REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 23 OF 2019

SABINA MUTHONI MATHENGE .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the conviction and sentence (Hon. Okuche, SPM), delivered on 26th September, 2018 in Criminal case No. 243 of 2018 at Loitokitok)

JUDGMENT

1. The appellant was charged with robbery with violence contrary to section 296(2) of the Penal Code. Particulars were that on the 15th day of May 2018 at blue post area in Loitokitok Sub County, within Kajiado County, jointly with others not before court being armed with an offensive weapon, namely, sisal rope, robbed James Nyaribo Mose of Motor vehicle registration No. KCD 102 W, Toyota Noah, Mobile Phone make intfix all valued at Kshs. 1,015,000/- and cash Kshs. 3000/- and immediately before time of such robbery, struck the said James Nyaribo Mose.

2. The appellant pleaded not guilty and after a trial in which the prosecution called 9 witnesses and the appellant's defence, he was convicted and sentenced to twenty five years imprisonment.

3. Aggrieved by both conviction and sentence, he lodged an appeal through a petition of appeal dated 9th May, 2019 and filed on 10th May, 2019 raising the following grounds of appeal, namely:

> ***1. That learned trial magistrate erred in law and fact by failing to appreciate that none of the cardinal ingredients of the offence of robbery with violence were proved beyond any reasonable doubt by the prosecution evidence so as to sustain a safe conviction.***
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> ***2. That trial magistrate erred in law and fact by failing to comply with the provisions of Article 50(2) (g) and (h) and sections 43(1) (1A) and 4 of the Legal and Act No. 6 of 2016, thus seriously occasioned substantial injustice to her.***
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> ***3. The learned trial magistrate erred in law and fact by convicting the appellant based on contradictory, unsatisfactory and inconsistent evidence.***
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> ***4. The learned trial magistrate erred in law and fact by conducting a trial that was not fair and thus arrived at a wrong and premeditated decision.***
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> ***5. That the learned trial magistrate erred in law and fact by rejecting the entire evidence of the appellant and assuming the role of prosecution in probing the appellant defence.***
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> ***6. The learned trial magistrate erred in law and fact by failing to warn himself on the dangers of relying on a single identifying witness to convict the appellant.***
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> ***7. The learned trial magistrate erred in law and fact when he failed to appreciate that prosecution adopted and relied entirely on circumstantial evidence to prove their case and thus the tests in admission and reliance of such evidence were never satisfied.***
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> ***8. The learned trial magistrate erred in law and fact by applying and relying on the wrong evidence thus arrived at h wrong decision.***
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> ***9. The learned trial magistrate erred in law and fact by seriously casting aspersions on the appellant defence thus shifting the legal and evidential burden of proof to the appellant which is contrary to the established principles of criminal jurisprudence.***

10. That the learned trial magistrate erred in law and fact by passing an excessive sentence.

4. During the hearing of the appeal, Mr. Nairi, learned counsel for the appellant, submitted highlighting their written submissions dated and filed on 10th December, 2019, that the appellant's right to fair trial was violated. According to counsel, the appellant was not informed of her right to legal representation contrary to Article 50(2) (g) of the Constitution. Counsel also argued that the record did not reflect that the appellant was supplied with witness statements even though the matter had been adjourned twice for that purpose.

5. Mr. Nairi further argued that there was no proven identification of the appellant. He submitted that PW1 went to the police station where he was shown the appellant and said she was the one. According to the counsel, there was no identification parade and the trial court should not have relied on such identification.

6. It was submitted that the prosecution evidence was inconsistent, in counsel's view, whereas PW1 stated that the incident happened at 7.30 pm, the appellant was arrested at 7.30 at Loitokitok and was not arrested in the motor vehicle. He argued that the prosecution evidence was that the police shot at a motor vehicle which stopped and the occupants ran away but one was however arrested. He contended that the distance from the scene of crime to the roadblock was about 30 Km. According to Mr. Nairi, the items that were said to belong to the appellant were not proved to be hers.

7. Further submission was that the charge sheet stated that the assailants were armed with offensive weapons, namely; a sisal rope. He argued that the trial court erred in holding that the sisal rope was a dangerous weapon within the meaning of section 296(2) of the Penal Code.

8. Regarding injuries, it was counsel's submission that PW1 stated that he was tied and left with no injuries and that he injured himself while trying to untie his hands. He argued that there was no evidence that the weapon was handled in a dangerous manner.

9. Counsel further argued that the requirements under section 308 (1) of the Penal Code were not proved. According to counsel, there was no proof that the weapon was dangerous; that the appellant was in the company of more than one person and that they used violence. He relied on a number of authorities and urged that the appeal be allowed, conviction quashed and sentence set aside.

