



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CRIMINAL APPEAL NO. 81 OF 2018**

**BRIAN OCHIENG.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(Being an appeal against conviction passed by Hon L. Kassan, Senior Principal Magistrate while sitting at Mavoko Law Courts in Criminal Case 899 of 2016 vide undated judgement delivered on an unknown date but presumably on 29.5.2018 and sentence passed on 13.6.2018)

**BETWEEN**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**BRIAN OCHIENG.....ACCUSED**

**JUDGEMENT**

1. This is an appeal that was lodged herein on **23.8.2018** by the Appellant, **BRIAN OCHIENG**, against the conviction and sentence imposed by the Senior Principal Magistrate, **Hon. L.P. Kassan**, in Mavoko Senior Principal Magistrate's **Criminal Case 899 of 2016**. The Appellant had been charged before the lower court with the offence of Robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. It was alleged that the appellant on the 15<sup>th</sup> day of December, 2016 at Sheshe Gardens of Sabaki Area in Athi River District within Machakos County while armed with an offensive weapon namely knife robbed off Edith Gathoni Thuo mobile phone make Sony Xperia serial number YT9107LR7N valued at Kshs 26,000/-, hand bag valued at Kshs 800/-, navy blue purse valued at Kshs 1,000/-, KCB ATM Card, Medical Insurance Card, Identity card number 24013004, one note book and cash 9,300/- all valued at Kshs 37,100/- and at the time of such robbery threatened to stab the said **EDITH GATHONI THUO**.

2. The Appellant, having denied the allegations against him before the lower court, was taken through the trial process and a Judgment was subsequently rendered by the learned trial magistrate on an unknown date. The Appellant was found guilty of the offence of robbery with violence and was convicted thereof and sentenced to serve life imprisonment in respect the main count on **13.6.2018**. Being aggrieved by his conviction and sentence, the Appellant, preferred this appeal that challenged the decision of the trial court on the following grounds and as supplemented:

- a. The prosecution case against the appellant was not proved beyond any reasonable doubt;
- b. His defence was dismissed;
- c. That the charge sheet was defective;
- d. That the appellant was not properly identified
- e. That the prosecution evidence was marred with contradictions and inconsistencies that went to the root of the prosecution case.
- f. That the judgement was faulty and did not conform with Section 169 of the Criminal Procedure Code

g. That the sentence was harsh and excessive.

3. Accordingly, the Appellant prayed that appeal succeed in its entirety, the conviction be quashed and sentence set aside.

4. In his written submissions, the appellant submitted that the charge sheet did not conform with the evidence adduced by the prosecution. According to the appellant, there was no evidence of a receipt for the phone; in evidence it came out that there were two phones stolen yet there was one in the charge sheet and that the value of the money that was stolen differed. In placing reliance on the case of **Juma v R (2003) eKLR** and **Jason Akumu Yongo v R (1983) eKLR** the appellant urged the court to hold that the charge sheet was defective. The appellant submitted that the elements of the offence were not proven. It was his argument that it was not proven that the assailant was armed with any dangerous weapon and cited the case of **Donald Atemia Sipendi v R (2019) eKLR**; it was his argument that there was no evidence to prove that the suspect was in the company with one or more persons neither was there any evidence that the appellant used violence on the complainant.

5. In placing reliance on the case of **R v Eria Sebwato (1966) EACA** it was submitted that no identification parade was conducted therefore the appellant's conviction was unsafe. On the issue of contradictions in the prosecution case, it was submitted that there was contradiction in the value of the phone that was reported as stolen. It was also submitted that no knife was recovered and yet the complainant told the court that the appellant showed her a knife. It was the appellant's argument that there was discrepancy in the amount of the money that was stolen and as a consequence all the contradictions went to the root of the case and the same ought to be resolved in favour of the appellant.

