REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 107 OF 2018

(CONSOLIDATED WITH

HCRA.108/18, HCRA. 109/18, HCRA. 110/18** and **HCRA.111/18

JOHN MUTUA KIMATU alias GITAI.......................................1ST APPELLANT

PETER GITUKU CHARLES...2ND APPELLANT

STEPHEN KIOKO MWEA...3RD APPELLANT

PETER KITAVI MUIA...4TH APPELLANT

PATRICK KIMEU MWANZIA...5TH APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(Being an appeal from the conviction and sentence passed by D. Orimba (SPM)

in Kangundo Criminal Case 428 of 2017 on 29.10.2018)

JUDGEMENT

1. The appellants herein, **JOHN MUTUA KIMATU alias GITAI, PETER GITUKU CHARLES, STEPHEN KIOKO MWEA, PETER KITAVI MUIA and PATRICK KIMEU MWANZIA** were jointly charged with two counts of the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code while the 1st and 2nd appellants faced an alternative charge of handing stolen goods contrary to Section 322(2) of the Penal Code.

2. After the trial, the learned trial magistrate on 7th September, 2018 found that it was undisputed that a robbery occurred on 22nd and 23rd April, 2017; that several items were recovered in the process; that the watchman to the bar was injured and that all the appellants were arrested on 23rd April, 2018. The trial court found that circumstantial evidence led to the identification of the appellants and that the prosecution found that the appellants had raided Frenzy Bar and having found them guilty, convicted them accordingly and sentenced the appellants to 25 years imprisonment each in respect of the two counts and the sentences were to run concurrently. The appellants were dissatisfied with the findings of the trial court

and lodged this appeal where they challenged the failure to tender exhibits; the failure to prove the prosecution case and the dismissal of their defence.

3. This is a first appellate court. I am expected to analyze and evaluate afresh all the evidence adduced before the lower court and draw my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where 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."***

4. In that regard, the evidence of the trial court was from six witnesses as follows:- Pw1 was Robert Mweu Kimatu who testified that he was on duty at Frenzy Bar on 22.4.2017 when he heard noises and saw eight persons armed with pangas and metal bars who broke the door and took a DVD, his jacket and beer and they left. He testified that there was a second raid the following day whereby he saw the 1st appellant wearing his stolen jacket and that the 1st appellant was armed with a metal bar and who assaulted him. He testified that he and his colleague followed the thugs and cornered them and with the assistance of the police they followed them to Kangundo where they dropped the beer and later the appellants were arrested. It was his testimony that he believed that the thugs were from the same group as they were found with the things that were stolen the previous day. When recalled he presented the P3 form in respect of the injuries suffered. On cross examination, he testified that the 2nd and 3rd appellants dropped things on the road when chased by the police and ran away. On reexamination, he testified that he identified the 1st and 2nd appellants as they used to frequent the bar together.

5. Pw2 was Robinson Kilonzo who testified that on 22.4.2017 he was asleep when he was alerted by Pw1 that items had been stolen from his bar and he then alerted the police who in the process of tracking the thugs found two persons carrying two keg beer jars and when they saw the police the persons dropped the loot and fled. He testified that the thugs had been to his bar severally and knew them. He stated that the 1st appellant was wearing the same cloth that he had worn the previous day when he visited the bar. He testified that the 3rd appellant was found at his home after following his footsteps, and that the 2nd appellant had left one of his shoes while running. The 1st appellant was seen by members of the public entering his house through a window and he was arrested. It was his testimony that Pw1 was injured. On cross examination, he testified that the 1st appellant was the one who hit Pw1; that the 2nd appellant was arrested when he tried to locate his lost shoe; that the 4th appellant was arrested in his house and that he bumped into the 5th appellant carrying stolen items and being a well-known person he was traced to his house where he was found with the 4th appellant.

6. Pw3 was Cpl George Wanjohi who testified that on 22.4.2017 he received a report that the subject bar had been attacked and proceeded to track the thugs who together with his colleagues he was able to pursue but however the thugs dropped a shoe, a keg and maasai bedsheet and fled. He testified that he was led to a house where he found the 3rd to 5th appellants sleeping and found muddy shoes raising some suspicion as to their previous movements to which the appellants failed to explain. He testified that one of the persons who had left his shoe came back to look for it and he was identified as the 2nd appellant who was promptly arrested. He stated on cross examination that there was no need for identification parade and that the 2nd appellant was found wearing one single shoe on one leg while the other leg had no shoe; that the 3rd appellant was connected to the theft as he was in the company of the 4th and 5th appellant and that he also had muddy shoes; that the 4th appellant was traced vide his footsteps from the scene and that

the 5th appellant dropped exhibits and ran away.

7. Pw4 was Dominic Mbindyo the clinical officer who presented the P3 forms in respect of examination that was carried on Pw1 on 24.4.2017 and assessed the injury as harm. The P3 form was tendered in evidence.