10. Mr. Meroka, learned Principal Prosecution counsel opposed the appeal, supported the conviction and sentence. Regarding ingredients of the offence, counsel submitted that these were proved. He submitted that PW1's evidence showed that he was engaged by one Paul who hired his vehicle in Nairobi and picked the appellant and her husband at Mlolongo. They were in the vehicle from 2 pm to 7 pm. He submitted that there were several stop overs and that the appellant, her colleagues and PW1 had a meal at Mbirikani.

11. Regarding use of force, learned counsel argued that PW1 was threatened that he would be shot if he did not cooperate. In counsel's view, use of rope handed over by the appellant amounted to force that enabled them rob PW1. He submitted that the P3 form, (PEX 4) showed that there was an altercation. He argued that use of a rope and threat to use a gun was sufficient proof of use of force.

12. According to counsel, PW1's evidence was corroborated by that of PW2 and that the appellant admitted that she was in the vehicle all the way from Nairobi. The recovered items, namely; sandals and the fact that the appellant was bare foot hardly one km away from the scene, placed the appellant at the scene of crime.

13. On legal representation, Mr. Meroka argued that there was no violation. According to counsel, the trial was properly conducted and the appellant was supplied with witness statements and cross-examined witnesses. He argued that failure to cross-examine witnesses could not be deemed to be failure on the part of the prosecution. He urged that the appeal be dismissed, conviction upheld and sentence affirmed.

14. I have considered this appeal; submissions by counsel for both parties and the authorities relied on. I have also perused the record of the trial court. This being a first appeal, it is the duty of this court as the first appellate court, to reevaluate, reconsider and reanalyze the evidence afresh and make its own conclusion on it.(**See *Okeno v Republic*** [1973] EA 32)

16. In ***Kiilu& Another v Republic*** [2005]1 KLR 174, the Court of Appeal held 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 and to the appellate Court's own decision on the 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 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."***

16. PW1, James Nyaribo Mose, a taxi driver based in Nairobi, testified that on 15th May, 2018 he was hired from Donholm Nairobi to pick a patient at Emali with his motor vehicle KCD 102 W. He did not know the person who hired him. They agreed a charge of Kshs. 8000/- for the work. He told that he was to pick the patient and bring him to a hospital in Nairobi. At Mlolongo he was asked to pick the man's sister and her husband which he did.

17. At Emali, Paul, the person who had hired him suggested that they have a meal. While taking the meal, Paul called him out and asked him to talk to a lady who knew where the patient was. They then drove further ahead about 30 km to Mbirikani near a roadblock. The lady had told him that she would be waiting at the road. Paul told him to go off tarmac and he saw one person off the road. When he attempted to reverse the vehicle, Paul engaged neutral gear and ordered him to keep quiet or else he would shoot him. Paul ordered him to show him the cutout; held him by the hand while another person held his other hand. Another person held him by neck tied him on the hand and leg using a rope. They walked for about one km and left him there.

18. He went to a home to seek help. A man called Joel called the area chief on phone since the attackers had taken his phone. The chief called police at Mbirikani roadblock. He was later told that the vehicle had been detained at Loitokitok. He later went to Loitokitok police station where he identified the appellant and his motor vehicle. He identified his phone and wallet in court. In cross-examination, the witness told the court that it was the appellant who gave Paul the rope.

19. PW2, Joseph Ndoipo and Chief of Mbirikani Location, testified that on 15th May, 2018 he was at home when one Joel called him at about 7.30 pm and informed him that a person whose hands had been tied had gone to his home for assistance, saying that he had been robbed of his vehicle. PW2 called Mbirikani roadblock and gave them the registration number of the motor vehicle. The police asked him to take PW1 to the roadblock. Later at 9 pm he was informed that the vehicle had been detained by police. He later recorded his statement with the police.

20. PW3 NO. 235981 IP Charles Mwita the Officer in Charge of Kimana Patrol base, testified that on 15th May, 2018 he was on patrol at Kimana at 7.30 when he got a call from CI Mong'are informing him that a motor vehicle had been stolen from Nairobi and was heading to Kimana. He went to Kobil Petrol station together with CPL Onyonka. Shortly, they saw a vehicle approaching at high speed. He checked the number plate and noticed that it was KCD 102W. He informed the OCS and asked him to man the road block at the station. The driver of the vehicle indicated that he was turning to the right. The witness shot and hit the right side mirror. The vehicle went off the road and stopped. It had rained and the road was slippery. The occupants got out and ran away.

21. The OCS heard the gunshots and joined him together with Marwa. He booked the incident and had the vehicle towed to the station. Later PC Wanderi came to the station with the appellant who had no shoes. She was also booked at the station.