6. The appellant in placing reliance on the case of **Joseph Kisilu Mulinge v R (2014) eKLR** submitted that there was no evidence of recovery of stolen items and that there was no inventory that was prepared in relation to the alleged stolen items that belonged to Pw1. The appellant also submitted that the trial court failed to anchor its judgement on the relevant section of the Penal code as was required under Section 169(3) of the Penal Code. Reliance was placed on the case of **Nyanamba v R (1983) eKLR** and the appellant argued that the trial court erred.

7. On the issue of failure to consider the appellant's defence, it was submitted that the appellant proved that he was a casual labourer returning home and was attacked and arrested in respect of the instant matter before the court. It was the appellant's argument that the sentence meted on him was harsh. In placing reliance on the case of **Daniel Gichimu & Another v R (2018) eKLR** where a death sentence was substituted with a 15 year sentence, the appellant urged the court to review the sentence meted on him.

8. The appeal was opposed by the State. Counsel submitted that the prosecution proved its case to the required standard and in placing reliance on the case of **David Muchiri Gakuya v R (2015) eKLR** submitted that the evidence of Pw1 was to the effect that she was attacked by a man armed with a dangerous weapon who robbed her after threatening to use force on her. It was submitted that the appellant was identified vide sufficient light and that she screamed after the ordeal then she was rescued by security guards. It was submitted that the evidence of Pw1 was corroborated by Pw2 who heard the screams and after rescuing her he was able to locate the appellant who was hiding in a bush as well as recover a handbag from the appellant, which handbag was confirmed as having belonged to Pw1. Counsel further submitted that there was evidence of force because the complainant fell down during the ordeal. On the issue of whether the charge sheet was defective, reliance was placed on Section 134 of the Criminal Procedure Code and the case of **Sigilani v R (2004) 2 KLR** and it was submitted that the statement of offence and the particulars on record were stated in an unambiguous manner and as such the appellant was not prejudiced. Further, that the appellant's contention could be cured under Section 382 of the Criminal Procedure Code and the same could not found a ground to render the trial a nullity.

9. On the issue of consideration of the evidence on record, counsel submitted that when the appellant was put on his defence, he gave a sworn statement denying the charges and told the court that he was a victim of circumstances but however the court was satisfied with the evidence on record and convicted the appellant. On the issue of contradictions, counsel invited the court to consider Section 382 of the Criminal Procedure Code and the case of **Philip Nzaka Watu v R (2016) eKLR** and submitted that there was no contradiction and if there was any, the same would be curable under Section 382 of the Criminal Procedure Code. Counsel urged the court to dismiss the appeal and uphold the conviction and sentence of the trial court as the trial prosecutor proved his case beyond reasonable doubt.

10. I have given careful consideration to the appeal and taken into account the written submissions made herein. I am mindful that, in a first appeal such as this, the court is under obligation to reconsider the evidence adduced before the lower court and come to its own conclusions thereon. In **Okeno v Republic [1972] EA 32**, the Court of Appeal for East Africa expressed this principle thus:

**"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...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 findings 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..."**

11. The prosecution called a total of six witnesses in support of their case. **PW1, Edith Gathoni** testified that on 15.12.2015 at 7.30 pm she was on her way home from work when she was attacked by a man who jumped from a side of the wall and with the help of security lights she was able to see him; she had never met him before. She testified that her attacker was holding a knife and he grabbed her and she fell and as they struggled he took her bag that had a diary, purse, ATM, identity and medical card, a Samsung and Sony phone and that he grabbed the bag and ran. She told the court that she screamed and the screams attracted two guards who rescued her and later she was called to identify the suspect who was found with her bag that contained the named items that were inside her bag. She testified that she was unable to find the receipt of the phone that was valued at Kshs 26,000/-. On cross examination, she told the court that no identification parade was conducted but she was able to identify the appellant as she saw him face to face. She confirmed to court that the inventory marked as DMFI 2 contained the list of eight items that she had lost and that there was no mistaken identification of the appellant. On reexamination she testified that the appellant was arrested thirty minutes after the attack.

