REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO 33 OF 2019

ABEL MAINA MBURU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Consolidated with Criminal Appeal No. 34 of 2019)

UMIJA BRIAN MUEMA .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Appeal from original conviction and sentence (Hon. M. Kasera, SPM) dated 11th March 2019 in Criminal Case No. 774 of 2017 at the Chief Magistrate's Court, Kajiado)

JUDGMENT

1. The appellants were jointly charged with robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code. Particulars were that on 21st June,2017 at Milimani area near Coca-Cola Depot in Isinya District within Kajiado County, jointly with another person not before court while armed with dangerous weapons, namely; homemade pistols, robbed Daniel Wambua Muthiani cash Ksh.10,000, mobile phone make Techno W5 Lite black in colour, national identity card and Co-operative bank ATM card, all valued at Ksh.23,000, and immediately before or immediately after the time of such robbery, used actual violence to the said Daniel Wambua Muthiani.

2. The appellants denied the charge, and after a trial in which the prosecution called 4 witnesses and appellants' sworn testimonies, they were convicted and sentenced to 20 years imprisonment each. Being aggrieved with both conviction and sentence, the 1st appellant lodged his appeal on 24th June 2019 (Criminal Appeal No. 33 of 2019), raising the following grounds:

> ***1. THAT, the pundit magistrate erred both in law and in fact when she relied on evidence which was not sufficiently trustworthy to have supported the conviction.***
>
> ***2. THAT the learned trial magistrate erred both in law and fact when she acted heavily on suspicion to convict him.***
>
> ***3. THAT, the learned trial magistrate erred both in law and fact when she failed to observe that the prosecution did not prove its case to the required standard needed in law***
>
> ***4. THAT the pundit trial magistrate erred both in law and fact when she 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 section 169(1) in relation to his defiance statement.***

3. The 1st appellant filed amended grounds of appeal together with written submissions on 6th January,2021, raising the following new grounds:

> ***1. THAT the trial court erred in both law and facts and made a crucial misdirection by holding that the case for the prosecution was proved beyond reasonable doubt whereas the same was not supported by the evidence.***

2. THAT the circumstances of his arrest was unsatisfactory and out of suspicion

3. THAT the purported identification parade (exhibit 1) in law is inadmissible and suspicious going by the record.

4. THAT the provisions of section 169(1) of the Criminal Procedure Code were not adequately complied with in relation to his plausible sworn defence.

4. **Umija Brian Muema,** the 2nd appellant, filed a separate appeal (CRA No.34 of 2019) and raised similar grounds to those initially raised by the 1st appellant. He, however, filed amended grounds of appeal together with written submissions on 6th January,2021, raising again similar grounds to those of the 1st appellant as follows:

1. ***THAT the trial court erred in both law and facts and made a crucial misdirection by holding that the case for the prosecution was proved beyond reasonable doubt whereas the same was not supported by the evidence adduced in court.***

2. ***THAT the circumstances of his arrest was unsatisfactory and out of suspicion***

3. ***THAT the purported identification parade (exhibit 1) in law is inadmissible and suspicious going by the record.***

4. ***THAT the provisions of section 169(1) of the Criminal Procedure Code was not adequately complied with in relation to his plausible sworn defence statement.***

5. The two appeals were consolidated with appeal No. 33 of 2019 being the lead file, thus this consolidated judgment.

1st appellant's submissions

6. The 1st appellant submitted through his written submissions, that the trial court misdirected itself on the burden of proof which the prosecution failed to discharge. He argued that his was a case of mistaken identity as he was not at the scene of crime. He further argued that there was no report on the robbers' descriptions, their attire or facial appearance when the complainant made his first report to the police. It was the 1st appellant's case that the trial court only convicted him on the basis of evidence of identification at identification parade and relied on ***Ramadhan Ahmed v Republic,*** EACA (1955) Vol.22.

