REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CRIMINAL DIVISION

CRIMINAL APPEAL CASE NO. 390 OF 2010

LESIIT, J

RICHARD OCHIENG RUTO........................APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. Mr. M. Maundu, SPM dated 6th July 2010 in Kibera Chief Magistrate Criminal Case No. 8113 of 2007)

JUDGMENT

1. The Appellant's appeal was heard by a mixed bench of Korir and Marete, JJ and judgment delivered on 17th June 2014. That judgment was set aside by the Court of Appeal, Musinga, Gatembu and Murgor JJA on the 5th November 2019, and the appeal ordered to be re-heard. Thus the hearing of the appeal before this court.

2. The Appellant appeared in person and relied on the grounds of appeal as filed. In his oral submission the Applicant urged the court to find that the charge was defective as it did not have "dangerous weapon" in the particulars of the charge. He also urged the court to note that the Chief of the camp where he had been taken upon his arrest by the complainant was not called as a witness. He also decried the fact the complainant arrested him in person and also took him from the Chief's Camp to the Police Station without Police escort.

3. Ms. Akunja, Learned Prosecution Counsel opposed the application. Counsel urged that the Appellant was arrested at the scene of crime by the complainant soon after his accomplices robbed him of his cash. Counsel submitted that the Appellant was accompanied by 2 others who escaped, and one of whom was armed with a pistol which they used to threaten the complainant. Counsel urged that the offence of robbery with violence contrary to **Section 296(2)** of **Penal Code** was proved.

4. Ms Akunja urged that even though the terms "dangerous weapon" is not in the particulars of the charge, the weapon used is described as a pistol. Counsel urged that the arrest of the Appellant was by the complainant which was in order.

5. Regarding sentence, Learned Prosecution Counsel conceded the appeal urging that courts can now give a determinate sentence depending with the circumstances of the offence.

6. This is a first appellate court and therefore its mandate is clear that it should re-examine and re-evaluate the evidence afresh as set out in **OKENO V. REPUBLIC [1972] EA 32**.

> "**An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [**Pandya vs. Republic (1957) EA 336] **and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion** (Shantilal M. Ruwala v. Republic [1957] EA 570.) **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; 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, (See** Peters v. Sunday Post, [1958] EA 424.)"

7. The Appellant was charged and convicted of one count of Robbery with Violence contrary to **section 296(2)** of the **Penal Code**. The particulars of the offence were:

"On 16th November 2007 at Kibera Line Saba within Nairobi Province, jointly with others not before the court, while armed with a pistol robbed Dominic Nzioki Kinyingi cash KShs.10,000/= and immediately before or immediately after such robbery threatened to use actual violence to the said Dominic Nzioki Khufungi."

8. The Prosecution called 3 witnesses. PW1 was the complainant and he testified that on the material day he was selling paraffin at his employer's shop when the Appellant and 2 others attacked and robbed him. They were armed with a pistol like object which they placed on his ribs while the Appellant jumped over the door to the cash box where he removed money and handed over to his two accomplices. The complainant testified that he managed to hit the weapon used and it fell but the second accomplice picked it and both accomplices escaped leaving the Appellant behind whom he apprehended and was later helped by members of public at the scene of crime.

9. PW2 was the owner of the paraffin shop and employer of PW1. He confirmed hearing commotion of members of public who were saying that there were robbers. He went to his shop to find the Appellant already apprehended and members of public baying for his blood. PW2 testified that he took the Appellant to the Chief's Camp after confirming details of the incident from PW1. PW2 also produced a delivery note confirming that on 13th November 2007 he had purchased paraffin stock. That was a few days before the date of incident.

10. PW3 was the investigating officer of the case. He took over the investigations on 21st November 2007 five days after the incident. He interviewed witnesses and recorded statements. He also interviewed the Appellant before charging him with the offence.

11. The Appellant gave an unsworn statement and denied the offence. He said that he had gone to PW1's shop to buy paraffin and that he was waiting to be served as two people entered and engaged the seller. That soon thereafter he heard screams from the shop and the two people he had seen came out and ran away. That the pump attendant came out of the shop and pointed to him as a thief and he was apprehended by members of public and taken to the Chief's Camp after a thorough beating.

