REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 58 OF 2019

VITALIS MUTHENYA MBINDYO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From the original conviction and sentence of Hon. J. Mwaniki (SPM) in Makueni

Principal Magistrate's Court Criminal Case No. 737 of 2015 delivered on 29th January, 2018).

JUDGMENT

1. **Vitalis Muthenya Mbindyo** the Appellant herein was charged with the offence of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code. The particulars being that the Appellant on 17th December 2015 jointly with others not before court armed with dangerous weapons namely pangas and wooden rods robbed **Gefferson Mwongela Mwiva** a mobile phone make TECNO T340 and Kshs. 1,700/= and at the time of such robbery threatened to use actual violence against the said **Gefferson Mwongela Mwiva**.

2. He faced an alternative count of handling stolen goods contrary to section 322(1) of the Penal Code. The particulars were that the Appellant on 18th December 2015 otherwise than in the course of stealing dishonestly retained one mobile phone make TECNO T340 the property of **Gefferson Mwongela Mwiva** having reason to believe it to be stolen.

3. He denied the charges after a full trial he was found guilty, convicted and sentenced to twenty (20) years imprisonment on the main count of robbery with violence.

4. The case of the prosecution was premised on the evidence of six (6) witnesses. **PW1 Gefferson Mwongela Mwiva** is the Complainant. It was his evidence that on 17th February 2015 at 9.30 p.m. he was in his kitchen at home preparing food. Together with him was his worker Lembi Kisina (PW6). While there two people wearing police uniforms (green/black spotted) entered the kitchen and demanded for money. They were ordered to sleep down and the intruders embarked on beating them with a stick then later with a panga.

5. PW1 then told them where the money was in his main house. PW6 left to give them the money as PW1 remained with the two men behind. They got a rope tied his hands and demanded for his cellphone which they took. It was a Techno T340 make. They asked for his Mpesa pin and sim card pin which he gave them after a thorough beating. By then they had broken his kitchen electricity bulb.

6. They started using his phone by calling his friends and relatives demanding for a ransom to avoid them being killed. The assistant chief James Mutiso called PW1 on his cell phone asking if there was any problem. The Appellant directed him to tell the assistant chief that he was okey which he did. The two intruders then left and locked the kitchen door from outside.

He managed to untie the rope and jumped through the window and went into the main house. He found the money gone and PW6 had been locked inside.

7. He escorted PW6 to her house three kms away. He spent the night at a neighbour (Joseph Wambua). The next day he went to report the matter at Makueni police station and sought treatment at Chuasini centre then Makueni district hospital. During the robbery he said he was able to identify the accused who is his nephew (sister's son) whom he had known for 15 years. He also identified the navy blue trouser (EXB2), police jacket (EXB1) worn by the Appellant, stick (EXB3) and panga (EXB4) used by the Appellant to assault him, rope (EXB5) and his phone (EXB6), white sneaker sports shoes (EXB7) worn by the Appellant.

8. He identified his treatment notes (EXB8) and P3 form (EXB9). Mpesa statements for his number were obtained in respect to transactions for 16th December 2015 upto 18th December 2015 (EXB 10A & B). He said he identified the Appellant as he entered the kitchen wearing a red cap as there was electricity light on. A parade was conducted on 19th December 2015 and he was able to identify him.

9. In cross examination he said he had given the name of the Appellant to the police when he reported on 18th December 2015. He admitted there being a land dispute in the family but he denied being involved.

10. **PW2 Kiendi Muiva** is a brother to PW1. He stated that on 17TH December 2015 he received a call from PW1's phone but the caller was not PW1. A demand for Kshs. 30,000/= was made by the caller who said if the money was not sent PW1 would be killed. He sent Kshs. 9,750/= to PW1's phone. He was told to send the balance the next morning. He complied and sent Kshs. 19,800/=. The next day he learnt that PW1 had been found. He managed to get PW1 who informed him of the previous day's attack.

