REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO.31 OF 2016

FREDRICK OCHIENG OLANGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment, conviction and sentence in Ukwala SRM Criminal Case No.603 of 2011

delivered on 24th May, 2013 by Hon R.M.Oanda, Ag, and Principal Magistrate)

JUDGMENT

Introduction

1. This appeal has been lying in this court since 2016 for ant of the trial court record which was later discovered to have been send to the archives in Kisumu and retrieved and submitted to this court only on 20th March 2020 during the onset of the Covid-19 pandemic.

2. The Appellant **FREDRICK OCHIENG OLANGO** was charged before the Senior Resident Magistrate's Court at Ukwala with the offence of **robbery with violence contrary** to section 296 (2) of the Penal Code, the particulars being that on the 26th day of June 2011 at Kirindi sub location in Ugunja District within Nyanza Province while armed with a walking stick robbed John Nyawade Ochieng of his mobile phone make Motorolla valued at Kshs 1500/= and at or immediately after the time of said robbery wounded the said John Nyawade Ochieng.

3. The trial magistrate, Hon. R.M. Oanda after hearing four prosecution witnesses, the appellant's defence and considering the appellant's mitigation, found the appellant guilty of the offence of robbery with violence as charged and convicted him under section 215 of the Criminal Procedure Code and sentenced him to death.

4. Dissatisfied by the said conviction and sentence, the appellant filed his petition of appeal based on the following grounds:

a) That the sentence imposed on him was manifestly harsh and excessive as to amount to misdirection.

b) That the learned trial magistrate erred in both law and fact that the conditions coupled with circumstances prevailing at the time of the act were not conclusive to permit positive recognition.

c) That the learned trial magistrate erred in both law and in facts by appreciating the evidence on record to implicate him as one of the assailants yet there was no direct circumstantial evidence linking him to the offence.

d) That the learned trial magistrate erred in both law and in facts in failing to appreciate that the unnamed explained failure by the prosecution to call some of the unnamed witnesses who were together with PW1 at the scene of the crime.

e) That the trial the learned trial magistrate erred in both law and in facts failing to comply with section 324 as read with section 329 of the CPC.

f) That the learned trial magistrate erred in both law and in facts in convicting without appreciating that the credibility of the prosecution witnesses was domed thoroughly by the duration taken before his arrest since there was no evidence that he had gone underground.

g) That the learned trial magistrate erred in both law and facts in convicting him while placing his defence that the prosecution evidence without giving some tangible points of determining thereby leaving it plausible and secure enough to entitle him to an acquittal.

h) That since he could not recall all that transpired in court he prayed to be furnished with the trial proceedings to enable him erect further grounds of appeal.

5. On 12th October 2020 the appellant filed amended grounds of appeal to the effect that:

1. THAT, the learned trial magistrate erred in law and fact when he convicted and sentenced me in the instant case without observing that the charges drawn and preferred against me was defective.

2. THAT, the learned trial magistrate erred in law and fact by failing to consider my Constitutional rights under Article 49 and 50 of the Constitution.

3. THAT, the pundit trial magistrate erred in law and facts by taking the appellant through a wrong court procedure which led also the magistrate to arrive at wrong decision.

4. THAT, the learned trial magistrate erred by convicting and sentencing the appellant to death yet its unconstitutional.

6. On the 5/10/2020 both the appellant and respondent were given 10 days to file their written submissions. The appellant filed submissions on 12/10/2020 whereas the respondent never filed any submissions on record.

Submissions

7. In his written submissions filed on 12/10/2020, the appellant had this to say:

Ground One and Two Merged

8. That the Prosecution totally failed to prove their case beyond all reasonable doubt to warrant a conviction ***with a defective charge sheet against the appellant. T***hat the death sentence was arrived by the Honourable court under baseless and a defective charge; that the charge sheet in this instant case states that the appellant wa s arraigned in court on 10/2/2012, yet the trial records shows that his first appearance in court was on 30/12/2011.

9. According to the appellant, what that means is that he was arraigned in court before the charges were preferred against him. He submitted that the omission of any number or any information in the charge sheet makes the whole charge sheet DEFECTIVE. He relied on section 194 of the Criminal Procedure Code and submitted that the section provides that *"EXCEPT as otherwise expressly provided, all evidence taken in a trial under this code shall be taken in the presence of the accused, or, when his personal attendance has been dispensed with, in the presence of his advocate [If any].*

10. According to the appellant, the learned trial magistrate who was very much conversant to this Code and who was qualified to preside over the case overlooked this section and ordered plea to take place in the appellant's absence, yet he was nowhere on record or represented.

