REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 51 OF 2017

PAUL CHERUIYOT KOECH…..……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(Being an appeal against original conviction and sentence in Nakuru Criminal Case Number 1034 of 2013 by J. N. Nthuku (Senior Resident Magistrate) on the 15th May 2017)

J U D G M E N T

1. On 3rd May 2013 Paul Cheruiyot Koech was arrested, and on 6th May 2013 brought before Chief Magistrate's Court Nakuru in Criminal Case Number 1034 of 2013 and charged with the offence of **Robbery with Violence Contrary to Section 296 as read with 296 (2) of the Penal Code.**

2. It was alleged that on 16th April, 2013 at Ndavimbi Trading Centre in Njoro District, Rift Valley Province, jointly with others not before court while armed with offensive weapons namely rungus and swords robbed Robert Ngetich Kipkurui of Kshs. 350/- techno mobile phone valued at Kshs. 12,400/= and at or immediately after the time of such (act) robbery *(sic)* wounded the said Robert Ng'etich Kipkurui.

3. The appellant took plea on 6th May 2013 and pleaded not guilty.

4. The case for the prosecution was very well summarized by the trial court.

> *"PW1 Kipkurui Rotich testified that on 16/4/2013 at 7.30 p.m. he was on his way home from a neighbour's. He met 3 people one was his neighbour. They ordered him to sit down and give them all the money he got after selling maize. He told them he had no money. One of the men Paul Cheruiyot had a Maasai sword and he cut PW1's belly. He said he was able to recognize the accused because of a bright moonlight and also his voice when he said they wanted the maize proceeds of maize sale.*
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> *After being cut he fell. The robbers took his phone from him and money. He scream and tried to escape but Paul cut him a second time on the head. Peter Kirui and Ngetich came to his rescue and chased after the attackers then came back a while later saying Cheruiyot had turned on them with the sword so they feared and ran for their dear lives. He was taken to Nakuru for treatment where he was admitted for 7 days and upon discharge, he reported to the police at Mau Narok where a P3 Form was issued.*
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> *He said that the accused person was his neighbour for 8 years and after his discharge the accused person agreed to compensate him for the injuries and also the medical expenses but he failed to do it.*
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> *PW2 Peter Kirui testified that on 16/4/13 at 7.31 p.m. he heard screams and ran to see what it was, he found people struggling and 2 ran away while 2 remained at the scene as he approached. When he arrived, he found PW1 and the accused person herein struggling over a sword and PW1 said I have been cut." The accused person ran away after PW2 asked him, "Paul What's wrong" and the accused person responded by asking PW2 what he was doing there. Hillary joined him and they chased the accused person who dared them to touch him so they ran away to help the wounded man.*
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> *PW3 Simon Kipmgetich testified that he filled P3 forms for PW1 who reported that he had been cut by a person well known to him. PW1 had a serious wound on the belly and also on the scalp. The degree of injury was grevious harm.*
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> *PW4 Hillary Kipyegon testified that on 16/4/2013 at 7.30 p.m. he heard screams on the road and ran to check. He caught up with Peter PW2 and on nearing the scene they saw three people flee, two in one direction and one in another, they pursued the one who*

was alone aided by moonlight. They caught up with him and he drew a sword and declared "let whoever things he is a man come." He recognized him as a neighbour, Paul Cheruiyot. The attackers challenge made them freeze because he stopped escaping and waited for any of the two to approach him and was 3 metres away. They therefore left him and went back to the scene. The victim Robert had his belly slashed open and also a cut on the head. They found many people had come to the scene so they took him to hospital. The accused went into hiding but they traced him in a Munanda where they led officers to and he was arrested.

PW5 PC Juma's evidence is that on 3/5/13 the accused person herein was brought to the station by AP officers from Kiptangwany AP Camp. He put him in cells and recorded the complainant's statement. He said there was an earlier report made at the station before the arrest."

