REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 46 OF 2018

BETWEEN

HAMISI SULEIMAN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against sentence passed by Hon. P. Wambugu SRM on 6.8.2018 in Mombasa CMC CR Case no. 60 of 2013)

JUDGMENT

Introduction

1. The Appellant herein was charged with two counts of the offence of Robbery with violence contrary to Section 295 as read with section 296(2) of the Penal code.

2. The Appellant pleaded not guilty and the case proceeded to full hearing. The prosecution called four (4) witnesses. At the end of the trial, the Appellant was convicted of the two counts, and that the trial court sentenced him to death stating the law only provided for one sentence, which is death.

3. The Appellant being aggrieved by that decision lodged an Appeal to this Court against the conviction and sentence vide Amended Grounds of Appeal filed in Court on 7.9.2020, on the following grounds.

> ***1. That the Learned trial Court magistrate erred in law and fact on convicting me the Appellant on a charge of robbery with violence without proper finding the same was defective.***
>
> ***2. That the Learned trial Court magistrate erred in law by failing to find the offence of robbery with violence was not proved beyond any reasonable doubt***
>
> ***3. That the Learned trial Court magistrate erred in law and fact by failing to find that from the evidence adduced by the complainant the disclosed offence of which I the Appellant could have been convicted on was stealing contrary to Section 268(1) and assault causing actual bodily harm contrary to Section 251 both of the penal code.***
>
> ***4. That the Learned trial Court magistrate erred in law and fact by failing to consider the period spent in remand custody prior to conviction and sentence.***

Submissions

4. The Appellant filed his written submissions and relied on the same. He submitted that no violence, threats or any weapon was used in stealing from PW1, since he was not present when his CD's were stolen from his shop. Therefore, the offence of robbery with violence could not be proved beyond reasonable doubt. Therefore, the appropriate offence to be preferred would have been stealing which is contrary to Section 268(1) of the penal code.

5. The Appellant further submitted that PW1 was not injured during the robbery. Rather, he was injured when he was in the process of arresting the Appellant who had stolen from his shop. Consequently the appropriate offence to be preferred would have been Assault causing actual bodily harm contrary to Section 251 of the penal code as was stated in **Erick Mwata Onono vs Republic CR. APP. NO. 17 of 2015** where the Court of Appeal stated where the Court of Appeal substituted a conviction of attempted robbery with a conviction for assault

causing actual bodily harm contrary to Section 251 of the penal code.

6. The Appellant in conclusion asked this Court to consider the period he spent in remand custody prior to his conviction and sentence, and the time already served when imposing a custodial sentence.

7. **Ms. Mwangeka** Learned Counsel for the D.P.P relied on her written submissions filed in Court on 22.9.2020. She submitted that the critical ingredients of robbery with violence were proved to the required legal standard as against the Appellant herein. On the sentence meted, Counsel submitted that this Court should re-sentence the Appellant, as it deems fit and just.

Determination.

8. This being the first Appellate Court, it is imperative that I must examine and analyze all the evidence adduced in the trial Court afresh and arrive at my own independent finding and conclusions on both the facts and the law. This is the principle espoused in a plethora of cases including **Kiilu & Another V. Republic [2005] 1 KLR 174** where the Court of Appeal held that:

> ***"An Appellant in a first Appeal is entitled to expect the whole evidence as a whole to be submitted to afresh and exhaustive examination and to the Appellate Court's own decision in the evidence. The 1st Appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not function of the 1st Appellate Court to merely scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions, only then can it decide whether the Magistrate's finding 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 witnesses. …."***

9. The Appellant seeks to challenge his conviction and sentence for the offence of Robbery with violence contrary to Section 295 as read with section 296(2) of the Penal code. These ingredients of robbery with violence are as set down in section 296 (2) of the Penal Code, as follows:

> ***Section 295*** *of the* ***Penal Code*** *states;*
>
> ***295. 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.***
>
> ***Section 296(2)*** *of the Code defines when robbery as defined under* ***section 295*** *morphs into robbery with violence; it says: -*
>
> ***296 (2). If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.***