11. The appellant submitted that he was prejudiced by the trial magistrate bearing in mind and considering SECTION 207 CPC which provides that, ***"the substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits, or denies the truth of the charge."***

12. The appellant further lamented that the trial magistrate violated his rights under Article 49(1)(g) that, an arrested person has the right at the first appearance, to be charged or informed of the reason for detention continuing, or to be released. He submitted that he was denied the right to cross-examination pursuant to section 302 of the CPC which provides that the witness called for the prosecution shall be subjected to cross examination by the accused person or his advocate and to be re-examined by the advocate for the prosecution.

13. In this case, the appellant claims that he was not accorded that right to cross examine a very crucial witness and also a complainant in this case, at page 8 line 12, and that even though the complainant was stood down for further investigations, he was not recalled back again to complete his evidence and to be subjected to cross examination by the appellant. He referred the court to page 9 line 10 of the proceedings. The appellant claims that he was prejudiced by the alleged failure to recall the complainant to be cross examined hence he was not accorded fair trial as guaranteed under Article 50(2)(k) of the Constitution.

Ground Three and Four Merged

14. The appellant submitted that the trial magistrate erred in law and fact for taking the appellant herein through a mistrial. He submitted that although section 214(1) provides that "where at any stage of trial before the close of the case for prosecution, it appears the case to the court that the charge is defective, either in substance or in form, the court may make such order or by the substitution or addition of a new charge, as the court thinks necessarily to meet the circumstances of the case provided: ***(I) Where a charge is so altered, the court shall thereupon call the accused person to plead to the altered charge***.

15. That nowhere in the records was the appellant recalled to plead for the new charges, but instead PW2, PW3, and PW4 were allowed in the court to give evidence and that PW1 was not recalled to give evidence as per the substituted charges.

16. The appellant submitted that a charge sheet should be clear on the offence charged upon so that an accused person knows that offence he is facing and in respect to which is supposed to defend himself. Reliance was placed on the case of **MADLINE AKOTH BARAZA AND ANOTHER VS REPUBLIC [2007] eKLR where TONUI, OKUBASU and GITHINJI JJA** held that the unexplained violation of the Constitution will normally result in an acquittal irrespective of the nature and strength of evidence which may have been adduced to support the charges.

17. It was submitted that according to the evidence on record as per the charge sheet, the Appellant was arrested on 10/02/2012. And that he was delayed for more than forty days in the police custody without any explanation. That even if the trial applied the old Constitution, the same was violated, under Section 72(3)(b) of the old Constitution.

18. The appellant further submitted that the trial court record was incomplete and rather defective from page 10 of the proceedings, the next page is 29 utmost 19 pages missing from the record, which is prejudicial as he is facing death sentence. That the trial court must be clear bearing in mind that this records is carrying a sentence of death. He urged this court to consider Section 332(1) of the Criminal Procedure Code.

19. In conclusion, the appellant submitted that following the conviction that the trial court sentenced the appellant to death, and since the delivery of the judgment of the Supreme Court in the case of **FRANCIS KARIOKO MURUATETU & ANOTHER Petition No. 16 of 2015,** the Supreme Court founded that mandatory death sentence prescribed for the offence of murder by Section 204 of the Criminal Procedure Code is unconstitutional. That the mandatory nature deprives the court of their legitimate jurisdiction to exercise discretion not to impose death sentence. That the sentence imposed fails to conform to the tenets of fair trial that accrue to an accused person under Article 25 of the Constitution.

20. The appellant urged the court to quash his conviction and set aside the death penalty imposed.

Analysis & Determination

21. This being a first appeal, the court is required to re-evaluate the evidence and reach its own conclusion. In doing so, it should bear in mind that it neither saw nor heard the witnesses, which the trial court had the advantage of doing- see **Okeno v R (1972) EA 32** and **Joseph Njuguna Mwaura & 2 Others v Republic [2013] eKLR**.

22. The prosecution called 4 witnesses. PW1, the complainant **John Nyawade Ochieng** testified that he comes from Asango West sub location and that he has two homes; one at Kirindi village and the other at Nyamaoso village. It was his testimony that on the 26/6/2011 at 10.am he was from Kirindi village going to Nyamaoso. He had a bicycle which he was pushing as it had a puncture.