22. PW4 NO. 107280 PC Ann Mary attached to Loitokitok police station, testified that on 15th May, 2018 while at the police lines, she heard gun shots and went to the station. Someone went to the station and informed her and PC Jane that there was a lady who looked suspicious and was asking where the police were. She went with PC Katana to where the lady was. There was already a report of theft of motor vehicle that had been made at the station. They saw a lady walking downwards barefoot at around 7.30 pm. They stopped her and she told them that she was coming from the farm, but there was no indication that she was coming from the farm. They arrested her and took her to the station and handed her over to the OCS and OCPD. At the station, they found IP Mwita and Marwa who had recovered a male shoes, sandals, one infix phone, a woman hand bag, a wallet, jumper and rope. She identified the items in court.

23. PW5 NO. 55903 COPL Gideon Male, attached to Mbirikani police base, testified that on 15th May, 2018 he was called by in charge of the base who informed him that a motor vehicle had been stolen 3 km from the road block. They got into a vehicle and proceeded to Enkoizo junction where it had been alleged the vehicle had been stolen from. On reaching the place, PW2 called and informed them that the victim who had been at his home was heading to the base.

24. They interrogated the person who told them that he had been hired by a lady and four men to pick a patient around Simba Cement and that his phone was in the vehicle. They called CPL Nancy of CID Illasit Police station and asked her to locate the phone. She informed them that the phone signal could be picked at Kamukunji. They called IP Mwafrika and informed him of the incident. The vehicle was later recovered. He directed the person to Loitokitok police station. The victim gave them a rope which had been used to tie him.

25. PW6 Joel Mani, a resident of Mbirikani, testified that on 15th May, 2018, at around 7 pm he was at home when a person went to his home with his hand and legs were tied and asked for help. He called neighbours who came and assisted him. The witness called the area chief who asked him to take the man to the road. He took him to Mbirikani Police Base. He later recorded his statement with the police. He identified the rope in court.

26. PW7 Abdi Hussein, a clinical officer based at Loitokitok hospital, testified that on 16th May, 2018 he attended to James Nyaribo Mose who had been taken to the hospital with a history of assault and robbery of his vehicle. His cloths were soiled, wrists where swollen. He assessed the degree of injury as harm. He signed the P3 form which he produced as PEX 4.

27. PW8 No. 55008 Sgt Virginia Wanjiku of DCI Headquarters Scenes of Crime Department, and a gazette officer under No. 4562 on 7th July, 2003, testified that on 21st May, 2018 she received one CD marked B dated the same day from PC Patrick Katana. She was requested to develop photographs from the CD. She produced 2 photographs and issued a certificate dated 18th June, 2018.The photographs were for motor vehicle KCD 102W and a person. She produced the photographs for the motor vehicle and person PEX2 and the certificate PEX11. The exhibit memo was produced as PEX 12.

28. PW9 No. 235641, IP Salim Mwafrika based at Loitokitok police station, in charge Crime division, testified that on 16th May, 2018 he went to work and on checking the OB he noted that a case had been reported and minuted to him to investigate. According to the OB, motor vehicle KCD 102 W Toyota Noah belonging to the complainant had been hired by the appellant and two others from Nairobi to Emali. They stopped at Emali for lunch and later on their way to Mbirikani, they asked Pw1 to stop. When the driver stopped they overpowered him tied him with a rope and robbed him of the motor vehicle.

29. The witness testified that they mobilized officers and detained the vehicle. Other people ran away but the appellant was arrested. They recovered personal effects belonging to the appellant and PW1 from the vehicle. He prepared an inventory which both the appellant and PW1 signed. He produced it as PEX 6. The phone was produced as PEX 1, shoes belonging to the appellant PEX 8, one shoe PEX 7, Rope PEX 10, black bag, identified copy of logbook PEX 13.

30. When the appellant was put on her defence, she testified as DW1 and told the court that she is a shopkeeper and comes from Nyeri. According to the witness, Paul Wanjohi called and asked her to accompany him to go for a patient at Emali and picked her at Mlolongo. They picked the patient and but they turned on her and robbed her of her properties. A lady showed them the way to use. She went to relieve herself and when she came back she found the door of the vehicle open. She called Wanjohi and he told her to get into the vehicle.

They then left. She was arrested and charged. She denied stealing the vehicle.

31. After considering the evidence, the trial court was satisfied that the prosecution had proved its case, convicted the appellant and sentenced her triggering this appeal.

