REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 173 OF 2019

SAPHAN BARABARA.....-APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Conviction and Sentence in Eldoret Chief Magistrate's Court Criminal Case Number 3110 0f 2018 delivered on 30th October 2019 by Hon. (Mrs) Jacinta Orwa SPM)

JUDGMENT

Saphan Barabara was charged with **Robbery with Violence c/s 296(2) of the Penal Code** in Eldoret Chief Magistrate's Criminal Case Number. 3110 of 2018. It was alleged that on the 20th July 2018 at Kapsabet Township, Kapsabet Town Location, Nandi County while armed with a dangerous weapon namely a knife robbed Kennedy Musavi Lukanda of one mobile phone make Kibosun black in colour valued at Ksh 1200 and at, or immediately before or immediately after the time of such robbery used actual violence to the said Kennedy Musavi Lukanda by cutting him on the right hand.

He denied the offence.

The state called four witnesses to establish and prove their case, the complainant, the alleged eye witness, the investigation officer and the clinical officer. The appellant was found to have a case to answer, was put on his defence where he made an unsworn statement of defence and called no witnesses.

The learned trial magistrate in a judgment delivered on the 1st day of October 2019 found that the case had been proved beyond a reasonable doubt and convicted him accordingly. Following the consideration of a probation officer's report the appellant was sentenced to death on 30th October 2019.

Aggrieved by both the conviction and sentence, the appellant filed this appeal on 6th November 2019. He later amended the appeal and challenged the trial magistrate's findings on the following grounds:

That the learned trial magistrate erred in law and fact by:

1. Awarding the mandatory death sentence without taking into consideration the appellant's mitigation and the circumstances of the offence contrast to the Supreme Court decision in **Francis Muruatetu.**

2. By passing a conviction on evidence of identification by recognition where there had been no advance report of recognition to the police

3. Holding that the offence of robbery with violence was proved beyond a reasonable doubt but failed to note that the ingredients the offence under Section 296(2) of the Penal Code had not been established.

4. Failing to analyse the appellant's defence against the evidence adduced by the prosecution.

The case for the prosecution was that the complainant in this case was at all material times a Prison's Officer at Kapsabet GK prison. In the year 2015, the appellant was serving a prison term at the same prison. On 20th July 2018, the complainant was walking along Eben Street in Kapsabet Town heading to his residence at Show Ground. It was 8:00pm. He met the appellant whom he knew from them days. He testified that the appellant stopped and asked him why he had mistreated him in prison. He then removed a knife from his clothes and aimed the knife

at him, stabbing him in the right hand. He also picked the complainant's phone make Kibosum black in color from the complainant's shirt's breast pocket and ran way.

The complainant proceeded to Chepsoo Medical centre for treatment and later reported to Kapsabet Police station where he was issued with a P3 form. It was filled on 21st July 2018.

He said that there were streetlights where the appellant attacked him. He produced the receipt for the purchase of the phone dated 20th June 2018.

He identified the appellant in court.

On cross-examination, he testified that he raised alarm and several people responded, and indeed, one person found the appellant asking him why he had mistreated him in prison. That a colleague of his escorted him to hospital that night. That the phone was not recovered.

Asked why the P3 indicated that he had been attacked by an unknown person, he explained that the reason for that was that at the time of the attack he knew the appellant only by his appearance and not by name. He said he was able to recognise the appellant under the streetlights. That the knife was never recovered. That he had no grudge with the appellant and he never mistreated him in prison.

On re-examination he said that he told the doctor who treated him that he knew the assailant by appearance and not by name.

The Clinical Officer **Josphat Embeko** testified that the complainant told him that a well-known person assaulted him on 20th July 2018 at 6:00pm. He had a deep cut wound on the right hand, probably caused by a sharp object. The wound was stitched, he was put on painkillers. The degree of injury was harm. He produced the medical records as exhibits 1(a), (b), (c) and 2.

PW3 **Hillary Ruto** testified that he was a painter. On the 20th July 2018, about 8:00pm he was passing Kemron Street when he met 'Sava and Ken' talking. He testified that he knew both of them very well. He testified that there were security lights. He passed the two. Then he heard a distress call. He went back to the scene and met Sava running and on getting to Ken, he found him bleeding on the right hand near the elbow. He escorted him to Chepsoo hospital then went home. On 23rd July 2018, he went and recorded a statement. He identified 'Sava' to be the appellant.

On cross-examination, he told the court he did not know what the two were discussing. That it was ladies who were around there who raise alarm. That it was Ken who told him that the appellant had stabbed him with a knife. That he saw the appellant running way from the scene. He said he was on duty on 20th July 2018 but at 8:00pm he had closed his business.

PW4 no. 852994 **PC John Keter** testified that he was at the Kapsabet Police station on duty on 20th July 2018 at 10:45pm when the complainant reported a case of robbery with violence. He reported that a well-known person to him attacked and stabbed him with a knife and robbed him of his phone. The case was assigned to him for investigation.

