REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL APPEAL NO. 15 OF 2020

ABEL MAINA MBURU....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from original conviction and sentence (Hon. M Kasera, SPM) dated 11th March 2019 in Criminal Case No. 778 of 2017 in the Chief Magistrate's Court at Kajiado)

JUDGMENT

1. Abel Maina Mburu, the appellant, was jointly charged with three other persons with two counts. In count I, he was charged with robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code. Particulars were that on the 16th day of June, 2017 at Kitengela Township in Kajiado County, in the company of Stephen Mwangi Njoroge, Stephen Kamande and Umija Brian Muema, while armed with dangerous weapons, namely; homemade pistols, robbed Frankline Kivoi Makau of cash of Kshs. 66,000/=, 5 mobile phones and assorted airtime cards, all valued at Kshs. 78,000 and at or immediately before the time of such robbery, threatened to use actual violence to the said Frankline Kivai Makau.

2. In Count II, he was charged with preparation to commit a felony contrary to section 308 (1) of the Penal Code. Particulars were on the 23rd day of June 20 17, in the company of Stephen Mwangi Njoroge, Stephen Kamande and Umija Brian Muema, at Kitengela Township within Kajiado County, they were found armed with dangerous weapons, namely; two homemade pistols in circumstances that indicated that they were so armed with intent to commit a felony.

3. They pleaded not guilty to both counts and after trial in which the prosecution called 5 witnesses, the appellant and Stephen Kamande Mwaura were convicted. The appellant was sentenced to 23 years imprisonment. Stephen Mwangi Njoroge and Umija Brian Muema were acquitted. Stephen Kamande Mwaura was not sentenced as he was at large.

4. The appellant was aggrieved with both conviction and sentence, and filed this appeal raising the following grounds, namely:

> **1. THAT, the pundit magistrate erred both in law and fact when he relied on evidence which was not sufficiently trustworthy to have supported the conviction entered.**
>
> **2. THAT, the learned trial magistrate erred both in law and fact when he acted heavily on suspicions to convict him.**
>
> **3. THAT, the learned trial magistrate erred both in law and fact when he failed to observe that the prosecution did not prove its case to the required standard needed in law.**
>
> **4. THAT, the pundit trial erred in both law and facts when he relied on contradictory testimonies to convict him.**
>
> **5. THAT, the learned trial magistrate erred in both law and facts by failing to comply with the provisions of sections 169(1) in relation to his defence.**

5. During the hearing of this appeal, the appellant relied on his grounds of appeal filed together with the petition of appeal. He argued that the complainant did not identify his attackers at the time of commission of the offence. According to the appellant, the person the complainant reported to the police was not the same person he identified during the identification parade. In his view, the complainant claimed that the person who attacked him was tall and black but during the identification parade and in court, the complainant claimed that the attacker was brown and tall.

6. The appellant further argued that PW2 stated in court that he (appellant) was identified through a tooth gap. The appellant relied on ***Jaribu Abdallah v Republic*** (Criminal Appeal No. 220 of 1994) and ***Terekali and Another v Republic*** (1952) EA where the courts emphasized on the importance of the evidence of the first report by a complainant to the police.

7. The appellant again argued that PW1 was not able to identify his attackers and that his was a case of mistaken identity since the person described to the police was not him, given that the person the complainant described to the police was a short brown person without upper incisor tooth while at the trial he described the attacker as a tall black person.

8. Regarding the conduct of the identification parade, the appellant relied on subsection (D) of the Force Standing Orders to argue that the identification parade must be conducted with scrupulous fairness otherwise the value of identification as evidence will be lessened or nullified. He further relied on ***Kariuki Njiru and 7 Others v R*** [2001] eKLR on the need for careful scrutiny of identification evidence.

9. On identification, the appellant relied on ***Wamunga v Republic*** [1989] KLR 424 for the argument that where the only evidence against a defendant is that of identification and recognition, the court ought to examine such evidence carefully and be satisfied that the circumstances of identification were favorable and free from any error before safely making a conviction. He submitted that the witness did not give his description to the police during the first report and, therefore, the same was an afterthought.

10. Regarding credibility of witnesses, the appellant relied on ***GMW v Republic*** [2019] eKLR to argue that attainment of justice is each and everyone's responsibility. He also relied on ***Kiilu & Another*** **v Republic [**2005] KLR 174; [2006] eKLR for the argument that the prosecution bears the duty to prove its case beyond reasonable doubt.

11. According to the appellant, PW1's evidence was not watertight; he did not know the identity of the people who attacked him and did not describe the attackers to the police or even while testifying in court. Further, PW1 was only referring to the attacker as **"him"** throughout the proceedings on the analogy that the one in court might have been the robber. He urged the court to find that the complainant was malicious as no evidence was tendered to corroborate his evidence**.** He relied on ***Paul Ndege Mwangi v Republic*** [2016] eKLR.