8. Pw 5 was Pc Alex Kibet who testified that he received a report that the subject bar had been broken into and on arrival at the bar he found that Pw1 had been injured. He testified that he was along the road when he saw six people carrying a keg tank and who dropped the same and ran in different directions. He testified that the footmarks led them to the house of 3rd to 5th appellants where they were found sleeping and had muddy shoes and who were arrested. He testified that at the scene he recovered a black boot that was traced to the 2nd appellant who was found without a shoe and he was arrested as he tried to trace the boot. On cross examination, he testified that fresh mud in the shoes of the 3rd to 5th appellants was found.

9. **Pw6** was **Sgt Joseph Muriuku** who testified that he received a report of a robbery at a bar on 22.4.2017 and he went to the said bar and confirmed that items had been stolen and that the padlock ad been cut. He testified that the second attack on 23.4.2017 was reported to him and that the appellants were tracked, traced and arrested. On cross examination, he testified that the appellants were traced using their footmarks and muddy shoes.

10. The trial court found that the appellants had a case to answer and were put on their defence. The 1st appellant testified that he was arrested on 25.4.2017; the 2nd appellant stated that he was arrested on 23.4.2017; the 3rd to 5th appellants stated that they were arrested on 23.4.2017 while sleeping at 5 am.

11. In a case of robbery with violence, the prosecution must prove beyond reasonable doubt that:

(i) There was theft of property;

(ii) There was violence involved;

(iii) There was a threat to use a deadly weapon or actual use of it; *and*

(iv) The accused took part in the robbery.

12. As to whether there was theft of property, there is evidence of Pw1 and Pw2 that the subject bar was attacked by thugs who robbed property from the subject bar. The offence was investigated by Police according to the evidence of Pw6. I have seen no cause to doubt the evidence of these witnesses. In these circumstances, I find as a fact that the prosecution has proved beyond reasonable doubt that theft was committed on 22.4.2017 and 23.4.2017 to the prejudice of PW1 and Pw2. Some of the stolen items from the bar including a jacket belonging to the watchman were recovered a few hours after the robbery.

13. As to whether or not there was violence, PW1 testified that he heard a bang on the door. PW1 testified that he was hurt and this was evidenced by the P3 form. It is my considered opinion that these acts of the attackers upon PW1 amounted to violence within the meaning of section 295 of the Penal Code. The second ingredient of the offence has also been proved beyond reasonable doubt.

14. This leads me to the issue of whether or not there was use of an offensive weapon or a threat to use it. A deadly weapon is defined in section 89 (4) of the Penal Code as any article made or adapted for use for causing injury to the person, or intended by the person having it in his possession or under his control for such use. From the evidence of Pw1 and Pw4, the P3 form that was tendered in evidence, it is clear that the use of an offensive weapon was proved by the prosecution. I find that this ingredient of the offence has been proved beyond reasonable doubt. As to whether the appellants took part in the robbery, the whole issue hinges on the question of identification made by Pw1 and Pw2 as corroborated by Pw3, Pw5 and 6.

15. I will start with identification evidence. It is contained in the testimony of Pw1 and Pw2. PW1's evidence is that he saw the 1st appellant who was in company of seven others and that the appellants had been regular customers to the bar. It was PW2's evidence that the appellants were customers and that the 1st appellant was identified by the clothes he wore the previous day; it was Pw3 and Pw5 who stated that the appellants were traced vide their footmarks; that the 2nd appellant was traced vide his lost shoe and more specifically, the 3rd to 5th appellants had muddy shoes that they could not explain about their movements prior to going to bed. Their evidence brings into focus the issue of identification. In determining the correctness of identification, I have taken into account the following factors:

(i) The length of time the suspects was under observation;

(ii) The distance between the witness and the suspect;

(iii) The lighting conditions at the time; and

(iv) The familiarity of the witnesses with the appellants.

(v) The circumstances before and during the arrest of the appellant and the circumstances after the theft.

16. As regards the length of time the thugs was under observation, the evidence is not clear. And for the distance between them, it is not clear. As for the source of light at the time there is no evidence. As to the familiarity of the witnesses with the appellants, the appellants are known to be regular customers at the bar. The appellants were said to have had muddy shoes; were traced vide their footmarks while the 2nd appellant had only one shoe and was then searching the other missing shoe. In their defence the appellants denied the charges and maintained that they had been framed. I find the identification was made under favourable circumstances. In the instant case, the appellants were arrested few days after the incident and that some of them were well known to the watchmen. Some of the witnesses themselves had no doubt in the identity of the appellants as the persons who robbed Pw2's bar and injured Pw1. The witnesses stated that they had known them as they had been regular customers to the bar. Again the appellants were apprehended a few minutes after the robbery and that some of the stolen items were recovered after they were dropped by the fleeing appellants. The bar owner, police and the watchman while in pursuit of the robbers caught up with them and who dropped some items. These items were recovered and they followed the foot marks as it had rained and with assistance of the area assistant chief they arrested the appellants from their houses.