12. After carefully analyzing the evidence before her, the Learned Trial Magistrate believed the prosecution evidence and dismissed the Appellant's defence.

13. The Appellant has five grounds of appeal in his memorandum of appeal as follows:

(1) ***That the learned trial magistrate erred in law and facts when she convicted me while relying on my mode of arrest without considering that it was a matter of mistaken identity.***

(2) ***That the learned trial magistrate erred in both law and facts when she convicted me with no exhibit of this case.***

(3) ***That the learned trial magistrate erred in law and facts when she convicted me without her considering that I was not given adequate time to prepare for the case since it was done for one day.***

(4) ***That the learned trial magistrate erred in law and facts when she convicted me while rejecting my defence without explaining the proper reasons for rejecting thus violating the law provision under section 169(1) of the Criminal Procedure Code.***

(5) ***That my lordship I cannot recall the whole evidence that was adduced during the trial I now beg leave to this honourable court of appeal to furnish me with trial proceedings so that they may assist me to add more grounds during the hearing of this appeal and same I pray to be present during the hearing date.***

14. I have already set out the submissions by the Appellant and the submissions of the Learned Prosecution Counsel. From the Appellant's Memorandum of appeal four grounds of appeal are apparent, one that of mistaken identity, two failure to avail exhibits, three Appellant was not given sufficient time to prepare defence and four failure by the trial court to give reasons for rejecting the defence. Two new grounds were raised in the Appellant's oral submissions, five that the charge was defective and six that the Chief was not called as a witness.

15. The most critical ground raised is that of identity. There was one identifying witness in this case, PW1. His testimony was that he was selling paraffin for his employer at his shop when three men appeared, the Appellant and two others. PW1 described the role played by the Appellant. He said that the Appellant jumped over to where the cash box was as his two accomplices remained with him, one pressing a pistol like object on his ribs as the second one stood by. PW1 said that as soon as the Appellant took cash from the till, he handed it over to his accomplices who managed to escape. The Appellant was not able to escape as the complainant apprehended him and soon members of public assisted him.

16. From this account it is clear the Appellant is the one who jumped into the shop to where the cash till was where he removed the cash. He was not able to leave the scene after that act. He was also the only person inside the shop before he was apprehended. From this circumstances, there is no chance that PW1 could have mistaken him for someone else.

17. Regarding identification in **ABDULLAH BIN WENDO VS. REX 20 EACA** the Judges of Appeal emphasized the need for careful scrutiny of the evidence of identification especially by a single witness and had this to say:

"Subject to certain well known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care ;the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a Judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free

from the possibility of error."

18. In **R. VS. ERIA SEBWATO [1960] EA 174** the court held:

> "**Where the evidence alleged to implicate an accused is entirely of identification, that evidence must be absolutely watertight to justify a conviction**."

19. And in **CLEOPHAS OTIENO WAMUNGA VS. REPUBLIC [1989] eKLR** the Court of Appeal held:

> "***What we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger.***
>
> ***Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification."***

20. I am well guided. From these authorities it is clear what a trial court should satisfy itself of before convicting on the basis of identification by a single identifying witness. First of all, the circumstances under which the Appellant was identified is critical. In this case the incident happened at 8.30 p.m. I was inside a shop. The Appellant had jumped in to access the cash box and did not make it out. The other facts are that customers stood at a window to be served. They never entered the shop. The Appellant gained entry to the shop where PW1 was through the door to the shop which was not closed.

21. PW1 testified that he arrested the Appellant "there and then" before he could leave the shop. Even though the lighting condition was not favourable being night, the Appellant had entered the shop, separating himself from everyone else. Therefore, he was alone in the shop after giving out the money and chances of mistaking him did not exist. Furthermore, PW2 came to the scene soon after the robbery and confirmed finding PW1 holding the Appellant inside the shop. PW1's evidence received support from PW2. PW2's evidence corroborates the fact the Appellant was inside the shop at the time of his arrest.

