REPUBLIC OF KENYA

AT THE HIGH COURT OF KENYA

IN BUNGOMA

CRIMINAL APPEAL 47 OF 2018

COLLINS ODHIAMBO ARWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the judgment in original Webuye Cri. Case No. 782/2016 delivered on 8.9.2014 by Hon T. Mwangi - SPM]

JUDGMENT

The appellant Collins Odhiambo Arwa was charged in the Magistrates Court with **Robbery with violence Contrary to Section 295 as Read with 296(1) of the Penal Code.** Particulars of offence being; On the night of 7th day of October 2016 at Dina area, in Webuye Township Bungoma East sub-county within Bungoma County, jointly with another not before the court, while armed with crude weapons namely knife and rungu robbed Kelvin Khisa off his cash Money Kshs.400/= and a mobile phone make Techno, all valued all valued at Kenya shillings one thousand, two hundred shillings only (Kshs.12000/=) and immediately before the time of such robbery used actual violence to the said Kelvin Khisa.

The evidence before the trial court briefly was that Kelvin Khisa the complainant testified that he knew appellant well. He testified that on 7/10/2016 at 5pm he was with his friend Bonnie and they had gone to drink. He testified that Sinigo came and picked him so that they can go and drink elsewhere at Liz's place where he met the accused.

He testified that he was in the company of Liz, Yusuf and Fasa. He testified that later Fasa called Sinigo leaving him behind. He testified that Fasa attacked Sinigo who fell down and he instructed Sinigo to remove all his money and the accused held him by the neck. He testified that he asked Collins what they were doing and he went to where they were and Collins threw a kick at him but he blocked. He testified that Collins removed a knife from his waistline and he cut him on his left hand. He testified that while on the ground Yusuf came with a jembe and hit his head. He testified that that neighbors around screamed but Collins threatened them and neighbors locked themselves up. He testified that managed to wake up he run to Rukia's house for safety. He testified that they followed him and found him and he asked them why they attacking him yet they knew him and stated that the accused started beating him with a knife forcing him to leave the house and they later on left.

He testified during the incident he lost his cellphone make Techno worth Kshs.800/= and Kshs.400/= in cash which he had in his pocket.

He testified that he was bleeding profusely and was taken to Webuye District Hospital and he was admitted for several days. He produced discharge summary. He testified that he knew Collins and they lived with him for long and they used to live as neighbors.

Pw2 Lilian Wanjala testified that on 7/10/2016 he was called by her mum who informed her that her brother had been stabbed. She testified that she went home and her brother bleeding and she called a motor vehicle and took him to the hospital. She testified that she reported at the police station. She testified that when she asked her brother who had attacked, he stated that it was Collins and Yusuf using a knife and Jembe handle.

Pw3 Roselyne Nekesa Wafula testified that she knew Collins for a long time. She testified that on 7/10/2016 she unsuccessfully tried to get in touch with Kelvin. She testified that someone called her to go to Kwa Dina and on arrival she found Kelvin bleeding profusely and a neighbor assisted him to take him to the hospital and at the hospital he told her that he was stabbed by Collins and Yusuf.

Pw4 Richard Mutula testified that he is a clinical officer at Webuye District Hospital and produced P3form and discharged summary that filed by collegue Festus a clinical officer. He testified that he had discharge summary notes that indicate that he was admitted on 7/10/2016 and discharged on 17/10/2016 and he was admitted as a result of penetrating wound.He testified that the patient had been assaulted by people known to him on 7/10/2016 and he was stabbed with a knife and he sustained multiple cut wounds on all limbs.

Pw5 PC Shadrack Kipsang testified that he is based at Webuye Station performing investigating duties. He testified that on 7/10/2016 at 9.30pm and a lady called Lilian Wanjala made a report that her brother Kelvin was in critical condition at Webuye District Hospital having been robbed and injured by a person known to him.

He testified that he and his colleague rushed to the hospital and when they interrogated him he informed them that Collins and Yusuf had attacked him at Kwa Dina at 5.30pm. He testified that he recorded statements for the witnesses and eventually suspects were arrested.

Pw6 Simon Wabombo from Maraka,Webuye. He testified that he knew complainant as his friend and also knew accused. He testified that on 7/10/2016 at 4pm he had left work at 5PM and met Kelvin at Kwa Dina Junction.

