REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 275 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

PHILEMON MANARI NGAIRU.....APPELLANT.

JUDGMENT

(Being an appeal against the conviction and sentence to suffer death for the offence of

Robbery with Violence Contrary to Section 296 (2) PC in Criminal Case No. 1445/2012

passed upon me by Hon. J.n. Nthuku (SRM) Senior Resident Magistrate

at Nakuru on the 12th day of November 2014).

1. The appellant was convicted for the offence of **robbery with violence Contrary to Section 296 (2) of the penal code** and sentenced to suffer death as the only penalty under the penal code. Particulars of the offence are stated that on the 26/4/2012 at 10:30 pm in Subukia District within Rift Valley Province the accused robbed Kioko Ngumbao of his mobile phone make **Techno Serial No. AXN4VD982330** valued at Shs.5000/= and a jacket brown in colour Shs.1,500/= and immediately before the time of such robbery wounded the said Kioko Ngumbao on the left upper jaw.

2. Aggrieved by the decision, the appellant moved to appeal on both conviction and sentence, on several grounds, that may be summarise into three, thus

(1) Lack of proper and positive identification by the complainants (PW1 and PW2)

(2) Failure to call crucial witness (driver of the motor vehicle ferrying the alleged stolen goods.

(3) That appellant's defence was disregarded.

3. The duty of the first appellate court is to analyse and re evaluate all the evidence before the trial court and draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses – **Kiilu & another Vs. Republic (2005) e KLR, Isaac Ng'ang'a alias Peter Ng'ang'a Kahiga Vs. Republic (2205) e KLR and Okeno Vs. Republic (1972) EA 32.**

4. In an offence under **Section 296 (2) of the Penal Code,** three ingredients must be proved against the accused;

(1) That the offender was armed with a dangerous weapon.

(2) That he was in the company with one or more other persons or

(3) That immediately before or immediately after the time of the robbery, the offender threatened to use actual violence.

5. I have considered the particulars of the offence as stated in the charge sheet against the prosecution evidence, and the defence.

The burden of proof in a criminal case always rests with the prosecution to adduce satisfactory and sufficient evidence to convict an accused

person to the commission of the offence, such evidence must be so clear, cogent and credible that there is no possibility of an error. It must be beyond reasonable doubt that it is the accused, and no other that committed the offence.

On identification.

6. The offence is alleged to have occurred at 10:30pm. PW1's evidence was that as he walked home about 9:30pm he saw a person ahead of him talking, that he emerged from the bush and was armed with a knife. He testified that the said person stabbed him on the left eye brows, threw him down and ordered him to surrender everything. That he took away his coat, padlock with three keys, wallet with Shs.100, a phone Nokia 6233 valued at Shs. 4000/=

It was his evidence that the he did not identify the attacker at the scene of crim.

He further testified that later on the 26/4/2012, he heard that a thief had been arrested and upon going to the police station he found the telephone and the padlock that belonged to him, and found that the suspect was his relative.

7. **PW2** Kioko Ngumbao, a police constable testified that on the 25/4/2012 as he walked from the shops to the Kerongero police station, he saw three people ahead, on opposite directions. He testified that suddenly he was hit from behind, and he fell down, then suddenly removed his jacket, and his phone fell, and he ran away. He then reported the incident at the police station.

On the following day, he was called to the Railway Police Station to identify items found in a vehicle from Subukia to Nakuru. It was his evidence that he found the appellant wearing his stolen jacket, and his phone **Serial NO.VD982330,** but did not produce the purchase receipt. It was his testimony that at the time of the offence, he did not identify the attacker.

8. By the above evidenced, was there then positive identification of the offender? The person who hit the complainant was behind him. He did not see him. It has not been stated that the three people the complainant saw ahead of him. In the instant case the attacker was alone, it was not testified to what weapon, if any, was used by the alleged offender. Indeed the complainant did not testify that his phone was stole forcefully, but that it fell from his jacket.

9. **PW1** spoke of only one person whom he did not identify at the scene as the attacker. He too, other than stating that the padlock and phone belonged to him, no evidence to show and prove ownership was adduced.

10. It is trite that before a court can rely on the evidence of identification to convict an accused person, it must examine such evidence carefully and to be satisfied that the offender is positively identified.

In the Case **Wamunga Vs. Republic 1989 KLR 426**, the court rendered that

"*It is trite that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction".*

11. Further, in the case **Republic Vs. Turubull & others, (1976)** all **ER 549,** a case cited and quoted with approval in the **Kenya courts, Lord Wilgery, CJ** pointed out that:

> "*Recognition may be more reliable than identification of a stranger, but even then when the witness is purporting to recognize someone whom he knows, the Jury should be reminded that mistakes in recognition of close relatives and friends, are sometimes made------All these matters go to the quality of the identification evidence. If the quality is good and remains good and at the close of the accused's case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger".*

12. It is on record that PW1 and PW2 did not recognize the assailant as they were hit from behind, by a lone assailant though the offence is stated to have been committed at night about 9:30 pm, the complainant, PW2, did not state the approximate time in his evidence save that it is stated to have been at 10:30pm.

13. It was not testified to the offence being among 9 series of similar offences by the same assailant.

Thus in the matter of identification, there is no evidence that it was the appellant with others, who committed the offence.

I have looked at the charge sheet. The crime is stated to have been committed on the 26/4/202 at 10:30p.m.

14. The complainant's evidence is of a crime committed on the 25/4/2012, with no approximate time stated, though only stated that there was moonlight and bright.

It is therefore safe to find and hold that the appellant was not identified by either PW1 or PW2.

