



REPUBLIC

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 16 OF 2019

ISSACK KARIUKI NDAMBIRI Alias KIDERO...APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the Hon. Thomas T. Nzioki (SPM) at Siakago delivered on the 10/04/2019 in SPM Criminal Case No.1031 of 2015)

JUDGMENT

FACTS

1. The Appellant, **Issack Kariuki Ndambiri alias Kidero**, was charged with the offence of Robbery with Violence contrary to **Section 296 (2)** of the **Penal Code**; the particulars of the charge are that on the 27th day of October, 2015 at Gachuriri Market, Gachuriri Sub-Location in Mbeere Sub-County within area in Embu County jointly with others not before the court; while armed with dangerous and offensive weapon namely an AK47 rifle and a knife robbed **Joseph Masila Mutinda (PW1)** of cash in the sum of Kshs.181,000/-, and during the time of such robbery used actual violence on the complainant.

2. The prosecution called at total of twelve (12) witnesses to support its case; the Appellant was found guilty and was convicted and sentenced to twenty (20) years imprisonment;

3. Being aggrieved by the conviction and sentence, the Appellant filed the instant Petition of Appeal and the Grounds of Appeal are summarized as follows;

i. The trial court failed to interrogate the sequence of events leading to his arrest; The investigations and recording of the statements commenced after the appellant was arrested; The trial court erred in both fact and law in finding that his motor cycle was used to ferry the real actors of the crime from the scene;

ii. There was no evidence that placed the appellant at the scene of the crime; the single identifying witness' (**PW3**) testimony contradicted that of **PW4**; and therefore, **PW3's** evidence was not corroborated;

iii. The trial magistrate acted like a prosecution witness when it concluded that the appellant used his motorcycle to ferry the robbers;

iv. The trial court failed to consider the appellant's defence.

v. The prosecution failed to prove its case to the desired threshold.

4. The parties were directed to canvass the appeal by filing and exchanging written submissions; hereunder is a summary of their respective submissions;

APPELLANT'S SUBMISSIONS

5. The appellant submitted that this court being the first appellate court was under an obligation to evaluate the evidence and find whether there was sufficient evidence to warrant a conviction; it can also check the manner in which the trial was conducted to satisfy itself that it was fair; and that the sentencing was also fair;

6. No report was made at the Kiritiri Police Station against the appellant and his motor cycle registration number KMDJ 235D; the incident of robbery took place on the 27/10/2015 whereas the investigations were done after the appellant had been arrested on 17/11/2015;

7. The only witness who connected the appellant to the robbery was Purity Berita (**PW3**) who admitted under cross-examination that the appellant never entered the complainants shop; her evidence was that the appellant wore a jacket or a coat and rode towards the bush instead of joining the members of the public in pursuing the offenders;

8. **PW 11** who was the investigating officer did not allude to whether **PW3** could remember and the person she had seen with the motorcycle when the robbery took place; in his testimony he stated that there was an eye witness who saw the motorcycle headed for Kirinyaga but a tractor had blocked it at the bridge; but this witness was never called to testify;

9. Peter Kilunda (**PW4**) testified that the appellants motorcycle passed him headed for the crime scene; the rider had a helmet and two pillion passengers; the motorcycle left the scene of crime and headed to the New Apolistic Church;

10. The complainant stated that he had seen the motorcycle being driven very fast in front of his shop and that he was able to read and memorize the registration number plate; the appellant's only connection to the offence was his motorcycle which had been seen at Gachuriri market; the appellant submitted that there were different contradictory versions of his connection to the crime;

11. The trial court went on to find that **PW3** saw the appellant ride the motor cycle towards the bush whilst being pursued by members of the public; yet this was not the testimony of **PW3**;

12. The police conducted a first identification parade which was botched; the appellant contended that the police then took photographs of the suspects and shared the photographs with the witnesses before conducting the second identification parade which they deemed as successful;

13. At the trial the police admitted that they had no evidence against the suspects who had been identified at these parades; that the arrest, identifications, the trial and the conviction were a mere convenience to please the complainant;

14. The prosecution had failed to prove its case beyond reasonable doubt; and the appellant prayed that the appeal be allowed; the conviction be quashed and the sentence set aside.