He testified that they went to Mama Liza premises who sells changaa and on arrival the met Collins, Yusuf and Faso. He testified that Faso asked him to buy them Shangaa of Kshs.20/= and when he said he did not have money Faso swept him with a kick and he fell down. He testified that got a chance escape and he hide behind a tree and he saw the 3 attacking Kelvin. He testified that later on Kelvin joined him and he had cut wounds and got a motor cycle that took the complainant to the hospital.

The appellant gave sworn evidence. He testified that on 7/10/2016 he lives 50 meters away from the complainant and on the incident date he had gone Aunt Liz were the complainant was to pay his debt. He testified that he went to the house paid his debt and came out found the complainant quarrelling with Yusuf and they started to fight. He stated that he separated them and Kelvin was taken to the hospital.

It is upon the above evidence that appellant was found guilty, convicted and sentenced to life imprisonment. The appellant filed this amended ground of appeal on the following;

> **i. THAT the learned trial magistrate erred in law and fact in considering extraneous facts and when he convicted the appellant without cogent evidence, the charge sheet is defective and the names of witness are different.**
>
> **ii. THAT the learned magistrate erred in law and fact in arriving on decision basing on evidence that was full of contradiction.**
>
> **iii. THAT the learned magistrate erred in law and fact in rejecting the alibi defence of the appellant.**
>
> **iv. That the sentence and conviction passed upon the appellant was excessive in nature.**

The appellant filed written submissions in support of his grounds of appeal. He submitted that there was contradiction in prosecution evidence since none of the witnesses testified, they witnessed how Pw1 was robbed his mobile phone. He submitted that charges of robbery with violence were never proved against him. He submitted that independent witnesses never testified in the case.

Mr. Thuo for the state opposed the appeal. He submitted that the charge sheet is not defective as name of the accused, offence and date are included. He submitted that evidence was given by Pw1-Pw4 and identification was through recognition. He submitted that there was mens rea due to gravity of the injuries inflicted on the complainant.

This is a first appeal. The duty of the first appellate court is to re-evaluate that evidence and arrive at its own conclusion but bearing in mind it did not hear or see the witnesses testify.

The appellant was charged with the offence of robbery contrary to Section 296(1) as read with 296(2) of the Penal code; **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 or the robbery, he wounds, beats, strike or uses any other personal violence to any person, he shall be sentenced to death.**

> **"Robbery with violence is committed in any of the following circumstances:**
>
> **a. The offender is armed with any dangerous and offensive weapon or instrument; <u>or</u>**
>
> **b. The offender is in company with one or more person or persons; <u>or</u>**
>
> **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 ……"** *[our own emphasis].*

The use of the word ***OR*** *in this definition means that proof of* ***any one*** of the above ingredients is sufficient to establish an offence under section 296(2) of the Penal Code. In this case the complainant said that he was accosted by a group of six men – this fulfils ingredient (b). The complainant testified that the accused and his companions were armed with knives which were used to threaten the complainant – this fulfils ingredient (a). The fact that the complainant did not sustain any injury in the course of the robbery does not reduce the offence to simple robbery. Two ingredients of Robbery with Violence under section 296(2) have been shown to have existed and that is sufficient to prove the offence. We therefore find that the trial magistrate was correct in imposing a conviction under section 296(2). The trial magistrate did give due consideration to the appellant's defence which he found to be unworthy and subsequently dismissed. We are satisfied that the appellant was properly convicted and we do hereby dismiss his appeal against conviction.

I have considered the prosecution evidence on record, the judgment of the trial court, and the submissions by the parties. The following seven issues arise for determination:

i. Whether the charge sheet was defective;

ii. Whether the prosecution evidence was inconsistent and contradictory;

iii. Whether the appellant was properly identified by recognition;

iv. Whether the mandatory use of the death sentence at the trial was illegal.

On issue number one whether the charge sheet was defective. The appellant submitted that he was convicted on a defective charge sheet. He submitted that the charge sheet was not supported by evidence. The prosecution opposed the same submitting that the charge sheet set out all the ingredients of the offence.