12. Pw2, **Lamack Lesingiki** told the court that on the material day he was startled by screams that he later learnt were from Pw1. He testified that he responded to the same and Pw1 recounted how she was robbed of a handbag that contained her valuables and that her attacker ran into a bush. It was his testimony that he, Pw3 and two other guards were able to trace and track down the appellant who was found in a bush, they chased him for five minutes and they arrested him after they caught him. He testified that Pw1 was called to identify whether the bag that was found in possession of the appellant was hers and she confirmed the same then the police were called. On cross examination, he testified that there was no identification parade and that when the appellant was found, he was found with a bag.

13. Pw3, **Fredrick Musembi** told the court that on 15.12.2016 he was on night patrol together with Pw2 and on the said day he heard screams that he discovered were from Pw1. He testified that from information from Pw1 he was able to track down the appellant who was hiding in a bush and he was found holding a bag. He testified that Pw1 was able to identify the appellant as well as the aforementioned bag as belonging to her as she opened it and retrieved money and identity cards from the purse that was inside the bag.

14. Pw4, **Joseph Chasaro** told the court that he re-arrested the appellant who had been arrested at Sheshe Gardens on suspicion of having attacked Pw1. He testified that he did not recover a knife but recovered an ID card, medical card that was inside the bag that was said to belong to Pw1. On cross examination, he informed the court of the inventory of seized goods that was marked DMF12.

15. Pw5, **Pc Isir** testified that on 15.12.2016 he went to the scene where he found the appellant who had been arrested and he was bleeding. He told the court that the appellant was taken to hospital and then to Athi River Police. On cross examination, he told the court that he rearrested the appellant.

16. Pw6, **Cpl Cherotich Too** testified that on 15.12.2016, Pw1 reported to her that on her way home she was attacked by a man who threatened her with a knife and she screamed. She testified that she visited the scene on 16.12.2016 and saw the bush from where the appellant had been arrested as well as recovered a knife at the place where the appellant was said to have been hiding. It was her testimony that two watchmen and members of public found the appellant in a thicket and in possession of Pw1's bag which contained Pw1's property and that Pw1 identified it as the one that was used to threaten her. On cross examination, she testified that she did not have the receipt of the phone, neither did she indicate the serial number. The court found that the investigation diary indicated that the appellant was known to Pw1 and that the robber was a lady. She testified that no knife was recovered on the night of the attack and that the appellant was not a victim of mistaken identity. On reexamination, she testified that she did the search the next day on 16.12.2016 and recovered a knife. She testified that the investigation diary was different from what Pw1 wrote in her statement. After the close of the prosecution case, the court found that a prima facie case had been established against the appellant and he was put on his defence.

17. In his defence, the Appellant gave sworn evidence that on 15.12.2016 he was at work in Sabaki Area from 7.00 am to 1.00 pm and on his way to his home in Mlolongo he was attacked on the road by people and one of them had a black hand bag. He testified that he was beaten unconscious and he found himself at night at Mavoko Hospital then he was discharged the same night at 10 pm and taken to Athi River Police station. He denied hiding in the bush and told the court that he was on the road when he was attacked. He told the court that no bag was recovered from him but instead it was planted on him. He stated that he did not see Pw1 being attacked and that no one saw him attack Pw1. He told the court that this was a fabricated case and no identification parade was conducted. It was his testimony that he did not know Pw1. He testified on cross examination that he was unable to identify the people who attacked him and that he had no witnesses. He told the court that he did not have the treatment notes as the police remained with them. He told the court that he was walking along the road and there was no light. It was his testimony that the complainant had a grudge with him.

