by and the occupants wanted to buy shoes but they could not agree on the price. Later, several maasai herders went towards his directions and at the same time a motorcyclist also went and asked him if he knew the people in the vehicle and that the vehicle had been stolen. Many motorcyclists and some herders accompanied him to where the white vehicle was. PW3 and PW6 joined them and the thief who was found hiding in a hole was apprehended and beaten senseless until he could not talk. PW3 took his remaining 5 pair of shoes, cash Kshs.20, 000 and a Huawei phone and promised to surrender them to the police and PW4 confirmed their receipt. He was told to record a statement because he had talked to the people in the vehicle.

31. At about 11pm, PW4 and another police officer beat him and injured him on both legs and he was taken to hospital on 22nd September 2017. He stated that on 25th September 2017, he was charged with the offence. He told the court that he had recorded a witness statement but this changed on 8th October 2017 when PW10 informed him that the other person he was to testify against had died. He stated that at the time of his arrest, PW6 did not see him with shoes because they had already been taken away.

32. The trial court considered the evidence and concluded that the prosecution had proved its case beyond reasonable doubt and convicted the appellant, prompting this appeal. The appellant has faulted the trial court decision to convict him on several grounds. From the grounds, the issues arising for determination in this appeal, are; whether the prosecution proved the ingredients of the offence of robbery with violence beyond reasonable doubt and whether the appellant was one of the robbers.

33. The law is clear that the prosecution has the burden to prove its case against an accused beyond reasonable doubt. In ***Philip Nzaka Watu v Republic*** [2006] eKLR, the court held that to convict in a criminal case, the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt. (See also ***Bakare v State (***1987) 1 NWLR (PT 52) 579).

34. The appellant was charged with robbery with violence under section 296(2) of the Penal Code. The prosecution was under duty to prove that, first, there was robbery with violence. Section 296(2) states that 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, the offence is complete.

35. PW1 testified that he was hired to take the men to Kitengela. On the way, they were stopped by the appellant and two other people who pretended to be police officers because they had what looked like police pocket phones. The men entered the vehicle, tied him using ropes the man who hired him had just purchased, beat him up and bundled him between the seats. They drove off and later dropped him from the vehicle and drove off.

36. There is no doubt from this evidence that there were several people who attacked PW1. There was however no clear evidence whether the attackers were armed with dangerous weapons. That notwithstanding, they were more than one when the offence was committed. They also used personal violence against PW1 because they beat him up and tied his hands and legs while threatening to kill him. The attackers having been more than one, and having used personal violence on PW1, the requirements of the offence under section 296(2) were proved. The prosecution is deemed to have proved the offence even where only one of the ingredients of the offence was met. This is because the requirements are disjunctive and not conjunctive. (See ***David Njuguna Wairimu v Republic*** [2010] eKLR).

37. The other issue is whether the appellant was properly identified as one of the attackers. The appellant argued that the prosecution did not prove that he was one of the attackers. According to him, he was going about his business when a vehicle stopped by and the occupants asked to buy his shoes. They, however, disagreed on the price and the men drove off. Immediately after, a motorcycle approached and the pillion passenger asked him if he knew the occupants of the vehicle. Soon after, more people arrived and maasai herders took his shoes and beat him up. He was arrested; taken to the police station and later charged with the offence.

38. The prosecution case was, however, that the appellant was one of the people who stopped the vehicle pretending to be police officers. He had what resembled a police pocket phone (Walkie talkie). He and two other men entered the vehicle, and drove off. They tied PW1, beat him up made him to drink some liquid and later dropped him near a dry river. A motorcyclist assisted PW1 pursue the vehicle while screaming calling for help. Other motorcyclists joined in the pursuit and herdsmen also joined in. When the robbers realized that they would be cornered, they abandoned the vehicle and ran away. The appellant and another man were apprehended and subjected to mob justice with members of the public baying for their blood.

39. PW3 was called and rushed to the scene where he found the appellant and another suspect already apprehended by members of the public. He rescued the appellant and the other man from beatings from members of the public. He called the police who went and rearrested the appellant and the other suspect and took them to the police station.

40. PW5 and PW6 were present when the appellant was arrested. PW6 was one of the herders who chased and apprehended the appellant and took him to where the Probox vehicle was had been abandoned. The appellant was being chased by a motorcyclist towards where PW6 was while shouting thief; thief, thief and calling for the man's arrest.

41. PW8 is one of the police officers who was called to the scene with two other officers and found PW3 already at the scene with members of the public surrounding the Toyota Probox vehicle with the appellant in the boot of the vehicle. The second man had been badly injured and was bleeding. They rearrested the two men. The other later died at KNH.

42. The evidence of PW1, PW3, and PW6 is clear that the appellant was one of the men who were in the vehicle that had been carjacked. The appellant was arrested at the scene by PW6 and other herders. His contention that he was selling shoes and that the occupants of the vehicle wanted to buy shoes from him was not plausible. It would be inconceivable that robbers who were escaping and were being pursued would stop to buy shoes. PW6 was clear that the appellant was being chased. He had no shoes when he was arrested.

43. The incident took place during the day. PW1 saw the appellant as one of the people who entered the vehicle and tied him as they beat him and tied his hands and legs. He was dropped from the vehicle and went in pursuit of the robbers. The chain of events was not broken from the moment PW1 was attacked to when the appellant was arrested. I am satisfied, as the trial court was, that the appellant participated in the robbery incident and that he was arrested and properly identified as one of the robbers.

44. The appellant's argument that the charge was defective because exhibits including the vehicle and walkie talkie among others were not produced does not hold water. The fact also that there was no evidence of a pistol did not invalidate the charge. As already stated, the robbers were more than one and used personal violence against PW1 by beating him and threatening him with death. The prosecution proved its case beyond reasonable doubt.

45. The appellant again argued that he was not supplied with witness statement for PW9. The appellant did not complain that he was not given statements for the other witnesses. I have perused the trial court's file and noted that PW9 only photographed the vehicle which he produced as exhibits. The appellant cross examined him and he stated that did not know much about the case and that he did not dust the vehicle for finger prints. I do not see how failure to give the appellant the statement of PW9 prejudiced him.

46. Having considered the appeal, the arguments and reevaluated and reanalyzed the evidence myself, the conclusion I come to is that this appeal has no merit and is dismissed.

47. Regarding sentence, the appellant was sentenced to thirty (30) years imprisonment which was a legal sentence since the law provides for a death sentence. The record shows that the appellant arrested on 22nd September 2017 and was charged on 9th October 2017. He was in remand throughout his trial until 22nd May 2019 when he was sentenced. The trial court did not consider this period when sentencing the appellant as required by section 333(2) of the Criminal Procedure Code. For that reason, I order that the sentence of thirty (30) years shall run from 22nd September 2017 when the appellant was arrested,

Dated, Signed and Delivered at Kajiado this 23rd July 2021.

E C MWITA

JUDGE