REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 86 OF 2019

(From original conviction and sentence in Butali PMCCRC No. 38 of 2019, by Hon. CN Njalale, Senior Resident Magistrate (SRM))

YOSIA MUSUNGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was convicted by Hon. CN Njalale, Senior Resident Magistrate, of robbery contrary to Section 296(1) of the Penal Code, Cap 63, Laws, and was accordingly sentenced to thirteen (13) years imprisonment. He had faced a charge of robbery with violence, contrary to section 296(2) of the Penal Code. The particulars were that he had robbed Phylise Aliviza of a mobile phone, a solar panel and a T-lamp, on 14th January 2019, at Mahanga area of Matete Sub-County, Kakamega County.

2. At the trial court five witnesses testified in support of the charge. The complainant came home in the morning of the material day, found the padlock to the door to her house broken, and when she asked who was in the house, the appellant emerged and attacked her. He overpowered her, pushed her to the ground and pierced her left leg with a knife. He went back into the house and came out carrying the items listed in the charge. She screamed and neighbours came, followed the after the appellant, until he was eventually apprehended. She described him as a stranger to her. PW2 was one of the persons who responded to the screams by PW1. He chased after the appellant and arrested him in a sugar plantation. He stated that he had not seen the appellant prior to that day. During cross-examination, he stated that he knew him as a neighbour who lived across River Nzoia, about a kilometer from the home of PW1. PW4 witnessed the appellant being arrested by PW2. PW3 was the clinical officer, who treated PW1 of the injuries, that she allegedly incurred during the robbery. PW5 was the police officer to whom the report of the robbery was made, who took photographs at the scene of the robbery, recorded statements from the witnesses, and received the recovered items.

3. At the conclusion of the prosecution case, the trial court put the appellant on his defence. He gave a sworn statement. He said that on the material day he met people on the road, who accused him of theft, and arrested him and took him to the Lukusi AP Camp, after which he was transferred to Webuye Police Station and onwards to Matete Police Station, from where he was taken to court. He did not call a witness.

4. After reviewing the evidence, the trial court found that the same could not sustain a conviction for robbery with violence, but disclosed the offence of simple robbery. Relying on section 179 of the Criminal Procedure Code, Cap 75, Laws of Kenya, the trial court proceeded to convict the appellant of simple robbery under section 296(1) of the Penal Code.

5. The appellant was aggrieved by his conviction and sentence, and he lodged an appeal. In his petition of appeal, he alleged that the charge was defective, that he was not subjected to an identification parade, that section 214(3) of the Criminal Procedure Code was violated, that his defence was rejected without evaluation, and that the trial court did not consider that the evidence was flimsy uncorroborated and inconsistent.

6. I directed, on 14th May 2020, that the appeal be canvassed by way of written submissions. Both sides did file their respective written submissions.

7. The appellant argued four grounds. On the charge sheet being defective, he pointed out that the matter was reported on 15th June 2019 and was committed on 14th June 2019, and the arrest of the accused was effected on 14th June 2019. He also argued that the charge sheet indicates that he was taken to court on 16th June 2019, yet the charge sheet was signed on 7th May 2019. He submitted that the information in the charge sheet was not supported by the evidence tendered by the prosecution. He also raised issue with the application of section 179 of the Criminal Procedure Code. He submitted that the offence was allegedly committed in a house as PW1 was away, and, therefore, the proper charge ought to have been breaking in and stealing from a dwelling house. He argued that the offence alleged should be disclosed and stated in a clear and ambiguous manner so that an accused person is able to plead to a specific charge that he understands.

8. On identification, he submitted that the neighbours who had responded to the alarm had not identified him. He argued that PW2 and PW4 said that they saw him at River Nzoia and not at the scene, whereas PW1 ran to alert neighbours and did not know the direction that the fugitive took. He further submitted that PW1 was called and alerted that he had been arrested. He submitted that no details were given of him prior to the arrest and that the police, after re-arresting him, did not conduct an identification parade, instead they invited PW1 to where he was.

9. Finally, he submitted that the evidence was unreliable and the defence was not properly evaluated. He raised doubt as to whether a thief who had struggled during daylight with the intended victim would get into her house and commit a theft inside. He also raised issue with the items that were allegedly dropped by the fleeing robber at a neighbour's compound, saying that the neighbour was not called as a witness. He also argued that the first responder was a Jane, who came to the scene, and followed the fugitive, but the said Jane was not called as a witness. He submitted further that the alleged stolen items were recovered, but PW1 provided no proof of ownership before the court. He submitted that PW2 and PW4 did not recover any items from him at the time of arrest, yet the investigating officer stated that the items were recovered from him, at the point of arrest. He suggested that an issue of truth arose from that inconsistency. He submitted that these inconsistencies provide a doubt that ought to have been resolved in his favour.