23. He testified that on reaching Kisame River, he met the appellant who told him that he had finally gotten him. It was his testimony that the appellant blocked his way and wanted to take away the walking stick he had on his bicycle resulting in a struggle to ensue that resulted in the said walking stick being broken into two pieces with the appellant getting the bigger portion. He testified that the appellant used it in beating him up, hitting him on the finger, and head, left eye and on the mouth resulting into the loosening of the front teeth. PW1 testified that he screamed and people came to his rescue as the appellant ran away with his phone. It was his further testimony that his bicycle was destroyed too.

24. PW1 testified that he was treated at Sigomere Health Centre and later at Siaya District Hospital where he was admitted for seven days. He further testified that the matter was reported to the police and he was issued with a P3 Form. He then told the court that after the incident, the appellant went underground and resurfaced in December.

25. In cross-examination PW1 stated that he had known the appellant as he was born and grew up in the same village as the complainant. He further stated that he did not have the broken stick as the same remained at the scene when he went to hospital. He further stated that after the incident, the appellant ran away until December.

26. **PW2 Howard Okeyo,** a clinical officer based at Ambira testified that he examined the complainant herein who went to the facility on 29/7/2011. It was his testimony that during the visit, the complainant had medical notes from Sigomere Health Centre and Siaya District Hospital. He further testified that on examination, he found that the complainant's left hand was on POP, and the upper gum had been wired to align the teeth. He stated that he classified the injuries sustained as harm and filled the P3 Form on 29/7/2011 which he produced as Exhibit P1.

27. In cross-examination, he stated that he received the complainant on 29/7/2011, the complainant having been sent to the facility on the 15/7/2011. It was his testimony that he did not treat him and referred to the treatment notes and also examined him. He further stated that he did not see the weapon used and could not tell who injured the complainant.

28. **PW3 No. 89073 PC Reuben Khaemba** of Sigomere Police Station testified that he was instructed to arrest the appellant herein and that on 28/12/2011, he proceeded to Kirindi village and arrested him and later charged him with the charge of robbery with violence. In cross-examination he stated that he got a letter instructing him to go and arrest the appellant and found him at Kirindi market. It was his testimony that the appellant had run away after the incident and that he did not find the appellant with any weapon.

29. **PW4 Caroline Atieno Otieno** told the court that she came from Kirindi village and that on 26/6/2011 at 10.00 am, she saw the appellant beating up the complainant using a fimbo. It was her testimony that she screamed and people gathered. In cross-examination she stated that she saw the appellant come to her village. It was her testimony that she only screamed as the appellant beat up the complainant and people gathered. She reiterated that the appellant used the complainant's fimbo to beat him up.

30. Placed on his defence, the appellant denied the allegations against him and stated that he was a chef at Robinson Hotel in Nakuru and that

he was arrested on 27/12/2011 whilst taking empty soda bottles to Kirindi Shopping Centre. He testified that he saw people coming towards the shop who ordered him to sit down and handcuffed him.

31. He testified that they boarded a motorcycle and they proceeded to Tingare Police Cells where he was booked and after a while he was taken to Sigomere Police Station where he was asked to provide a bribe to secure his freedom but he did not have anything. The appellant testified that the next day his fingerprints were taken and he was brought to court. It was his testimony that no evidence was adduced in court of either the phone or weapon. The appellant was not cross-examined.

Determination

32. Having considered the appeal herein, the evidence before the trial court and the submissions filed by the appellant in support of his appeal, the main issue for determination is whether the prosecution proved their case against the appellant beyond reasonable doubt to warrant a conviction and sentence imposed.

33. The key ingredients of the offence of robbery with violence are that;

i. The offender is armed with any dangerous and offensive weapon or instrument; or

ii. The offender is in the company with one or more other person(s); or

iii. At or immediately after the time of the robbery the offender wounds, beats, strikes, or uses other personal violence to any person.

34. Robbery with violence entails the use of a weapon whether used or not; it also entails the use of threat, use of force or violence; the prosecution must prove that that the property was taken from the victim against his will and that fear or threat or violence was used; this is what aggravates a simple robbery to robbery with violence. It is trite law that the prosecution only has to prove any one of the key ingredients.