18. The trial court found that Pw1 was able to identify the missing items and their approximate value. It also found that Pw1 was able to identify the assailant and that Pw2 found the appellant hiding in a bush. The court found that the ingredients of the charge were proven and it found the appellant guilty as charged. It was this decision that prompted the instant appeal

19. From the foregoing summary of the evidence adduced before the lower court, the pertinent questions to pose in this appeal, granted the appellant's grounds of appeal are:

[a] Whether sufficient evidence was adduced before the lower court to prove the ingredients of the offence of robbery with violence to the requisite standard;

[b] Whether the trial court went into error in failing to consider the appellant's defence.

[c] Whether there were procedural infractions in the trial regarding the propriety of the charge sheet, the propriety of the judgement and whether the same could vitiate the trial.

[d] Whether the sentence was excessive and whether this court can review the sentence downwards.

20. Having looked at the provisions of Section 295 as read with Section 296(2) of the Penal code, it can be elicited that 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.

21. I shall address myself to the elements of the offence in performing the duty of the 1<sup>st</sup> appellate court. As to whether there was theft of property, there is evidence of Pw1 that several items went missing on account of a robbery that was reported to have occurred on 15.12.2016. I have not seen an inventory of the lost items and this raised doubt as to whether the items were recovered. However the evidence of Pw1 as well as the exhibits that were tendered by the investigating officer who testified as Pw6 as well as the evidence of Pw2, Pw3 and Pw4 prove the element of asportation of property from one location to another. In these circumstances, I find as a fact that the prosecution has proved beyond reasonable doubt that theft was committed on 15.2.2016 to the prejudice of PW1. Indeed the appellant was apprehended by members of public within minutes from the crime scene and the stolen bag recovered from him.

22. As to whether or not there was violence, Pw1 testified that she was involved in a struggle with the appellant who took off with her bag and that she screamed for help, a fact that was corroborated by Pw2 and Pw3. There is no evidence of injuries sustained but there is evidence that Pw1 was distressed and fearful. It is my considered opinion that there were acts of the appellant upon Pw1 that amounted to violence within the meaning of section 295 of the Penal Code and I see no reason to disbelieve Pw1's evidence; though she was a single witness, I am satisfied that she is told the truth. I find that the second ingredient of the offence has been proved beyond reasonable doubt.

23. 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 prosecution evidence it is not clear that there was use of an offensive weapon. Despite the fact that there was no weapon presented in evidence I wish to observe that there are exhibits which are not recoverable however the evidence giving a description of the weapon that the assailant was armed with, the nature of damage that was occasioned at the scene is enough and sufficient proof that the assailant was armed. From the prosecution evidence, there is no proof of injury occasioned on the complainant. In this regard, I find that this ingredient of the offence has not been proved beyond reasonable doubt.

24. As to whether the appellant took part in the robbery, the whole issue hinges on the question of identification made by Pw1 to Pw3 as well as the circumstantial evidence.

25. I will start with direct identification evidence as contained in the testimony of Pw1. Pw1 saw the appellant on the material night at 7.30 pm. Her evidence brings into focus the issue of visual identification. In determining the correctness of visual identification, I have taken into account the following factors:

- i. The length of time the appellant was under observation;
- ii. The distance between Pw1 and the appellant;
- iii. The lighting conditions at the time; and
- iv. The familiarity of the Pw1 with the appellant.

**26. In Donald Atemia Sipendi v R (2019) eKLR** where Justice Mativo observed that in evaluating the accuracy of identification testimony, the court should also consider such factors as:-

- a) **What were the lighting conditions under which the witness made his/her observation?**
- b) **What was the distance between the witness and the perpetrator?**
- c) **Did the witness have an unobstructed view of the perpetrator?**
- d) **Did the witness have an opportunity to see and remember the facial features, body size, hair, skin, color, and clothing of the perpetrator?**
- e) **For what period of time did the witness actually observe the perpetrator?**
- f) **During that time, in what direction were the witness and the perpetrator facing, and where was the witness's attention directed?**
- g) **Did the witness have a particular reason to look at and remember the perpetrator?**
- h) **Did the perpetrator have distinctive features that a witness would be likely to notice and remember?**
- i) **Did the witness have an opportunity to give a description of the perpetrator? If so, to what extent did it match or not match the accused, as the court finds the accused's appearance to have been on the day in question?**
- j) **What was the mental, physical, and emotional state of the witness before, during, and after the observation?**
- k) **To what extent, if any, did that condition affect the witness's ability to observe and accurately remember the perpetrator?**