12. Referring to the evidence by the police, the appellant argued that they said they arrested 6 people in a single room but only 4 were charged. According to the appellant, some of the those arrested in the house were not charged and, therefore, this exonerated him from the offence. He relied on ***Francis Muchiri Joseph v Republic*** [2015] eKLR.

13. The appellant further blamed the trial court for wrongly construing circumstantial evidence. He argued that the witness was unreliable and as such his evidence was prejudicial and relied on **section 163 (1) (c)** of the **Criminal Procedure Code.**

14. The appellant also blamed the trial court for not complying with section 169 of the **Code**. According to the appellant**,** the trial court failed to identify the law relating to the issues it was canvassing in its judgment; failed to give reasons for his conviction and for not believing his defence which was not challenged by the prosecution yet the court allowed the defence of the 4th accused, in whose house the home made pistols were found which was not disputed by the 4th accused.

15. The appellant relied on ***Peter Karobia Ndegwa v Republic*** [1985] KLR for the argument that the accused person is the most sacrosanct individual in criminal administration of justice. He also relied on ***James Nyanamba v Republic*** [1983] eKLR where the trial magistrate had considered and accepted the prosecution evidence but rejected the appellant's evidence without giving reasons, thus failing to comply with section 169(1) of the Criminal Procedure Code. The Court of Appeal opined that the first appellate court should have considered the evidence as a whole as was held in ***Okale Okethi & Others v Republic*** (1965) EA 555**.**

16. The appellant further submitted that the omission by the trial court to comply with section 169 (1) and (2) of the **CPC** is not curable by section 382 of **CPC**. The section states that a judgment should contain the point or points for determination, the decision thereon and the reasons for the decision. He relied on ***Charles Kibara Muraya v Republic*** (CR. APP No. 33 of 2001 Nyeri) for the argument that a more serious charge places a heavier burden of proof on the prosecution. He maintained that the ingredients of the offence were not proved beyond reasonable doubt and urged this court to allow his appeal, quash the conviction and set aside the sentence.

17. The Prosecution counsel filed written submissions dated 30th October, 2020 and filed on 1st December, 2020 conceding the appeal. The Prosecution counsel however prayed for a retrial for purposes of consolidating the evidence in Criminal Case Nos. 774of 2017 and 778 of 2017.

18. I have considered this appeal, submissions and the decisions relied on. I have also perused the trial court's record and considered the impugned judgment. Though this appeal has been conceded, that does not, however, mean that the appeal should automatically succeed. This court has a duty to subject the evidence under scrutiny and consider the appeal on merit and come to its on conclusion on that evidence.

19. In ***Odhiambo v Republic*** [2008] KLR 565, the court stated:

> **[T]he court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to clear and fresh scrutiny and re-assess it and reach its own determination based on evidence. (See also Norman Ambich Mero & Another v Republic (Nyeri Criminal Appeal No. 279 of 2005).**

20. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, reevaluate and reanalyze the evidence afresh and come to its own conclusion on it. The court should however bear in mind that the trial court had the advantage of seeing the witnesses as they testified and give due allowance for that. (*See* ***Okeno v Republic*** [1972] E A 32.)

21. In **Kamau Njoroge v Republic** [1987] eKLR, the Court of Appeal stated:

> **As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect.**

18. Similarly, in ***David Njuguna Wairimu v Republic*** **[2010] eKLR** the Court of Appeal again stated:

> **The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.**

22. PW1 Frankline Kivoi testified that on 16th June, 2017 at about 10.00 p.m., he was on his way home after the day's work when three men accosted and robbed him of his Infix phone and shopping at gun point. They also took him to his house and MPesa where they took Kshs. 12,000; Kshs. 42,000, phones and credits cards for Equitel and Airtel respectively. They beat him, locked him inside and left. He raised an alarm and the caretaker of the building came and opened for him. He reported the matter at Kitengela police station. He stated that he was able to identify the three attackers because the lights in the house and at the shop were on during the attack. One was tall and fat man and had a gun, another was short brown with a missing upper incisor. He was later called to the police station to attend an Identification parade and he identified the appellant and Stephen Kamande Mwaura who was the 2nd accused.

23. PW2 No. 236160 IP Edgar Nyale of DCI Kitengela, testified that on 26th July, 2017, he organized an identification parade and called the appellant and informed him of the parade. The appellant was satisfied with the arrangement and agreed to take part in the parade. The appellant also stated that he did not need any representation during the parade and signed the parade identification forms to that effect. The appellant chose to stand between No. 6 and No. 7. The witness then called PW1to the parade and he identified the appellant through the missing incisor by touching. The appellant once again was satisfied with the conduct of and signed the identification parade form.

