REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL APPEAL NO. 9 OF 2018

DAVID MUENDO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From the original conviction and sentence by Hon. J.N Mwaniki (SPM) in Makueni

Senior Principal Magistrate's Court Criminal Case No. 634 of 2015 delivered on 9th April, 2018).

JUDGMENT

1. David Muendo the Appellant was charged with the offence of **robbery with violence contrary to section 296(2) of the Penal Code**. The particulars of the offence were that on the 2nd day of October 2015 at Kathonzweni market in Kathonzweni district within Makueni county, the Appellant jointly with others not before court robbed **Benson Musyoki Mwongela** of his motor cycle registration No. KMDH 386Y make Kingbird valued at Kshs.93,000/= and at or immediately before or immediately after the time of such robbery, wounded the said **Benson Musyoki Mwongela**

2. The Appellant pleaded not guilty and the case proceeded to a full trial with the prosecution calling four (4) witnesses. The Appellant elected to remain silent and called no witness. Later the Appellant was found guilty, convicted and sentenced to fifteen (15) years imprisonment.

3. Aggrieved by that decision, the Appellant filed this appeal and raised the following 5 grounds;

> ***a)*** **That,** the charge sheet was incurably defective.
>
> ***b)*** **That,** the learned trial Magistrate erred in law and fact by grossly misdirecting himself on the identification of the Appellant which did not meet the required standards.
>
> ***c)*** **That,** the learned trial Magistrate erred in law and fact by failing to consider the entire evidence, evaluate it and draw a fair and just conclusion.
>
> ***d)*** **That,** the learned trial Magistrate erred in law and fact by not considering that the Appellant's rights to fair trial were violated.

4. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

5. On ground (**a**), the Appellant submits that it is clear from the prosecution evidence that the attackers were armed with a stone and the stone was produced as an exhibit. He submits that the charge sheet did not describe the stone as a dangerous weapon hence omitted an essential ingredient of the offence. He relies on the case of **Juma –vs- Republic (2003) eKLR** where the Court of Appeal stated that;

> *"We have considered the particulars of the charge and it cannot be denied that the charge refers to the Appellant having been armed with knives. The particulars of the charge do not clearly state whether the knife was a dangerous weapon. Under section 296 (2) of the Penal Code, the charge must state that the accused was armed with a dangerous or offensive weapon or instrument, or was in the company of one or more other person or persons or at or immediately before of immediately after the time of the robbery, the accused wounds, beats or strikes or uses any other personal violence to any person. In this appeal, the charge as laid was defective as it did not clearly specify essential ingredients of the offence under section 296 (2) of the Penal Code."*

6. On ground (**b**), he submits that Pw1 did not describe the person who robbed him and contends that one cannot claim to identify a person

and fail to give their description. He cites **Zeffert and Paizes:The South African Law of Evidence (2nd ed) at 152-153** where it is stated;

> *"It is generally recognized that evidence of identification based upon a witness's recollections of a person's appearance is dangerously unreliable unless approached with due caution."*

7. On ground (**c**), he submits that the evidence of the prosecution witnesses was not reliable. He contends that Pw3 claimed to have been woken up by the complainant whereupon he went outside the gate and saw him (*Appellant*). On the other hand, he submits that Pw1's evidence was that his neighbor did not wake up. That Pw1 went to his home (Appellant's) after visiting all the surrounding police posts and contends that if he had truly identified the person who robbed him, he would have gone straight to the home of that person.

8. On ground (**d**), he submits that he was not supplied with witness statements and the trial continued without him being aware of what he was accused of. He states that it was within his right to remain silent even if the trial court did not inform him of the right and its consequences.

9. In response to ground (**a**), the State, through the learned senior prosecution counsel M/s. Gitau, submits that all the ingredients of the offence were clearly captured in the charge sheet and that the section of the law, captured in the statement of offence, informed the appellant the sentence he would face upon conviction. She cited **Kericho HCCRA 27 of 2017: Leonard Kipkemoi –vs- Republic (2018) eKLR** where the Court held that a charge sheet was not defective for failure to state that the accused was armed with a dangerous weapon.