10. On her part, Ms. Omondi, for the respondent, on the matter of the charge sheet being defective, submitted that the same was properly done, as it had a statement of the offence and particulars of the offence clearly brought out. She submitted that the particulars of the offence were sufficient to inform the appellant of the offence for which he was charged.

11. On the identification parade, she submitted that it was not a mandatory requirement of criminal law that identification parades be conducted in all criminal matters. She submitted that in this case the appellant was arrested immediately after the offence as he tried to flee from the scene, and it was, therefore, unnecessary to conduct a parade as he did not manage to escape, adding that a parade would not have added anything tangible to the case.

12. On the trial offending section 214(3) of the Criminal Procedure Code, a ground that the appellant did not argue in his written submissions, she submitted that the charge was not amended at any stage of the proceedings, and, therefore, the ground was not merited.

13. On the defence being an afterthought, she submitted that in that defence the appellant alleged that two people had approached him, alleging that he had stolen some items, and when he asked of them what he had stolen, they told him to give them money that he had others had taken from Chomo, yet he knew no Chomo. Ms. Omondi submitted that when these two people, PW2 and PW4, were presented in court as witnesses, the appellant did not cross-examine them on those matters. She submitted that it was on that basis that the trial court concluded that the defence evidence was an afterthought.

14. With regard to the prosecution evidence being inconsistent, contradictory and uncorroborated, she submitted that the same was as consistent as it could possibly be. PW1 had testified as to how she was robbed and stabbed on the leg with a knife, by the appellant, as he was escaping. She screamed, and neighbours chased the appellant and arrested him. That story was corroborated by the other prosecution witnesses. She submitted that if there were inconsistencies, then the same must have been minor, and could be ignored by the trial court without prejudicing the appellant.

15. With respect to the conviction of the appellant for the lesser offence of simple robbery rather than robbery with violence, on the basis that the appellant committed the offence while alone, Ms. Omondi submitted that the trial court fell into error in that regard, arguing that the prosecution did not have to prove all the three aggravating elements of being armed with offensive weapons, being accompanied by another or others, and using actual violence in the course of the robbery. She submitted that only one of the aggravating elements should be present to qualify the offence being robbery with violence. She submitted that in the instant case, the appellant was armed with a knife and he did wound PW1 using the knife.

16. She urged the court to dismiss the appeal in its entirety, and find that the appellant was guilty of the offence of robbery with violence, contrary to section 296(2) of the Penal Code, and proceed to sentence him accordingly for that offence.

17. Being the first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of ***Okeno vs. Republic*** **(1972) EA 32** has consistently been cited on this issue. In its pertinent part, the decision is to the effect that: -

> "An appellant 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. 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 magistrates' findings can 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."

18. The first issue related to the charge being defective. From the material in the written submissions, the appellant raised issue with some information in the charge document to the effect that the offence was reported on 15th June 2019, the OB refers to 15th January 2019, the matter was taken to court on 16th June 2019 and the charge sheet was signed on 7th May 2019. His case then was that the charge sheet contains contradicting information, which was not supported by the evidence on record. I have looked at the charge sheet in the trial record file. The date of arrest was indicated as 14th January 2019, the matter was indicated to have been taken to court on 16th January 2019, and that it was signed by a police officer at Matete Police Station on 7th May 2019. The dates that the appellant refers to, of 15th June 2019 and 16th June 2017, are not in the record before me. The date of 7th May 2019 is reflected on the charge sheet. I do not understand why the police officer who signed the charge sheet indicated the date as on 7th May 2019, yet the appellant was arraigned I court on 16th January 2019. 7th May 2019 was when the first witness, PW1, testified.

19. The dates that the appellant refers to are not in the body of the charge, that is within the particulars of the offence. The most critical components of a charge sheet are the portions stating the charge the accused person faces and the particulars of the offence that he is alleged to have committed. The details on the charge relating to when he was arrested and presented to court are not so critical, and errors relating to them do not go to the core of the matter. A conviction cannot possibly be vitiated on the basis of errors on the body of the charge sheet which do not relate to the charge itself or the particulars of the charge. I agree with the state, that the charge and the particulars gave a fair amount of information and detail from which the appellant was able to understand the charge that he faced, in order to prepare a defence to that charge.

