



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CRIMINAL APPEAL NO. 30 OF 2019**

**JOHN SIMIYU MUNYOKOLI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against conviction and sentence imposed by Hon L. Kassan,*

*Senior Principal Magistrate while sitting Mavoko Law Court*

*in Criminal Case 732 of 2013 on 25.2.2019 and 12.3.2019)*

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JOHN SIMIYU MUNYOKOLI.....ACCUSED**

**JUDGEMENT**

1. This is an appeal that was lodged herein on **25.3.2019** by the Appellant, **JOHN SIMIYU MUNYOKOLI**, against the conviction and sentence imposed by the Senior Principal Magistrate, **Hon. L.P. Kassan**, in Mavoko Senior Principal Magistrate's **Criminal Case No. 732 of 2013**. The Appellant had been charged jointly with two of his co accused 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 and his co accused, on the 12<sup>th</sup> day of May, 2013 at Nodor Factory EPZ in Athi River District within Machakos County, jointly with others not before court while armed with dangerous weapons namely a pistol, rúngus and metal bars robbed off Philip Kilenga, Daniel Adego Ayengo, Peter Odhiambo and Francis Ndolo Kasuni of 868 Kgs of brass bars, 355 Kgs of Nickel silver bars, 8 computer monitors, 6 computer CPU's, Sony Bravia Tv S/No. 7841262, 2 mobile phones Make Nokia 100 and one mobile phone Make ITEL all valued at Kshs 1,335,166.39 the properties of Nodor (K) EPS Ltd and at the time of such robbery used actual violence to the said Philip Kilenga, Daniel Adego Ayengo, Peter Odhiambo and Francis Ndolo Kasuni.

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 **25.2.2019**. The Appellant was found guilty of the offence of robbery with violence and was convicted thereof and sentenced to serve 10 years' imprisonment in respect of the main count on **12.3.2019**. 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 appellant was not supplied with witness statements;

3. Accordingly, the Appellant prayed that appeal succeed in its entirety.

4. In his written submissions, the appellant in placing reliance on the cases of **Pandya v R (1957) EA 336** and **Pius Arap Maina v R (2003) eKLR** submitted that the prosecution evidence was contradictory and ought not to be relied upon. The appellant submitted that there was no report that was made to the police of breaking that was made by any of the prosecution witnesses. The appellant in placing reliance on the case of **R v Mwangi S/o Manaa (1936) EACA 29** challenged his identification as a perpetrator and submitted that the prosecution did not meet its standard in proof of its case.

5. 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 appellant was in the company of other assailants and was armed with a dangerous weapon and immediately after the time of robbery used force. It was submitted that the appellant was identified through an identification parade. Counsel further submitted that when the appellant was put on his defence, he gave an unsworn statement that had no probative value and in this regard his evidence could not exonerate him from the offence. Counsel urged the court to dismiss the appeal and uphold the conviction and sentence of the trial court.

6. 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..."*

7. The prosecution called a total of four witnesses in support of its case, whose evidence was severally repeated when the trial commenced *denovo*. The hearing commenced before Hon T.A Odera P.M. **PW1, Mike Stephen**, testified as the resident director of Nodor EPZ Limited. It was his testimony that on Sunday 12.5.2013 he received a call from Pw3 that there was a raid on the factory and he proceeded the following day to the scene. He testified that he saw the padlock to the gate had been cut; the door had been lifted up and the glass door to the office was broken; computers were missing and several screens were missing too. He tendered in court receipts in respect of the Tv, invoices in respect of the computers. He testified that a list of the stolen items was prepared and the police took photographs of the scene.

