REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 118 OF 2018

(CONSOLIDATED WITH CRIMINAL APPEAL NO.8B OF 2020)

JOHN WANELOBA..... 1ST APPELLANT

KENNETH MAKOKHA....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

((Being an appeal from the original Criminal Case No. 566 of 2018 at the Principal Magistrate's Court Webuye by Hon. M. Munyekenye – PM on 22nd October 2020)

JUDGMENT

1. John Waneloba, 1st Appellant and **Kenneth Makokha** 2nd Appellant, respectively, jointly with two (2) others were charged with Robbery with Violence contrary to **Section 296 (2)** of the Penal Code. Particulars of the offence were that on the 5th day of October, 2018 at Trans West Area along Matisi – Miendo Road, Webuye West Sub-County within Bungoma County, jointly with others not before court while armed with dangerous weapons namely an axe, robbed John Simiyu Juma of his Laptop make Mecar 3 series, Service ID card, Cash Kshs 5,000/- assortment of books, post bank ATM, Equity Bank ATM, 1 black bag, all valued at Ksh 105,860/- and immediately before or immediately after the time of such robbery wounded the said John Simiyu by cutting him on his left palm using an axe.

2. At the outset, the 1st Appellant pleaded guilty, was convicted and sentenced to suffer death as provided by the law. The 2nd Appellant on the other hand having denied the charge was taken through full trial, convicted and sentenced to serve fifteen (15) years imprisonment.

3. Aggrieved, both appellants have appealed against the conviction and sentence. The 1st appellant appeals on the ground that: he was misled by the Investigating Officer who took advantage of him being a layman in law; the learned Magistrate erred in not telling him the consequences of pleading guilty to capital offences such as robbery with violence; he was a first offender and considering all factors surrounding the commission of the offence, it was erroneous to be given a maximum jail sentence.

4. The 2nd appellant appeals on grounds that: the conviction and sentence were against the weight of evidence adduced; the law was not adhered to as the appellant was not subjected to medical attention and scientific tests to ascertain whether or not he committed the offence and that the verdict prejudiced the appellant under the provisions of the Constitution making the conviction null and void.

5. In a nutshell, the prosecution's case was that **PW1 John Simiyu Juma**, the complainant, who had travelled from Eldoret alighted at Matisi junction at about 9.00 pm and having not found any motorcycle that he would use as means of transport he decided to walk back home. Upon reaching Trans-ways area, Miendo location where roads merge he saw people. Three of them were seated on a culvert while others were standing. All of them approached him, even the ones who were sitting stood; they surrounded him and one of them sought to know if he had taken his bag. He answered in the negative and one of them instructed the rest to cut the individual and 'spoil their game'. The individuals who were eight (8) in number had weapons. One carried a panga, and another one had a slasher that had been sharpened. The one who had a panga lifted it to cut him but he dodged and it missed him. The one with a slasher lifted it and aimed at cutting his neck, but, he lifted his left hand to prevent him and the slasher cut his hand on the palm. He decided to run but the bag that he was carrying which contained an ipad, 3 mega pads, a calculator, six books, service delivery card, National Identity card and Ksh.5000/- fell down as the strap had been cut. One of them took the bag and ran away. He recognized the people as there was bright moonlight, as Muhamed Ibrahim, Sitati, John Waneloba, Aaron Wanjala, Ken Makokha, his village mates.

6. He ran to his cousin's place, Nick Barasa, a nurse who lived nearby. He went to hospital in the morning where he was treated. On his way

home, he met John Waneloba (1st Appellant) and he called his uncle, a village elder who arrested him and Members of public assisted in taking him to Webuye Police Station. He recorded a statement, was issued with a P3 form that was filled. The police investigated and recovered some of his items that were stolen.

7. On cross examination the complainant stated that he knew the 2nd appellant, his village mate and that he saw him running away with his bag.

8. The complainant was examined by **PW2 Dr. Edward Vilebwa** who filled a P3 form in that regard. He found the complainant having sustained a cut on the right hand measuring 12 cm, other cuts on the ring and little finger and assessed the degree of injury sustained as harm.

9. PW3 No. 91988 P.C. Vincent Langat re-arrested the appellants from members of public and the complainant. They led him to the home of another suspect **Aaron Wanjala** who attempted to escape but with the help of 'Boda Boda' riders they chased after him and caught up with him near the river. He led them to his home where they recovered a bag with a aptop, and a panga suspected to have been used. Another suspect Mohammed Ibrahim Salim was arrested by 'Boda Boda' riders. Investigations were conducted and the appellants with others were charged.