7. The 1st appellant again submitted that no evidence was adduced in court to support the allegations of his body descriptions or that he had gun. According to the 1st appellant, the evidence of PW1 was that he was arrested based on the informer's information and not on the physical description given by PW1. He also argued that he was not found with any stolen items belonging to PW1, neither was he arrested from the iron sheet house whose owner was not established or called as a witness to confirm his arrest.

2nd appellant's submissions.

8. The 2nd appellant also submitted that the trial court misdirected itself on the burden of proof which the prosecution failed to discharge. He also relied on ***Ramadhan Ahmed v Republic,*** (supra) that in a first criminal appeal, the onus is upon the appellant to show that the findings of the court of first instance were unreasonable and could not be supported having regard to the evidence on record.

9. He similarly argued that his case was that of mistaken identity as he was not at the scene of the crime. According to the 2nd appellant, PW1 was attacked at about 6.05 am; that the attack was sudden; unexpected and he was therefore frightened. The 2nd appellant also asserted that PW1 had admitted in cross examination that he had not known the robbers or the appellants before. The 2nd appellant therefore argued that although the prosecution called several witnesses, it failed to discharge its burden of proof.

10. The 2nd appellant further argued that when PW1 first reported the matter he did not give the robbers' descriptions, their attire or facial appearance. He maintained that the investigation by police was not responsible for his arrest and prosecution nor was he arrested out of any description given to the police by PW1. According to the 2nd appellant, he was arrested because of information given to PW4 and his colleagues that there were suspicious people in a house. He asserted that the alleged informers did not say there were robbers in the house. He denied that he was arrested in that particular house and no stolen property found in his possession. He maintained that he was convicted on the basis of suspicious evidence of identification.

Prosecution's submissions

11. The Prosecution conceded these appeals and requested for a retrial for purposes of consolidating the evidence in Criminal Case Nos.774 of 2017 and 778 of 2017.

12. 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. The two appeals have been conceded, but that does not mean that the appeals should automatically succeed. This court has a duty to consider the appeals on merit and come to its on conclusion on the evidence.

13. **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).

14. 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 it did not see witnesses testify and give due allowance for that. (***See Okeno v Republic*** [1972] E A 32.)

15. 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.

16. The complainant, **Daniel Wambua Muthiani,** testified that on 21st June 2017 at about 6.05 am he was going to work, when he met a motor cycle with a pillion passenger. The pillion passenger a tall, slender man held him and pointed a pistol at him demanding money and a phone from him. The motorcycle rider took his Techno phone W5, money and a wallet. They did not however beat him. He later reported the matter at Kitengela Police Station. On 26th June 2017, he was called to the police station to attend an identification parade. He identified the 1st appellant, the man who had the gun. The 2nd appellant was lighter in skin. Cross examined by the 2nd appellant, he stated that the 2nd appellant was at the time of robbery more brown than he was at the time of trial. He identified the phone cover recovered by the police (Pex4) as his.

17. **PW2 No. 231154 APC Dominic Gikonyo**, attached to AP Headquarters, testified that on 23rd June 2017, while on patrol with his colleagues, CPL Karanja and PC Kiprono, they went to a house and found four men inside. On searching the house, they recovered two homemade guns and a phone cover. They arrested the men and took them to the police station. Identification parades were later conducted by IP Ngale (PW3) and IP Mbogo (PW4) and the appellants were identified.

18. **PW3 No.236160 Edgar Ngale** of D.C.I Kitengela, testified that on 26th June 2017, he was requested to conduct an identification parade for the 2nd appellant. He arranged 8 of the same general height and size. He then informed the 2nd appellant of his rights, the purpose of the parade and the fact that he could have an advocate or a relative present but the 2nd appellant said he had would have none. The 2nd appellant chose to stand between member Nos. 4 and 5. He then called PW1 and informed him that the robber may or may not be in the parade. PW1 identified the 2nd appellant by touching him. The 2nd appellant stated that he had been identified by mistake which he noted in the identification parade form.