32. The appellant has challenged her conviction on a number of grounds. First, that she was not properly identified. The trial court considered the evidence and was satisfied that she was one of the people who robbed PW1. He dismissed the argument stating:

> "***The accused person also it should be noted, was found walking bare foot when she was arrested by PW4. She has not given a plausible explanation as to where her shoes or why she was walking bare footed at that time of the hour. The accused person earlier had told PW4 that she had come from the farm. However, it could be of concern that the accused person was arrested at 7.30 pm, it could be a wonder that a person would be coming from the farm at that hour and take into that it had been raining, as for the evidence of Pw3. On the other hand the accused person crying (sic) and not raise the same in her defence. In fact she did tell that she is a shopkeeper based in Nyeri"***

33. I have myself reevaluated and reanalyzed the evidence on record. PW1 testified that he picked the appellant with another man at Mlolongo at the request of the man who hired him. They were together till the time he was robbed. The appellant confirmed in her defence that she was picked at Mlolongo and that it was Paul Wanjohi who requested her to accompany him to pick a patient at Emali. The incident took place during the day and the appellant and PW1 had been together for the better part of the day. The appellant was arrested shortly after the robbery had been reported. She did not come from the area and could not explain what she was doing in the area at that time of the evening. It is clear that the appellant was one of the robbers who committed the offence she was charged with. She did not deny that she was not in the vehicle but alleged that she was also a victim of the same robbery. Her explanation is not believable. I am unable to agree with the argument that she was not properly identified.

34. Second, the appellant argued that the charge was not proved as required. The appellant was charged under section 296(2) of the penal code. Section 296 provides:

> ***"(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.***
>
> ***(2) 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 of the robbery, <u>he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death</u>."*** *(emphasis)*

35. The offence is proved when it is shown that at or immediately before or immediately after the time of the robbery, the person wounds, beats, strikes or uses any other personal violence to the victim. There is no doubt that the appellant was in the company of more than one person. They used force to rob PW1 by tying him. That is, they used personal violence against him to achieve their aim by forceably tying his hands and legs. They also threatened to shoot him. Whether or not they were armed, the fact that they used threats against PW1 fell within the ambit of section 296(2).

36. The section is disjunctive as opposed to a conjunctive one which means the prosecution needed to prove one ingredient to establish the offence. The fact that the appellant was in group of more than one person and used personal violence against PW1, established the offence as required by law. I am satisfied that the prosecution proved the ingredients of the offence and I see no reason to interfere with the trial court's finding on this ground.

37. The appellant also argued that her right to fair trial was violated that she was not informed that she was entitled to legal representation; that she was not given witness statements and that she did not cross-examine witnesses. I have perused the record of proceedings before the trial court. The appellant cross-examined PW1 but did not cross-examine the rest of the witnesses. The record shows that she was given the opportunity to cross examine witnesses but did not. That shows that she understood her right to ask questions and if she chose not to ask questions, that could not be blamed on the prosecution or the court.

38. Regarding witness statements, there is no evidence that she complained that she had not been given the statements. The trial court had adjourned the hearing because the prosecution had not supplied the appellant with witness statements. There after the hearing proceeded without incident. If the appellant had not been given the statements, she was entitled to complain to the trial court for intervention. If she did not complain, it meant she was supplied the statements and was satisfied with the conduct of the trial.

39. On whether the trial court should have explained to the appellant the right to legal representation, that is true but that alone cannot invalidate the trial. As it is, the legal Aid Act has not been operationalized and many accused persons, and not the appellant alone, find themselves in that situation.

40. Regarding sentence, the law provides for a death penalty for the offence the appellant was charged with. However, she was sentenced to twenty five years imprisonment. The trial court did not impose the mandatory death sentence provided for. However I find that he sentence of twenty five years was excessive in the circumstances of this case. For that reason I will interfere with the discretion of the trial court quash the sentence and set aside the sentence of twenty years. in place therefor a sentence of twenty years is imposed,

41. The other aspect of the sentence that I find necessary to comment on is with regard to section 333(2) of the Criminal Procedure Code. The section requires courts to consider the period an accused spent in custody or remand while undergoing trial when imposing sentence. According to the charge sheet, the appellant was arrested on 15th May 2018 and was sentenced on 9th October 2018. The trial court did not consider this period when imposing sentence as required by law.

42. Having considered the appeal submissions and the authorities relied on; I find no merit in the appeal on conviction. Consequently, the appeal is dismissed and conviction upheld regarding sentence, appeal on sentence is allowed and sentence of twenty-five years quashed and in place therefor, a sentence of twenty years imposed. The sentence of twenty years shall run from the date of arrest, that is; 15th May 2018

Dated, signed and delivered at Kajiado this 30th day of April, 2020.

E.C. MWITA

JUDGE