8. **PW2, Philip Kilenga**, testified and told the court that he was a machine operator at the scene and that on 12.5.2013 he reported to work at 1.00 a.m and was attacked by four persons whom he recognized and that one was armed with a bolt cutter, another armed with a rungu and the third one had a round stick. He testified that his mobile phone was stolen then he was taken to a room where he was detained with his co-workers and in the process he was able to identify one of the men who hit him with an iron bar. He told the court that after he was freed he noted that the factory door had been broken; there were iron bars missing and the glass door had been broken too. He testified that he noted that several computers, a television set, CCTV cameras and goods were missing. It was his testimony that he was treated on Monday at Kitengela Medical Hospital and issued with a P3 form after recording a statement with the police. He told the court that he was called to Mavoko Police Station for an identification parade of more than 15 people and was able to identify the appellant as the one who was armed with a round stick. On cross examination, he testified that he did not know the appellant before the incident and that he identified him on the identification parade on 28.6.2014. He stated that he identified the appellant by his face and that he had talked to the appellant at the scene.

9. **Pw3, Daniel Adegoy Ayengo** testified that he was a supervisor with Nodor Kenya EPZ on the material day. He testified that he reported to duty at 1.00 am on 12.5.2013 and noted a group of ten people came to the godown where he was and one of them took his mobile phone. He testified that he was hit by one of the robbers as he failed to switch off a machine and then tied and taken to a room and detained but however he was able to free himself and call Pw1. He testified that after he gained his freedom at about 4.00 am he noted that brass iron bars, silver bars, computers and CPU Monitors were missing. It was his testimony that he sustained soft tissue injuries and was treated at Kitengela Medical Services Clinic and that he obtained a P3 form that was filled by the doctor. He stated that he identified the suspects in an identification parade that was conducted on 28.6.2013 at Athi River Police Station and maintained that the appellant at the time was holding a crowbar. On cross examination, he testified that he did not know the appellant before.

10. Pw4 **Francis Ndolo Kasuni** was an employee at Nodor Ltd who testified that he was at work when a group of about ten people came and tied his hands using a sisal strip. He told the court that the persons were armed with a rungu, a panga and a pistol and that his mobile phone was taken. He testified that he was then detained in a room until 5.00 am with his other workmates and later freed by Pw1. He testified that he was injured in the ordeal and was issued with a P3 form.

11. Pw5, **Peter Odhiambo Oyola** testified that he was an employee at the subject company and that on the material he was hit by strange persons who later tied his hands with sisal. He told the court that he was asked to show the assailants how to switch the machines off then he saw one of the assailants switching the machines off whereupon he was detained in a room till 4.30 am. He testified that he was freed and noted that the gate to the factory had been cut. It was his testimony that he was treated at Kitengela Hospital on 12.5.2013 for the injuries he sustained then he recorded a statement with the police who issued him with a P3 form that was filled at Athi River Health Centre. He testified that he was called for an identification parade at Athi River Police Station on 28.6.2013 and was able to identify the appellant having recalled the he saw him when he was being taken to put off the machines.

12. **Dr Mwende Ndibo (PW6)**, told the court that she knew Maureen Maithya as a colleague and was aware of her handwriting. She testified that she had P3 forms that were filled by Maureen Maithya in respect of Peter Oyolla, Daniel Anyego, Francis Ndolo and Philip Kilenga who were reportedly assaulted at their place of work on 12.5.2013 and were treated at Kitengela Medical Hospital. Maureen Maithya examined the said persons and indicated the injuries noted and assessed the injuries as harm. She produced the P3 forms that were tendered without any objection from the appellant.

13. **PW7** before was **IP Joseph Ngaira**, who testified that on 28.6.2013 he conducted an identification parade that was conducted with the

consent of the appellant and his co accused. He testified that the appellant was identified from eight persons by Pw2 and Pw3 but Pw4 was unable to identify him. He testified that the appellant signed the parade form and the same was tendered in court and produced as Pexh 22.

14. **Pw8** was **Sgt John Njoroge** who testified that he had been tasked to identify three suspects and he was able to locate the appellant after tracking numbers that were said to have been used to communicate with the robbers. The appellant was tracked at EPZ Area.

