REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 40 OF 2014

PAUL KISELI MBUVI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence imposed by P. N. Gesora, Senior Principal Magistrate in Machakos Chief Magistrates Court in Criminal Case 1463 of 2012 on 13.11. 2013)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

PAUL KISELI MBUVI.....ACCUSED

JUDGEMENT

1. This is an appeal that was lodged herein on **2.12.2013** by the Appellant, **PAUL KISELI MBUVI**, against the conviction and sentence imposed by the Senior Principal Magistrate, **Hon. P.N. Gesora**, in Machakos Chief Magistrate's **Criminal Case 1463 of 2012**. The appeal was pursuant to grant of leave to file the appeal out of time that was allowed on 27.2.2014 and the appeal is deemed to be properly on record. The Appellant had been charged before the lower court with one count of Robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. It was alleged on the 10th October 2012 at Kivandini sub location in Mwala district within Eastern Province he robbed Mumbua Muli of cash Kshs 10,700/- and at or immediately before or immediately after the time of such robbery wounded the said Mumbua Muli.

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 **13.11.2013.** The Appellant was found guilty of the offence of robbery with violence and was convicted thereof and sentenced to serve the mandatory death sentence. Being aggrieved by the conviction and sentence, he preferred this appeal where he has challenged the decision of the trial court on the following grounds:

a. He was in custody for more than 24 hours hence a breach of his rights under Article 49(1)(i) of the Constitution.

b. The appellant was not properly identified.

c. Essential witnesses were not called to give evidence;

d. The appellant's defence was dismissed;

e. The appellant sought that he be supplied with a certified copy of the proceedings and the judgement;

f. That his constitutional rights under Article 25(c) and 50(2) of the Constitution were violated

g. That the appellant's sentence be reviewed in light of the decision in **Francis Karioko Muruatetu & Another v R (2017) eKLR**

3. Accordingly, the Appellant prayed that the conviction be quashed and sentence set aside.

4. In his written submissions, the appellant challenged his identification as a perpetrator that in his view was mistaken. Reliance was placed on the case of **Matianyi v R (1986) eKLR.** The appellant submitted that he was denied statements by the prosecution and hence there was a breach of his constitutional rights guaranteed under Article 25 and 50 of the Constitution. The appellant sought for a review of sentence in terms of Section 333(2) of the Criminal Procedure Code. The appellant also sought for a remission of sentence and urged the court to be guided by the case of **Francis Karioko Muruatetu & Another v R (2017) eKLR**.

5. The appeal was opposed by the State. On the issue of witness statements counsel submitted that the appellant did not raise it early enough hence this ground was an afterthought and lacked merit. On the issue of identification, counsel cited the case of **David Muchiri Gakuya v R (2015) eKLR** and submitted that the evidence of identification was more of recognition than identification as he was well known to Pw1, Pw2 and Pw4.

6. Counsel submitted that the prosecution proved its case to the required standard and urged the court to dismiss the appeal and uphold the sentence and conviction of the trial court.

7. 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 vs. 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..."**

8. The prosecution called a total of six witnesses before the lower court in support of their case, the first of whom was Jane Mumbua Sila (**PW1).** Her evidence was that, on the 10.10.2012 at 7.30 p.m she was at Kivandini walking with Beth Sila and Esther Ngui when she felt someone hit her from the back and she only heard the word “leta pesa”. She told the court that she fell unconscious and found herself at Machakos Hospital where she was admitted for two weeks. She testified that her face was swollen, she had wounds and cut on her upper lip and that when she was attacked she had Kshs 10,700/- that got lost. She testified that she reported the matter to the police officers at Masii Police station. She tendered in court the P3 form, treatment notes from Mwala Hospital, Treatment Card from Machakos Hospital and x-ray that were marked for identification. On cross examination she testified that she did not see the attackers.

9. PW2, Felista Mbethi, testified and told the lower court that on 10.10.2012 when she was with Pw1 and Esther Nzisa walking home, she was able to see the appellant whom she knew approaching them and later purported to ease himself by a tree. She told the court that the appellant then started trailing them and she saw him hit Pw1 with a spade and demand money from her then he later stole money from her. She testified that Pw1 was taken to Mwala Hospital and later Machakos Level Five Hospital then the matter was reported to Masii Police station. On cross examination, she testified that there was light from a vehicle that enabled her to see the appellant.

10. The clinical Officer attached to Masii Hospital, **Damaris Nyabuto (PW3),** told the court that she examined Pw1and noted that she had blood stains on her clothes and mild head and facial injuries. She testified that Pw1 was treated and referred to Machakos Hospital. She filled the P3 form and she tendered the same together with the treatment card, discharge summary and x-ray as exhibits.

11. PW4 before was **Esther Nzisa Ngui** who testified that on 10.10.2012 she was walking in the company of Pw1 when she spotted the appellant who was known to her before ahead of her by the side of a tree. She testified that she saw the appellant hit Pw1 with a spade and demand money from her. She testified that the complainant was taken to Masii Hospital with the help of a good Samaritan and later to Machakos level Five Hospital.

12. Pw5, APC John Gitonga testified that on 10.10.2012, three ladies approached the Mwala Administration Police post where he was and reported that the complainant had been attacked and robbed of money, a phone and her handbag. He testified that the appellant was named as the attacker and later the appellant was brought to the station by members of the public. He told the court that he recorded the same in the OB. On cross examination, he testified that the appellant was found in possession of a spade that was before court.