10. On ground (**b**), she submits that the appellant was known to the complainant hence there was no need of giving his physical description. She adds that the Appellant was recognized by Pw1 and Pw3 beyond any reasonable doubt, and the Appellant did not challenge his positive identification through cross examination.

11. On ground (**c**) she relies on the case of **Oluoch –vs- Republic (1985) eKLR** to submit that the offence of robbery with violence is proved when stealing is accompanied by one or more of the ingredients stated in section 296(2) of the Penal Code. She submits that the prosecution evidence established that Pw1's motor cycle was stolen by 3 people and that one of them hit Pw1 on the forehead with a stone. She submits that the medical evidence demonstrated that indeed Pw1 sustained injuries. She contends that only one ingredient is required but the prosecution proved all the three.

12. She submits that proof beyond reasonable doubt does not mean proof beyond any shadow of doubt and relies *inter alia* on **Bakare –vs- State, 1985, 2 NWLR at pg 465** where the Supreme Court of Nigeria held that;

> *"Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says. It does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability."*

13. On ground (**d**), M/s. Gitau submits that this ground is a mis-representation since the lower court record is clear that the Appellant was supplied with witness statements.

Analysis and determination

14. This being a first appeal it is the duty of this court to scrutinize the evidence on record, make it's own findings and draw it's own conclusions giving due allowance to the fact that the trial Court had the advantage of seeing and hearing the witnesses. See **Okeno –vs- Republic (1972) E.A 32; Kiilu & Another –vs- Republic (2005) I KLR 174.**

15. I have considered the entire record of appeal and both submissions. I will now deal with the grounds of appeal separately

Whether the charge sheet was defective

16. Section **134 Criminal Procedure Code (CPC)** provides as follows;

> *"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."*

17. In this case, the charge sheet clearly informed the appellant that he had been charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. I reproduced the particulars in paragraph one (1) of this judgment and they clearly state the date and place of offence, the item stolen, name of complainant and circumstances of the offence.

18. Evidently, the information was sufficient to make the appellant aware of the offence facing him. His complaint that the charge sheet failed to describe the stone as a dangerous weapon does not, in my view, negate the reasonableness of the particulars given.

19. Further, I am in agreement with the submissions of the prosecution counsel that, a charge of robbery with violence constitutes three ingredients and the offence is proved even where it is only one of the ingredients that is established. In **Oluoch –vs- Republic (supra)** the Court of Appeal held as follows;

"*Robbery with violence is committed in any of the following circumstances;*

a) The offender is armed with any dangerous and offensive weapon or instrument; or

b) The offender is in company with one or more person or persons; or

c) 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…."

20. In instant case, the charge sheet informed the Appellant that he was in the company of others not before the court and that he wounded the complainant immediately before or after the robbery. Evidently, two of the ingredients of the offence were specified hence sufficient. In any case, section **382** of the **CPC** provides that;

"*Subject to the provisions hereinabove contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summon, warrants, charge, proclamation, order, judgment or other proceedings before or during the trial or in any enquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings....."*

21. Accordingly, the omission complained about by the appellant did not occasion a failure of justice and this ground of appeal fails.

Whether the Appellant's right to a fair trial were violated

22. The record shows that on 25/02/2016, the prosecution was ready to proceed but the court allowed an adjournment because the Appellant had not been supplied with witness statements. On 31/03/2016 and 19/05/2016, the Appellant indicated his readiness to proceed and the case proceeded.

23. On 27/06/2016, the prosecution was ready to proceed but the Appellant indicated that he had malaria and could not proceed. The court allowed the adjournment to enable the Appellant to recuperate. It is clear from the record that before any hearing took place the Appellant assured the court that he was ready to proceed. On 10th August 2016 he again told the court he had witness statements.

24. Clearly, the Appellant's claim of an unfair trial is untrue and is indeed misleading. He was supplied with the statements, afforded adequate time to prepare his defence and even indulged when he was unwell. His rights to a fair trial were not violated and this ground should fail.

Whether the Appellant was positively identified

25. The complainant, (Pw1), testified that upon hearing the main gate being opened, he looked through the window and saw the Appellant in the company of a stranger. The two lifted his motor cycle and hurriedly moved outside the gate and Pw1 followed them. Once outside, Pw1 was hit on the forehead with a stone by a third person. The three people boarded his motor cycle and left.