11. **PW3 Patrick Kioko** testified that on receiving information of the robbery he went to PW1's home on 18th December 2015. Later that day he received a report of a suspect at Hi-Tek Bar with a lot of money taking beer with friends. When he arrived at the bar the suspect had taken off. Later the suspect whose driving licence PW3 had, came. He identified the Appellant as the said suspect. The witness recovered two phones, two sin cards and Kshs. 20,500/= form him. Later in the day PW1 arrived with police officers form Makueni and he identified the Techno phone as his stolen property. He said he had arrested the Appellant severally in Mukuyuni but the Complainants had withdrawn their complaints.

12. He identified the Techno phone (EXB6), two sim cares (EXB12) and memory card (EXB13). **PW4 Abdul Ausman Bure** on 18th December 2015 while at Mukuyuni police station searched the Appellant and recovered from his left foot shoe two sim cards and a memory card (EXB 12 & 13) which he handed over to police CID at Makueni. The Appellant was at the station to demand for his driving licence before his arrest.

13. **PW5 Peter Kariuki** accompanied by Cpl. Amina to Mukuyuni to a robbery scene. They met PW1 who told them about the incident. They recovered a rope used to tie him, a panga and bow. They returned to the station and found the Appellant there. He handed to him a cell phone which was identified by PW1. PW1 had told them that the Appellant and accomplice had during the attack worn a military like jacket and black trouser pretending to be police officers.

14. They proceeded to the Appellant's home and led by the Appellant himself. They recovered the military like jacket (EXB1), blue trousers (EXB2) which were muddy; bow (EXB3), phone (EXB6), panga (EXB4), rope (EXB5). The phone was taken for analysis vide a letter. The report showed PW1 as the real owner of the phone telephone No. 072xxxxx and it had been in use on 18th December 2015. He identified reports form safaricom (EXB10), (11a & b); phones recovered from Appellant (Alcatel (EXB14) and Techno (EXB6); 2 sim cards and memory card (EXB 12a & b and 13) respectively.

15. **PW6 Lebi Kisina** confirmed PW1's evidence but said she was so shaken and so did not identify any. She said she had been beaten by the intruders even after taking them to the Complainant's house to pick the money. She said two intruders entered the kitchen while others remained outside. One of them was armed with a panga.

16. When placed on his defence and after provisions of Section 211 Criminal Procedure Code being explained to him the Appellant elected to remain silent.

17. Upon conviction and sentence he filed this appeal raising the following grounds;

> ***a. That*** *the learned Trial Magistrate erred in points of law and fact by recognition, without observing that the conditions prevailing at the scene of crime were absolutely difficult, for a witness to make any significant identification.*
>
> ***b. That*** *learned Trial Magistrate erred in points of law and fact in convicting the Appellant on a duplex charge.*
>
> ***c. That*** *learned Trial Magistrate erred in points of law and fact by failing to evaluate the evidence as a whole and observe that the prosecution never proved their case beyond reasonable doubt. As this case had arisen due to the grudge between the Appellant and the Complainant.*
>
> ***d. That*** *learned Trial Magistrate erred in law and fact in basing the reason for conviction on inconsistent and incredible evidence of possession of a stolen phone without observing that the said recovery was not proven beyond reasonable doubt as required in law.*
>
> ***e. That*** *the learned Trial Magistrate erred in law and fact by failing to consider his rights to a fair trial were violated when he was denied an opportunity to recall witnesses as provided for under Section 200(3) of the Criminal Procedure Code.*

18. He canvassed his appeal through written submission. He states that PW1's identification of him cannot be relied on. The reason he says that he never gave his name to the police or anybody else. That he did not state the conditions that enabled him to identify him and it was at night. He referred to the cases of **Wamunga –Vs- Republic Cr. Appeal No. 20 of 1989 (KSM); Norman Mbachu Njoroge & Anor [2016] eKLR**; **Simiyu & Anor –Vs- Republic [2005] I KLR 192**; **Republic –Vs- Alexander Muiwirei Rutere alias Sanda & Others [2006] eKLR** among others to support this submission.