13. Pw6, **PC Cornelius Busienei** testified that on 11.10.2012 the appellant was brought to his office and he re-arrested the appellant. He testified that it was reported to him that the appellant hit Pw1 from the back on her head and she fell unconscious whereupon the appellant took her shawl that had Kshs 10,000/-. He testified that he got the OB extract from the Administration Police. On reexamination he testified that the complainant was admitted in hospital for five days and that the P3 form was filled on 20.10.2012. That was the close of the prosecution case. The court found that a prima-facie case had been established against the appellant and put him on his own defence.

14. In his defence, the Appellant told the court that on **10.10.2012,** he went to work at a hotel from 6 pm to 9 pm and on his way home he was taken by eight persons to the Mwala Administration Police post, then the following day he was taken to Masii police post where he was charged. He testified that he was a stranger to the charges. He testified on cross examination that the used to work at Kwa Nthoo Market.

15. The trial court found that the evidence of injury of the complainant was not challenged; that the appellant was recognized as the attacker that was evidence of higher evidential value than identification. The trial court found that Pw1 explained that she had Kshs 10,700/- that was the capital for her business and accepted that evidence. The court found that the defence failed to meet the threshold for meeting a credible defence and declined to accept the same and proceeded to convict him which decision prompted the instant appeal.

16. From the summary of the evidence adduced before the lower court, the pertinent questions to pose in this appeal, based on 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 there were any procedural and constitutional infractions by the prosecution or the learned trial magistrate that would vitiate the conviction that was recorded against the Appellant.

[c] Whether this court has jurisdiction to review the sentence meted on the appellant.

17. On the first issue**,** it is undisputed that the complainant was injured and it is undisputed that she lost money. The appellant seemed to challenge the evidence on identification**.** The trial court found that the evidence was that of recognition rather than identification. In the case of **Donald Atemia Sipendi v R (2019) eKLR** 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 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?

18. From the direct evidence of Pw2 and Pw4, it is clear that there was a level of familiarity of the said witnesses with the appellant, they knew him before having seen him earlier hence this was reason enough for them to realize that indeed he was the perpetrator of the violent act. The clear consistent, cogent evidence of Pw2 and Pw4 is enough to prove the element of participation of the appellant. The two witnesses promptly gave out the name of the appellant to the police who swung into action and that the appellant was immediately apprehended. He imputed an alibi that he was at work from 6 pm to 9 pm. However in my view, there was identification made under favourable conditions and I am of the view that Pw2 and Pw4 had no doubt in the identity of the appellant as the person who robbed Pw1.

19. 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).

20. 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 P.W.2 and Pw4 that placed him at the scene of the crime. I have examined closely the evidence of Pw2 and Pw4 and found it to be free from the possibility of mistake or error. In light of that evidence, I am in agreement with the trial court’s rejection of the appellant’s alibi. I am satisfied that there was ample evidence which put the appellant at the scene of crime. In any event the two key witnesses confirmed that they had no grudge against him to suggest a frame up. Further the evidence adduced established that the appellant was armed with a dangerous weapon namely a spade and that he wounded the complainant in the process of robbing her of a sum of Kshs 10,700/. These were the essential ingredients of the offence.

21. The appellant has told the court that he was in custody for more than 24 hours hence a breach of his constitutional rights. From the evidence of Pw6, the appellant was arrested on 11.10.2012 and charged the same day and this information is indicated on the charge sheet. It is not correct for the appellant to allege that he was in custody for more than 24 hours and this ground raised by the appellant is unsubstantiated. The appellant also belatedly raised the issue of failure to be supplied with witness statements. From the record, on 9.11.2012 and 13.12.2012 the court directed that he be supplied with witness statements and there was no indication that there was a confirmation that the directions of the court were complied with.

22. Article 50 (2) (j) of the Constitution provides for the right of the accused person to be informed in advance of the evidence the prosecution intends to rely on, to have reasonable access to that evidence and to have adequate time and facilities to prepare his defence. From the testimony of Pw6, who took the statements of Pw2 and Pw4 which evidence was reiterated by the said Pw2 and Pw4 I am convinced that the evidence in court was the same as that in their statements to the police. The appellant exhaustively cross-examined both witnesses and at no stage did he complain that he was handicapped due to witness statements. The appellant has also not indicated the injustice he suffered due to lack of statements.

23. In view of the foregoing analysis I find that the appeal against conviction lacks merit and is dismissed.

24. With regard to sentence, Section 296(2) provides for a death sentence upon conviction. The cited case of **Francis Karioko Muruatetu & Another v R (2017) eKLR** is a decision of the Supreme Court which has paved the way for resentence hearing for convicts facing the death sentence after the death sentence was declared to be unconstitutional. The appellant herein was sentenced to death and being guided by the above decision I hereby declare the said sentence as unconstitutional as the trial court's hands were unduly tied by the mandatory death sentence. Following the said Supreme Court's decision in Muruatetu case (Supra) the appellant is entitled to appear before the trial court for the purposes of a resentencing hearing. In that regard the issue of sentence is now remitted to the lower court for deliberation.

25. In the result the appellant's appeal against conviction lacks merit and is dismissed. On sentence the appellant is hereby ordered to be presented before the **Chief Magistrate Machakos Law courts** for the purposes of a resentencing hearing in line with the Supreme Court decision in **Francis Karioko Muruatetu & Another V. R (2017) eKLR.**

It is so ordered.

Dated and delivered at **Machakos** this **28th** day of **April, 2020.**

D. K. Kemei

Judge