26. Further, he testified that he called the Appellant's brother to inform him that the Appellant and some strangers had taken his motor cycle. He also testified that he went to the appellant's home in the company of other riders but they did not find him. In his further evidence, he testified as follows;

"*I Identified accused 1(Appellant) using moonlight. It was around 3.00am. I knew accused 1 prior to the incident. He was my friend and I stayed with him in Kathonzweni."*

27. The Appellant elected not to cross-examine Pw1. Pw2 was **Bernard Mutinda** and he testified that he accompanied Pw1 to various police posts while using his motor cycle. He also testified that Pw1 had identified the Appellant as one of the robbers hence their journey to the Appellant's home.

28. **Pw3 (Patrick Musyoki Mutinda**) testified that he is a neighbor to Pw1 and that on the material night he was woken up by Pw1 and informed about the theft. He found three men at Pw1's gate and one of them was the Appellant. He recognized the Appellant pushing the motor cycle away and the other person hit Pw1 with a stone as he attempted to resist the robbery. The Appellant carried the other two and they drove away, on Pw1's motorbike.

29. From the totality of the evidence, the Appellant's identification was by recognition as opposed to identification of a stranger. Pw1 and Pw3 recognized the Appellant even though Pw1 was not cross examined, Pw3's evidence was not shaken by the cross examination. In fact, he confirmed being present when the motor cycle was stolen and when the Appellant was arrested. The moonlight enabled them to see the Appellant and others well. He gave the Appellant's name to the police when he reported. (*see Pw4's evidence*).

30. In defence, the Appellant opted to remain silent while his co-accused, Jackson Muinde, gave adverse evidence against him by testifying as follows;

"*I know complainant. I used to see him at home. On 02/10/15 on a Friday, I left home for my boda boda business at Musini Market.*

Other boda boda operators came and found me with accused 1. They asked accused 1 if I was the person he stole a motor cycle with. Accused 1said I was the one. He was the one who implicated me. I was arrested and taken to police."

31. The Appellant was given an opportunity to cross examine his co-accused but he opted not to ask him any question

32. Having re-evaluated the evidence, I am convinced that the Appellant was well known to Pw1 and Pw3 and was recognized as one of the robbers. Failure by the witnesses to describe him does not taint the overwhelming evidence of the prosecution. It is also generally accepted that recognition is more reliable than identification of a stranger. Accordingly, the question of description becomes critical when dealing with identification of strangers which is not the case here. Further, the authorities relied on by the appellant do not advance his cause as they are about identification of strangers.

Whether the case was proved beyond reasonable doubt.

33. The prosecution established that Pw1 was the beneficial owner of motor cycle registration No. KMDH 386Y, that the motor cycle was stolen by the Appellant and two others and that one of the robbers hit Pw1 on the forehead with a stone. The P3 form (EXB-1) confirmed the injuries and the trial Magistrate noted that Pw1 had a healed scar on the forehead. The stone was also produced as an exhibit (EXB2).

34. The prosecution's duty was to demonstrate either one or all the ingredients in section 296 (2) of the Penal Code accompanied the theft and they managed to show that the Appellant was in the company of two other people and Pw1 was assaulted. Accordingly, the offence was proved beyond reasonable doubt. Further, it is clear from the judgment that the trial Magistrate highlighted all the evidence and analyzed the same. This ground of appeal also fails.

35. The sentence provided for this offence of robbery with violence contrary to section 296(2) of the Penal Code is death. It is a fact that the stolen motorbike was never recovered. The trial court considered all the relevant circumstances and factors and sentenced the Appellant to 15 years imprisonment. He made a further order that the sentence runs from the date of arrest when he was not even a convict. He should count himself lucky.

36. The upshot is that the appeal lacks merit and I see no reason for this court to interfere with the learned trial Magistrate's finding on conviction or sentence which I confirm. The appeal stands dismissed.

Orders accordingly.

Delivered, signed & dated this 29th day of September 2020, in open court at Makueni.

.....

H. I. Ong'udi

Judge