10. It follows that in order to convict for the offence of robbery with violence, the prosecution must have proved that the complainant was not only robbed but also that, at the time of the robbery, the accused was armed with any weapon or instrument that may deemed to be dangerous or offensive; or, that the accused was in the company of one or more persons; or, immediately before or immediately after the time of the robbery, the accused wounded, beat up, struck or used violence to any person. The ingredients of the offence of robbery with violence were set out by the Court of Appeal in the case of ***Johana Ndungu vs Republic*** **Criminal Appeal No. 116 of 2005 (UR)** as follows:-

> ***i. If he offender is armed with any dangerous weapon or instrument; or***
>
> ***ii. If he is in the company with one or more other person or persons, or;***
>
> ***iii. If at or immediately after the time of the robbery, he wounds, beats, strikes or uses violence to any person.***

11. The prosecution's case forms part of the record of appeal and I need not reproduce the same, however I purpose to summarize the prosecution's case and the defence. **Godfrey Juma** (PW1) testified and stated that on the 7.1.2013 at about 8:25 am he left his shop to go and call Omondi who was to watch his shop, while he took breakfast. As he walked, he was beckoned by a dumb friend of his. He went toward him. However, on returning, he noticed that some of his CDs were missing. The dumb man pointed at a man who was walking away as the one who had stolen the CDs. PW1 states that he pursued the Appellant while raising an alarm. On catching up with the Appellant and holding his shoulder, the Appellant hit him with his fist on his jaw making him to fall down where he injured his right arm. Further, the Appellant started running toward Blue room as the CDs scattered on the ground. Members of the public joined in the chase to pursue the Appellant. The Appellant picked an iron rod and hit him on his right hand fracturing it. That is when the public overpowered the Appellant, arrested him, and escorted him to the police station.

12. Upon cross-examination, PW1 confirmed that he did not see the Appellant take the CDs. However, it is the dumb man who notified him of the same, and that the Appellant boxed him making him fall to the ground and that the iron rod used to hit him was picked from the ground

13. **John Omondi Osusda** (PW2) also testified and stated that he saw the dumb man clapping his hands signaling that someone was stealing PW1's CDs, and that is when PW1 rushed outside to pursue the thief and after some minutes, PW1 came back to the scene with a man who was bleeding. Upon cross-examination, PW2 confirmed that he only saw the Appellant was brought to the scene after being arrested.

14. **Dr. Lawrence Ngone** (PW3) testified and stated that PW1 was injured on 7.1.2013 by a person known to him and that he sustained a tender left cheek, lacerations of the right forearm and a fracture of the 4th finger of the right hand.

15. The Appellant in his defence testified and stated that he was at his work place when he saw some commotion caused by municipal askaris who were arresting hawkers. The complainant approached him demanding to know who had taken his CDs. He even assaulted him injuring his mouth before the public came to his rescue and they were both advised to head to the central police station where the dispute would be resolved.

16. In this appeal, there is uncontroverted evidence that the appellant while trying to retain the stolen CDs hit the complainant on the jaw making him fall down. Further, the Appellant picked an iron rod and hit the complaint on his right hand thereby fracturing it. As already stated there are three ingredients, any one of which is sufficient to constitute the offence of robbery with violence under ***section 296 (2)*** of the Penal Code. If the offender is armed with any dangerous or offensive weapon or instrument that would be sufficient to constitute the offence. Secondly, if one is in company with one or more other person or persons that would constitute the offence too. And lastly if at or immediately before or immediately after the time of the robbery he wounds, beats, strikes or uses any other violence to any person that would be yet another set to constitute the offence. In the present appeal, evidence was adduced and accepted by the trial Court that the appellant wounded the complainant immediately after he had robbed him and was being pursued by the complainant. That falls in the third categories stated above. Clearly, the offence of robbery with violence was committed and proved beyond reasonable doubt by the prosecution.

17. In the result, it is my finding that the conviction was safe and the sentence meted out on the appellant was proper, as it is what is spelt out in law.