24. PW3 No. 79028, PC Samuel Kipruto of Kitengela Police Station testified that on 17th June, 2017 the OCS assigned him to investigate a case. PW1 had been reported that on 16th June 2017 he was walking home after closing his shop when he was attacked and robbed Kshs. 12,000, an Infinix phone worth Kshs. 12,000; Kshs. 42,000 from an Mpesa shop; 4 mobile phones and assorted airtime scratch cards worth Kshs. 7,000. On 23rd June, 2017 while on patrol around Miriam area with CPL Karanja and APC Gikonyo, they received information that a group of men was in an iron sheet house within the area. They went to the house and found 6 men. They searched the house, and recovered two homemade pistols. The men did not give a satisfactory account of how the guns came into their possession. They arrested and took them to the police station. On 26th June, 2017, an identification parade was conducted and PW1 identified the appellant and Stephen Kamande. The homemade guns were sent for ballistic examination. He also stated that he did not recover the complainant's property.

25. PW4 No. 66930 CPL James Karanja of Kitengela Police Station in Crime Branch Office, testified that on 23rd June, 2017, he was on patrol with PC Chepkuruto and APC Gikonyo when they were informed that there were 8 men in an iron sheet house at Miriam road. They went to the house and found 8 men. They searched the house and found two homemade guns in a metal box. They took the men together with the guns to the police station. On 26th June, 2017, PW1 was called to the station to attend an identification parade which was conducted by PW2.

26. PW5 No.235225 IP Kenneth Chomba, a ballistic examiner based at CID Headquarters, Nairobi**,** testified that on 28th September, 2017, they received two homemade guns from PW3 who wanted to know whether A1 and A2 were firearms in terms of the Firearm Act; whether A1 and A2 could fire ammunition and the caliber of ammunitions they could discharge. IP Alex Mwandawiro conducted ballistic examination and in his report dated 22nd November 2017, A1 and A2 were confirmed to be homemade guns. They were capable of firing 9 X 19 mm caliber. They were test fired with 3 rounds of ammunitions and they fired. A1 had one chamber and one ammunition was used for test firing, while A2 had 2 firing chambers and two ammunitions were used for test firing. It was concluded that A1 and A2 were firearms in terms of the Firearms Act and were capable of being fired. He produced the report on behalf of by IP Mwandawiro as an exhibit.

27. When put on his defence, the appellant gave a sworn testimony with no witness. He testified that on the material evening, he was on his way home from work when he was arrested by 3 police officer in civilian and taken to Kitengela Police station. An identification parade was later conducted and PW1 identified him. Another witness Daniel Muthina also identified him. On 27th June, 2017 he was taken to court and charged jointly with people he did not know and for offences he had not committed. He also testified that the PW1 had seen him earlier in the office before the identification parade.

28. After considering the evidence of both sides, the trial court was satisfied that the prosecution had proved its case beyond reasonable doubt, convicted the appellant and sentenced him prompting this appeal. The trial court stated:

> **The issue before the court is whether the accused person robbed complainant. Complainant said he was robbed by 3 people. He was able to identify accused 2 and accused 3 at the identification parade. Accused 2 is at large. He said he saw them with the use of the lights in the house and at his shop. The accused person did not cover their faces at the time of the incident.**

29. The trial court further considered the definition and ingredients of the offence as well as decisions on the issue and concluded that the appellant committed the offence thus the conviction. The appellant has now challenged the conviction and sentence on several grounds. The

key issues for determination in my view are, whether: the prosecution proved its case to the required standard; whether the prosecution evidence was contradictory and inconsistent and whether the trial court considered the appellant's defence in compliance with section 169(1) of the Criminal Procedure Code.

30. The appellant was charged with robbery with violence under section 296(2) of the Penal Code. Under that section, the prosecution is usually under obligation to prove that the offender was armed with any dangerous or offensive weapon or instrument, or was in company of one or more other person or persons, or that, at or immediately before or immediately after the time of the robbery, he wounded, beat, struck or used any other personal violence to against the victim or the person.

31. In the case before the trial court, the complainant's evidence was that he was attacked and robbed by three men who were also armed. They beat him and locked him inside the house before they left. With this evidence, there was no doubt that the prosecution the evidence proved that there were more than one attackers; they were armed with dangerous weapons and used personal violence against PW1. The evidence satisfied the requirements under section 296(2) of the Penal Code. The offence is proved where the prosecution establishes even one only of the ingredients of the offence under that section. (See ***David Njuguna Wairimu v Republic*** [2010] eKLR).