15. The safeguards stated in the **Turubull Case and Wamuuga Case (supra)** are essential and failure to observe them may lead to a mistaken identity.

I therefore come to the conclusion that the appellant was not identified by the complainant at all.

16. **Doctrine of Recent Possession.**

I have stated above that the complainant's alleged telephone was not positively identified.

In his evidence PW2 did not testify that his phone was stolen, but that it fell when he was hit and fell to the ground, and that the assailant pulled off his jacket. That in my view explains why the telephone, if at all it was stolen, was not identified as belonging to the complainant.

17. On the matter of the complainants jacket, no sufficient description was given of the jacket, save that it was brown. It was upon the complainant to give more and better particulars of the alleged jacket as there is no evidence that fitted his jacket to the exclusion of other brown jacket's in the market.

That goes for the phone allegedly stolen from PW1. He too failed to tender any evidence as to ownership. To that end, I agree with the trial magistrate holding that she could not without reasonable doubt, find that the said phone belonged to PW1 not the one allegedly stolen.

18. The trial court stated that the complainant's phone was produced as Exhibit 3 and the jacket as Exhibit 4.

I have considered the evidence of PW3, a police officer, Peter Nyanduso. He did not identify the staff of 4NT who informed him of a suspicious vehicle carrying suspicious items. He interrogated the appellant at the police station over items - two sacks one with alcohol and one with a T.V, and four phones with sim cards inside. His evidence was that he recovered a knife under his trousers and was wearing three heavy jackets. He also had money. It was his evidence that he could not account for the items, and thereafter preferred the charges of robber with violence.

19. In the case **Erick Otieno Arum Vs. Republic (2206) e KLR** stated, on the Doctrine of recent possession that

> **"In our view before court of law can rely on the doctrine of recent possession as basis for conviction in a criminal case, the possession must be positively proved.**
>
> **In other words, there must be positive proof first that the property was found with the suspect and secondly, that the property is positively the property of the complainant, thirdly, that the property was recently stolen from the complainant"**

20. I have stated above that no positive identification of the items was tendered by the complainant.

Mere statement that the brown jacket belonged to the complainant without strict proof cannot, in my view be taken seriously, more so that no further identification or better particulars were produced.

21. It is not clear from the prosecution evidence when the alleged offence was committed, having alluded to two different dates as stated in the charge sheet, and evidence of the complainant.

PW4's evidence was that the complainant told him he could recognize his attackers, yet in his own evidence, the complainant stated that he did not, and could not identify his attacker, -------- one.

22. **PW5's** evidence that the appellant was found with goods he could not account for did not, in my view, amount to evidence that the said goods, stolen or not, belonged to the complainant. It was subject to strict proof that indeed the said goods belonged to him, and no other persons.

23. In the matter of circumstantial evidence, upon which the trial court based its conviction, the court in the case **Abas Alias Onyango Vs. Republic – Cr. Appeal No. 32/1990 (UR)** stated that

> "*It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests that:*
>
> *(i) The circumstances from an inference of guilt is sought to be drawn, must be cogent and firmly established.*
>
> *(ii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that twill all human probability the crime was committed by the accused and no other-----*"

25. In his defence, upon sworn evidence, the appellant testified on how he was arrested, that while in a matatu, it was stopped and taken to the police station whereupon several items including a T.V., changaa and others were found, and that nobody in the said vehicle owned them.

It was his evidence that he had no luggage, and that when he failed to give to the police officers Shs.10,000/= as demanded in exchange for his freedom, he was beaten locked up and later charged with the offence.

26. Considering the entire evidence and priority it through a serious scrutiny, I am not satisfied that the trial magistrate's findings were based on the entirety of evidence, and the law.

27. The ingredients of robbery with violence as stated under Section 296 (2) of the Penal Code must be satisfied for a conviction to be sustained. As stated in the body of this judgement, the complainant was attacked by only one person. He did nt state what weapon, if any, was used to injure him.

28. Granted, he stated that the attacker got on top of him when he fell down upon being hit on the head. He did not know what weapon was used, whether a dangerous weapon or not. He did not state that it was a knife or at all.

Considering the P3 Form Exhibit 1 (a) filled one day after the alleged offence, the Doctor PW5, noted a swelling at the back of the head, and mild swelling and pain on left index finger.

He alluded to a blunt injuries caused by a blunt weapon.

29. The only weapon produced was a knife. By and large, a knife is a dangerous weapon. However, the complainant did not alluded to a knife as the weapon used to attack him. Indeed, blunt injuries as stated in the P3Form cannot cause blunt injuries as stated by PW5, the doctor. In that aspect, the first two ingredients under **Section 296 (2) of the Penal Code** were not proved – **Francis Muturi Kiaro Vs. Republic (2018) e KLR.**

30. On the third ingredient, there is no doubt that the complainant was injured. However having come to a finding that the offender was not positively and or circumstantially identified as the offender, it follows that the prosecution failed to prove the offence of robbery with violence against the appellant beyond any reasonable doubt.

31. I therefore find and hold that the prosecution evidence adduced before the trial magistrate was not cogent, plain and credible, nor sufficient to sustain a conviction under **Section 296 (2) of the Penal Code.**

32. For the foregoing, I find and hold that the conviction of the appellant to have been unsatisfactory and unsafe. The appeal succeeds in its entirety.

Consequently, I set aside the conviction, and the sentence meted upon the appellant.

Unless otherwise lawfully held, the appellant is set free.

Delivered, signed and dated at Nakuru this 28th Day of May 2020.

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J.N. MULWA

JUDGE.