20. The second component of the submission relating to the charge being defective was that the offence was allegedly committed within a house, according to the charge, when PW1 was away, and, therefore, the proper charge ought to have been breaking in and stealing, instead of robbery with violence. The appellant was, no doubt, submitting that robbery would require an encounter between the robber and the robbed, which is an accurate statement of the law. PW1 testified that she had gone outside of her compound, and when she came back she found the padlock she had used to lock her house had been broken, so she enquired if there was someone inside the house. In response to that enquiry the appellant emerged from the bedroom, and attacked her, pushed her to the ground, cut her with a knife, and then he went back into the bedroom and emerged with. According to that testimony, the break in happened in the absence of PW1, but then PW1 came back, and there was an encounter between her and the appellant, which left her injured, after which the appellant went into her bedroom and stole items from within the house. The facts as presented by PW1 point to an act that was more than a mere break in and stealing. There was a violent altercation, which left her injured, after which there was a theft.

21. The elements of robbery with violence are theft in aggravating circumstances. According to section 296(2) of the Penal Code, the aggravating circumstances are the fact that the accused person was armed with an offensive or dangerous weapon, or was accompanied by one or more persons, or used actual violence by beating or wounding or striking the victim of the theft. Those elements emerge from the testimony of PW1. She said that there was a theft. After the appellant knocked her down, he allegedly went back into the house and came out with items taken from the house, which she said belonged to her. The theft happened after she had been pushed to the ground and pierced on her left leg with a knife. PW3, the clinical officer, testified that PW1 had a deep wound on her left leg. The facts as presented by the prosecution do not point to a mere break in and stealing, but a robbery where violence was directed at the victim shortly before the stealing was carried out.

22. On identification, his case is that PW1 did not identify him. PW1 said, during examination in chief, that the appellant was a person he did not know at all, adding that he was a stranger. She said she identified him as they struggled in the house, adding that she noted that he had six fingers on one of his hands. She said that a neighbour followed him and arrested him shortly after the incident. The appellant argued that his arrest had nothing to with any discreption of him given to those responsible for his arrest by PW1. He argued that he was arrested by PW2 and PW4, but the two were at the river, and not at the scene. PW2 testified that he was working in his farm, when he heard screams. He saw people running towards the river shouting thief. He joined them. When he saw the appellant, the latter was inside the river. The appellant swam across the river to the other side, and PW2 swam across also and was able to arrest him, with the assistance of others. PW4 testified that he was at his home, when he had screams, and he went out towards the river. He found the appellant swimming, with several persons swimming after him. PW4 also jumped into the water and swam across the river to the other side, where he joined the others in arresting the appellant. He said the appellant had a knife as he was being arrested, and that he cut one of the persons who was arresting him with it, before he threw it into the water. The evidence from PW2 and PW4 was that they joined a crowd that was chasing after the appellant and arrested him. It is true that they were not at the scene, but they joined other individuals who had been in hot pursuit of the appellant, claiming that he was a thief.

23. Was the appellant properly identified? He was arrested shortly after the incident. PW2 and PW4 were part of the group of individuals who effected the arrest. They joined the party as it chased after the appellant. Shortly after the arrest he was taken to Lukusi AP Camp, from where PW1 was called, and she went to the camp and identified the appellant as her assailant. She stated that she was able to identify him from his clothes, the black jacket, the checked shirt and black pair of trousers. That black jacket was also mentioned by PW2 and PW4. From the material placed before the trial court, I am satisfied that the appellant was properly identified. He was arrested soon after the incident, and there was, therefore, no need for an identification parade to be mounted. The appellant submitted that no description of him was given before his arrest. The arrest was not effected by the police subsequent to investigations based on information, but rather it was done by members of the public, who had chased after the appellant after PW1 raised alarm. In any event, PW1 said in examination-in-chief that she had shouted to the members of the public, who had responded to her call, the colors of the clothes and jacket the appellant was wearing, and the shopping bag he had carried, so that as they chased him there was no confusion. The members of the public needed no description of the appellant from PW1 to effect arrest, since they arrested the person who had fled from the scene of the crime, and who wore the clothes that PW1 has indicated.

24. His other argument was that the evidence was unbelievable, for a thief who struggles with a victim of robbery cannot possibly get back into the house, after the struggle, and steal. PW1 related to the court what had happened on the material day. Whether a robber cannot act in the manner described by PW1 is a matter of conjecture, as no material was placed before the court on the psychology of robbers, and how they behave in given situations. To suggest and hold that a robber should have behaved one way and not the other is to engage in speculation.