27. As regards the length of time the appellant was under observation by the complainant I find it was more than a fleeting glance. She told the court that she saw him face to face and that there was a struggle between the two and this is enough time for her to have noticed her

attacker. As for the distance between them, they were close enough when she saw him jump from a wall and also when they were engaged in a struggle. As for the source of light at the time, the act occurred with electrical lights on. As to the familiarity of Pw1 with the appellant, there was nothing. The appellant told the court nothing that was of assistance to controvert the evidence of the prosecution witnesses. He imputed that he was framed. However in my view, there was identification made under favourable conditions. I am of the view that Pw1 had no doubt in the identity of the appellant as the person who robbed her. In any case the appellant was apprehended from the vicinity while in possession of the complainant's bag which she promptly identified as hers.

28. The appellant has assailed the court on failure to conduct an identification parade. However in my view the parade was not necessary as the appellant was apprehended immediately and the stolen bag recovered from him upon the complainant pointing him out as her attacker. The identification of the appellant at the scene having been conducted in favourable circumstances, in my view an identification parade would serve no useful purpose.

29. The appellant in his evidence had not raised the defence of alibi and assailed the trial magistrate for dismissing his defence. The law on alibi is now well settled. It is that a prisoner who puts forward an alibi as an answer to a charge does not assume any burden of proving it. The burden remains on the prosecution to disprove it. If evidence adduced in support of an alibi raises a reasonable doubt as to the guilt of an accused person it is sufficient to secure an acquittal. (see *Leonard Aniseth v. Republic* (1963) EA 206).

30. In the case of *Wazir Singh & Another v R* (1939) 6 EACA 145, the court of Appeal for East Africa observed that "if a person is accused of anything and he had a defence of alibi, he should bring forward the alibi as soon as he can because firstly, if he does not bring it forward until months afterwards, there is naturally a doubt as to whether he has not been preparing it in the interval and secondly if he brings it forward at the earliest possible moment it will give the prosecution opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped". According to the evidence as per the record of the trial court, the appellant did not set up the defence of alibi and only told the court that he was framed. I wonder why the appellant during the trial did not set up the defence of alibi and in an attempt to have a second bite at the cherry pops up the defence at the appeal stage and claims that it was not considered. This in my view amounts to deliberate untruthfulness on the part of the appellant. Even though it was the duty of the prosecution to rebut the said alibi raising it at appeal stage does absolutely nothing to support the appeal as the trial arena has changed.

31. In the instant case, if for arguments sake I were to consider the defence of alibi, I find that the same would not absolve the appellant of culpability. The prosecution adduced evidence proving that the appellant was the perpetrator of the unlawful actions. In this case, the prosecution's evidence largely rests on the accounts of Pw1 to Pw3 that placed the appellant at the scene of the crime. I have examined closely the identification evidence of Pw1 and the circumstantial evidence of Pw2 and Pw3 and found it to be free from the possibility of mistake or error. Consequently I reject the appellant's claim to a defence of alibi. I am satisfied that there was cogent and consistent evidence which put the appellant at the scene of crime.

