REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO.112 OF 2016

(Appeal Originating from Eldoret CM's Court Cr.No.1202of 2014 by: Hon. C. Obulutsa – S.P.M.)

CORNELIUS KIPLAGAT CHIRCHIR.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

J U D G M E N T

Cornelius Kiplagat Chirchir was convicted for the offence of robbery with violence contrary to Section 296(2) of the Penal Code in CM.Cr.Case No.12012014 by Hon. Obulutsa SPM.

The particulars of the charge were that on 19/2/2014 at Kuruka Farm in Uasin Gishu County, jointly with another not before the court, robbed Julius Kipkosgei Bett of Kshs.800/=, Motor Cycle Reg.No.KMDB 480L frame MD2421B Z3D W46178 Make Bajaj B M 150 Boxer, a mobile phone make Nokia and National Identity Card all valued at Kshs.95,800/= the property of Julius Kipkosgei Bett and immediately before the time of such robbery, wounded the said Julius K. Bett.

After a full trial, the court found the appellant guilty of the offence as charged, convicted and sentenced him to suffer death.

Aggrieved by both conviction and sentence, the appellant filed this appeal citing the following amended grounds;

1. That the court erred by failing to consider the glaring inconsistencies between the particulars of the charge and the evidence tendered;

2. That the court erred by convicting the appellant on identification evidence without evidence of description of the appellant;

3. That the court erred by relying in a flawed identification parade;

4. That the court erred by relying on tracking records that were not produced in evidence;

5. That the death sentence imposed by the court is unconstitutional.

The appellant therefore, prays that the court do quash the conviction, set aside the sentence and set him at liberty. The appellant filed written submissions which he adopted.

The first ground the appellant has argued is that the prosecution case was full of inconsistencies and evidence of witnesses did not tally for example, that the witnesses, PW1 and PW2 gave different registration numbers of the motor cycle, that is, KMDB 480L or KMJB 480L; that the witness testimonies differed as regards when the incident occurred, on 16/2/2014 or 19/2/2014 or 19/8/2014 or on 21/8/2014. He urged that the charge and evidence are at variance and hence the charge is defective and not curable under Section 382 of the Criminal Procedure Code; that the variation in the charge and evidence prejudiced the defence case.

On ground two, the appellant submitted that he was convicted based on the evidence of PW1 and PW2 who identified him on a parade but that though PW1 claimed to have stayed with the appellant for long, he never gave a physical description of the appellant to the police nor did PW4 do it and that therefore the identification on the parade was not conclusive; that the conduct of the parade violated the provisions of the Standing Orders Cap.46 LoK; that the parade was conducted in an open area at the canteen which should not have been the case; that the witnesses never touched on him as is required by the Rules.

On ground four and five, the appellant argued that PW1 never told the police that he gave out the appellant's name as Cornelius; that it is under her the number used to track the appellant was found because PW1 and PW4 never mentioned having given the said number to the police when they made the first report; that though PW6 claimed to have recovered the appellant's identity card, none was produced in evidence, from the Safaricom as to how the appellant was tracked; that failure to call the informer as a witness was a major lapse in the prosecution evidence and prejudiced the defence case; that PW6 also contradicted himself when he claimed to have recovered a motor cycle in the appellant's house but during cross examination, he denied having done so.

As regards the death sentence imposed on him, the appellant submitted that death sentence was declared unconstitutional by the Supreme Court in the *Muruatetu case* hence the conviction ought to be quashed and the sentence set aside.

Mr. Mokua, leaned counsel for the State, opposed the appeal by arguing that the charge sheet indicates that the offence was committed on 19/2/2014, that the appellant was arraigned before court on 19/8/2014. He urged that, that is a mere error because by then, the appellant had been charged and the date of 16/2/2011 is not correct; that PW1 and 2's evidence is corroborative; that PW1 gave his motor cycle to PW2 and was called on the same day and informed that it had been stolen; that the error does not prejudice the appellant.

As regards the registration number of the motor cycle, counsel replied that the report to police station tallies with the logbook produced in court by the complainant; that the error in the registration number was a typing error; that on the issue of identification, counsel submitted that failure to give a description of an accused to police before the parade does not render the parade worthless; that the parade was conducted in accordance with the police standing orders and witnesses identified the appellant by touching him.