22. I find that the evidence adduced in this case even though that of a single identifying witness was water tight to justify a conviction. I find that there was no mistaken identity in this case.

23. On the issue of exhibits, the only exhibits which may have been required was the weapon used in this offence and the stolen cash. The evidence is clear that the Appellant was not alone during this offence. He had two accomplices. PW1 is clear the two left with both the weapon used and the stolen cash. There was therefore no exhibits the prosecution could have produced in this case.

24. On the issue of not being given adequate time to prepare for his defence, I see from the record that the Appellant was put to his defence on the same day that the prosecution closed its case. He did not seek any adjournment or time to prepare for his defence. He gave an unsworn defence after which he said he had no witnesses to call and closed his case. Since he never raised this issue at the trial, and the prosecution case being simple and with only 3 witnesses, I find, one that the issue being raised at this stage is an afterthought; and two, that the Appellant had adequate opportunity to prepare for his defence.

25. The other ground raised is that the Learned Trial Magistrate did not give reasons why he rejected the Appellant's defence. I have perused the Learned Trial Magistrate's judgment. I find that he gave the reasons why he rejected the Appellant's defence. Part of the grounds given being the water tight evidence on identification, the arrest at the scene soon after the offence and the fact that the Appellant was a total stranger to PW1 and therefore the latter had no reasons to implicate him with such an offence. These reasons are sufficient to satisfy the requirements of **section 169(1)** of the **Criminal Procedure Code**.

26. Regarding defective charge, the Appellant raises issue with lack of use of the words 'dangerous weapon' in the charge against him. I agree with the Learned Prosecution Counsel that the weapon used was a pistol and failure to describe it as a dangerous weapon does not raise any doubt that it was a dangerous weapon.

27. The last issue raised is that of failure to call the Chief of the Camp where the Appellant was taken after this incident. PW2 the owner of the shop where PW1 worked testified that the Appellant was taken to the Chief's Camp for the night and then taken to the Police Station the day after. There is no evidence to show whether the Chief handled the Appellant. Even if he did, I find that his evidence is not important in this case and the role he played if any is minimal. There is no doubt the Appellant was arrested at the locus in quo of the crime. Failure to call the Chief does not affect the veracity of the prosecution case.

28. Having carefully considered the evidence before court and having analyzed and evaluated it afresh, I find that the learned trial Magistrate's findings and conclusions were correct and cannot be faulted. The conviction was sound and is therefore upheld.

29. The Learned Prosecution Counsel raised the issue of the sentence. This I believe is in light of the famous **FRANCIS MURUATETU & ANOR. VS. REPUBLIC** Supreme Court Case No. 14 and 15 of 2015. The Appellant was sentenced to death. The courts are empowered to give alternative sentences to the death penalty in capital offences. Pursuant to the above binding case of **Muruatetu**, supra.

30. I have considered that the Appellant was not heard in mitigation before sentence but this was because he escaped from Kenyatta National Hospital where he had been admitted while in custody pending judgment. I have considered that the Appellant has been in prison after arrest on 26th November, 2007 to the date he escaped from Kenyatta National Hospital on 20th May, 2008 when judgment was slated to be read.

He was re-arrested and brought before court on 6th July 2010. In total he has been in custody for 10 years and 5 months which I have considered.

31. He appears to be a young man when he appeared before me through skype during the hearing of his appeal. Taking all these factors into consideration, I set aside the death penalty and substitute it with a sentence of 15 years' imprisonment to commence from the date of arraignment before trial court, which is 26th November 2007. He shall not be eligible for remission having escaped from prison custody in the course of his trial.

32. In the result the appeal against conviction is dismissed for lack of merit and conviction upheld. The sentence is reduced from the death penalty to 15 years' imprisonment on the terms set out in paragraph 31 of this judgment.

DATED IN NAIROBI THIS 25TH DAY OF MAY, 2020.

LESIIT, J

JUDGE

SIGNED AND DELIVERED THIS 28TH DAY OF MAY, 2020.

BY HON. JUSTICE JAMES WAKIAGA

JUDGE

SIGNED