REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. 107 OF 2019

FREDRICK WAFULA BARASA.....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence of Hon. J. Gandani (CM) in Kibera Chief Magistrate's Criminal Case No. 2956 of 2014 dated 2nd May 2019

JUDGMENT

1. The appellant, *Fredrick Wafula Barasa,* was charged jointly with another with the offence of robbery with violence contrary to *Section 296 (2)* of the *Penal Code*. He also faced an alternative count in which jointly with his co-accused, he was charged with the offence of neglecting to prevent a felony contrary to *Section 392* of the *Penal Code.*

2. After a full trial, the appellant and his co-accused were acquitted of the main charge of robbery with violence. His co-accused was also acquitted of the offence charged in the alternative count but the appellant was convicted in the alternative count. He was sentenced to pay a fine of KShs.100,000 in default to serve eight (8) months imprisonment.

3. The appellant was dissatisfied with his conviction and sentence hence this appeal. In his amended petition of appeal, he advanced two grounds of appeal. He complained that the trial magistrate erred in law and fact by denying him an opportunity to cross examine his co-accused which prejudiced his defence and led to a mistrial and by misapprehending the law and facts of the case leading to an erroneous conviction and sentence.

4. By consent of the parties, the appeal was prosecuted by way of written submissions which both parties duly filed. The submissions were highlighted before me on 22nd November 2021 by learned counsel *Mr. Wangila* who represented the appellant and learned prosecuting counsel *Mr. Chebii* who appeared for the respondent.

5. Briefly, it was submitted on behalf of the appellant that the trial court's failure to give him an opportunity to cross examine his co accused who gave incriminating evidence against him caused him prejudice as it violated his right to a fair trial under *Article 50* of the *Constitution* and *Section 208 (3)* of the *Criminal Procedure Code;* that the trial court's failure to accord him an opportunity to cross examine his co-accused caused him injustice and for this reason, his conviction should be quashed. For this proposition, he placed reliance on the persuasive authority of ***Harrison Ochilo V Republic [2020] eKLR***.

6. Further, citing the case of ***APC Rashid & Another V Republic, [2012] eKLR***, *Mr. Wangila* submitted that the appellant's conviction was wrong as the evidence on record did not prove the essential elements of the offence which were; knowledge of plans to commit the felony in question or that the offence was being committed and the appellant's failure to take steps to prevent its commission or completion. Counsel submitted that the appellant only became aware of the offence after it had been committed. He urged the court to find merit in the appeal and allow it as prayed.

7. The appeal is contested by the state. Learned prosecuting counsel *Ms. Kibathi* who authored the written submissions and learned prosecuting counsel *Mr. Chebii* who gave oral highlights of the said submissions supported the appellant's conviction and sentence. They submitted that the appellant knew that a felony was going to be committed or was being committed as there is evidence to show that he heard an alarm go off on the night the offence was committed and he failed to employ reasonable means to prevent its commission or completion.

8. It was further submitted that the appellant's co-accused (DW1) did not implicate the appellant in his evidence and that therefore, the appellant's failure to cross examine DW1 did not occasion him any prejudice. It was thus the respondent's prayer that the appeal be dismissed in its entirety for lack of merit.

9. I have carefully analysed and re-evaluated the evidence on record as required of me as the first appellate court bearing in mind that unlike the trial court, I did not have the benefit of seeing and hearing the witnesses testify. See: ***Okeno V Republic, [1972] EA 32.***

10. I have also considered the rival submissions made on behalf of the parties and the authorities cited. Having done so, I find that only two issues emerge for my determination. These are;

i. Whether the appellant's failure to cross examine his co-accused led to a miscarriage of justice.

ii. Whether the prosecution proved its case against the appellant in the alternative count beyond any reasonable doubt.

11. Starting with the first issue, it is not disputed that the appellant's co-accused testified as DW1 in support of his defence and that he was not cross examined by the appellant. The trial court's record confirms that DW1 was only cross examined by the prosecution. The record is however silent why the appellant did not cross examine DW1.

12. The appellant has argued that DW1 gave incriminating evidence against him in that he claimed that all security guards had radio call gadgets and that after being notified of the robbery, he called the main gate where the appellant was supposed to be on duty and there was no response; that the trial court's failure to accord him an opportunity to challenge this evidence by way of cross examination violated his rights under *Article 50* of the *Constitution* and *Section 208 (3)* of the *Criminal Procedure Code.*

13.Section 208 (3) of the *Criminal Procedure Code* is in the following terms:

> **"If the accused person does not employ an advocate, the court shall, at the close of the examination of each witness for the prosecution, ask the accused person whether he wishes to put any questions to that witness and shall record his answer."**

14. It is evident from the above provision that in cases where an accused person is unrepresented, the trial court has a duty to inform him of his right to cross examine prosecution witnesses. A plain reading of this section reveals that the duty of the trial court is limited to informing the accused of his right to cross examine prosecution witnesses and does not apply to defence witnesses. *Section 208 (3)* of the *Criminal Procedure Code* does not therefore aid the appellant's argument.