25. The second aspect of this ground is about the items that were allegedly recovered from the appellant. He said that the same should have not been put in evidence as when he was arrested, nothing was recovered from him, and PW2 and PW4, the persons who allegedly arrested him said so, contrary to what PW5, the investigating officer, told the court. The record conforms with what the appellant was submitting. PW1 testified that the appellant dropped the items he had taken from her house, in the compound of a neighbour, and then ran through a sugarcane plantation. PW2 and PW4 testified that when they arrested the appellant he had nothing on him. PW2 said the alleged stolen items were brought later by members of community policing. PW5 gave an equivocal statement, during cross-examination, at one point he said that the items were recovered from the appellant by those who arrested him, at another point he said the items were recovered while the appellant was running away.

26. From the material placed before the court, PW1 was very clear on what he saw the appellant carry from her house. Those were items that were being removed from her house in her own presence. They were not allegedly taken in her absence, where the matter of identification of the items would then become critical. The theft happened in her presence and she saw what the appellant was removing from her house. She also saw him ran through a neighbour’s compound and drop the items. It would have been prudent to have the person who retrieved the

items to testify, but that does not take away from the fact that there was material before the trial court that pointed to the fact that those were the items that had been stolen from the PW1's house by the appellant. On proof of ownership of the said items, I have noted that PW1 did not dwell on matter of ownership. She was not asked to identify the items. She merely said that he stole the items that were before the court. I reiterate that the prosecution should have done better, but, again, it was sufficiently established that those were the items stolen or removed from PW1's house in her presence, and were dropped in the compound of her neighbour in her presence. The appellant raised the matter of inconsistency, as between the testimonies of PW1, PW2 and PW4 on the one hand, on recovery of the stolen items, and that of PW5. It was PW1, PW2 and PW4 who were in the picture when the incident happened and shortly thereafter. Their testimonies are consistent on the recovery of the items. The inconsistency introduced by PW5 was of a nature that did not dent the overall picture.

27. Overall, I have not found much merit in the appeal. The evidence presented by the prosecution was sufficient to support the charge that the appellant faced. The appellant was properly convicted and the appeal ought to fail on that score,

28. The only issue that I should now consider is the submission by the respondent that the trial court erred in convicting the appellant of simple robbery rather than with the offence charged, of robber with violence. I was urged to consider converting the conviction from simple robbery to robbery with violence, and to sentence the appellant appropriately.

29. The charge that the appellant faced was that of robbery with violence, and not simple robbery. The trial court found that the robbery with violence offence was not proved because the appellant was acting alone rather than in company of others. I have addressed the ingredients of robbery with violence in paragraph 20 of this judgement. The facts as proved before the trial court established the offence of robbery with violence, for two aggravating factors were proved, the appellant was armed with a knife, which was a dangerous or offence weapon, and he employed actually used violence on PW1 using the knife, for he did cut her with it, leaving her with a large wound, and the injury was inflicted shortly before he stole items from her house. The violence was intended to prevent her from stopping him from committing the theft. The trial court should have, therefore, convicted the appellant of robbery with violence rather than with simple robbery. There was no justification, therefore, in invoking section 179 of the Criminal Procedure Code.

30. The Court of Appeal has addressed the matter of the ingredients of the offence of robbery with violence in a number of decisions. It said, in *Joseph Kaberia Kahinga & 11 others vs. Attorney General* [2016] eKLR**,** that:

> "The offence under Section 296(2) of the Penal Code in addition to the ingredients specified under Section 295 of the Penal Code has the following ingredients:
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> (i) The offender is armed with a dangerous or offensive weapon or instrument, or
>
> (ii) The offender is accompanied with one or more person(s)
>
> (iii) The offender wounds, beats, strikes, or inflicts any other personal violence to any person immediately before or after the time of robbery.
>
> The term robbery has been defined in various cases. In the case of Shadrack Karanja vs. Republic Criminal Appeal 119 of 2005; [2006] eKLR, the Court of Appeal stated as follows:
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> > "The same issue was raised in Moneni Ngumbao Mangi vs. Republic Criminal Appeal No.141/2005 (UR) and this court examined in detail the essential ingredients of the offence of robbery with violence under Section 296(2) of the Penal Code as analyzed in Johana Ndungu vs. Republic, Criminal App. No.116/1995 (UR). After noting that the charge sheet in that case stated, as it does in this case, that the Appellants "robbed" the Complainant, the Court continued: - 'The word "robbed" is a term of art and connotes not simply a theft but a theft preceded, accompanied or followed by the use of threat or use of actual violence to any person or property in order to obtain or retain stolen property. The predecessor of this Court so held in Opoya vs. Uganda [1967] E.A. 752 …'
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> As already stated there are three ingredients, any one of which is sufficient to constitute the offence of robbery with violence under Section 296(2) of the Penal Code. If the offender is armed with any dangerous or offensive weapon or instrument that would be sufficient to constitute the offence. Secondly, if one is in company with one or more other person or persons that would constitute the offence too. And lastly if at or immediately before or immediately after the time of the robbery he wounds, beats, strikes or uses any other violence to any person that would be yet another set to constitute the offence …"