RESPONDENT'S SUBMISSIONS

15. In response the respondent submitted that the prosecution had proved its case against the appellant; the witnesses were clear in their testimonies and their statements corroborated each other; any inconsistencies as alleged were not fundamental so as to cause any prejudice to the appellant; case-law relied on **Joseph Maina Mwangi vs Republic [2000] eKLR**;

16. The ingredients of the offence of robbery are set out in the following cases **Johana Ngungu vs Republic (CRA 116/1995) and Dima Denge & Others vs Republic Criminal Appeal No.300 of 2007** where it was held that under the provisions of Section 296(2) of Penal Code any one of the following circumstances amounts to robbery with violence;

i. Where the offender is armed with a dangerous or offensive weapon or instrument;

ii. Where the offender is in the company of one or more person(s);

iii. Where immediately before, or immediately after the time of the robbery, the offender wounds, beats, strikes or uses any other form of violence to any person;

17. The sworn statement of the appellant was considered but failed to dislodge the evidence of the prosecution; and the alibi defence was an afterthought;

18. The judgment of the trial court was prepared in accordance with Section 169 of the Criminal Procedure Code;

19. The appellant was convicted after being heard by a competent court; he was sentenced to serve twenty (20) years in prison; that this court has unfettered jurisdiction to review the appellants sentence; and the respondent urged this court to consider the aggravating circumstances under which the offence was committed, the seriousness of the offence and the penalty set out in law;

20. That the grounds of appeal as enumerated in the appellants submissions lacked merit.

ISSUES FOR DETERMINATION:

21. After taking into consideration the written submissions made by both counsel this court has framed two issues for determination;

i. Whether the appellant was positively identified by the two prosecution witnesses **PW3** and **PW4**;

ii. Whether there was sufficient evidence to connect the appellant to the offence of robbery with violence and whether the evidence adduced could sustain the conviction.

ANALYSIS

22. This court being the first appellate court it is incumbent upon it to re-evaluate and re-assess the evidence on record and arrive at its own independent conclusion bearing in mind that this court did not have the opportunity or benefit of hearing and seeing the witnesses as they testified; reference made to the case of **Okeno vs Republic (1972) EA 32**.

Whether the appellant was positively identified; whether there was sufficient evidence to connect the appellant to the offence of robbery with violence and whether the prosecution proved its case to the desired threshold:

23. The duty of the prosecution is that it must prove its case to the threshold of beyond any reasonable doubt and this case is no exception; under the provisions of Section 296(2) of Penal Code any one of the following circumstances amounts to robbery with violence;

- a. Where the offender is armed with a dangerous or offensive weapon or instrument;
- b. Where the offender is in the company of one or more person(s);
- c. Where immediately before, or immediately after the time of the robbery, the offender wounds, beats, strikes or uses any other form of violence to any person;

24. In this instance the prosecution had to ensure that sufficient evidence was adduced that the appellant was in the company of one or more offender(s) so as to uphold a conviction under the provisions of Section 296(2) of the Penal Code;

25. **PW1** stated in his testimony that when he gave chase to the robbers he had seen the motorcycle which came from the bush and was being driven at a very fast speed; that the rider was alone and had no pillion passenger; that he was able to read and memorize the registration number plate KMDJ235D; as regards the appellant's involvement in the robbery he stated as follows;

“After a few days I was informed by a police officer who had recorded my statement there was a suspect arrested with the motorcycle registration number KMDJ 235D. I did not go to identify the suspect because I had not seen him.”

26. Under cross-examination **PW1** stated **“I was not able to see the 1st accused during the robbery.”**

27. The evidence of Purity Berita (**PW3**) was that she saw the appellant on the material day; her evidence as stated on the court record was;

“At about 8.00am someone arrived riding a motorcycle and parked it at an unoccupied house adjacent to my hotel. The motorcycle is a Boxer Reg.No.KMDJ235D.....the accused was alone when he parked the motor cycle”.