As regards tracking forms, counsel submitted that, they do not form part of the ingredients to a charge of robbery with violence but only led to appellant's arrest; that the appellant was called and where he was and he responded which led to his arrest. He urged the court to affirm the conviction.

This being a first appeal, the court is required to evaluate all the evidence tendered in the trial court, analyze it and arrive at its own conclusion. However, the court has to make some allowance taking into account the fact that this court did not have an opportunity to see or hear the witnesses. The trial court however had that opportunity. I draw guidance from the decision in *Okeno v Republic (1972) EA 32*.

The prosecution called a total of six witnesses. PW1 Julius Kipkosgei Bett, the complainant, was a motor cycle rider and was employed by Mathew Kiptoo at junction to Moiben. On 16/2/2014, while at work at the junction, while with a motor cycle KMJB 480L Boxer, was called by Cornelius and they agreed on a price of Kshs.300/= for a return trip from the junction to Sesia. When they reached Kungar, the appellant told him he knew of a shortcut and the one he was looking for had called him and so they turned. On the way, the appellant pushed him and he fell. PW1 got up and ran but the appellant chased him, hit him with a helmet and other people joined him and he lost consciousness; when he came back to, he found many people surrounding him and he was taken to Moi Referral Hospital. The appellant escaped with the motor cycle but PW2 was later called to the police station to identify the appellant on an identification parade.

PW2 Mathew Kiptoo Chepkok gave his motor cycle KMDB 480L to PW1 who does motorcycle business (boda boda services); that on 19/2/2014 at 2.00 p.m., he left the motor cycle with PW1 who told him that he had got a client; PW2 called PW1 at 7.00 p.m. but could not get him.

At 8.00 p.m. he learnt from a friend that his motor cycle had been stolen and the rider hijacked. He went to the scene with some of his friends and found PW1 being rushed to Mot Teaching & Referral Hospital. He produced documents to show he had bought the motor cycle on 11/7/2012 Chandauni Entreprises Ltd and the Log Book.

PW3, Albert Kipchumba who was officer in charge of Bumala Patrol Base conducted the parade in respect of the appellant; that he informed the appellant the purpose of the parade that he looked for people of same age and size as the appellant and that they were not seen by the witnesses before the parade; that the appellant chose, that he was identified by PW1 Kipkosgei but he was dissatisfied; that a second witness also identified him and he still complained that he was never asked to open his house.

PW4, Jonathan Kiptus Kosgei is also a motor cycle rider at Moiben junction; that on 19/8/2014, PW1 informed him that there was a customer at Sinai and he referred him to the appellant; that he discussed with the appellant a price of Kshs.400/= but he declined PW4's offer and insisted that Kipkosgei takes him and pointed at PW1's motor cycle; that the appellant boarded the motor cycle and they left. He later received a call at 7.00 p.m. that Kipkosgei had been attacked by the customer and strangled and he proceeded to the scene. He found PW1 being taken to hospital. PW4 was able to identify the appellant because he talked to him and he later identified him on a parade.

PW5 John Suter, a Clinical Officer at Huruma Sub-County Hospital examined PW1 who had a history of assault. He noted that PW1 had several healing bruises on the left side of the head 3 cm, on the face, neck, inflicted by both blunt and sharp objects. He assessed the degree of injury as harm.

PW6 Sgt. Philip Etyang of Kapsoya Police Station was assigned to investigate this case on 21/8/2014. He saw the complainant was injured and issued him with a P3 form. He produced the receipt and log book of the stolen Motor Cycle (P.Ex.2 & 3); that PW1 reported having communicated with the robber on phone and he got the cellphone contact and when he sent a message, it showed the owner of the number to be Cornelius Kiplagat Chirchir. PW6 called the number and the owner said he was at Kipkaren near Langas. PW6 went to the area and through a police informer, found the residence. On 5/3/2014, they contacted the CID office and traced the house where they found a motor cycle. They found an identity card with names of Cornelius Kiplagat Komu and arrested him. He said that although the complainant also lost his phone, he got information from Safaricom.