17. There is also the issue of the doctrine of recent possession of stolen property. The law is that if the accused is found in possession of stolen property for which he has been unable to give a reasonable explanation, the presumption arises that he is either the thief or the receiver of stolen goods. The evidence of PW2 proves beyond reasonable doubt that the keg was his. However he did not identify the same in court. I also accept as truthful the evidence of PW1 and PW2 that the keg was among the property robbed from the bar on 24.4.2017. Possession is of two types. It may be immediate or mediate. Immediate possession is possession retained personally; mediate possession or custody is possession retained for or on account of another. See: **A Concise Law Dictionary by P.G. Osborn, 5th Edn. At P.245.**

18. In the instant case, I am satisfied that the 3rd appellant had mediate possession of the keg in question. It was in his custody on account of the 1st and 2nd appellants. I am satisfied that the 3rd appellant was found in recent possession of the stolen jacket that belonged to Pw1 which he appropriated to himself. Once an accused has been proved to have been found in possession of stolen property, it is for the accused to give a reasonable explanation as to how he came by the said item. He will discharge this burden on a balance of probabilities, whether the explanation could reasonably be true. If he does so, then an innocent possibility exists which receives the presumption to be drawn from other circumstantial evidence.

19. In the instant case, the 3rd to 5th appellants have completely distanced themselves from the robbery by testifying that nothing was recovered from their house. The 3rd appellant gave no explanation about Pw1's jacket that was found on him. In view of the credible evidence of PW2, PW3, PW5 and Pw6 about what was found when the appellants were chased and what was found at the scene, I don't hesitate to say that the appellant's defences did not shake the evidence by the prosecution. The same have been destroyed by the credible evidence of the prosecution witnesses. I therefore reject the same. The keg was traced to the appellants within hours after the robbery. This is in my view strong circumstantial evidence, which corroborates PW1's evidence of identification under difficult conditions. In these circumstances I am satisfied that the appellants did take part in the robbery.

20. I now move to the issue of the identification parade that the appellants have repeatedly raised in their evidence. I am satisfied that the evidence on record supplements the primary evidence of identification as there was no need for the parade. I find that there was a joint action by the appellants in prosecuting a common purpose as stipulated in section 21 of the Penal Code. I agree with the finding by the trial court that the appellants participated in the robbery. They were arrested a few hours of the robbery and that some of the stolen goods were trace to them. It had rained that night and upon the police accosting them they fled but were arrested within minutes and there were telltale signs in the form of muddy shoes. The police officers and the bar owner had spotted the robbers who dropped the stolen items and ran. They pursued them up to their homes as they followed their foot marks as it had rained. A jacket belonging to the watchman was recovered. All the appellants were well known to the watchman and the bar owner as they were regular customers at Frenzy bar. The watchman gave out the names of the robbers when he lodged complaint to the police. I am satisfied that the appellants were properly identified and that the trial court properly rejected their defences. The conviction in my view was safe and there is no need to interfere with it. The robbers are said to have struck twice on two consecutive days. The watchman stated that during the first raid his jacket among other items at the bar was stolen and that he was able to identify the said jacket being worn by one of the appellants. This reinforces the complainant's evidence that the appellants had struck Frenzy bar twice. I am satisfied that the conviction of the appellants on the two counts of robbery with violence by the trial court was sound.

21. With regard to sentence, Section 296(2) provides for a death sentence and therefore the sentence meted upon the appellants is lenient. On reviewing all the evidence and the relevant factors relating to the sentence I find that considering the injuries inflicted on the victim and the fact that the maximum sentence for robbery with violence is death as was found in **Francis Matu Mwangi v Republic [2019] eKLR,** where the death sentence in respect of robbery with violence was upheld the sentence given is reasonable and lenient. Nevertheless in **Leonard Kipkemoi v Republic [2018] eKLR,** death penalty was reduced to 20 years from the date of sentencing having placed reliance on the case of **Francis Karioko Muruatetu & another v Republic [2017] eKLR.**

22. In this regard, section 354 of the Criminal Procedure Code allows the court to alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence. Looking at the circumstances and being guided by the Supreme Court in Francis Karioko Muruatetu (supra) I find the sentences imposed upon the appellants to be reasonable and lenient. The appellants' mitigation were duly considered by the trial court. The appeal on sentence therefore lacks merit.

23. In the result it is my finding that the appellants appeal lacks merit. The same is dismissed. The conviction and sentence is upheld.

It is so ordered.

Dated and delivered at **Machakos** this **29th** day of **January, 2020.**

D. K. Kemei

Judge