32. The appellant has challenged the charge sheet for being defective. Section 134 of the Criminal Procedure Code provides as follows:-

**"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 such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."**

33. According to the appellant, the defectiveness was that there was variance in the amount of money that was stolen that was indicated in the charge sheet as against the evidence tendered in court. The appellant also pointed out that whereas the charge sheet indicated one phone was stolen, the evidence was to the effect that there were two phones that were stolen. I am unable to agree with the appellant that the charge sheet was defective because when I look at the charge sheet I find that it set out the elements of the offence; the evidence on record was substantively in tandem with what was indicated in the charge sheet and as a result the court was able to make a finding that the appellant had a case to answer. The appellant was present during trial, heard all the evidence against him and in my view there was no defect in the charge sheet as to go to the merits of the case or as to vitiate the trial.

34. The appellant has challenged the content of the judgement of the trial court. In this regard, I have considered **Section 169 of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** which provides as follows:

169(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, shall contain the point or points for determination, the decision thereon and the reasons, and **shall be dated** and signed by the presiding officer in open court at the time of pronouncing it.

**(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.**

(3) In the case of an acquittal, the judgment shall state the offence which the accused person is acquitted, and shall direct that he be set at liberty.

35. I note that the judgement of the trial court is undated and it was inconveniencing for this court to try and make out when the same was delivered. In addition, the judgement did not specify the offence and the Section of the law that the appellant was convicted and in this regard the trial magistrate failed to comply with **section 169(2)** of the *Criminal Procedure Code*. I am of the view that the appellant was indeed prejudiced because in light of my analysis of the evidence, the evidence did support a conviction for an offence other than the one that the appellant was charged with. I am guided by the view expressed by the Court of Appeal in *James Nyanamba v Republic* [1982 – 88] 1 KAR 1165 [1983]eKLR as follows;

**Again the magistrate transgressed subsection (2) of section 169 of the Criminal Procedure Code which requires that in the case of a conviction, the judgment must specify the offence of which and the section of the Penal Code or other law under**

**which the accused person is convicted. Since in his opening statement of the judgment, the magistrate did not state which accused was charged alone in which count of the counts 3 and 4 it cannot be said that the omission to comply with section 169(2) (ibid) did not occasion the appellant injustice. In the circumstances of this case that omission is not cured by section 382 of the Criminal Procedure Code.**

36. In view of the foregoing analysis, I find that this ground has merit. The judgement by the trial magistrate comprised the analysis of the evidence. As it has been shown that there is a serious anomaly which goes to the root of the matter the eventual conviction arrived at by the trial court was unsafe.

37. In light of the aforesaid procedural infractions by the trial magistrate which has led to a failure of justice the next issue for consideration is whether a retrial should be made. In calling for a retrial great care and caution should be exercised. An order for retrial should not be made where for example due to lapse of such long period of time it is no longer possible to conduct a fair trial due to loss of evidence, witnesses or such other similar adverse occurrence. The Court of Appeal in the case of **Mwangi –V Republic [1983] KLR 522** held as follows:-

“..... several factors have therefore to be considered. These include:-

- 1. A retrial will not be ordered if the conviction was set aside because of insufficient evidence.**
- 2. A retrial should not be ordered to enable the prosecution to fill up the gaps in its evidence at the first trial.**
- 3. A retrial should not be ordered where it is likely to cause an injustice to the accused person.**
- 4. A retrial should be ordered where the interest of justice so demand.**

**Each case should be decide on its own merits.”**

Looking at the circumstances of this case, I find that the justice of the case warrants an order for retrial. The appellant was sentenced on 13/06/2018 and has barely served the sentence. He will not be prejudiced if a retrial is ordered. The prosecution on the other hand will also not be prejudiced as they are able to trace the witnesses for the retrial.

38. The upshot of the foregoing is that the appeal succeeds. The conviction is quashed and sentence set aside and is substituted with an order for a retrial. The appellant shall be released from prison custody and placed at **Athi river Police station** and to be presented before the **Senior Principal Magistrate at Mavoko Law Courts** as soon as is practically possible at this time of the Covid-19 pandemic for the purposes of a retrial.

Orders accordingly.

**Dated and delivered at Machakos this 30<sup>th</sup> day of April, 2020.**

**D. K. Kemei**

**Judge**