15. The record indicated that the trial court was on transfer and after explaining section 200(3) of the CPC to the appellant and his co accused, they elected to have the matter commence de novo. Hon E.K. Too took the evidence of Pw1 who reiterated his evidence. The court was on transfer again and after explaining section 200(3) of the CPC to the appellant and his co accused, they elected to have the matter to proceed from where it had reached. Hon L.P. Kassan took the evidence of Pw2, Pw3, Pw4 and Pw7 that was a reiteration of their earlier testimony. Pw8 in addition to his earlier testimony testified that he was given the phone number of a guard to the suit premises and he traced communication with the appellant who was reportedly a former worker with Royal Garments in EPZ. He told the court that he was able to recover television sets that were traced back to the appellant. On cross examination, he told the court that he arrested the appellant at Royal Garments on 27.6.2012.

16. Pw9 was **IP Alex Makoma** who testified that the appellant was tracked because he was in frequent communication with a person called Patrick who was still at large. He testified that the appellant admitted to have committed the robbery and on cross examination he told the court that the list of stolen items was given by the complainant. When recalled he testified that Patrick was a former guard at Nodor where the theft occurred and that the appellant used to work with Royal Garments and hence they colluded to steal.

17. **Cpl Jackson** of Makueni DCI office testified as Pw7. He told the court that he was the investigating officer and when he went to the scene he recovered a padlock that had been broken. He tendered the same in court together with the recovered TV, list of assets, P3 forms for Pw2 to 4, Inventory, Receipts as well as summary of items stolen together with their value. He testified that an identification parade was conducted and that the appellant was among the persons identified as the assailants. The court found that a prima facie case had been established against the appellant and put him on his defence.

18. In his defence, the Appellant gave sworn evidence that on 27.6.2013 he was at work at Royal Company EPZ when he was taken away by three men and put in the cells. He came to know the nature of the case in court. On cross examination, he testified that on the 12.3.2013 he was at home.

19. The trial court found that Pw1 was able to identify the missing items and their approximate value. The court found that Pw2 was able to identify the assailants as well as note that they were armed and this evidence was corroborated by Pw3 and Pw4. The court found that the testimony of Pw5 to the effect that he traced the TV that was recovered to the appellant and that the TV was established as having belonged to the complainant. It was this decision that prompted the instant appeal

20. 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.

21. 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.*

22. 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 as per the inventory and list of missing items, the said items went missing on account of a robbery that was reported to have occurred on 12.5.2013. I have seen no cause to doubt the evidence of Pw1 as well as the exhibits that were tendered by the investigating officer who testified as Pw7 when the trial commenced denovo. In these circumstances, I find as a fact that the prosecution has proved beyond reasonable doubt that theft was committed on 12.5.2013 to the prejudice of PW1.

23. As to whether or not there was violence, PW2 to 4 testified that they suffered various injuries and this is corroborated by the evidence of the investigating officer who testified as Pw7. Pw2 to Pw4 also testified that they were tied up and detained in a room. It is my considered opinion that these acts upon Pw2 to 4 amounted to violence within the meaning of section 295 of the Penal Code. The second ingredient of the offence has also been proved beyond reasonable doubt.

24. This leads me to the issue of whether or not there was use of an offensive weapon or a threat to use it. A deadly weapon is defined in section 89 (4) of the Penal Code as any article made or adapted for use for causing injury to the person, or intended by the person having it

in his possession or under his control for such use. From the evidence of Pw2 to Pw4, the P3 forms that were tendered in evidence without the objection of the appellant, it is clear that use of an offensive weapon was proved by the prosecution. 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 weapons that the assailants were armed with, the nature of damages that were occasioned at the scene is enough and sufficient proof that the assailants were armed. In addition the injuries that were noted on the Pw2 to Pw4 is proof of injury occasioned on them.

25. In view of the evidence mentioned, I find that this ingredient of the offence has been proved beyond reasonable doubt. As to whether the appellant took part in the robbery, the whole issue hinges on the question of identification made by Pw2 to Pw4 as well as the circumstantial evidence.