On 21st July 2018, he accompanied the complainant to the scene. He saw streetlights. He issued him with a P3. He also obtained the receipt for the complainant's phone. On the same date the accused accompanied the complainant to the police station where he was released on a P22 pending investigations. On 7th August 2018, the appellant was arrested. On cross-examination, the witness told the court that the appellant was escorted to the police station on the 21st of July 2018, whereby he placed him in the cells and later released him pending investigations.

In his defence, the appellant in his unsworn statement told the court he was a casual labourer. He denied the offence stating that he was being victimised for a matter that took place in 2015. That he roasted maize as a business. On the 7th of August 2018, some people came, bought maize, then asked them to accompany them to the police station where he was placed in the cells and later charged with this offence. He said he saw the complainant for the first time in court.

The issues for determination as set out by the appellant are;

1. Whether the sentence meted out was without consideration of the appellant's mitigation and the circumstances of the offence.

2. Whether the evidence of identification of recognition was tainted with the possibility of error.

3. Whether the charge of robbery with violence was proved.

4. Whether the appellant's defence was considered.

This being a first appeal I am guided by **Okeno vs Republic (1972) EA 372** where it was stated

"The first appellate court must itself weigh conflicting evidence and draw its own conclusion (SHANTITLAL M RUWALA V R, [1957] EA 57). It is not the function of a first appellate court merely to scrutinise the evidence to see if there was some evidence to support the lower courts' findings and conclusions; it must make its own findings and draw its own conclusion only then can it decide whether the magistrate's findings should 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 witness."

In the oral high lights of his written submissions, the appellant reiterated that there were no eyewitness to the offence, no exhibits were produced, and the sentence and conviction were not supported by evidence.

On the first ground, he argued that the prosecution actually told the court that the appellant was a first offender without any criminal record. Then in mitigation he had told the court that his business had collapsed, his pregnant wife had left and his mother passed away upon his arrest. That the learned trial magistrate was bound to consider all these because by virtue of **Section 216 and 329 of the Criminal Procedure Code** mitigation was part of the trial process, and it was evident that the trial court had not considered his. He submitted that the trial magistrate's sentence ran counter to the Supreme Court decision in **Francis Karioko Muruatetu &Anor v R [2017] eKLR,** on the unconstitutionality of the mandatory nature of the death sentence.

Mr. Masisa in opposing the appeal on this ground submitted that the appellant deserved the sentence of death, as it was a legal sentence. That the Probation Officer's Report requested by the court indicated that the appellant was not a first offender that the court was told that the charges the appellant faced was rampant in that area.

I have carefully looked at record. The appellant mitigated before the learned trial magistrate. The Probation Officer's Report indicated that he was not a first offender having been convicted of a bhang related charge, where he had served sixteen (16) months imprisonment. There was no case number, no year, no dates.

In sentencing the appellant, the learned trial magistrate took into consideration the appellant's mitigation and the fact that he was not a first offender. The record states:

> *" The court is alive to the Muruatetu case emanating from the Supreme Court being petition No. 16 of 2015. However, the sentence provided for in law is the death sentence in accordance with Section 296(2) of the Penal Code. The accused is hereby sentenced to the death sentence in accordance with Section 296(2) of the Penal Code"*

It is evident from the above that the learned trial magistrate considered that, once the appellant was found guilty, there was no other sentence available to the appellant except the sentence of death. According to ***Muruatetu,*** that was clearly misguided. The Supreme Court declared the mandatory nature of the death sentence or nay sentence for that matter unconstitutional for taking away the discretion of the court. Of course, the death sentence is still a lawful sentence in appropriate cases. However, in this case, the trial court failed to exercise its sentencing discretion and to that end, this ground succeeds.

Was the appellant properly identified as the attacker?

In support of the position that the identification evidence was not free of possible error, the appellant cited the flowing cases:

1. **Anjononi vs Republic [1980]KLR 59** *' recognition of the assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other'*

2. Joseph Muchangi Nyaga & Anor vs Republic [2013] eKLR *'evidence of visual identification should always be approached with great care and caution'*

3. Waithaka Chege vs Republic [1972] KLR 217, **Gikonyo Karume & Anor vs Republic [1980] KLR 273** *'…before acting on such evidence the trail court must make inquiries as to the presence and nature of the light, the intensity of such light, the location of and the source of that light in relation to the accused and time taken by the witness to observe the accused so as to* be *able to identify him…***"**

4. Maitanyi vs Republic [1986] eKLR where the court held that the trial court before recording a conviction based on the evidence of a sole identifying witness must warn itself , and be absolutely certain that the conditions for identification were free from any possibilities of error or mistake.

The appellant submitted that the complainant did not know who had attacked him, that if he had recognised the appellant as the attacker he would have given a name to the police when he made his report, and he would not have reported that the attacker was *'a person well known to him'*. That his later naming the appellant as the attacker failed the test in Terekali **& Another – vs – R[1952] EACA. 37** that the initial report to a person of authority provided a good test of the truth and accuracy of later statements, as it is at this early stage that the complainant's recollection was still fresh.