19. It is his submission that it was wrong for him to be charged under Section 295 as read with Section 296(2) Penal Code since the former deals with simple robbery while the latter gives the ingredients of robbery with violence. He cited the cases of **Joseph Nuguna & Others – Vs- Republic [2013] eKLR** & **Simon Materu Munialu –Vs- Republic [2007] eKLR** where the court of appeal found that charging one under both sections amounted to duplicity of charge. The same position was held in the case of **Joseph Onyango Owuor & Cliff Ochieng Oduor –Vs- Republic [2010] eKLR.**

20. On ground (3) he states that there exists a grudge involving family land. This he says was raised in cross examination of PW1 and he refers to PW1's answer at page 21, lines 5-10 where PW1 said,

"There is a land dispute in our family bit I am not involved in the case. I have never been arrested at Kilome police station. Myself and Kasevu Mwiva have no grudge. Joseph Sila Mwiva and me have many cases. There is an agreement, a peace agreement between me, your mother and one Joseph Sila over land issues. I signed the agreement."

21. He contends that though PW1 denied the existence of a grudge it was apparent it was there. He adds that all along PW1 had wanted to withdraw the complaint since this was a family issue.

22. On ground (4) he submits that there was o proof of possession of the phone by him. He refers to PW1's evidence at page 18, line 20-22 where he states;

"I went to report at Mukuyuni police station but did not reach as the police called me on my cell phone and told me to wait for them at my home."

It's his argument that the phone was not with him and was even in use. He wonders what PW1 was using to communicate, with the police. He also raises issue with the alleged recovery of sim cards whose details are unknown. He further states that PW1 did not strictly identify the recovered phone to be his.

23. On ground (5) he complains of having been denied an opportunity to have PW1 recalled which is contrary to section 200(3) Criminal Procedure Code which is coached in mandatory terms. He relied on the case of **Antony Musee Matinge –Vs- Republic [2010] eKLR** in support of this submission. He reckons that the Trial Magistrate decided to choose and decide for him what needed to be done. He also cited the case of **Ndegwa –Vs- Republic [1985] eKLR 534.**

24. M/s. Owenga counsel for the state opposed the appeal saying the evidence tendered by the state was sufficient. That the complainant gave an account of the incident, and the Appellant was found with the phone which amounted to recent possession. She admitted that PW1 may have made a call to the police but added that one could have more than one phone. That he never asked PW1 about this.

25. Further that failure to produce Kshs. 20,000/= was not fatal to the case. Finally the sentence was not excessive as his period in custody was considered before the sentence was passed.

Analysis & Determination

26. This is a first appellate court and as such it is guided by the principles set out in the case of **David Njuguna Wairimu –Vs- Republic [2010] eKLR** where the Court of Appeal stated;

"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."

27. In a much earlier decision the Court of Appeal similarly held in **Okeno –Vs- Republic [1972] EA 32** that;

"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."

28. I have considered the evidence on record, grounds of appeal, submissions and authorities cited. The Appellant has raised a pertinent issue in ground No. 5 which I will address first as it may determine this appeal. In ground 5 the Appellant says;

"That the learned Trial Magistrate erred in law and fact by failing to consider my rights to a fair trial were violated when I was denied an opportunity to recall witnesses as provided for under Section 200(3) of the Criminal Procedure Code."

29. He is complaining how the learned Trial Magistrate handled it. He submits that he was unrepresented and the court took it upon itself to decide without giving any reason on how the matter would proceed. To the Appellant this was a violation of Section 200(3) Criminal Procedure Code.

30. The Appellant went on to cite cases where the issue of Section 200(3) Criminal Procedure Code had been dealt with namely;

(i) Antony Musee Matinge –Vs- Republic (2012) eKLR.