10. Upon being placed on their defence, the 2nd Appellant stated that he was at home selling milk, then later he went to harvest grass for his cows. At about 4.00 pm he saw a CID car. A person alighted and asked his brother whether he was Kenneth. His brother identified him hence his arrest. On entering the motor vehicle, he found the 1st appellant inside. It was alleged that the 1st appellant had mentioned his name. As they moved on Aaron was arrested and they were taken to the Police Station.

11. The trial court analyzed evidence adduced and reached a finding that the 2nd appellant was identified positively as there was bright moonlight, as one of the persons who used actual violence on the person of the complainant who lost his property in the course of the attack.

12. The appeal was canvassed through written submissions.

It was urged by the 1st appellant that a retrial be ordered as it will not cause an injustice as he is serving a sentence that is unconstitutional. He relied on the case of **Koome Vs. Republic (2005) KLR 575** where the court held that:

> **" In general a retrial will be ordered when the original trial was illegal or defective; A retrial will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; Even where a conviction is initiated by mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; Each case must depend on its particular facts and circumstances; An order for retrial should not be ordered where it is likely to cause an injustice to the accused person."**

13. He called upon the court to find that he was a layman and the court failed to observe if he was in sober mind while pleading guilty to the charges.

14. The 2nd appellant submitted that he was not informed of the right to legal representation. He cited the case of ***Thomas Aluga Ndegwa Vs. Republic. Cr. Appeal No. 2 of 2004*** where the court allowed such a prayer.

15. That the court failed to warn itself of the danger of relying on evidence of a single witness. That the prosecution's evidence was contradictory and unreliable as PW1 stated that he was attacked at 9.00 pm while PW2 stated he was attacked at 3.00 pm. In this regard he cited the case of **Ndungu Kimani Vs. Republic.**

16. That the nature of light was not proved as was held in the case of ***Maitanyi Vs. Republic, Cr. Appeal No. 6 of 1986*** where the court held that:

> **"It is at least essential to ascertain the nature of light available. What sort of light, its 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 known because they were not inquired into."**

17. And that obvious doubts were disregarded.

18. With regard to the 1st appellant, the Respondent who opposed the appeal urged that the charge was read to him in a language that he understood and he admitted the same. That the court proceeded to warn him of the gravity of the offence and read the charge again and he maintained his plea of guilty; therefore, the allegation that he was misadvised by the Investigating Officer was an afterthought. In this respect the case of ***Ombena Vs. Republic (1981) eKLR*** was cited.

19. With regard to the 2nd appellant, it was submitted that the court noted that there was bright moonlight that enabled the complainant to see people who approached him and idenfied them as his village mates. That the people who had weapons cut the bag that the complainant carried and also his palm. That there was no evidence to discredit that of the witness who was an adult.

20. That the court erred in sentencing the 2nd appellant to 15 years while the 1st appellant was sentenced to the mandatory death sentence. This court was therefore called upon to set aside the sentence imposed against the 2nd appellant and substitute it with the mandatory death

sentence.

21. That the right to counsel is not absolute as the law is being implemented progressively.

22. This being a first appellate court, I am duty bound to analyse and evaluate afresh all the evidence adduced before the trial court and draw my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. In the case of **Okeno vs. Republic [1972] EA 32** the Court of Appeal set out the duties of a first appellate court as follows:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). 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, see Peters vs. Sunday Post [1958] E.A 424."**

23. With regard to the 1st appellant, he was convicted on his own plea of guilty, which means that the court should ideally be questioning the legality of sentence. **Section 348** of the Criminal procedure Code provides thus:

> **No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.**

24. The legal principles that have always been applied in plea- taking in criminal cases were enunciated in the *locus calssicus* case of ***Adan Vs Republic (1973) EA 445*** where the court held that:

> **"(i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;**
>
> **(ii) The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;**
>
> **(iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;**
>
> **(iv) If the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered;**
>
> **(v) If there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded."**

25. In the case of ***Ndede vs Republic(1991)KLR 567***, the Court of Appeal held that:

> **"…the court is not bound to accept the accused person's admission of the truth of the charge and conviction as there may be an unusual circumstance such as injury to the accused person or the accused person may be confused or there have been inordinate delay in bringing him to court from the date of arrest. The list of circumstances and examples that may lead the first appellate court to consider the appeal on merit even when the conviction was on the accused person's own plea of guilty, are not closed. It has long been settled that section 348 of the Criminal Procedure Code which provides that no appeal is allowed in a conviction arising from a plea of guilty, except to the extent of legality of the sentence is not an absolute bar to challenging such a conviction on any other ground."**

26. According to the trial court, following arraignment on 8th October 2018, the charge was read to the appellant. It was indicated that the substance of the charge and every element thereof was read to him in a language that he understood and on being asked whether he was admitting or denying the truthfulness of the charge he responded thus: **"It is true"**