15. That said, I entirely agree with the appellant's submission that the right to cross examine witnesses including an accused person's co-accused is a fundamental tenent of the right to a fair trial which is protected under *Article 50 (2) (k)* of the Constitution. This Article guarantees an accused person the right to adduce and to challenge evidence.

Though the appellant claims that the trial court denied him an opportunity to cross examine DW1, he has not explained how he was denied that opportunity. He has not claimed for instance, that he sought to cross examine DW1 but the trial court refused him permission to do so. The record does not show whether or not the applicant requested to cross examine DW1.

16. That notwithstanding, it is clear that the appellant was unrepresented during the trial and may not have known about the existence of his right to cross examine his co-accused and in such circumstances, the trial court had a duty to inform the appellant about his aforesaid right.

17. In ***Tedium Roger Leneni Mzungu & Another V Republic, [2007] eKLR***, a Court of Appeal decision which was followed by *Musyoka, J* in ***Harrison Ochilo V Republic, [2020] eKLR***, the court held that where the evidence of a co-accused incriminated the appellant, the failure to give the appellant an opportunity to cross examine his co-accused amounted to a denial of a fundamental right which was fatal to a conviction. The court was however clear that a court first must scrutinize the nature of the evidence adduced by an appellant's co-accused to ascertain whether it incriminated an appellant to enable it determine whether failure to test that evidence by cross examination prejudiced the appellant.

18. In this case, I have read the evidence of DW1 and I am unable to agree with the appellant's submission that the evidence incriminated him in the alternative count for the following reasons.

First, it is clear from the evidence that the appellant in his defence admitted to having had a radio call gadget on the material night which he allegedly used in trying to alert the security guards in Sector 2 and Sector 10 about the alarm.

Secondly, it is also clear that when PW2 called the main gate which was being manned by among others, the appellant, the robbery had already occurred and the police were already at the scene. In the premises, I am unable to see how DW1's evidence incriminated the appellant as alleged.

19. Having found as I have above, i am satisfied that the trial court's omission to inform the appellant of his right to cross examine DW1 did not prejudice the appellant's defence or his right to a fair trial and did not result in a miscarriage of justice. I find that this is an omission which is curable under *Section 382* of the *Criminal Procedure Code*. Ground 1 of the appeal therefore fails.

20. Turning to the second issue, the particulars supporting the alternative count alleged that on 12th June 2014 at Advent University in Ongata Rongai Township within Kajiado County, knowing that a person was committing a felony namely, robbery, the appellant failed to use all reasonable means to prevent the commission or completion thereof.

21. The offence of neglecting to prevent a felony is created by *Section 392* of the *Penal Code* which states as follows:

> **"Every person who, knowing that a person designs to commit or is committing a felony, fails to use all reasonable means to**

prevent the commission or completion thereof is guilty of a misdemeanour." [Emphasis added]

22. From the foregoing, it is evident that in order to sustain a safe conviction in offences charged under *Section 392* of the *Penal Code*, the prosecution must prove to the required legal standard that the accused person had knowledge of the design to commit a felony or that one was being committed and he failed to use reasonable means to prevent the commission or completion of the felony.

I cannot put it better than *Achode, J* did in the case of ***APC Rashid & Another V Republic, [supra]***, which is referenced by both parties when she stated as follows:

> **"A construction of Section 392 of the Penal Code however shows that it is not sufficient for the prosecution to prove that ambit of felonious offences, occurred. The more important question is whether any of the two appellants knew that this felony was going to occur, hence at the design stage or witnessed it in progress. It is this limb of the offence which provides the** *mens rea* ***even as the third limb failure to take reasonable measures to stop the commission of the felony provides the*** *actus reus.***"**

23. To resolve the second issue, it is important to summarise the evidence presented before the trial court to ascertain whether it disclosed the ingredients of the offence for which the appellant was convicted.

The prosecution's case in the lower court was that on the night of 12th June 2014 at about 2.00 am, PW1 and his wife (PW3) together with members of their family were asleep in their house located within Adventist University in Ongata Rongai when they were awakened by a loud bang. They switched on the lights in their bedroom and saw four men enter their bedroom armed with an assortment of weapons. The four men robbed them of several valuables and cash money all valued at KShs.4,447,068.

24. After the robbers left, PW1 called PW2 and told him what had happened. PW2 then called the guards stationed at the main gate who included the appellant and notified them about what had happened. He also reported the matter to the police. In cross examination, PW1 confirmed that his house was more than a kilometre away from the main gate. PW11, the investigating officer testified that the robbers appeared to have gained entry through an electric fence which was behind PW1's gate and not through the main gate where the appellant was supposed to be on duty.