(ii) Ndegwa –Vs- Republic (1985) eKLR.

(iii) Richard Charo Mbole –Vs- Republic Cr. Appeal No. 135 of 2004.

31. In her submissions the learned counsel for the state did not respond to this issue.

32. The record here shows that this case was handled by Mr. Koech (SRM) for almost a year without the matter proceeding for hearing. The main reason for delay was an indication from both the defence and the prosecution that the Complainant wanted to withdraw the charge. The matter proceeded before Mr. C.O. Nyawiri (SRM) who heard the Complaint (PW1) Mr. J. Mwaniki (SPM) heard the rest of the five (5) witnesses.

33. The issue is how this matter was handled by the succeeding Magistrate. Section 200 CPC provides for this by stating thus;

> **(1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may -**
>
> **(a) Deliver a judgment that has been written and signed but not delivered by his predecessor; or**
>
> **(b) Where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial.**

34. The record shows that when the matter came for hearing before Mr. Mwaniki SRM on 12th October 2017 this is what transpired;

> *Coram*
>
> *Before Hon. Mwaniki, SPM*
>
> *Prosecutor: Gakumu*
>
> *Court Assistant: Mwengi*
>
> *Accused: Present.*
>
> ***Ann:*** *The case is part heard.*
>
> ***Court: Section 200(3)*** *of the Criminal Procedure Code explained to the accused person.*
>
> ***Accused:*** *I need recall of the complainant.*
>
> ***Court:*** *Complainant be recalled but only for purpose of further cross examination and subject to his availability.*
>
> ***Ann:*** *The surety is in court and wish to withdraw.*
>
> ***Surety Present, Sworn and States in Kiswahili***
>
> *I am* ***Muli Mwatu Nzomo****. I stood surety for accused. I deposited my title deed No.* ***MITABONI/MUTITUNI/2596****. I wish to withdraw as the accused does not come to court. He absconded on 22/05/2017.*
>
> ***Accused:*** *I was in custody on 22/05/2017. I can have a talk with surety to see if we can agree.*
>
> ***Surety:*** *Under no circumstances will I change my mind.*
>
> ***Court:*** *I notice the sentiments of the surety and concerns by the accused person. Suretyship is a voluntary act with attendant legal obligations. It cannot be imposed on an unwilling surety/person. I will allow the surety withdrawal. The title deed be refunded back to him. Accused to remain in custody until he secures another surety.*
>
> ***Applicant:*** *I don't have witnesses in court. None was bonded.*
>
> ***Accused:*** *I do object the case does not proceed. I was even once in remand.*
>
> ***Applicant:*** *the case has not delayed. It was the accused who delayed the case talking of possible reconciliation. Only on 30/01/2017 when the state did not have witnesses.*
>
> ***Court:*** *Adjournment allowed as last one for the prosecution. Summons to the remaining witnesses. Hearing on 23/11/2017. Mention 24/10/2017.*

35. It is clear that Section 200(3) Criminal Procedure Code was explained to the Appellant and his response was to have the Complainant (PW1) recalled. Apparently PW1 is the only who had testified. In essence the Appellant was asking that the matter starts *denovo*. There is no record to show what the response by the prosecution was. It is therefore not clear what informed the learned Magistrates decision to have PW1 recalled only for cross examination and only if he was available. He ought to have given the reason since the Appellant wanted the Complainant recalled.

36. The prosecution did not raise any objection nor say it would be a challenge recalling the Complainant.

37. From the evidence on record the Complainant is a key witness and his evidence is very crucial. The Appellant may have wanted the new trial Magistrate to hear PW1 and make his own assessment of him. This is an opportunity blocked by making his own decision on the matter without an input from the prosecution.

38. The Complainant (PW1) was in court on 23rd November 2017 and the prosecution brought it to the attention of court as follows;

> ***Ann:*** *Accused had requested for recall of PW1 (Complainant) who is in court.*
>
> ***Accused:*** *I don't intend to proceed with that witness (Complainant).*

The Appellant had wanted the witness recalled for full hearing. However following the trial Magistrate's Ruling limiting him to cross examine he appears to have seen no need of having him recalled.

