



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL 19 OF 2019

(CORAM: F.M. GIKONYO J.)

(From the conviction and sentence of Hon. W. Juma (C.M) in Narok CMCR No. 1388 of 2017 on 29th March 2019)

KIRAKO OLE KISERIAN.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

[1]. The Appellant was charged with two counts of Robbery with Violence contrary to Section 295 as read with Section 296 (2) of the Penal Code.

[2]. **Count I.** Robbery with Violence contrary to Section 295 as read with Section 296 (2) of the Penal Code. The particulars of the offence are that on the night of 6th November 2017 at Duka Moja Trading Centre in Narok East Sub County within Narok County, jointly with others not before court while armed with dangerous weapons namely a rifle and maasai swords robbed Charles Sipitek Lekaipai Kshs. 476,000/= and during the time of such robbery threatened to use actual violence to the said Charles Sipitek Lekaipai.

[3]. **Count II.** Robbery with Violence contrary to Section 295 as read with Section 296 (2) of the Penal Code. The particulars of the offence are that on the night of 6th November 2017 at Duka Moja Trading Centre in Narok East Sub County within Narok County, jointly with others not before court while armed with dangerous weapons namely a rifle and maasai swords robbed James Kamau kshs. 30,000/= and during the time of such robbery threatened to use actual violence to the said James Kamau.

[4]. One complainant failed to testify in this case for count 2 and case was withdrawn under section 87 (a) of criminal procedure code.

[5]. The prosecution called 7 witness while the defense gave unsworn testimony and did not call any witnesses.

[6]. He was tried for the offence and convicted on the charge of robbery with violence and sentenced to 35 years imprisonment. Having been dissatisfied with the conviction and sentence he filed this appeal.

[7]. The appellant set out 9 grounds in his petition of appeal. He however, filed amended grounds of appeal under Section 350(3) (v) of the C.P.C. that;

a) The learned trial magistrate erred in points of law and fact by relying on evidence of identification, without observing that the conditions prevailing at the locus quo were absolutely difficult, for a witness to make any significant identification.

b) The learned trial magistrate erred in points of law and fact by failing to appreciate that the credibility of the identification parade was utterly at stake as it completely faulted the procedures set out in the force standing orders pertaining to an identification parade.

c) The learned trial magistrate erred in points of law and fact in basing the reason for conviction on inconsistent and incredible evidence of possession of an alleged stolen gun without observing that the recovery was not proven beyond reasonable doubt as required in law.

d) The learned trial magistrate erred in points of law and fact by failing to consider the appellant's plausible defense without considering that the same was not rebutted or rather displaced by the prosecution pursuant to the provisions of section 309 of the criminal procedure code.

e) **The learned trial magistrate erred in law and in fact by failing to appreciate that the nature of his arrest was inconsistent with guilt.**

f) **The learned trial magistrate erred in points of law and fact by failing to appreciate that the evidence adduced as a whole by the prosecution did not entirely discharge the prosecution burden of proving its case beyond any reasonable doubt.**

1st Appellant's submissions

[8]. The Appellant argued his appeal through written submissions. He submitted that he was not positively identified. PW1 only identified the appellant by the fact that he had no lower teeth. PW4 was not able to identify him during the parade but could identify him in the dock. He argued therefore that the evidence on identification was insufficient. He cited the cases of *Kariuki Njiru & 7 Others Vs Republic, Republic Vs Turnbull & Others [1976] 3 ALL ER 549, Cleophas Otieno Wamunga Vs Republic Criminal Case No. 177 Of 2004 eKLR And Donald Atemia Sipendi Criminal Appeal No. 299 Of 2011 At Nakuru eKLR*

[9]. The appellant submitted that the identification parade was conducted in the manner that violated chapter 46 of the Force Standing Orders. There was one identification parade with 8 members and the two accused person were identified. The parade had 9 members according to pw5 which contradicted PW1's testimony that they were 8 members. He relied in the case of *John Mwangi Kamau Vs Republic eKLR., And Njihia V Republic [1986] KLR 422*

[10]. The appellant submitted that the prosecution did not create a nexus between him and the recovered gun and crucial witnesses were not called to testify. He argued that there were several gaps in the prosecution case. Pw6 mentioned someone gave him a number which he gave to the intelligence to track the suspects.pw6 did not give sufficient details. An AP officer who was alleged lost his fire arm was not called to testify.