5. The accused defence was given through an unsworn statement of defence and he called one witness.

"The accused person in his defence stated that on 14/4/13 PW1 went to his place of work and asked for his money borrowed from him Kshs. 10,000/= but he didn't give him because he didn't have it. Thereafter he went to see his mother who was in hospital.

From 16/4/13 he was at home helping his mother to weed till 2.30 p.m. then he went to look after cows so he was at home until 7.30 p.m. when they took tea watched TV and his mother went to bed and he remained with his brother watching TV till 9p.m. On 17/4/13 he went on weeding and didn't know anything had happened. He was at home until 2/5/13 he met PW2 at Munanda and asked for his motor cycle tyre which PW2 said the complainant was holding it as security for his shs. 10,000/=. Two officers came and arrested him saying he owed PW1 shs. 10,000/=. He was taken to Kiptangwany Ap Post but the officers released him and told him to go and sort the issue at home with Robert (PW1) but before he could leave the post, he was called back and taken to Mau Narok Police Station where the OCS asked for money from him. He failed to pay and he was charged with this offence.

DW2 Esther Rono testified that the accused person is her son whom she depends on. On 14/4/13 she was sick and she notified her son who came home but found that neighbours had helped her with the hospital bill. She told the accused to help her weed and he agreed. They weeded until 2/5/13 and finished on 3/5/13. She was told that Paul had been arrested."

6. At the end of the trial the trial magistrate found the appellant guilty of the offence of robbery with violence c/s 296(2) of the Penal Code, convicted him and sentenced him to death.

7. The appellant was aggrieved and filed this appeal, and later the amended Grounds of Appeal filed on 20th November 2019.

1. THAT the pundit trial magistrate erred both in law and fact when convicted me in the present case yet failed to comply with the provisions of section 214 CPC.

2. THAT the pundit trial magistrate erred both in law and fact when he convicted me in the present case yet failed to find that my right to a fair hearing were violated under Article 50(2) (k) of the Constitution of Kenya.

3. THAT the pundit trial magistrate erred in both law and fact when he relied on evidence of identification by recognition mad in difficult circumstances.

4. THAT the pundit trial magistrate erred in both law and fact when he dismissed my plausible defence.

These he filed together with his written submissions.

8. When the appeal came for hearing the appellant relied wholly on his submissions.

9. The issues for determination from his submissions were;

- Whether the trial court, failure to comply with the provisions of Section 214 Criminal Procedure Code were fatal to the case for the prosecution.

- Whether his right under **Article 50(2) (k) of the Constitution** were violated, and as a result he was not accorded a fair hearing.

- Whether the evidence of identification by recognition by the prosecution witnesses was reliable.

- Whether the trial court considered his defence.

10. As a first appellate court I am guided by the holding in **Okeno v Republic** to re-assess, re-evaluate the evidence and draw my own conclusions always bearing in mind that I never heard I saw the witness testify.

11. The appellant submitted that when the last prosecution witness testified, the state was allowed to amend the charge sheet, however he was not given any opportunity to recall and cross examine the witness who had already testified. He argued that by failing to give him that opportunity the court failed to accord him a fair hearing taking into consideration the nature of the offence he was charged with. In addition that the court did not explain to him the seriousness of the offence and that it carried the death sentence as required by **Article 50(2) (b).** He argued that the court had also failed to notify him of his right to counsel and relying on **David Njoroge Macharia vs Republic [2011] eKLR** argued that he had a right to legal representation at state expense, a right that the trial court did not accord him.

12. The appellant analysed the evidence on identification given by PW1, PW3 and PW4. That the offence is alleged to have been committed at 7.30 p.m. on a moonlit night, that these circumstances were not conducive to recognition or identification. He argued that the evidence was not conclusive. He relied on **Abdallah Bin Wendo v Republic [1953] 20 EACA 66 o**n the proposition that a witness could be honest yet mistaken, and **Weeder v Republic CA 228 of 1930 EACA**, that even a number of witness can be mistaken on identification in difficult conditions.