When called upon to enter his defence, the appellant opted to make an unsworn statement in which he stated that on 4/3/2014, he was asleep when he heard a knock on the door. On opening, he found police officers who threatened him with guns. They asked for a gun, searched but found nothing. He was taken to police station, was asked about a motor cycle. He was placed on a parade and police said he was the one. He was told to sign.

I have considered all the evidence tendered in the trial court, the grounds of appeal and the rival submissions.

To prove a charge of robbery with violence, under Section 292(2) of the Penal Code, the prosecution has to establish the existence of the following elements:

(1) That the offender was armed with a dangerous or offensive weapon or instrument; or

(2) That the offender was in company with one or more persons, or

(3) That the offender at, or, immediately after the time of robbery, the offender wounds, beats, strikes or uses other personal violence to any person.

See *Oluoch v Republic (1985) KLR*. The prosecution only needs to prove one of the above elements.

The issues for consideration:

(1) Whether the charge of robbery with violence was proved;

(2) Whether the charge sheet is defective;

(3) Whether the appellant was properly identified.

Whether an offence of robbery with violence was committed; PW1 explained to the court how he was hired by a passenger to be transported to Sesia whereby the passenger turned on him, pushed him, made him fall, chased him, hit him with a helmet and that other people joined the attacker, assaulted him till he fell unconscious. He was later treated for the injuries sustained and a P3 form was produced by PW5. PW1 on coming to, found the motor cycle was nowhere. PW4 also a 'boda boda' rider confirmed having been with PW1 when he was hired. He found him injured and the motor cycle was nowhere.

PW2, the owner of the motor cycle produced the receipt and logbook for the motor cycle. The said motor cycle was not recovered. There is therefore ample evidence on record that PW1 was robbed by a motor cycle. In the process, violence was visitedon PW1 and he was seriously injured. PW1 stated that at the scene of robbery, the robber was joined by many others. The attackers were more than one. The three ingredients that form the offence of robbery were all satisfied even though the prosecution only needed to prove one.

Whether the charge sheet was defective:

The appellant complained that in the charge sheet, the registration number of the motor cycle is different from what the witnesses told the court. In PW1's evidence, it indicates that he told the court that the motor cycle that was stolen was Boxer KMJB 480L. PW2 on the other hand said it was KMDP 480L.

I have seen the handwritten testimony of the witnesses. PW1 told the court that the stolen motor cycle was KMDB 480L which is the registration number as per the log book. As for PW2, the court records KMDP 450L but he produced the log book which shows that the particulars in the logbook was still registered in the names of the previous owners. In my considered view, the recording of the registration number as KMDP instead of B at the end seems to be only a matter of pronunciation. It is not uncommon to have a person who have problem with pronouncing 'B' and 'P', 'd' and 't' due to the mother tongue. PW1's evidence tallies with the registration number in the log book and I do not find any major inconsistency between the charge sheet and the evidence. It is a defect that cannot render a conviction void. It is an error that is curable under Section 382 of the Criminal Procedure Code which reads:

"Section 382

Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

The defect is not prejudicial to the defence. PW1's evidence corroborated the contents of the Log Book.

Whether the appellant was identified as the robber?

The appellant has faulted the manner in which the parade was conducted and complained that PW1 and 4 never gave the description of the assailant before they attended the parade.

What is the purpose of an identification parade?

In *Samuel Kilonzo v Republic (2014) eKLR* the court said:

"The purpose of an identification parade as explained in Kinyanjui & 2 others v Republic (1989) KL 60 is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify, and for a proper record to be made of that event to remove possible late confusion.

It is precisely for the reason that courts have insisted that identification parades must be fair and be seen to be fair. Scrupulous compliance with the rules in the conduct of identification parades is necessary to eliminate any unfairness or risk of erroneous identification. In particular, all precautions have to be taken to ensure that a witness's attention is not directed specifically to the suspect instead of equally to all persons on the parade. Once a witness has properly identified a suspect out of court, the witness is allowed to identify him on the dock on the basis that such dock identification is safe and reliable, it being confirmed by the earlier out of court identification."