28. She admitted under cross examination that she did not see the appellant enter the complainant's shop; with regard to the appellant's involvement in the robbery her evidence was as set out hereunder;

“The 1st accused person was involved in the robbery because he rode away instead of joining the other members of the public.”

29. **PW4** stated that he saw the motorcycle on that material date and it had two pillion passengers; after identifying the motorcycle in court his evidence on the identification of the three persons he stated **“I did not see the face of the men clearly.....I did not identify the three men I saw.”**

30. He stated that after the robbery incident the rider of the motor cycle rode away towards the New Apostolic Church after a member of the public had aimed a panga at him; as for the other two men one was armed with a gun and the other was crying a paper bag and he saw them walk away towards the bush;

31. Under cross-examination he stated that;

“I cannot tell where the pillion passengers disembarked from the motorcycle.”

32. The trial court in its judgment made a finding that the appellant was correctly identified by the independent witness **PW3** at Gachuriri Market during the robbery; that she attended an identification parade and positively identified the appellant; that all the witnesses positively identified the motorcycle **‘PEX.7’** that was recovered from the appellant and used during the robbery at Gachuriri Market; and proceeded to convict the appellant for the offence of robbery with violence;

33. It is not in dispute that the appellants motorcycle was seen at Gachuriri Market on that material date and that is the only connection to the crime; one of the key ingredients of the offence of robbery with violence that the prosecution ought to have proved was that the appellant was in the company of one or more robbers; the prosecution witnesses **PW1**, **PW3** and **PW4** gave different and contradictory versions that left an unanswered question as to whether the appellant was in the company of any other person(s) on that material date;

34. This court is satisfied that the prosecution failed to prove this key ingredient to the desired threshold; this ground of appeal is found to have merit and is hereby allowed;

35. **PW1** and **PW4** admit in their evidence that they were not able to identify the rider of the motor bike on that material date; and therefore did not see nor were they able to positively identify the appellant; as for **PW3** she may have identified the appellant at the identification parade but she admitted under cross-examination that she did not see the appellant entering **PW1**'s shop or going to the crime scene; her assumption that the appellant was one of the robbers was based on fact that he failed to assist them in pursuing the robbers;

36. From the afore-going evidence this court is satisfied that the appellant was not positively identified as being one of the robbers by any of the prosecution witnesses **PW1**, **PW3** and **PW4**;

37. Lastly, on the appellants involvement in the robbery it is noted that the evidence of **PW1**, **PW3** and **PW4** did not also establish a clear and unambiguous nexus between the crime and the appellant; the evidence of **PW3** is based on mere suspicion that the appellant was a stand-by get away rider; there are legions of authorities that have held that mere suspicion however strong cannot sustain a conviction for a serious offence; refer to the case **Sawe vs Republic [2003]KLR**; other than just stating that the appellant parked his motor cycle and rode away it was incumbent upon the prosecution to adduce evidence adequate evidence to prove involvement;

38. Upon having re-examined the evidence on record this court has doubts as to whether the evidence on the different accounts of the scenario presented by the prosecution witnesses was sufficient to connect or link the appellant to the offence of robbery with violence; and finds the circumstantial evidence relied upon to convict the appellant was without a doubt based on mere suspicion; and in the circumstances the conviction is found to be unsafe;

39. This ground of appeal is found to have merit and is hereby allowed;

FINDINGS& DETERMINATION

40. In the light of the forgoing this court makes the following findings and determinations;

i. This court finds that the appellant was not positively identified as being one of the robbers; and finds that there was insufficient evidence presented from the scenario to connect the appellant to the offence; and finds that the prosecution failed to prove its case to the desired threshold; the conviction is found to be unsafe;

ii. The appeal is found to have merit and is hereby allowed.in its entirety.

iii. The conviction is hereby quashed and the sentence on the offence of robbery with violence is hereby set aside; the appellant be set at liberty forthwith unless otherwise lawfully held.

It is so Ordered.

Dated, Signed and Delivered Electronically at Nyeri this 17th day of December, 2020.

HON. A.MSHILA

JUDGE