27. The court proceeded to caution him on the gravity of the offence and its consequences and read again the charge to him and he replied as follows: **"It is true"**

28. Consequently, the court entered a plea of guilty against him. Facts as captured herein were read to him and he admitted the facts as being correct. He was granted an opportunity to mitigate and he stated thus**: "I have nothing to say in mitigation"**

29. The court deferred sentencing to midday and subsequently delivered itself thus:

> **"…I have considered the fact that the accused is a first offender with no criminal past. I have however considered the offence committed and the gravity of the same. The 1st accused person was cautioned twice before a plea of guilty and subsequent conviction entered. The 1st accused person is hereby sentenced to death in accordance to the law."**

30. The 1st appellant does not complain that he was confused . He understood the language used therefore the ingredients of the offence. His argument is that he was misled by the Investigating officer. Prior to the sentence being meted court he was granted the opportunity of reflecting on his actions of admitting the charge and repercussions thereto. But he did not change plea. He waited until a year later that is when he thought of raising the allegation. This cannot be viewed as an unusual circumstance.

31. With regard to the 2nd appellant, he urges in his submissions that he was not advised on the fact of legal representation, a right that is being achieved progressively. This was however not one of the grounds of appeal as seen, he was not prejudiced by the sentence meted out.

32. The 2nd appellant argues that the offence was not proved beyond reasonable doubt. The ingredients of robbery with violence were set out in the case of ***Olouch vs Republic (1985)KLR*** where the Court stated that:

> **"...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 armed with any dangerous and offensive weapon or instrument; 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."**

33. In his testimony the complainant stated that there were eight (8) people who were armed with weapons and at the time of stealing from him what he was carrying, one of them cut him with a slasher. Ingredients of the offence as charged were proved.

34. The trial court has been faulted for relying on evidence of a single witness without warning itself of the danger of relying on such evidence. In the case of ***Wamunga vs Republic (1989) KLR 424*** the Court of Appeal considering evidence of identification or recognition had this to say:

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

35. In the case of ***Abdalla bin Wendo & Anor. vs Republic(1953)EACA 166*** the Court of Appeal held that:

> **"Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but the rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification; especially when it is known that the conditions favouring a correct identification were difficult"**

36. In the case of ***Ogeto vs Republic (2004) KLR19*** the Court of Appeal stated that:

> **"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 witness especially when it is shown that conditions favouring a correct identification were difficult."**

37. In the instant case the complainant was alone, therefore it was a question of a single identifying witness. The trial court did not specifically warn itself of the danger of relying on such evidence.

But, in the case of ***Roria vs Republic (1967) EA 583*** the court stated that:

> **"…Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."**

38. Though the court did not caution itself, it stated that it had carefully considered the evidence. Therefore, as a first appellate court, I have the duty of re-analyzing evidence adduced at trial so as to satisfy myself that in the circumstances the conviction was safe. The offence was committed at night and it was a case of recognition. In the case of ***Anjononi & Others Vs Republic [1989] KLR*** the court held;

> **"Recognition is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another."**

39. The complainant told the court that his assailants were his village mates, persons he knew very well as they went to neighboring schools. He knew their physical appearance as well as names. There was moonlight that he described as' bright' and he came close to them as they engaged him. He saw the 2nd appellant in particular, run away with his bag and at the point of reporting the incident he mentioned his name

to the police and he was subsequently arrested. This was a case of recognition that was reliable. There was no mistaken identity. In the premises the conviction was safe.

40. On sentence, **Section 296(2)** of the Penal Code provides thus:

> **(2) 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, he shall be sentenced to death.**

41. The 2nd appellant was sentenced to serve fifteen (15) years imprisonment, this was during the year 2020 when courts were following the jurisprudence that emanated from the decision of ***Francis Karioko Muruatetu vs Republic (2017) eKLR***; where courts were of the view that they had discretion in sentencing offenders in such matters. However, following the decision of ***Francis Karioko Muruatetu (2021) eKLR*** the discretion to mete out the death penalty for the offence of robbery with violence is not available.

42. In its submissions the State/Respondent has sought enhancement of the sentence to the one provided for in law. In the case of ***J.J.W. vs Republic (2013) eKLR*** the court held that:

> **"It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 354 (3) (ii) and (iii) of the Criminal Procedure Code. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal"**

43. There was no cross appeal filed by the Respondent/ State and the appellant was not given a Notice of Enhancement of Sentence. Therefore, the trial court having acted at the time when such discretion was applicable, I restrain myself from interfering with the sentence meted out.

44. The upshot of the above is that appeals by both appellants have no merit, accordingly, they are dismissed in their entirety.

45. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 20TH DAY OF DECEMBER, 2021

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Court Assistant – Linus Malaba

ODPP – Mukangu

Appellants