REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL CASE NO.115 OF 2016

WILSON MUREITHI MAINA.......................APPELLANT

-VERSUS-

REPUBLIC..RESPONDENT

JUDGMENT

1. The Appellant was jointly charged with accused one **Wilson Muiruri Njeri** in the lower court with two counts of **Robbery with Violence Contrary to Section 296(2) of the Penal Code**. Particulars to Count I are that, on the 4th day of September 2012, Kabarak area in Nakuru District within the Rift Valley Province, accused persons jointly with others not before court, while armed with sticks and rungus robbed one **Caroline Machani** of her mobile phone make Samsung Galaxy valued at kshs 8,000 and cash kshs.15,000 all total value of kshs 31,000 and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said **Caroline Machani.**

2. Particulars to Count II are that on the same day they jointly robbed **Dennis Onduso Machani** mobile phone Samsung valued at kshs. 8,000 and cash kshs 7,000 all valued at kshs 15,000.

3. Alternative charge to Count II is the **offence of handling stolen goods contrary to Section 322(1) (2) of the Penal Code**. Particulars are that on 28th day of September 2012 otherwise than in the course of stealing, the appellant dishonestly retained a Samsung phone make chat 3222 serial no.35804043847039 knowing or having reason to believe them to be stolen goods.

4. After hearing, the trial Court found that the prosecution failed to prove the offence of robbery with violence against Accused 1 but found Accused 2 who is the appellant herein guilty of the offence of robbery with violence and convicted him accordingly. The Court imposed death sentence being mandatory sentence provided by the law.

5. Being aggrieved by the trial Court's decision, the appellant filed this appeal on the following grounds: -

> *i. That the learned trial magistrate erred in law and fact in convicting the appellant on an alleged evidence of identification yet failed to note that the circumstances and conditions described as prevailing at the scene of crime were not conducive to warrant a positive identification.*
>
> *ii. That the learned trial magistrate erred in law and in fact in failing in relying on the evidence of the identification parade yet failed to note that it was not sufficiently strong to satisfy the burden of proof in the prosecution case.*
>
> *iii. That the learned trial magistrate erred in law and in fact in convicting the appellant yet the most essential witnesses were not availed to adduce their evidence.*
>
> *iv. That the learned trial magistrate erred in law and in fact in dismissing the appellant's sworn defence and failed to advance any cogent reason yet it was plausible and comprehensive enough to cast considerable doubts to the prosecution case.*
>
> *v. That, the pundit trial magistrate erred in law and in fact in treating the prosecution case in isolation of the defence case.*
>
> *vi. That, the pundit trial magistrate erred in law and in fact in shifting burden of proof on the appellant*
>
> *vii. That for the genuine reasons that I cannot recall all that traversed during trial, I pray to be supplied with a true copy of the trial proceedings*

6. The appellant later filed the following supplementary grounds of appeal as follows: -

i. That the learned trial magistrate erred in law and in fact in convicting the Appellant on the basis of the evidence of identification suspicion despite the fact that the evidence in respect to identification was weak and unsupported by the evidence that was tendered.

ii. That the learned trial magistrate erred in law and in fact in convicting the appellants on the basis of alleged identification of the Appellant when the circumstances surrounding the scene was difficult for any positive identification.

iii. That the learned trial magistrate erred in law and in fact in convicting the appellants on the basis of identification parade yet the said parade was not conducted in accordance with the laws governing the carrying out of the identification parade.

iv. That the learned trial magistrate erred in law and in fact in failing to note that the prosecution had not discharged the burden as laid out under the ***Evidence Act Cap 80 Laws of Kenya.***

v. That the learned trial magistrate erred in law and in fact in violating the provisions of ***Section 169 of the Criminal Procedure Code Cap 75 Laws of Kenya*** *in failing to take into account the evidence of the accused.*

7. This appeal proceeded by way of written submissions.

APPELLANT'S SUBMISSIONS

8. **Mr. Maragia** counsel for the appellant filed submissions dated 27th September 2019. He submitted that the circumstances under which the appellant is alleged to have been identified by PW1 were difficult; he submitted that the lights in the house were not on and the 6 assailants had torches directed on their eyes making it difficult for them to see well.

9. Counsel further submitted that PW1 did not give description of the assailants; further that PW4 admitted that he never identified the assailants due to torch rays directed on his eyes; that both witnesses never gave description of the assailants to the police. The appellant further submitted that PW1 never gave police description of the assailants when they arrived at the scene.

10. Appellant further submitted that the appellant was pointed out to PW1 at the police station before the parade which went against **Force Standing Orders Section 6 (iv) (c)** which stipulate that witnesses should not see the suspect before parade; that identification parade evidence was weak though the trial Court warned itself on the dangers of relying on such evidence and it was erroneous to rely on it to find conviction.

11. Appellant's counsel submitted that there was no other evidence incriminating the appellant at the trial. He urged the Court to quash the conviction and set the sentence aside.

ANALYSIS AND DETERMINATION

12. This being the first appellate court. I am expected to subject the entire evidence adduced before the trial court to fresh evaluation and analysis. this I do while bearing in mind that I never had the opportunity to hear the witnesses and observe their demeanor. The principles that apply in the first appellate court are set out in the case of **Okeno Vs Republic [1972] EA 32** where it was stated as follows: -

> **"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.)"**

13. In view of the above, I have perused the proceedings before the trial court. I have also considered submissions herein. From evidence adduced in court, PW1 stated that 6 people entered her bedroom and they flushed torches in her eyes; she further stated that the lights in the house had not been switched on. She further testified that on 14th October 2012, she was called to the police station by the investigating officer. She testified that a police officer pointed to her the appellant and told her that he had been arrested in connection to her case and that he was arrested after being implicated by a student. She further stated that she heard him speak and that she picked his voice in the parade.

14. From the evidence adduced, there is no doubt that identification parade was conducted after the appellant had been pointed out to PW1 who later identified him in the parade. Even the voice she identified as being appellant's was known to her at the police station. Evidence adduced show that Accused 1 was arrested for selling PW4's mobile phone to a student. PW4 clearly said he was unable to identify assailants due to torch lights directed to his eyes. No evidence was adduced to connect the appellant (Accused 2) to the mobile phone recovered.

15. In my view no sufficient evidence was adduced in respect to identification of the appellant neither was evidence adduced connecting the appellant to recently acquired stolen it. Recent possession of any item stolen during the robbery was recovered from the appellant.

16. From the foregoing, I find that it was unsafe to convict the appellant as evidence adduced do not point to positive identification. In respect to alternative charge, evidence of recovery of phone do not demonstrate any connection to the appellant.

17. FINAL ORDERS

1. Appeal on both conviction and sentence is allowed.

2. Conviction against Appellant is hereby quashed.

3. Sentence imposed on appellant is hereby set aside.

4. Appellant is hereby released unless lawfully held.

Judgment dated, signed and delivered via zoom at Nakuru this 18th day of June, 2020

RACHEL NGETICH

JUDGE

In the presence of:

Schola - Court Assistant

Mr. Maragia Counsel for Appellant

Rita for State