REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 36 OF 2018

DANIEL NGURE WAMUNGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 35 OF 2018

FRANCIS MURAGE CHEGE .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT.

(Being an appeal against the conviction and sentence from criminal case No. 1879 of 2017 by Hon. V. Wakumile (SPM) at Nakuru. Judgment delivered on 9/3/2018).

1. Nakuru High Court Criminal Appeal No. 36 of 2018 was selected as the lead court file when the two appeals that arose from Nakuru Chief Magistrate's Criminal Case NO. 1879 of 2017 were consolidated by an order of the Court dated 8/10/2019.

2. The appellants were on the 12/7/2017 charged with the **offence of Robbery with Violence Contrary to Section 296(1) of the Penal Code** as stated in the charge sheet.

On the onset, the offence of **Robbery with Violence is not stated under Subsection (1) but (2) of Section 296 of the Penal Code.**

The particulars of the offence are that on the 7th day of July, 2017, at Kianjoya Village in Njoro Sub-County within Nakuru County robbed **Francis Kimani Kariuki** of Kshs.4,700/= and one mobile phone make GTide valued at Shs.2500/= all valued at Kshs.7,200/= and immediately before/immediately after the time of such robbery, threatened to use actual violence to the said **Francis Kimani Kariuki.**

3. They denied the offence. Upon hearing of the case, the trial court convicted, and sentenced them to ten (10) years imprisonment on the 9/3/2018.

4. This appeal is against both conviction and sentence.

By their Amended Petitions of Appeal, filed on the 25/6/2019 (in HCRA NO. 36/2018) they fault the trial magistrate that (a) the prosecution evidence was not sufficient to sustain the conviction as the offence was not proved beyond reasonable doubt (b) that the evidence was contradictory and inconsistent and (c) that there was no proper identification.

Prosecution Evidence.

5. The prosecution case was urged by three witnesses. The victim of the robbery **Francis Kimani Kariuki** testified as PW1.

His evidence was that on the material date the 7/7/2017 about 9:00pm. when riding home from his farm, he met three young men, known to him as neighbours (the appellants) and another, who roughed him up, fell him down ransacked his pockets and robbed him of Kshs.4000/= and a cell phone while calling out their names.

He testified that there was sufficient light from security lights along the road. The following day he made a report at the police station upon which the two appellants were apprehended. On cross examination, the complainant reiterated that he knew the assailants, having group up with them in the village.

6. **PW2** was the area chief, Michael Kamau Gitau. Upon receiving the report of the robbery and having been given the names of the assailants, he caused the two to be arrested, but the third, one Chege escaped from the village. He testified that he knew the young men and that they had been subjected to mob justice earlier. The appellants did not cross examine the victim.

7. The last witness, **PW3** was the Investigating Officer, PC Josecon Masese of Naishi Police Station. He recorded statements from the appellants. He testified that he did not issue a P3 Form to the complainant as he was not badly injured.

Defence Evidence

8. The appellants adduced unsworn evidence to defend themselves. They called no witnesses.

The **1st appellant Daniel Ngure** testified that he did not know why he was arrested.

The **2nd appellant Francis Mungi Chege** denied commission of the offence.

Upon cross examination by the trial magistrate, the 2nd appellant admitted knowing the complainant very well as they were relatives by marriage.

Analysis and determination

10. I have perused and considered the reasons for the judgement by the trial court. For an offence of robbery with violence to be proved, three ingredients must be proved.

The **Court of Appeal in Oluoch Vs. Republic (1985)** set them down as;

a) That the offender is armed with a dangerous and offensive weapon.

b) The offender is in the company with one or more persons.

c) At or immediately before or immediately after the time of the robbery the offender wounds, beats, sticks or uses dire personal violence to the person.

11. It is trite that proof of any of the ingredients is sufficient to establish the offence of robbery with violence.

I agree with the trial magistrate's finding that the charge sheet as filed was based on **Section 296 (1) Penal Code instead of Section 296(2).** The evidence on record does not show any use of violence with a dangerous weapon. The complainant's evidence supports the offence of simple robbery under **Section 296 (1) of the Penal Code.**

12. The above was taken into account by the trial magistrate when, upon conviction imposed a ten years imprisonment. Had the offence under **Section 296(2)** been proved to the required standard, the mandatory minimum sentence would have been imposed, being the death sentence.