25. PW6 recalled that on the material night, he was on duty at the main gate together with the appellant, *Mr. Nyamao* who was in charge of Radar Security Guards and one *Mr. Obonyo* (PW7). At about 1am, they heard an alarm go off from sector II. The appellant instructed *Mr. Nyamao* to raise his guards at sector II which he failed to do. He then used his radio to raise sector II but there was no response. Later at 3am, they received PW2's phone call reporting the robbery in PW1's house.

26. When cross examined by the appellant, PW6 and PW7 confirmed that if PW2 had not called them, they would not have known that a robbery had occurred. Other security guards testified as PW9 and PW10 and only testified about their duty posts that night and how they learnt about the robbery in PW1's home.

27. On his part, PW11 recalled that he visited PW1's home in the course of his investigations. On observing the scene, he noted that the institution had been divided into 12 sectors and PW1's house was in sector 6.

28. He also noted that the robbers had accessed the institution by tampering with an electric fence which was connected to an alarm system. An alarm would go off if there was interference with the electric fence. After his investigation, he concluded that the appellant had failed to act when the alarm went off at the time the robbers were gaining access to PW1's compound and for this reason alone, he charged him with the offence for which he was convicted.

29. When placed on his defence, the appellant in a sworn statement admitted having been on duty at the main gate on the night PW1 was robbed. He claimed that when the alarm went off at around 1:20am, he used the radio call to alert the guards at Sector 2 and Sector 10 that the electric fence had triggered an alarm. He did not bother with the matter any further since he hoped the alarm response car would show up and in any event, the alarm stopped after 5 minutes. At about 3am, he received a call from PW2 who informed him that PW1 had been attacked by robbers in his house. In a nutshell, he denied having had Knowledge of plans to rob PW1 or that the offence was being committed.

30. Having summarized the evidence presented before the trial court, I wish to reiterate at the outset the cardinal principle of law that in criminal cases, the onus to prove the charges preferred against an accused person rests with the prosecution throughout the trial and never shifts to an accused person. An accused person does not have an obligation to prove his innocence.

31. From my analysis of the evidence on record, I find that though the prosecution managed to prove that a felony namely a robbery was committed on the night in question within the institution in which the appellant and others were employed as security guards, the prosecution failed to adduce evidence to prove that the appellant had prior knowledge of the design to commit the offence or that it was in the process of being committed and failed to take steps to prevent its commission or completion. PW6 and PW7 who had been on duty together with the appellant confirmed that had PW2 not called them, they would not have known that an offence had been committed.

32. In my view, the learned trial magistrate erred by convicting the appellant on the basis of his admission that he heard the alarm go off but did not alert the security company to send its alarm car response team to find out what was happening. This statement by the appellant did not amount to an admission that he Knew that an offence was about to be committed or was being committed and he failed to use reasonable means to prevent its commission or completion. The evidence on record shows that it was possible for the alarm to be triggered by other things other than the entry of intruders into the compound.

33. The learned trial magistrate appears to have based her decision on a presumption that the appellant on hearing the alarm should have known that an offence was about to be committed and should have been more proactive in forestalling its commission. There is however no room for presumptions in criminal trials. The law is that the guilt of an accused person must be proved beyond any reasonable doubt. The appellant's conduct may have demonstrated irresponsibility or negligence on his part but it does not amount to an offence as defined in *Section 392* of the *Penal Code*.

34. I wholly agree with the finding by *Majanja, J* in ***Joseph Muriithi Nyaga & 2 Others V Republic, [2013] eKLR***, when he spoke to the test of establishing whether an offence under *Section 392* of the *Penal Code* had been established. The Hon. Judge stated as follows:

> **"In order to sustain a conviction, the prosecution must prove "knowledge" of the design to commit or commission of the felony. Thus, the test is not akin to one in negligence cases; it is not enough to show that the accused, 'ought to have known'. But that the person actually knew of the design to commit a felony and failed to prevent it. The fact of knowledge is a question of fact."**

35. As demonstrated above, the evidence adduced by the prosecution in this case does not meet the above threshold. The evidence did not establish as a fact that the appellant had knowledge of a design to rob PW1 or that the offence was being committed and he failed to take reasonable steps to prevent its commission. If the appellant did not have knowledge about commission of the offence, then he cannot be validly accused of having failed to use reasonable means to prevent its commission.

36. Given the foregoing, I am satisfied that the appellant's conviction was unsafe. I accordingly find merit in this appeal and it is hereby allowed. The appellant's conviction is consequently quashed and the resultant sentence set aside.

37. As the appellant paid the fine that was imposed by the trial court, the amount paid as fine should be refunded to him.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF DECEMBER, 2021

C. W. GITHUA

JUDGE

In the presence of:

Mr. Wangila for the appellant

Ms Ndombi for the respondent

Appellant present in person

Ms Karwitha: Court Assistant