19. He again arranged the parade for the 1st appellant and informed him his rights. The 1st appellant stated that he had no relative or advocate to be present and signed the form to that effect. The 1st appellant chose to stand between parade member Nos. 6 and 7. He again called PW1 who identified the 1st appellant by touching him. The 1st appellant stated that he was satisfied with the conduct of the parade and signed the identification parade form. PW3 also signed the form. He produced the identification parade forms as exhibits.

20. **PW4 No.66930 CPL James Karanja** the investigating officer, testified that on 23rd June 2017 while on duty at Miriam road, they were informed that there were 8 men in an iron sheet house. They went to the house and found eight men. They introduced themselves as police officers since they were in civilian clothes. They conducted a search in the house and recovered two homemade guns in an iron box and a phone case/cover. They took the men and the guns to the police station. On 26th June 2017, he called PW1 and an identification parade was conducted and PW1 identified the appellants. The guns were sent for ballistic examination, and according to the ballistic expert's report produced in court as an exhibits, the guns were found to be firearms capable of firing and being fired.

21. When put on their defence, the 1st appellant, testified on oath (as DW3), that he was going home at 10.00pm when he met police officers in civilian clothes. They arrested him without informing him why and took him to the police station where he was detained for 4 days. He was later taken through an identification parade after which he was charged jointly with people he did not know and for offences he never committed.

22. The 2nd appellant also testified on oath (as DW4) that on 23rd June 2017, he went to Kitengela to watch a football game from 7.30 pm to 8.30 pm. On his way home, he met a vehicle with private registration plates. He was arrested and taken to the police station on grounds that he had robbed people on the road. On 26th June 2017, an identification parade was conducted and PW1 picked in the parade. He was later charged for an offence he did not know and had not committed.

23. The trial court considered the evidence on record and was satisfied that the prosecution had proved its case beyond reasonable doubt, convicted the appellants and sentenced them to 20 years each. The trial court stated:

The evidence by the complainant is that he knew those who robbed him by appearance. He was able to identify accused 1 and accused 2 at the identification parade. He said accused 1 had a pistol at the time he was robbed. PW2 and PW4 were able to find homemade pistol (sic) where the accused persons were arrested….The phone cover exhibit(4) was also found in the house where accused 1 and accused 2 were arrested….The two accused persons were arrested in a house where the phone cover belonging to complainant was found. I find the prosecution has proved their case beyond reasonable doubt.

24. The appellants have faulted the trial magistrate's decision to convict and sentence them on various grounds. In my view, the key issues arising for determination in this appeal are, first; whether the prosecution proved the offence of robbery with violence to the required

standard and, second; whether the evidence of identification irresistibly established that the appellants were the robbers.

25. The first question is whether the prosecution established the case of robbery with violence beyond reasonable doubt. This calls for scrutiny of the evidence on record visa vis the ingredients of the offence of robbery with violence under section **296(2)** of the Penal Code. Ingredients of the offence were set out by the Court of Appeal in ***Johana Ndungu v Republic*** [1996] eKLR as follows:

> ***In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with s.295 of the Penal Code. 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 before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s.296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:***
>
> > ***1. If the offender is armed with any dangerous or offensive weapon or instrument, or***
> >
> > ***2. If he is in company with one or more other person or persons, or***
> >
> > ***3. 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.***

26. The prosecution evidence through the complainant was that he was accosted by two men who robbed him. The men were also armed with a dangerous weapon namely a gun but they did not use violence against him. It is clear that indeed the prosecution proved the ingredients of the offence under section 96(2) of the Penal Code which have to be looked at disjunctively and not conjunctively.

27. As the Court of Appeal stated in **Johana Ndungu v Republic** (supra), if the facts show that at the time of commission of the offence of robbery as defined in section 295 of the Penal Code, the offender was armed in the manner afore-described then he is guilty of the offence under section 196 (2). Similarly, if the offender is in the company of more than one other person, the court does not have to look for evidence use of force or threat to use force.