13. A court is empowered to convict on a lesser charge than is the one charged, if the evidence adduced supports the lesser charge under provisions of **Section 179 of the Criminal Procedure Code, Criminal Appeal No. 51 of 2017 Douglas Mutunga Muthene Vs. Republic (2018) e KLR; 2017, Isaac Wafula Vs. Republic (2017) e KLR,** among others

The trial court relied on the above provision when he sentenced the appellants to imprisonment for ten years.

14. The prescribed sentence for simple robbery under **Section 296 (1) Penal Code** prescribes a sentence of fourteen years, if found liable. This is not a minimum sentence, **as being liable** gives a court discretion to impose a lesser sentence depending on the circumstances of the case in point – **Abdikadir Hussein Mberwa Vs. Republic (2016) e KLR.**

The Appeal.

The appellants filed written submissions while the prosecution adduced oral submissions.

15. **Contradictory and Inconsistent Evidence**.

The prosecution evidence in my considered view was plain and straight forward. The appellants failed to adequately cross exam the prosecution witnesses, leaving the evidence largely uncontroverted, others than testifying in their defences that they did not commit the offence, they failed to shake the complainant's evidence.

In their submissions, the appellants also failed to tag any evidence that was contradictory. That being the case, I find no merit in this ground of appeal.

16. In the case **John Nyaga Njuki & 4 others Vs. Republic (2002) e KLR,** the court held that

> **"But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where the discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused".**

17. **Identification.**

Evidence on record is clear that both the complainant and the appellants were known to each other.

Indeed, the 2nd appellant in his defence testified that he knew the complainant very well because his brother, one Nganga married his elder sister Lucy Wacera.

The complainant testified that there was sufficient light from security lights on the road to enable him identify the assailants.

18. The trial magistrate made a finding that the evidence of identification was very tight as all the parties were known to each other, even by name.

Likewise, I find and hold that there was sufficient evidence that the appellants were adequately identified by the complainant, and when he made a report at the police station, he mentioned the names and identifies of his assailants.

I find no merit in this ground of appeal.

19 **Offence not proved to the required standard.**

The offence of robbery is stated at **Section 295 of the Penal Code** thus:

> **"Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery".**

20. The totality of evidence adduced by the prosecution witnesses pointed to the offence of robbery. The appellants ambushed and roughed up and fell the complainant, then stole his valuables, money and a cell phone all valued at Shs.7,200/=.

In their defences, the appellants failed to dislodge the plain and candit evidence by the prosecution, though the stolen items were not recovered.

21. I however disagree with the trial magistrates finding that the charge ought to have been brought under **Section 296(2) Penal Code.**

The evidence on record does not support the aggravated offence **Under Section 296(2)** as no violence at all was used upon the complainant, nor any dangerous weapons were used during the robbery.

In the circumstances, I found the trial court's conviction for robbery to have been properly based on the evidence.

22. **The Sentence.**

The value of the items stolen was approximately Kshs.7,200/= for which the appellants were handed down ten years imprisonment.

Under the Judiciary's Sentencing Policy, the court is enjoined to consider the circumstances under which an offence was committed.

23. Further, the sentence under **Section 296 (1) Penal Code** is not mandatory. The maximum is fourteen years.

Taking guidance from the Sentencing Policy, an appropriate sentence consumerate to the offence committed ought to be imposed taking into account that sentencing is at the discretion of the court.

24. I have taken into account the monetary value of the stolen property, not to underrate the seriousness of the offence, I find the sentence to have been excessive.

> **I therefore proceed to set aside the ten (10) years imprisonment and substitute it with one of three (3) years, commencing from the date of the trial court's judgment, the 9/3/2018.**

Orders accordingly.

Delivered, Signed and Dated electronically at Kerugoya this 24th Day of September, 2020.

J.N MULWA

HIGH COURT JUDGE

PARTIES:

Appellant in Person, C/O GK Prison at Nakuru.

Ms. Odero, State Prosecutor, Nakuru.