13. He queried the fact that the incident was alleged to have happened on 14th April, 2013, but from the evidence of PW6 was not reported until 17th May 2013, why?

14. Regarding his defence, that he gave a plausible defence which was dismissed.

15. Secondly that he was not given the opportunity to re-examine his witness DW2 after cross examination by the prosecution.

16. That the sentence was harsh and unconstitutional.

17. On their part, prosecution through Ms. Chelang'at opposed the appeal, that the appellant was well known to the complainant both by appearance and voice, and PW2 who said he had known appellant for thirty (30) years. That he witnessed the robbery with PW3 who said appellant was a neighbour. That there was bright, full moon on the material date and they saw the appellant from close 2m, 3m 500m. Hence there was no need for identification parade. That the ingredient of robbery were proved. That the complainant was robbed of his money and phone, that the appellant was in company of others, that the appellant was armed with a sword which was never recovered but which was seen by the three witnesses.

18. Regarding the appellant's defence the state submitted that the defence and alibi was considered and found to be an afterthought and rejected.

19. That appellants rights were not violated.

20. I have carefully considered the evidence and submissions and take guidance from **Okeno vs R 1972 EA 372** on the duty of the first appellate court to give the evidence before the trial court a fresh look and draw its own conclusions, bearing in mind that it neither saw nor heard the witnesses testify.

21. Regarding the non-compliance with **Section 214 of the Criminal Procedure Code,** the record shows that upon the prosecution amending the charge, they promptly proceeded to close their case. The trial court proceeded to give date for ruling and therefore did not comply with **Section 214 of Criminal Procedure Code** which states;

> *(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that he charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:*
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> **Provided that—**
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> *(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;*
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> *(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.*
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> **(2) …**
>
> **(3) …**

22. The tragedy about the application for amendment in that the prosecution did not tell the court what amendment they were seeking to make to the charge sheet. When the blanket application was made, the appellant objected but was overruled. Hence, even the appellant did not know what amendment was being introduced into the charge facing him. The trial court did not ask, and there is nothing on the record to show that the accused person was made aware of the specific changes the prosecution was to bring into the charge sheet. This was necessary, that it what **Article 50(2) (b)** says, this being an amended charge the appellant needed to have sufficient detail of the amendment to determine his way forward. That is the complement that **Section 214 of Criminal Procedure Code** gives to this Constitutional Right.

23. By failing to do so, he trial court was in violation of the accused person's right and hence denied him a fair trial.

24. Regarding the re-examination of his own witness the record shows that the appellant stated "That is all" after the witness had been cross examined. Hence there was no denial of any right by the trial court.

25. Regarding **Section 214** I had to closely examine the 2 charge sheets to find out for myself what the amendment was, it was the removal of "Section 295" from the charge sheet. Considering the nature of the offence, the rest of the particulars remained the same and hence though the right to fair trial was denied, by failure to comply with **Section 214**, the same was not fatal to the case for the prosecution.

26. Were the ingredients of the offence proved? These ingredients are theft from the complainant , by the accused either in the company of others, or while armed with a dangerous weapon, or infliction of injury or the threat to do so on the complainant.

27. Was theft proved? The allegation is that the complainant was robbed of money and a phone on 16th April 2013. There is no evidence placed before the trial court that the complainant owned a mobile phone. No receipt or extract from the mobile phone service provider to establish that the complainant owned a mobile phone of the make alleged. The investigation officer did not conduct any investigations into this. Complainant said he had Kshs. 350/=. He did not give evidence to even demonstrate that he had that money on him.

28. Hence with regard to the theft part of the offence of Robbery with Violence, the prosecutor did not place evidence before the court to show that complainant had the money and the mobile phone.

29. the complainant claimed that the robbers confronted him and demanded the money he had made from selling maize. He told them he had no money. He did not say whether he had sold any maize so that the appellant, who he claimed was his neighbour would know and go to rob him of the same.