Section 134 of the Criminal Procedure Code provides that:

Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with particulars as may be necessary for giving reasonable information to the nature of the offence charged.

In **B N D vs Republic [2017] eKLR, Ngugi J** laid out the test to be followed in determining whether a charge sheet is defective. The Learned Judge stated as follows:

"The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence.

29. The answer from our decisional law is this: the test for whether a charge sheet is fatally defective is a substantive one: was the accused charged with an offence known to law and was it disclosed in a sufficiently accurate fashion to give the accused adequate notice of the charges facing him? If the answer is in the affirmative, it cannot be said in any way other than a contrived one that the charges were defective."

I have considered the contents of the charge sheet in this matter. After setting out the offence charged as robbery with violence contrary to section 296(2) of the Penal Code, the particulars of the offence are set out as follows:

" On the night of 7th day of October 2016 at Dina area ,in Webuye Township Bungoma East sub-county within Bungoma County, jointly with another not before the court, while armed with crude weapons namely knife and rungu robbed Kelvin Khisa off his cash Money Kshs.400/= and a mobile phone make Techno, all valued all valued at Kenya shillings one thousand, two hundred shillings only (Kshs.12000/=) and immediately before the time of such robbery used actual violence to the said Kelvin Khisa''

In the present case, the appellant was charged with the offence of robbery with violence. The particulars of the offence stated that he was with others, and that he used violence on the victim. In my view, the charge in the present case was proper, and the challenge to the appellant's conviction on the basis of the charge sheet must fail.

On issue number two on whether the prosecution evidence was inconsistent and contradictory. Appellant submitted hat he was convicted on the basis of contradictory evidence. The basis of this argument is that prosecution evidence was not consistent to point out that he robbed Pw1. I have analyzed evidence of Pw1 and he stated that on the material day he gone to drink with Pw6 at drinking den of Liz. Pw1 stated that Pw6 was the first one to be attacked by Faso and when he went to intervene Dw1 attacked him as well by throwing a fist and took a knife from his waistline and stabbed Pw1 on the left wrist, left knee and right sheen. The medical evidence of Pw4 collaborated evidence of Pw1 that Pw1 sustained serious injuries on his limbs.

Pw6 also testified that during the attack when he managed to escape, and hide behind a tree and he was able to see Dw1 turn to Pw1 and attack him. He testified that he later on united with Pw1 and he was bleeding and he looked for a motor cycle to take Pw1 to the hospital. The appellant in his defence stated that he did not commit the offence, he testified that that he was trying to rescue Pw1 who was fighting with someone else. Dw1 did not tender any evidence to support the allegation. It my finding from the above analysis the evidence of Pw1, Pw4 and Pw4 was corroborated. I am satisfied that there was no inconsistency in the evidence of prosecution witnesses to weaken the prosecution case.

On issue number 3 on whether the Appellant was properly identified by way of recognition. It has been argued by appellant that the circumstances under which the incident occurred are a mystery, that the appellant was not identified. The factors to be considered with respect to recognition as set out in **Rep vs Turnbull & Others (1976) 3 ALL ER 549** must always be borne in mind when a court is dealing with the question of identification. The court in that case stated as follows:

"... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the

observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?.... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

In this case, the complainant argued that he was not properly identified as one who robbed the Pw1. Pw1 on the other had stated that Dw1 was well known to him. I find that looking at circumstance under with the robbery happened I find that the complainant was attacked by someone well known to him even by name. I am satisfied that in this case, the appellant was recognized by prosecution witnesses who knew him well. The incident occurred at 5.30p.m. all the witnesses knew the accused well. I find that the identification by recognition was safe.

Lastly on whether the sentence was excessive in nature. It was argued by appellant that the sentence was excessive. The court has the discretion on sentencing, however, to consider mitigating circumstances and impose a lesser sentence.

The accused was sentenced to serve 20 years imprisonment. The accused was a first offender, well known to the complainant and the injuries inflicted had healed. I therefore set aside the sentence of 20 years imprisonment imposed and substitute thereof a sentence of 10 (Ten) years imprisonment from the date of conviction on 24.5.2018.

Dated and **Delivered** at **BUNGOMA** this 12th **day of** March, **2020.**

S.N.RIECHI

JUDGE