26. I will start with direct identification evidence as contained in the testimony of Pw3. Pw3 saw the appellant on the material day and saw him in the company of the persons who wanted to switch off the machine. His 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 Pw3 and the appellant;**

**(iii) The lighting conditions at the time; and**

**(iv) The familiarity of Pw3 with the appellant.**

27. 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 likely 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?*

28. As regards the length of time the appellant was under observation, the same was more than a fleeting glance. And for the distance between them, they were close enough when he was ordered to show the assailants how to switch off the machine. As for the source of light at the time, the act occurred with electrical lights on. As to the familiarity of Pw3 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 an alibi that he was at home. However in my view, this was identification made under favourable conditions. I am of the view that Pw3 had no doubt in the identity of the appellant as the person who robbed them at the factory.

29. The evidence at the identification parade was in my view independent corroborative evidence. Pw2 and Pw3 are said to have seen the appellant as the assailant.

30. The rules governing how an identification parade should be conducted, which were first enunciated in **R v. Mwango s/o Manaa [1936] 3 EACA 29** and emphasized in **Ssentale v. Uganda [1968] EA 365**. These rules are.

a) *That the accused person is always informed that he may have a solicitor or friend present when the parade takes place.*

b) *That the officer in charge of the case, although he may be present, does not carry out the identification.*

*c) That the witnesses do not see the accused before the parade.*

*d) That the accused is placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself or herself.*

*e) That the accused is allowed to take any position he chooses, and that he is allowed to change his position after each identifying witness has left, if he so desires.*

*f) Care to be exercised that the witnesses are not allowed to communicate with each other after they have been to the parade.*

*g) Exclude every person who has no business there.*

*h) Make a careful note after each witness leaves the parade, recording whether the witness identifies or other circumstances.*

*i) If the witness desires to see the accused walk, hear him speak, see him with his hat on or off, see that this is done. As a precautionary measure it is suggested the whole parade be asked to do this.*

*j) See that the witness touches the person he identifies.*

*k) At the termination of the parade or during the parade ask the accused if he is satisfied that the parade is being conducted in a fair manner and make a note of his reply.*

*l) In introducing the witness tell him that he will see a group of people who may or may not contain the suspected person. Don't say, "Pick out somebody", or influence him in any way whatsoever.*

*m) Act with scrupulous fairness, otherwise the value of the identification as evidence will depreciate considerably.*

31. There is no evidence that cast doubt on the transparency of the process and the outcome thereof. I note that the Police Officer who was conducting the identification parade did abide by the above Rules and in the result the court was satisfied with the conduct of the identification parade.

32. The appellant raised the defence of alibi and assailed the trial magistrate for dismissing it. 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).

33. To counter this defence, the prosecution was required to adduce direct or circumstantial evidence proving that the appellant was the perpetrator of the unlawful actions. This was proved by the prosecution evidence as analyzed above. In this case, the prosecution largely rests on the accounts of Pw2 to Pw4 that placed the appellant at the scene of the crime. I have examined closely the identification evidence of Pw2 to Pw4 and found it to be free from the possibility of mistake or error. In light of that evidence, I reject the appellant's alibi. I am satisfied that there was ample evidence which put him at the scene of crime.

34. In view of the foregoing analysis I find that the appeal against conviction lacks merit and is dismissed. With regard to sentence, Section 296(2) provides for a death sentence. The sentence of 10 years meted on the appellant appears lenient. It is possible that the trial magistrate might have had in mind the decision by the Supreme Court in the case of **Francis Karioko Muruatetu & Another V. R (2017)** which outlawed death sentence. That being the position I find that there is no reason to interfere with the sentence passed by the court save that this court has power to enhance the sentence but opts not to do so. I note that the prosecution did not present evidence to the effect that the appellant had previous convictions and therefore I hold that he is a first offender. As the appellant appears to have remained in custody for the entire period of the trial I order that the sentence do run from the date of arrest namely 28.6.2013.

35. In the result the appellant's appeal on conviction is without merit and is dismissed. The appeal on sentence partly succeeds to the extent that the sentence of ten (10) years shall run from the date of arrest namely **28.6.2013**.

It is so ordered.

Dated and delivered at **Machakos** this 29<sup>th</sup> day of **April, 2020**.

**D. K. Kemei**

**Judge**