30. Is it the appellant who did it? The complainant testified that he recognized the appellant, by his face because he was one metre away, his voice because he had known him for long. That appellant ordered him to sit down, demanded money, but when he was told there was none, he cut the complainant on the left side, and the complainant on being cut "jumped and fell". How could that be yet he was seated on the ground?

31. He testified further that he screamed and tried to escape but was cut on the head, and that is was at this juncture that neighbours came Peter Kirui first, then Ng'etich and chased the attackers.

32. According to Peter, he heard screams and ran towards the screams. He said,

> "*I saw people struggling. Two ran away two remained. I found Robert PW1 and Paul struggling over a sword. On seeing me Robert said I have been cut. Paul started running away."*

33. Evidently this testimony is not consistent with what the complainant said. According to the complainant, there was no struggle. He was ordered to sit, money demanded, he was cut, first on side, robbed, then cut on head, when the neighbours came the attackers were already escaping and they chased them.

34. PW4, Hillary Ngetich's testimony was that;

> "*We heard screams on the road someone calling for help. We ran to the road and found three people. They saw us from 10 metres away and started running away leaving the victim on the ground, we ran <u>after the two went one way</u>, one went the other way…"*

35. First, he does not say who he was with when "they" heard the screams. He does not state that he actually was with PW2. Him, together with whoever he was saw three people. Pw4 saw four people. He does not say what the three people were doing. He said the three ran. While PW2 said the two ran away and one remained, and it is this one who was struggling over a sword with the complainant.

36. PW4 said he and others found the victim on the ground as the robbers ran away. PW2 said when PW4 arrived the robbers had run away. PW2 said;

> "*Hillary arrived and found me with PW1. Paul said I should not follow him and we got afraid of following him."*

37. Hence Hillary story about following the one robber, the robber confronting them with a sword is not corroborated by that of PW2, because according to PW2 he is the one who saw PW1 and appellant struggling over a sword, and it is him who saw the appellant. In cross examination he testified that appellant ran away on seeing them, and told him PW2, not to follow him. That Hillary came after the PW2 had arrived.

38. These two (2) witnesses gave contradictory evidence raising the doubt as to whether PW4 actually saw the persons who attacked the complainant. Hence the only evidence that appears on identification is that of the complainant and PW2.

39. On identification PW1 said there was bright full moonlight, PW2 that it was not very dark but there was sufficient light, PW4 on the other hand said that there was half-moon which was very bright. PW2 said he had seen the appellant earlier and he was in the same clothes he was wearing. He did not describe the clothes, PW4 said the same adding that the appellant had on a red jacket, no such description was given by the complainant. None of these witnesses testified as to where or when they had seen the appellant earlier that day to be able to recall the clothes he was wearing.

40. The complainant spoke about hearing the appellants of the voice, and having known the appellant for a period of time. The usefulness of his evidence of identification would have been if he had made a report to the police and made a description of his attacker, or the particulars. this is because the evidence of Pw2 and PW4 is a bit shaky as it does not stand together.

41. Was the complainant injured? He testified that he was taken to Nakuru District Hospital for treatment after the robbery and reported after he came from hospital to Mau Narok Police Station. PW4 said they took him to Ndambini then Naivasha Hospital while he was unconscious.

42. The evidence of PW3 the clinical officer was of the P3 he completed. The entries in the P3 are curious. He appears not to have been certain about what the patient was telling him. The records that the history given to him was all claims, even the attending of Naivasha Sub County Hospital is indicated as a claim, that the patient claimed to have been taken to Naivasha District Hospital and that there was surgery, TTI and daily dressing. On examination he found a sutured wound on the left side of the abdomen which was septic. It is noteworthy that this witness was not supplied with any documents to support all the claims that his patient made to him. His testimony that there was a wound on the complainant cannot be said to support the charge as it is not known when the wound was inflicted, when and where the complainant obtained treatment and whether it was related to the charges facing the appellant.