35. It was the appellant's case that he was not positively identified and that the prosecution failed to adduce sufficient evidence to sustain his conviction. PW1 who had seen the appellant grow up in the same village with testified that the appellant accosted him at the river Kisame, forced the complainant to park his bicycle, beat him up using the complainant's walking stick which was on the bicycle and when he realized that an alarm had been raised by the complainant attracting people, the appellant ran away with the deceased's phone, a Motorola C113 which fell from the complainant's pocket. This evidence of PW1 was corroborated by PW4 a neighbour to both the complainant and the appellant who testified that she saw the appellant beat up the complainant with a fimbo forcing her to raise an alarm by screaming which prompted the appellant to run away.

36. **In my humble view, the appellant was positively recognized by both PW1 and PW4 who were well acquainted with him being village mates.** Recognition is more reliable than identification as was held in the case of **George Kamau Muhia v Republic [2014] eKLR**. The offence took place at 10.00am in broad daylight hence there was no possibility of mistaken identity of the appellant by the two witnesses who knew him very well.

37. PW2, the clinician from Ambira further corroborated the complainant's testimony in regard to the injuries sustained when he testified that he found that the complainant's left hand was on POP, and the upper gum had been wired to align the teeth leading him to classify the injuries sustained as grievous harm and filled the P3 Form on 29/7/2011 which he produced as Exhibit P1.

38. The appellant further impugned the trial magistrate's judgement on the grounds that the prosecution failed to call some witnesses who would have exonerated him. I am alive to the fact there is no legal requirement in law on the number of witnesses to prove a fact. Section 143 of Evidence Act (Cap 80) Laws of Kenya provides: -

> ***"143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact"***

39. In the case of **Donald Majiwa Achilwa and 2 other v R (2009) eKLR** the Court stated as follows;

> ***"The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses' evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case. (See Bukenya & Others v. Uganda [1972] EA 549). That is, however, not the position here. We find no basis for raising such an adverse inference."***

40. Similarly, in the case of **Keter v Republic [2007] 1 EA 135** the court held inter alia thus:

> ***"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."***

41. Similarly, in the instant case the prosecution was at liberty to call the witnesses they deemed necessary to establish and prove their case. The trial court was in my view not at liberty to determine which witnesses are sufficient to prove the prosecution's case. Accordingly, I find this ground of appeal devoid of merit and dismiss it.

42. The appellant in his amended grounds of appeal and submissions attacked the charge sheet claiming that it was defective because it appears that he was arraigned before he was charged. I have perused the trial court record and I find that the appellant was initially charged with grievous harm contrary to section 234 of the Penal Code as per the charge sheet dated 28/1/2011 which shows that he was arrested on 28/12/2011 and arraigned on 29/12/2011.The appellant however appeared in court on 30/12/2011 in the presence of Hon J.N. Sani RM although the typed proceedings state-absent, the original trial handwritten record shows that he was present but due to jurisdictional issues, the Resident Magistrate referred that matter to SRM Ukwala Law Courts for plea and a plea was taken on 30/12/2011 before Hon. E.K. Mwaita, Principal Magistrate. The appellant pleaded not guilty to the charge in Dholuo and an order for his release on bond made. It is therefore not true that the appellant was not present or that he did not take plea. In addition, the appellant did not raise the issue of having been arrested on 28th December 2011 and being taken to court on 30th December 2011 for the trial court to seek an explanation from the Prosecution. Nonetheless, the 30th December, 2011 was within the 24 hours envisaged under Article 49 (1) of the Constitution hence the complainant is an afterthought. Furthermore, the appellant can still seek for compensation for alleged violation of his rights should he be inclined to do so, with proof.