Identification parade procedures are regulated by Police Force Standing Orders now under the National Police Service Act 2011. These procedures were laid out in the case of Republic vs Mwango s/o Manaa (1936) 3 EACA 29 and Ssentale v Uganda (1968) E.A.L.R 365. The rules include the following:

· *The accused has the right to have an advocate or friend present at the parade;*

· *The witness should not be allowed to see the suspect before the parade and the suspects on parade should be strangers to the witness;*

· *Witnesses should be shown the parade separately and should not discuss the parade among themselves;*

· *The number of suspects in the parade should be eight (or 10 in the case of two suspects);*

· *All people in the parade should be of similar build, height, age and appearance, as well as of similar occupation, similarly dressed and of the same sex and race;*

· *Witnesses should be told that the culprit may or may not be in the parade and that they should indicate whether they can make an identification; and*

· *As a recommendation, the investigating officer of the case should not be in charge of the parade, as this will heighten suspicion of unfair conduct in the courts.*

It is apparent that PW3 did not at all follow the procedure provided under the Police Force Standing Orders. He could not tell the court the exact warning he gave the appellant, or that the appellant could have an advocate or relative at the parade. It is also unknown what PW3 told the witnesses. He did not state how the appellant was identified. I am satisfied that the parade was of no evidential value and cannot be relied upon.

The robbery took place on 19/2/2014. The appellant was arrested about two weeks later on 5/3/2014. According to PW6, the investigating officer, they traced the appellant through his phone because on the day of the robbery, he had called PW1. However, PW1 never mentioned that the appellant had at one time called him; that PW1 lost his phone during the robbery and PW6 went on to state that they traced the appellant through Safaricom. PW1 never mentioned in his statement that he had lost his phone during the robbery or that he knew the appellant to be Cornelius. In any event, since PW1 did not have his phone, it was only prudent that PW6 get the data from Safaricom to support his evidence on how the appellant was traced through a call to the complainant. So far, there is no proof that the appellant had called the complainant on phone. Since the appellant was arrested two weeks later and I have found that the conduct of the parade was irregular, the data from Safaricom was very crucial in establishing the contact of the appellant to the complainant on the material day.

PW1 told the court that he was hired by the appellant at about 5p.m; that he had spent some time with the appellant. Similarly, PW4 who worked with PW1 at the junction said that, in fact, the appellant had been referred to him by PW1 at one time because PW1 did not have a motor cycle but they did not agree on the price and the appellant insisted on being carried by PW1. PW4 also said that he was able to identify the appellant because he stayed with him for long and that they talked. Although it is a good practice for a victim to give a description of the offender, sometimes the victims will not offer a description unless prompted to do so by the police who should know what is required in terms of identification. In this case, though PW1 and PW4 did not give a description of the assailant, I am satisfied that they were able to positively identify the appellant because the incident took place during the day, about 5.00 p.m.

In the end, I am satisfied that the appellant lured PW1 into giving him a ride on his motor cycle, attacked him and the appellant was joined by other robbers. PW1 was seriously injured in the process and the motor cycle stolen. I am satisfied that the prosecution proved the offence of robbery with violence beyond reasonable doubt. The conviction is sound and I affirm it.

Whether the sentence is excessive:

The appellant was sentenced to death. The Supreme Court in *Francis Warioko Muruatetu and others v Republic Pet.15 & 16/2015*, declared the mandatory death sentence under Section 204 of the Penal Code to be unconstitutional. I hereby set aside the death sentence. This court has discretion to mete any sentence taking all the circumstances into consideration. The appellant was treated as a first offender, he pleaded for leniency. I take into account the circumstances of the offence, I will sentence the appellant to 25 years imprisonment. The appeal succeeds to that extent.

Dated and Signed at *NYAHURURU* this *20th* day of *December,* 2019.

.....

R.P.V. Wendoh

JUDGE

Delivered by *Justice H. Omondi (Mrs.)* at *Eldoret* this *30th* day of *January*, *2020*

PRESENT:

Busienei – prosecution counsel

Komen – court assistant

Appellant - present