43. At the hearing of the case the complainant showed the court an "ugly scar''. While it is not in doubt from this that the complainant had an injury that healed leaving the scar, there is no evidence of admission either at Naivasha Sub-County Hospital Nakuru District Hospital, or Ndambini, or treatment at those hospital, at all material times, there is no evidence when this admission and treatment took place, so as to connect to the alleged robbery of 16th April 2013. It is also evident from the P3 that the report was made on 4th May 2013, as per the Occurrence Book (OB) of 5th May 2013 Mau Narok Police Station, and the reference to MOH made on 7th May 2013. There is no evidence that any report was made on 17th April 2013 as alleged, or that the appellant disappeared as alleged. What is clearly evident is that the report was booked **after** the appellant was arrested and there is no previous report made anywhere. The allegation that the appellant committed the offence and then went into hiding is not supported by evidence that indeed a report was booked at the police station on 16th April 2013 and 17th April 2013 and a hunt ensued from the perpetrator.

44. In fact according to No. 75683 PC Lwembe Juma the appellant was brought to Mau Narok Police Station on 3rd May 2013. Yet her report was made on 4th May 2013. The allegation that the report had been made at Kiptangwanyi Administration Police Post was not established and no officer from that station testified that since a report had been made. If a report was indeed made there is no explanation why the alleged robbery was not investigated and efforts made to track the perpetrator who was known and to recover the weapon.

45. The PW5 confirmed that complainant had a wound, but did not carry out any investigations to confirm that such an offence as alleged had been committed by the suspect who was brought to the station. He simply took him in and charged him with this offence. No investigations were conducted to recover the Somali sword or the red jacket allegedly won by the appellant.

46. n his defence the appellant explained his whereabouts on from 14th September 2013 to 3rd May 2013 when he was arrested. He told the court, which evidence was corroborated by his mother, that he was home from 15th April 2013, when she sent for him because she was unwell. On 16th April 2013 he was still there, and remained there up to 3rd May 2013 when he was arrested. His alibi is that he was away from the area of the offence when he is alleged to have committed the offence. The trial court said he was lying because his mother said she had no television. The accused never said he was watching television in his mother's house, his mother said he had a separate house. The fact is that she confirmed that the appellant was not where he was alleged to be on the 16th April 2020, he was at home.

47. The trial court was of the view that since the appellant gave an unsworn statement of defence, that was evidence and the prosecution was denied the opportunity to test it on cross examination. It escaped the trial court's mind that it was the accused person's right under **Section 211 of the Criminal Procedure Code** to give sworn or unsworn statement or even to keep quiet, and he could not be faulted for his option. The appellant's choice to make an unsworn statement of defence ought not to have been held against him. The duty of the court was then to make an analysis of the case for the prosecution and determine whether the prosecution had discharged its mandate to prove the case beyond a reasonable doubt. In any event, the prosecution had DW2 at their disposal to cross examine on the veracity of the accused person's defence. They only raised the issue of the TV yet the DW2 clearly stated that she had a separate house from that of the appellant and therefore whether or not she owned a TV was immaterial. The evidence that the appellant was at his mother's (Home) at the material time was not challenged by the prosecution. The prosecution had the obligation verify the appellant's alibi and could have called new evidence to test it.

48. The appellant's defence was plausible. Taking into consideration the status of the evidence of PW1, PW2 and PW3 on how the offence happened, the contradictions in their testimony, failure to prove theft, unreliable evidence of identification and the appellant's alibi, the conviction was unsafe. The same hereby quashed. The sentence of death set aside and the appellant be set at liberty unless otherwise legally held.

Dated and signed at Nakuru this 3rd day of August, 2020.

Mumbua T. Matheka

Judge

In the presence of: VIA ZOOM

Martin Court Assistant

For state: Ms Wambui

Appellant: Present