[11]. The appellant submitted that his defense was not considered by the trial court.

[12]. The appellant submitted that he was arrested on mere suspicion and was not consistent with guilt. PW6 confirmed that he was arrested by members of the public out of mere suspicion. he relied in the case of *Mary Wanjiku Gichira Vs Republic Criminal Appeal No. 17 Of 1998*

[13]. The appellant submitted that the prosecution failed to prove its case beyond reasonable doubt. He therefore prayed that the court allows his appeal, quash the conviction, set aside the sentence and he be set at liberty.

PROSECUTION'S SUBMISSION

[14]. The prosecution submitted that the appellant was positively identified by PW1. An identification parade was conducted and PW1 identified the appellant as one of his assailants because of the missing lower teeth. PW1 was able to identify the appellant at the scene because there was electricity in his shop at the time of the incident. PW5 testified that the ID parade was conducted in accordance with the law and force standing orders. The appellant conceded in the parade form that he had no objection with the manner in which the parade was conducted.

[15]. The prosecution submitted that upon arrest of the appellant and his accomplice the 1st accused they were interrogated by the police and gave information that led to the gunning down of a suspect at Tipis school. A rifle was recovered from the slain robber which was forwarded to the ballistics examiner and matched with ammunitions and cartridges that were recovered from the scene of the crime. These circumstances draw an inference of guilt that the appellant and the 1st accused were accomplices of the slain robber. It further shows that the appellant and the 1st accused were in constant communication with the slain robber from the time of their arrest. They cited *Republic V Richard Itweka Wahiti [2020] eKLR.*

[16]. The prosecution submitted that failure to give the description of the assailants to the police at the time of reporting did not negate the positive identification of the appellant at the ID parade.PW1's account of events of the date of the incident were well corroborated by PW4 who was also present at the scene at the time of the robbery. They relied in the case of *John Mwangi Kamau V Republic 2014] eKLR.*

[17]. The prosecution submitted that it proved all the ingredients of the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The appellant was in the company of three other robbers, two were armed with guns and two with swords.in the course of robbery they shot a neighbor who responded to distress that was raised by a customer who managed to escape from the scene one Moses Sembele. The complainant was hit with a gun on his left hand whereas Stephen was shot on the leg. The appellant was positively identified as one of the robbers by the complainant in the ID parade.

[18]. The prosecution submitted that no weapon was recovered from the appellant. It is possible the appellant disposed of the weapon used during the robbery given the 16 days' period it took for him to be arrested. Ms. Koina, however argued that the other evidence tendered before court placed the appellant at the scene of the robbery despite non-recovery of any exhibit from him.

[19]. The prosecution submitted that the trial court considered the appellant's defence and rejected it in light of the evidence adduced by the prosecution which was water tight and cogent. She urged the court to dismiss the appeal and uphold the conviction as well as the sentence as it was safe.

ANALYSIS AND DETERMINATION

Court's Duty

[20]. First appellate court is under duty to re-evaluate the evidence presented at trial and draw its own independent conclusions. Except, it must bear in mind that it neither saw nor heard the witnesses give their testimonies. Thus, matters of demeanor are best observed by the trial court. See Okeno vs. Republic [1972] E.A 32.

[21]. I have perused the lower court record, written submissions and authorities relied upon by both parties. The ultimate question is: -

i. Whether the prosecution proved its case beyond reasonable doubt.

