REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 51 OF 2019

BRIAN KENNEDY MANYOLO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of Hon. Ruguru N. (SRM) in Makueni Senior Principal Magistrate's Court Criminal Case No. 376 of 2018 delivered on 24th December, 2018).

JUDGMENT

1. **Brian Kennedy Manyolo** the Appellant herein was charged with the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code. The particulars were that on the 6th day of August 2018 at Miangeni market, Miangeni sub-location, Athi location in Mbooni East sub-county within the Makueni county, jointly with another not before court, robbed **Justus Mutisya Musumbi** cash Kshs.11,000/= and one coat all valued at Kshs.11,200/= and at the time of robbery used actual violence to the said **Justus Mutisya Musumbi**.

2. He denied the charge and the matter proceeded to full hearing with the prosecution calling five (5) witnesses, while the defence called only one witness (the Appellant). The Appellant was finally found guilty, convicted and sentenced to twenty-five (25) years imprisonment.

3. Being aggrieved with the judgment he filed this appeal raising the following grounds:

a) **That,** the learned trial Magistrate erred in both law and fact by convicting him on single dock identification.

b) **That,** the learned trial Magistrate erred in both law and facts by convicting him on contradictory and uncorroborated evidence.

c) **That,** the learned trial Magistrate erred in both law and facts by convicting him hence shifting the burden of proof to him, the accused 2.

d) **That,** the learned trial Magistrate erred in both law and facts by dismissing his sworn defence without enough reasons.

e) **That,** the learned trial Magistrate erred in both law and facts by convicting him in absence of the arresting officer's evidence.

4. A summary of the case is that Pw1 **Justus Musumbi Mutisya** was at vineyard bar and restaurant in Miangeni market with Pw4 **Anastacia Nduku Kariuki** (*a bar attendant*) on 6th August 2018 at 10:00 pm. They were seated at the back side of the bar. While there the Appellant arrived with a lady called Lucy and they were intoxicated. The said lady confronted Pw1 demanding for her alcohol. She slapped Pw1, dropped him from his chair and thoroughly beat him before being joined by the Appellant.

5. Pw2 and Pw4 witnessed the assault but were not able to assist him. The Appellant took away Pw1's black jacket which contained Kshs.11,000/= and his phone make Tecno T3 all valued at Kshs.11,200/=. After this, the Appellant and his companion left.

6. Pw1 went to hospital the next day from where it was confirmed that he had suffered the following injuries:

- Swelling around right part of head,

- Hunary bite on right eye

- Missing upper incisor

- Bruises on elbow and middle finger.

A P3 form (EXB1) was produced by Pw3 **Gathanwa Njoroge** who assessed the injuries as grievous harm.

7. Pw5 **No. 67026 CPL John Ateka** the investigating officer testified on the report he received from Pw1 on 7th August 2018 at around 8:21 am. He issued him with a P3 form (EXB1) and sent him to hospital. He produced Pw1's dusty torn trousers (EXB4). The Appellant was then arrested.

8. When placed on his defence the Appellant elected to give a sworn statement. He testified that he found himself at Kalawa police station on 8th August 2018 where he was told about this charge which he denied. He explained that he spent the whole of 6th and 7th August 2018 at home harvesting. On 7th August 2018 at 1:00 pm he went with his motorbike at Miangeni market where he operated a boda boda business. He left for home at 6:00 pm.

9. The next day he worked from 5:00 am to 6:00 pm. At 7:00 pm a client called him to transport him from Miangeni market to his home. On arrival at the said market, he went to the stage but missed the client. He saw an Administration Policeman from Miangeni who directed him to the Kalawa police station. The officer had a warrant of arrest against him from the said station. He was informed of this charge which he denied.

10. The appeal was canvassed by way of written submissions. It is the Appellant's submission that he was not properly identified by Pw1, Pw2 and Pw4. Secondly that Pw1 who was intoxicated could not have identified him. Finally, he submits that the Magistrate misconstrued the evidence adduced. That his, was a case of mistaken identity. He agreed that him and Pw1 know each other but he was not at Vineyard bar on 6th August 2018.