31. It said in *Mohamed Ali vs. Republic* [2013] eKLR**,** that:

> "…. The ingredients of the offence of robbery with violence were clearly set out by the Court of Appeal in the case of Oluoch vs. Republic [1985] KLR where it was held:
>
> 'Robbery with violence is committed in any of the following circumstances:
>
> The offender is armed with any dangerous and offensive weapon or instrument; or
>
> The offender is in company with one or more person or persons; or
>
> At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person ..."

The use of the word OR in this definition means that proof of any one of the above ingredients is sufficient to establish an offence under section 296(2) of the Penal Code.'

32. In *Johana Ndungu vs. Republic* [1996] eKLR, it was said:

> '…Analyzing the first set of circumstances the essential ingredient, apart from the ingredients including the use or threat to use actual violence constituting the offence of robbery, is the fact of the offender at the time of robbery being armed with a dangerous or offensive weapon. No other fact is needed time (sic) of robbery being armed with a dangerous or offensive weapon. No other fact is needed to be proved. Thus if the facts show that at the time of commission of the offence of robbery as defined in S.295 of the Penal Code, the offender was armed in the manner afore-described then he is guilty of the offence under sub-section (2) and it is mandatory for the court to so convict him. In the same manner in the second set of circumstances if it is shown and accepted by court that at the time of robbery the offender is in company with one or more person or persons then the offence under sub-section (2) is proved and a conviction there under must follow. The court is not required to look for the presence of either of the other two set of circumstances.
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> With regard to the third set of circumstances there is no mention of the offender being armed or being in company with others. The court is not required to look for the presence of either of these two ingredients. If the court finds that at or immediately before or immediately after the time of robbery the offender wounds, beats strikes or uses any other violence to any person (may be a watchman and not necessarily the complainant or victim of theft) then it must find the offence under sub-section (2) proved and convict accordingly."

33. Having found that the facts disclosed robbery with violence and not simple robbery, what should I do in the circumstances? I find guidance in *Johana Ndungu vs. Republic* (supra), where the Court of Appeal found that such a conviction, entered by a trial court and confirmed by the High Court, was unlawful, and proceeded to set the same aside, and to substitute it with a conviction under section 296(2) of the Penal Code, for which the appellant in that case had been charged. I accordingly set aside the conviction for simple robbery under section 296(1) entered against the appellant herein by the trial court, and is substitute therefor a conviction for robbery with violence, under section 296(2) of the Penal Code, the offence for which the appellant had faced before the trial court.

34. The sentence prescribed for robbery with violence, under section 296(2) of the Penal Code, is mandatory death. However, the recent decision by the Supreme Court, in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR, on the death penalty and mandatory sentences, would require that I consider a sentence other than the death penalty. The Supreme Court held the death penalty to be unconstitutional, and stated that mandatory sentences unjustly took away the discretion of the trial court to impose sentences that fit the particular circumstances of the case before the court.

35. The penalty for simple robbery, according to section 296(1) of the penal Code, is a maximum of fourteen years' imprisonment. The offence defined in section 296(2) is aggravated, and, therefore more serious than simple robbery. It should, therefore, attract a stiffer penalty than the offence defined in section 296(1), at least a term of imprisonment in excess of that prescribed under section 296(1) of the Penal Code. That would suggest at least fifteen years' imprisonment. That, again, would mean the court going back to the minimum sentences that the Supreme Court in the Supreme Court in *Francis Karioko Muruatetu & another vs. Republic* (supra) pronounced against. I note, for the purpose of this case, that the items stolen were recovered. The violence visited on PW1 inflicted an injury that was not life threatening. I would have considered imposing a term of fifteen years' imprisonment. I note, though that the sentence imposed was thirteen years' imprisonment, which is not far from the fifteen years. I believe I should not interfere with it. It fits the crime committed.

36. In view of everything that I have said above, the appeal herein is dismissed save for the variation of conviction from simple robbery to robbery with violence. The appellant has a right of appeal to the Court of Appeal.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 23rd DAY OF JULY 2020

W MUSYOKA

JUDGE