Elements to be proved

[22]. The elements of the offence of robbery with violence were set out by the Court of Appeal in the case of Oluoch –Vs – Republic [1985] KLR thus:

“Robbery with violence is committed in any of the following circumstances:

a) The offender is armed with any dangerous and offensive weapon or instrument; or

b) The offender is in company with one or more person or persons; or

c) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person” [Emphasis mine].

[23]. And according to the case of Dima Denge Dima & Others vs Republic, Criminal Appeal No. 300 of 2007.:

“...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.”

[24]. In this case the complainant told the trial court that he was attacked by four men and that the two accused persons were armed with guns, the other two had swords. One Moses Sembele was shot four times by the robbers and he died. They hit PW1; the complainant with a gun on his left hand, another was hit on the left face and Stephen was shot on the leg. – The evidence was sufficiently corroborated. Accordingly, the prosecution proved beyond reasonable doubt that; (i) the offenders were armed with dangerous and offensive weapon or instrument; (ii) the offender were in company with one or more person or persons; and (iii) at or immediately before or immediately after the time of the robbery the offenders wounded, beat, strike or used other personal violence them.

[25]. Nonetheless, as the incident occurred at night, care should be taken to ensure the appellants were positively identified as the perpetrators of the offence. The court in Wamunga v. Republic (1989) KLR 424 at 426 had this to say:

“Where the only evidence against a defendant is evidence of 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.”

[26]. I have interrogated the circumstances under which identification was made. PW4 and PW1 testified that they saw the appellants under electric light in the shop at the time of the robbery. PW1 identified the appellant in the identification parade as one who had a gap on the lower teeth. PW1 did not know the appellant prior to the incident. Pw4 testified that the first time she was in shock and could not identify the robbers but on a second time she identified the appellant and the 1st accused. Although the incident occurred at night PW1 testified that on that particular night their shop had electricity and the attackers did not have their faces concealed. The evidence show that there was sufficient electric light in the shop under which the witnesses saw the robbers. The robbers had not concealed their faces. The witnesses clearly saw them and were able to identify them in an identification parade duly conducted by the police. I cannot find any element of mistake or delusion on the part of the witnesses in the identification of the appellant and 1st accused as one of the people who robbed the complainant on the fateful night. The circumstances favour positive identification and do not exhibit any particular difficulty in the identification of the assailants.

[27]. Further evidence show that the appellant and 1st accused were in constant communication with the robbery suspect who was gunned down at Tipis School. Evidence by the police also show that information given by the appellant and the 1st accused led to the tracing of the suspect who was gunned down. From him a rifle was recovered. According to PW2, a ballistic expert, the rifle had been used in various incidents of crime, and that it tallied with the ammunitions and cartridges recovered at Duka Moja robbery- this is the scene of the offence herein. There is therefore circumstantial evidence that leads to an irresistible conclusion that the appellant was amongst the persons who committed the robbery herein. The connection is clearly visualized by the evidence. Evidence proves beyond reasonable doubt that, the two accused persons, in company with others and armed with dangerous weapons, robbed the complainant and also used violence on persons thereto immediately before or during or immediately after the robbery.

[28]. Accordingly, the appeal on conviction fails.

Sentence

[29]. The Penal Code prescribes a death sentence for the offence of robbery with violence. The trial court imposed a sentence of 35 years after taking into account the appellant's mitigation, circumstances of the offence, and upon proper guidance by recent jurisprudence on court's discretion in sentencing. The trial court broke away from the biddings of mandatory sentences and properly exercised discretion in passing sentence on the appellant. Accordingly, it has not been shown that the trial court overlooked some material factor or took into account some wrong or irrelevant factors, or acted on a wrong principle in imposing the sentence. Consequently, I find no reason to interfere with the sentence meted upon the appellant by the trial court.

[30]. The upshot of this analysis is that the appeal lacks merit and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 18TH DAY OF OCTOBER 2021.

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F. GIKONYO M.

JUDGE

In the presence of:

1. Karanja for DPP
2. The appellant in person
3. Mr. Kigotho – CA

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F. GIKONYO M.

JUDGE