11. The Respondent opposed the appeal vide the submissions filed by Mrs. Anne Gakumu. She cited the following as the issues for identification:

i. Whether there was any theft of any items on the night of 6th day of August 2018 at Miangeni market.

ii. Whether offender (s) were armed with any dangerous weapon or offensive weapon or instruments.

iii. Whether offender was with one or more other person or persons.

iv. Whether at or immediately before or immediately after the time of robbery, they wounded, beat, struck or used any other personal violence to any person.

12. It is her submission that all these issues can be confirmed through the evidence of Pw1, Pw2, Pw3 and Pw4. On identification of the assailant she contends that there is sufficient evidence to show that the Appellant was at Mitangeni Vineyard Bar and Restaurant with one Mwikali. There was enough light from electric bulbs. There was also evidence showing that that the Appellant confronted Pw1. The parties were well known to each other. Further she submits that the issue of Pw1 being too intoxicated to identify the Appellant is a non-starter.

13. On the Appellant's defence she submits that it was full of mere denials which did not dislodge the prosecution case. He urges the court to dismiss the appeal in its entirety, and confirm the sentence which was lenient.

Analysis and determination

14. The duty of the first appellate court is to re-analyze and re-consider the evidence tendered before the trial court with a view to arriving at its own independent conclusion. See **Okeno –vs- Rep (1972) E.A 32. In Kiilu an Anor –vs- Rep (2005) I KLR 174** the Court of Appeal stated that:

> ***"1. 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.***
>
> ***2. 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."***

15. The same was reiterated in the case of **David Njuguna Wairimu –vs- Rep (2010) eKLR** where the Court of Appeal stated:

> ***"The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."***

16. Upon consideration of the evidence on record, the grounds of appeal, both submissions and the law, I find the main issue falling for determination to be whether in the final analysis the prosecution proved the case against the Appellant beyond any reasonable doubt. Depending on the answer to this issue, the court may need to consider whether the sentence meted out on the Appellant was harsh and excessive.

17. The offence of robbery with violence is defined under section 296 (2) of the Penal Code to be: -

> **Section 296 (2)**
>
> ***(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, he wounds, beats strikes or uses any other personal violence to any person, he shall be sentenced to death.***

The issues to be established are:

> *i. Whether there was any theft of Pw1's items on the night of 6th August 2018.*
>
> *ii. Whether the theft was by more than one person or whether the thief/thieves were armed with dangerous weapons or whether there was any violence applied against Pw1.*
>
> *iii. Whether the Appellant was clearly and positively identified as Pw1's assailants driving the incident.*

Issue no. (i) Whether there was any theft of Pw1's items on the night of 6th August 2018.

18. It was Pw1's evidence that he was robbed of his jacket which contained Kshs.11,000/= in the inside pocket. He was also robbed of his Tecno T3 phone valued at Kshs.6,500/=. All this totaled Kshs.17,500/=. The charge sheet shows that the stolen items i.e. cash plus phone were valued at Kshs.11,200/= and not Kshs.17,500/= as per the evidence of Pw1.

19. I have read through the judgment by the learned trial Magistrate and I see no finding on whether there was indeed a theft of Pw1's cash plus phone. It was the duty of court to establish that indeed Pw1 had on himself cash 11,000/= plus a phone, the make of Tecno T3. It is not enough for an assertion to be made and the court goes by it.

20. There was nothing produced before the court to confirm ownership of a phone Tecno T3 by Pw1. No receipt no photo etc. was produced. Secondly, it is not an obvious thing to be carrying such an amount of money on self into a bar without a known purpose. What was the origin of the money? Besides saying that he sells carvings there is nothing he said about the money he alleges was in his possession. Did he really have Kshs.11,000/= on him?