That the complainant's testimony was contradicted by that of PW3 who claimed that the complainant told him at the scene that one Sava had stabbed him with a knife. Clearly if that was so, then the appellant would have named his attacker to the police. He urged the court to consider the complainant's testimony in the light of the Court of Appeal's standard in **Joseph Ndung'u Kimanyi vs Republic [1979] eKLR**; the judges stated;

> *"We lay down the minimum standard as follows. The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the Court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence."*

The complainant and PW3 were not witnesses of truth. PW3 stated on oath that he knew 'Sava' very well. If that was so, then the name Sava would have appeared in the Police report.

In addition, the appellant argued that the complainant's initial claim was that he had been stabbed. He never told PW3 that the said Sava had robbed him of his phone. The question was why?

It was also the complainant's position that the trial court did not question the light as required, the intensity of the light, the location of the source of light, the distance from the where the complainant was and the perpetrator so as to aid identification. The issue as to the position of the streetlights with regard to the position of the attacker and the complainant was not established. The Complainant was on one street, while PW3 was on another street. How then did he manage to see the appellant or the complainant?

The appellant also argued that the prosecution's position was that the assault and robbery were connected to the relationship between the appellant and the complainant in Kapsabet prison. That the prosecution had a duty to place both in Kapsabet Prison at the same time. That this the prosecution failed to do. First, the PW2 did not produce any evidence to support his claim that he was a prison officer, or that he served or had at Kapsabet prison. Second, no evidence was produced by the prosecution to place the appellant in Kapsabet Prison in 2015. This was important, as the Prosecuting Counsel had told the court that the appellant could be treated as a first offender. Third, that both the appellant and the complainant interacted in Kapsabet Prison. Based on these submissions the appellant contention was that the evidence of identification was full of errors, which the learned trial magistrate had not considered. Fourth, when the complainant went to Chepsoo medical centre for treatment in the company of PW3 they told the doctor that he was assaulted by an *unknown person by name but familiar face to him.*

On this ground, all that Mr. Masisa for the state submitted that was that PW3 knew the appellant and the appellant knew him. That he and PW2 saw him under the streetlights and identified him.

Looking at the record one cannot but agree with the appellant on the issue of identification. The learned trial magistrate proceeded on some assumptions. If the appellant was in prison in 2015, and this offence happened in 2018, how did the complainant identify the attacker as the appellant? The court did not question the apparent contradiction between the complainant's testimony and that of the PW3 on whether or not the attacker was identified at the scene as the appellant. Neither PW2 nor PW3 testified as to how they knew the appellant, in particular if he had been in and out of prison. Neither did the court question the relevant issues related to the light in which the two said they had identified the attacker.

On the whether or not the ingredients of robbery with violence had been established, it was the appellant's submission that each of the ingredients set out by the **Court of Appeal in Johana Ndung'u vs Republic Criminal Appeal 116 of 1995** had not been proved: the use of or threat to use actual violence to further the act of stealing. Further that the prosecution was required to prove that the attacker was armed with a dangerous weapon, was in the company of one or more persons. On this, the appellant was mistaken. The provisions of **Section 296(2) of the Penal Code** require the establishment of one or other of the ingredients.

The record shows that complainant reported an assault to PW3 as evidenced by his testimony, to the police as is evidenced by the details of the offence entered in the P3, to the medic who first treated him as evidenced by the treatment chit. It is not clear when the element of robbery with violence arose. Taking the circumstances of the case before court, he submitted that the alleged weapon was neither described nor produced in court. The only thing that the prosecution proved was that the complainant had an injury caused by a sharp object.

The appellant submitted that his alleged arrest and release on 20th July 2018 was suspect. According to the Investigation Officer the appellant was released pending investigations. The appellant's contention, which is tenable, was that if the complainant and his witness had positively identified the attacker, what further investigations were required? The appellant further contended that the Investigating Officer did not establish what other evidence he had gathered, that this rendered his testimony unreliable. That it was evident that the alleged arrest was on suspicion but no proof. See **Sawe v R**.

Taking into consideration the circumstances of this case, it is notable that the prosecution had not demonstrated that the appellant was arrested on 21st July 2018 and released on a P22 then traced and arrested on 7th August 2018. The appellant in his testimony clearly testified of his arrest on 7th August 2018. The charge sheet states that the appellant was arrested on 7th August 2018. There is nothing on record to support the prosecution's case that the appellant was arrested on 21st July 2018. Cleary the trial magistrate did not consider the appellant's defence, as it definitely threw a spanner in the prosecution's case.

From the foregoing it is evident that the prosecution failed to establish that the appellant and the complainant were at Kapsabet Prison at the same time as Prisoner and Prison Officer, the evidence of identification carried with it the possibility of error, the allegation of theft of the phone appears to have been an afterthought, and the alleged arrest, release and re arrest of the appellant was not established.

The conviction was unsafe. The same is quashed. The sentence set aside and the appellant be set at liberty unless otherwise legally held.

Right of Appeal 14 days.

Dated and delivered virtually this 30th December, 2020.

Mumbua T Matheka

Judge

Court Assistant Martin

Ms. Limo for the Republic

Appellant present