18. As regards the sentence, the mandatory nature of any sentence is now unconstitutional as per the constitutional test in the Supreme Court decision in the case of **Francis Karioko Muruatetu & Another -Vs- Republic (2017) eKLR** where the said court declared the mandatory sentence for murder under Section 204 of the Penal Code to be unconstitutional for the reason that it deprives courts of the inherent discretion to impose a sentence other than the death sentence in an appropriate case. Subsequently the Court of Appeal in **William Okungu Kittiny –Vs- Republic (2018) eKLR** applied the Muruatetu case *mutandis mutatis* to the mandatory sentence for robbery with violence under the provisions of section 296 (2) of the Penal Code and declared the said section to be unconstitutional on the same reasons stated by the Supreme Court in the *Muruatetu case*. As follows:

> **"...The appellant was sentenced to death for robbery with violence under Section 296 (2). The punishment provided for murder under Section 203 as read with Section 204 and for robbery with violence and attempted robbery with violence under Section 296 (2) and 297 (2) is death. By Article 27(1) of the Constitution, every person has inter alia, the right to equal protection and equal benefit of the law. Although the Muruatetu's case specifically dealt with the death sentence for murder, the decision broadly considered the constitutionality of the death sentence in general...From the foregoing, we hold that the findings and holding of the Supreme Court particularly Paragraph 69 applies *mutatis mutandis* to Section 296 (2) and 297 (2) of the Penal Code. Thus the sentence ... is a discretionary ..."**

19. In the premises, a court can in an appropriate case, impose a sentence other than the death sentence in a case of robbery with violence. The Appellant in his mitigation stated that he had a wife and two children and that he had hurt his eyes sight and he could therefore not see properly at night. Nevertheless, the trial Court noted that there was only one sentence provided by law and sentenced the Appellant to death.

20. The Supreme Court in the **Francis Karioko Murwatetu** case (supra) set out guidelines to assist the courts in the determination of the sentence where mitigation was not considered prior to the said case. The guidelines are as follows:

> ***"As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:***
>
> ***(a) age of the offender;***
>
> ***(b) being a first offender;***
>
> ***(c) whether the offender pleaded guilty;***
>
> ***(d) character and record of the offender;***
>
> ***(e) commission of the offence in response to gender-based violence;***
>
> ***(f) remorsefulness of the offender;***
>
> ***(g) the possibility of reform and social re-adaptation of the offender;***
>
> ***(h) any other factor that the Court considers relevant.***
>
> ***We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process. This notwithstanding, we are obligated to point out here that paragraph 25 of the 2016 Judiciary Sentencing Policy Guidelines states that:***

GUIDELINE JUDGMENTS

Where there are guideline judgments, that is, decisions from the superior courts on a sentencing principle, the subordinate courts are bound by it. It is the duty of the court to keep abreast with the guideline judgments pronounced. Equally, it is the duty of the prosecutor and defence counsel to inform the court of existing guideline judgments on an issue before it."

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

22. In **Nicholas Mukila Ndetei –V- Republic (2019) eKLR**, Odunga J. considered what the court has to consider in a re-sentencing hearing and held that:-

"In my view, fairness to the accused where a sentence re-hearing is considered appropriate would require a consideration of the circumstances prior to the commission of the offence, at the time of the trial and subsequent to conviction. The conduct of the accused during the three stages may therefore be a factor to be considered in determining the appropriate sentence. The need to protect the society clearly requires the court to consider the impact of the incarceration of the offender whether beneficial to him and the society or not hence the necessity for considering a pre-sentencing report."

23. I have considered the above stated principles of sentencing, the seriousness of the offence and mitigation by the Appellant especially in the light of the aforesaid **Muruatetu case.** It is noteworthy that the Appellant was a first offender, he has been in custody from the time of his arrest on 7.1.2013. Therefore, he has spent almost 7 years in prison as at the date of this judgment. I have also considered the circumstances prior to the offence, which point to a normal robbery, which escalated to robbery with violence when the complainant pursued the Appellant in a bid to arrest him leading to a scuffle that resulted to the complainant sustaining a fracture on his 4th finger and other minor injuries. Further, the offence occurred in early morning and the value of the CDs stolen from the complainant was Kshs. 15,000/=. I find and hold that a sentence of ten (10) years imprisonment is adequate punishment for the offence committed by the Appellant.

24. The upshot is that the sentence of death imposed by the lower court is hereby set aside and substituted with a sentence of 10 years from 8.1.2013.

Right of appeal in 14 days.

Dated, signed and delivered at Mombasa this 30th day of December, 2020

HON. LADY JUSTICE A. ONG'INJO

JUDGE