21. How was this jacket taken away from him? Pw1 states this at page **3** lines **4** – **6**

> *"Kennedy also dragged me from the bar towards the gate. He then removed my Jacket which had Kshs.11,000/= in the inside pocket."*

Pw2 who witnessed the beating says this of the jacket at page **6** lines **5-6** of the proceedings

> *"Mutisya had a jacket when he came to the bar. When he was being beaten, his jacket was missing."*

22. Pw4 who also witnessed the beating said the following at page 9 lines **11-16**

> *"She then pulled Mutisya and he fell down. Ken joined Lucy and started kicking and stepping on Mutisya. He kicked him everywhere. I tried to help Mutisya but Ken and Lucy over powered me. Ken then removed Mutisya's black jacket. At that time, I ran to the front counter and called safari (Pw2) who was at the counter and another customer."*

23. According to Pw1's evidence this jacket which contained the Kshs.11,000/= was taken away from him as the Appellant dragged him from the bar to the gate. However according to Pw4 who was present when the whole episode started said the jacket was taken away from him while inside the bar. She does not however say where it was taken to.

24. The impression given is that the whole episode took place inside the bar until the arrival of Pw2, and other revelers who helped Pw1. Thereafter the Appellant and his companion were chased out of the bar. My finding on this issue is that there wasn't sufficient evidence to confirm the theft of Kshs.11,000/= and the phone. This being my finding I do not see the need of tackling issue no. (ii) as it will serve no

purpose.

Issue No. (iii) Whether the Appellant was clearly and positively identified as Pw1's assailants driving the incident.

25. First of all, there is overwhelming evidence that Pw1 was assaulted on this material night by two people. The evidence of Pw1 – Pw5 is very clear on this. When Pw1 went to the station to report Pw5 saw an injury on Pw1's upper right eye and he had one tooth missing. Pw1, Pw2 and Pw4 witnessed the beating. Finally, Pw3 who examined him confirmed the injuries which he assessed as grievous harm. (EXB1).

26. The Appellant contends that the complainant (Pw1) did not identify him owing to the fact that he was intoxicated and it was at night. To him this was a case of mistaken identity. He therefore challenged his identification by recognition and stated that the same was not sufficient. In the case of **Anjononi & Others –vs- Rep (1976 – 1980) KLR 1556 at 1568** the court of Appeal stated as follows:

> *"The recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other."*

27. In the recent case of **Eric Oduor Odhiambo & Anor –vs- R (2019) eKLR t**he Court of Appeal clarified that:

> *"Of importance is the caution in **Anjononi & Others –vs- R (1976-80) I KLR 1566** that although recognition of an assailant is more satisfactory than identification of a stranger the possibility of someone making a genuine mistake even in circumstances that are not favourable for identification cannot be ruled out and therefore there is need to test and weigh the evidence of identification."*

28. It is thus proper for the circumstances prevailing at the time of incident to be analysed to enable the court to make a finding as to whether the circumstances were favourable for a positive identification. Pw1 stated that the incident occurred at 10:00 pm at a bar and there was sufficient electricity light from the bulb.

29. In the case of **Francis Kariuki Njiru & 7 Others –vs- R (2001) eKLR** the Court of Appeal stated this:

> *"The law on identification is well settled and this court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered. Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all."*

30. Before acting on such evidence the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and the time taken by the witness to observe him. See **Maitanyi –vs- Rep (1986) KLR 198 & Daniel Oginga & 2 others –vs- Rep (2019) eKLR.**

31. Evidence on identification was tendered by Pw1, Pw2 and Pw4. Pw2 who worked at the said bar at the counter confirmed that there was sufficient electricity light where Pw1 sat behind the bar. Pw4 who was a waitress at the said bar gave similar evidence on the lighting at the scene.

32. It was Pw1's evidence that he knew the Appellant before the incident. They had gone to the same primary school. Pw2 confirmed knowing both Pw1 and the Appellant before the incident. He even said the two were his friends. Pw4 said the Appellant was a regular customer at the bar and she knew him well. She is the one who was seated with Pw1. These three witnesses Pw1, Pw2 and Pw3 told the court about their encounter with the Appellant that night.