43. The appellant further alleges that the charge sheet was effective because it appears he was arraigned before being charged. Further, that his rights were violated because PW1 was not recalled for cross examination. That claim is unsupported because the trial court record shows, quite clearly that after the plea for the initial charge of grievous harm was read to him and he denied on 5/1/2011, the hearing commenced on 7/2/2012 before Hon Mwaita who stood over the hearing on noticing that the evidence led to disclose the offence of robbery, and directed investigations into the matter and on 14.2.2012 the prosecution applied to substitute the charges but the appellant opposed and a ruling allowing substitution of the charges was made on 16/2/2012. The fresh charge of robbery with violence was read over to him on 16/2/2012 and he denied the charge and the appellant was later on request allowed to get statements of witnesses and a fresh hearing date was given. A fresh hearing commenced on 2/7/2012 when PW1 the complainant testified afresh before Hon Oanda, SRM and the record shows that the appellant cross examined the complainant and all the other prosecution witnesses hence his allegation is devoid of merit and is dismissed. In addition, the lamentation that the charge was substituted contrary to the law has no legal basis. The appellant was given the opportunity to plead to the new charges and he did. The new charge sheet is dated 16/2/2012 and albeit the police wrote date of apprehension to court on 10/2/2012, in my humble view, no prejudice was occasioned to the appellant by the error on the date as the appellant was already in court having appeared on 30/12/2011 and was still in custody when he took the fresh plea on the fresh charges on 16/2/2012.

44. The Appellant also attacked the sentence of death imposed on him as being unconstitutional in view of the Supreme Court decision in **Francis Karioko Muruatetu v R[supra].** I must however point out that the Supreme Court only attacked the mandatoriness of death sentence where trial courts claim that they have no other option but to mete out death sentence, without giving the convicts an opportunity to mitigate. In addition, the Supreme Court's issue was that the mandatoriness of death penalty deprives the sentencing court that discretion in meting out appropriate sentence having regard to the mitigation and circumstances of each case. The Supreme Court did not outlaw death sentence in view of Article 26 of the Constitution.

45. Punishment for robbery with violence under Section 296 (2) of the Penal Code is death therefore the sentence of death imposed was lawful. Sentencing is a discretion of the trial court. In **Ambani v Republic (1990) eKLR**, Bosire J. (as he then was) stated that a sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in its entirely before settling for any given sentence.

46. The Court of Appeal **Thomas Mwambu Wenyi v Republic (2017) eKLR** cited the decision of the Supreme Court of India in **Alister Anthony Pereira v State of Mahareshtra** at paragraph 70-71 where the court held the following on sentencing:-

> ***"Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence."***

47. The Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1 as follows:

> ***"1. Retribution: To punish the offender for his/her criminal conduct in a just manner.***
>
> ***2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.***
>
> ***3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.***
>
> ***4. Restorative Justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims, communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.***
>
> ***5. Community protection: To protect the community by incapacitating the offender.***
>
> ***6. Denunciation: To communicate the community's condemnation of the criminal conduct."***

48. Section 333 (2) of the Criminal Procedure Code requires a sentencing court to take into account the period spent in custody awaiting trial.

I have considered the above stated principles of sentencing.

49. I have considered the sentences imposed in some other cases where convicts of robbery with violence were re-sentenced after the Supreme Court decision in the Muruatetu case. In **Michael Kathewa Laichena v Republic (2018) eKLR** where the petitioner was in a gang that was armed with a gun and knives, Mabeya J. re-sentenced the petitioner to a prison term of 15 years after considering that he had been in custody for 5 years pending trial.

50. In **Wycliffe Wangugi Mafura v Republic Eldoret Criminal Appeal No. 22 of 2016 (2018)** the Court of Appeal imposed a sentence of 20 years' imprisonment where the appellant was involved in robbing an Mpesa shop agent with the use of firearm.

51. I have considered the mitigation by the appellant before the trial court where he stated that this was his first offence and that he will not repeat this again. He prayed for forgiveness and that his wife died while he was in custody. I have also considered the fact the victim of the robbery sustained very serious injuries classified as harm. The appellant was a very daring robber who in broad day light attacked and robbed his neighbour. In darkness he could do worse than in broad daylight. The appellant has been in custody since December, 2011. Robbery with violence is a traumatizing offence on the victims and on the society at large. It is motivated by greed. The appellant must learn to live and let live and respect other people's lives and property. He has been behind bars for close to now 8 years but that can never be sufficient punishment considering the trauma occasioned to the victim and the psychological and emotional effects and pain on the victim of the robbery. Accordingly, I resentence the appellant **FREDRICK OCHIENG OLANGO** to serve 35 years imprisonment taking into account the period already served while awaiting trial from 28/12/2011.

52. Accordingly, the appeal against conviction fails and is hereby dismissed.

53. The appeal against sentence succeeds to the extent stated above.

Orders accordingly and this file is closed.

Dated, Signed and Delivered at Siaya this 30th Day of November, 2020

R.E.ABURILI

JUDGE