32. The critical issue is whether the appellant was one of the attackers. The prosecution case was that the appellant was one of the attackers. According to PW1, he was attacked by three armed men and he made a report to the police. Later the police arrested 8 men in a building and recovered two homemade guns. An identification parade was conducted and PW1 identified the appellant as one of the people who attacked and robbed him. PW1 stated that he was able to identify the appellant because lights were on in his house and the shop where he was taken and the robbers had not covered their faces.

33. There is no denial that the appellant's conviction was on the basis of the appellant's evidence, a single witness. The law requires the trial court to carefully scrutinize evidence of a single identifying witness and only convict if satisfied that it was free from possibility of error or mistake. In ***Wamunga versus Republic*** [1989] KLR 424 the Court of Appeal stated thus:

> **It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.**

36. The of Court of Appeal appreciated, however, that evidence of a single identifying witness can still prove a fact in a criminal trial thus leading to a conviction. In ***Ogeto v Republic*** [2004] KLR 19, it was stated:

> **It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken.**

37. In ***Roria v Republic*** **[1967] EA 583, the court warned on the dangers** of convicting on the evidence of a single identifying witness, stating:

> **A conviction resting entirely on identity invariably causes a degree of uneasiness… That danger is, of course, greater when the only evidence against an accused person is identification by one witness and though no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification.**

38. The complainant informed the police that he was accosted and robbed by three armed men. When the appellant was arrested, the police conducted an identification parade and the complainant was able to identified the appellant in the parade by touching. According to the complainant, he identified the appellant because he had missing teeth in his upper mouth. The complainant told the trial court that when he was accosted, he was taken to his house and shop when the robbers took more money, mobile phones and scratch cards. Lights were on both at his house and the shop. The appellant had also not covered his face all this time and the was therefore able to see his face which enabled the complainant to identify him.

39. The fact that the complainant was able to note that the appellant had a gap in his mouth is testimony that indeed he must have identified the appellant as one of the people that robbed him. I am therefore satisfied that the prosecution proved that the appellant was among the people who robbed the complainant and that he was properly identified.

40. The appellant also argued that the prosecution evidence was contradictory and inconsistent. In any criminal trial where several witnesses testify, there are bound to be contradictions or some inconsistencies. Such inconsistencies and or contradictions may be ignored if they do not go to the root of the prosecution case, otherwise they should be resolved in favour of the accused.

41. In **Richard Munene v Republic** [2018] eKLR, the Court of Appeal stated with regard to contradiction or inconsistency in the evidence of the prosecution witness:

> **Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused.**
>
> **It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.**

42. In **Dickson Elia Nsamba Shapwata & Another v The Republic,** (Criminal. Appeal. No. 92 of 2007), the Court of Appeal of Tanzania addressed the same issue of discrepancies and stated;

> **In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.**

43. Similarly, in ***Erick Onyango Ondeng' v Republic*** [2014] eKLR, the Court of Appeal cited ***Twehangane Alfred v Uganda,*** (Crim. App. No 139 of 2001, [2003] UGCA, 6, in which the Court of Appeal of Uganda stated:

> **With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.**

44. I have gone through the record of the trial court and reanalyzed the evidence. I am unable to note significant contradictions that would necessitate this court to overturn the trial court's decision on this ground. The witnesses recounted what happened and what they knew and therefore, they were consistent in their testimonies before the trial court.

45. What about the conduct of the identification parade? PW2 testified that he was asked to conduct the identification parade and assembled members of the parade, informed the appellant of his rights including of having a witness present but he opted not to have one. The appellant signed the parade form before PW2 called PW1 to the parade. The appellant chose the position in the parade and was satisfied after the complainant picked him by signing the form again. He did not raise any objection to the manner the parade was conducted. I have perused the parade form and I am satisfied that the parade was properly conducted.

46. The appellant argued that the complainant saw him before the parade. The appellant did not raise this issue before or during the parade and did not cross examine both the complainant and PW2 on this. This was therefore an afterthought.

47. Having considered the appeal, submissions and reevaluated and reanalyzed the evidence myself, I find no merit in this appeal and dismiss it.

48. Regarding sentence, the record shows that the appellant was arrested on 23rd June, 2017 and was sentenced on 11th March 2019 having been in remand throughout. The trial court did not consider the period the appellant spent in remand when sentencing him as required by section 333(2) of the Criminal Code. In that regard, the sentence of twenty-three years shall run from 23rd June 2017 when he was arrested.

DATED, SIGNED AND DELIVERED AT KAJIADO THIS 24TH DAY OF SEPTEMBER 2021

E C MWITA

JUDGE