33. In the case of **Hellen Anyango Oloo & 2 Others –vs- Rep (2018) eKLR** the Court of Appeal observed that:

> *"In our view, this was not merely a case of identification by Pw4 and Pw5; it was a clear case of recognition of well – known neighbors, who the witnesses had seen over a lengthy period on the material day starting from about 6:00 pm. On recognition, the courts have stated time and again that it is more satisfactory, reassuring and reliable than identification of a stranger because it is based on personal knowledge of the suspect. (see **Anjononi & Others –vs- Rep (1976 – 80) I KLR 1566."***

34. The Appellant denied having been at Vineyard bar on the material night as he was at his home throughout. He however admitted knowing Pw1 and also said Pw1 knew him.

35. Pw4 told the court that after the incident Pw1 spent the night at the Vineyard bar lodging. Pw5 received Pw1's report on the next day (*7th August 2018*) at 8:21 am. He gave to Pw5 the names of those who had attacked him as he knew them. That is how the Appellant was arrested. All in all, the evidence of Pw1 on identification is supported by that of Pw2 and Pw4. They all knew him. There is no known reason why they would gang up to lie that they saw him when they did not.

36. I therefore find the trial Magistrate's finding on identification to have been proper. That confirms that the Appellant was one of those who injured Pw1 causing him grievous harm. This court having found that the ingredient of theft was not proved it follows that the offence of robbery with violence contrary to section 296 (2) Penal Code was not established. It is however established that Pw1 was grievously assaulted by the Appellant.

37. Section 179(1) of the Criminal Procedure Code provides:

"When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it."

38. Is Section 179 (1) applicable in this case? The Court of Appeal addressed this issue in the case of **Kalu –vs- Rep (2010) I KLR** when it observed:

"With the greatest respect to the learned Judge there was no law which would authorize a judge on appeal to convict a person with an offence with which that person was never charged. All the provisions of the Criminal Procedure Code which are under the heading –

Convictions for offences other than those charged" and beginning with section 179 up to section 190 deal with situations in which a court is entitled to convict on a minor and cognate offence where a person is charged with a more serious offence. Thus it is permissible to convict a person charged with capital robbery under section 296(2) of the Penal Code for the offence of simple robbery contrary to section 296(1) of the Code. It is also permissible to convict a person charged with murder under section 203 of the Penal code with manslaughter under section 202 as read with section 205 of the Penal Code.

That is because the offence of manslaughter, for instance is a minor and cognate offence to that of murder. But where there is no charge of murder at all and the only charge available on the record is that of manslaughter, it would be courageous for a trial court to convert that charge into murder simply because the evidence on record proves murder."

39. Guided by section 179 (1) of the Penal Code and the decision above I find that grievous harm contrary to section 234 of the Penal Code is a minor and cognate offence to that of robbery with violence contrary to section 296(2) of the Penal Code. I therefore quash the conviction for robbery with violence contrary to section 296 (2) of the Penal Code and substitute it with a conviction for grievous harm contrary to section 234 of the Penal Code.

40. The maximum sentence for an offence of grievous harm is life imprisonment. The record shows that the Appellant was a first offender. He told the court he had nothing to say in mitigation. He was first arraigned in court on 10th August 2018 and was sentenced on 24th December 2018. I have taken into account all these factors including the period, he was in custody before conviction and sentence. I have also considered the trauma Pw1 went through at his instance.

41. I set aside the sentence of 25 years' imprisonment and substitute it with a sentence of six (6) years imprisonment. The upshot is that the appeal partially succeeds. The Appellant is convicted for grievous harm contrary to section 234 of the Penal Code. He will serve six (6) years imprisonment with effect of 24th December, 2018 which is the date he was sentenced.

Orders accordingly.

Delivered, signed & dated this 26th day of June 2020, in open court at Makueni.

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H. I. Ong'udi

Judge