39. The provision in Section 200(3) CPC must be complied with whenever a Judicial officer in this a Magistrate taking over a partly heard case by another Magistrate. In the instant case the learned trial Magistrate Mr. J. Mwaniki explained to the Appellant his right under Section 200(3) CPC. The Appellant made his election but the learned Magistrate made a unilateral decision without the input of the prosecution counsel who protests the interest of the Complainant. He limited the recall to cross examination without any reason being given.

40. After making that order the prosecution called five (5) more witnesses and none of them was cross examined by the Appellant. Even when placed on his defence the Appellant elected to remain silent. This speaks volumes. Justice Makau very well addressed this issue of Section 200(3) CPC in the case of the **Office of Director of Public Prosecution –Vs- Peter Onyango Odongo & 2 Others H.C at Siaya Constitutional and Judicial Review Div. Pet No. 2 of 2015 (2015) eKLR,** he concluded that;

> ***"……section 200(3) of the CPC was constitutional and valid as it protects the rights of an accused person to a fair trial in terms of Article 50 of the Constitution of Kenya, 2010……"***

41. In the case of Mugure –Vs- Republic Meru High Court Cr. Appeal No. 150 of 2017, Justice Mrima dealing with a similar issue as in the instant case stated in paragraph 16;

> ***"The Appellant's right to a fair hearing under Article 50 of the Constitution was therefore infringed by the failure by the succeeding magistrate to fully comply with Section 200(3) of the CPC. In essence all the subsequent proceedings were veiled with that constitutionality and cannot stand in law."***

42. The unilateral decision by the learned trial Magistrate to deny the Appellant the opportunity to have PW1 fully recalled amounts giving him a cake with one hand and taking it away with the other hand.

There was no valid reason for doing so especially when the prosecutions input was never sought. The trial cannot therefore be said to have been fair as provided for under Article 50 of the Constitution.

43. For that reason I will not consider the merits of the other grounds. The next issue to determine is whether to acquit the Appellant or order for a retrial.

44. In the case of **Ahmed Sumar –Vs- Republic [1964] EA 481** at Pg. 483 the Court of Appeal stated thus;

> ***"It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered.***

45. in the case of **Ekimat –Vs- Republic [2005] I KLR 18** the Court of Appeal stated thus;

> ***"1. It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not follow that a retrial should be ordered.***
>
> ***2. A retrial should not order unless the court is of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case depended on its particular facts and circumstances but an order for the retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person."***

46. Later in **Njenga & Anor –Vs- Republic [2006] I KLR 18** the Court of Appeal followed what it had stated in the Ekimat case.

47. From the principles above it is clear that each case must be considered depending on particular facts and circumstances of the said case. Further that an order for retrial should only be made where the interests of retrial require it.

48. Applying the above principles to the instant case and considering the various aspects of the case including the several attempts to withdraw the charge, the evidence adduced, the length of time the case took to conclusion, I find that it would not be in the interest of justice to order for a retrial and I decline to do so.

49. I hereby allow the Appeal, the conviction is quashed ans sentence set aside.

50. **It is ordered that the Kshs. 20,500/= received by Cpl. Amina Nasir Almasi of DCIO Makueni from police officers from Mukuyuni be given back to the Appellant.** Cpl. Amina acknowledged receipt of this money and phone and promised the court on 18/01/2016 that the same would be produced as exhibits. Only the phone was produced as exhibit. **The money should be given back to the Appellant within 14 days, without fail.**

51. **The Appellant to be released forthwith unless otherwise lawfully held under a separate warrant.**

Orders accordingly.

Delivered, signed & dated this 29th day of January 2020, in open court at Makueni.

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H. I. Ong'udi

Judge