28. In the case before the trial court, the prosecution proved not only that the attackers were two but also that they were armed with a dangerous weapon, namely a pistol which they pointed at the complainant. I am, therefore, satisfied as the trial court was, that the prosecution proved the ingredients of the offence required under section 196(2) of the Penal Code beyond reasonable doubt.

29. The second issue is whether the prosecution proved that the appellant was a one of the people who robbed the complainant. PW2 and PW4 testified that they went to an iron sheet house where they arrested several men. They searched the house and recovered two home-made guns and phone case/cover. They took the men to the police station where PW2 conducted an identification parade and PW1 picked out the appellants who were then charged and convicted.

30. The appellants have argued that they were not arrested in the iron sheet house. According to the appellants, each one of them was arrested at a different time and place. They maintained that they were charged with offences they had not committed and that they did not know one another.

31. I have considered the arguments from both sides and carefully considered the evidence on record. The complainant stated that he was robbed by two men on a motorcycle who were armed with a gun. They took his wallet phone. When identification parades were conducted, he was able to pick out the appellants. The appellants also identified the phone cover as his. PW2 was clear in his testimony that the appellants were arrested in the iron sheet house. I do not think the police officers were would have had reason to lie that the appellants were arrested from that house if they were not.

32. The police also recovered a phone cover from the house the appellants were and which the appellant identified as his. The cover was robbed from the complainant with its phone. The appellants did not explain how the phone cover taken from the complainant by force ended up in their dwelling house. Similarly, the police recovered guns which must be the guns used to rob the complainant. This connects the appellants with the offence.

33. The appellants also argued that they were not properly identified. The also contended that the complainant did not give their descriptions when he reported the matter to the police. It is important when a victim makes the first report to give descriptions of his or her attackers where possible. (See relevant cases). In this case there was no evidence whether the complainant gave the robbers descriptions to the police when he reported the robbery incident.

34. That notwithstanding, the appellants were found with recently stolen property phone cover belonging to the complainant and they did not give account of how the property came into their possession. This would be taken to be that the appellants were the robbers in the absence of any plausible explanation.

35. In **Eric Otieno Arum v Republic** (Criminal Appeal No. 85 of 2005; [2006] eKLR, the Court of Appeal stated:

> ***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.***

36. In ***Paul Mwita Robi v Republic*** (Criminal Appeal No. 200 of 2008);[2010] eKLR, the Court of Appeal again observed that;

> ***Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is (sic) especially within the knowledge of the accused and pursuant to the provisions of section 111 of the Evidence Act Chapter 80, the accused has to discharge that burden.***

37. In ***Kinyatti v Republic*** [1984] eKLR the Court of Appeal held that in order to prove possession, it is enough to prove either that the accused was in actual possession of the item or that he knew that the item was in the actual possession or custody of another person or that he had the item in any place (regardless of whether the place belongs or is occupied by him or not) for his use or benefit or another person. Knowledge that the item is in actual possession or in one's custody or of another person may be inferred from the circumstances or proved facts of the particular case.

38. There is no doubt that the appellants were arrested in the house where the phone cover was recovered. They did not attempt to explain how the complainant's phone cover came into their possession. They merely denied that they arrested in the house where the item was recovered. Having failed to give a plausible explanation, they were deemed to be the robbers and, therefore, the prosecution proved that they were the people who robbed the complainant.

39. Having carefully re-evaluated the evidence on record and given it due consideration, I am satisfied that the prosecution proved its case against the appellants beyond reasonable doubt. The prosecution counsel conceded the appeal and requested for a retrial. I do not think the concession was proper taking into account the evidence on record. The consolidated appeals on conviction fail and are dismissed.

40. Regarding sentence, the appellants were sentenced to twenty (20) years imprisonment each. According to the record, they were arrested on 23rd June 2017 and were in remand prison throughout their trial. The trial court having sentenced them to term of years, should have considered the period they spent in remand prison pursuant to the provisions of section 333(2) of the Criminal Procedure Code.

41. Consequently, the sentence of twenty years for each appellant shall run from 23rd June 2017 when they were arrested.

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

E C MWITA

JUDGE