REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO 23 OF 2017

BENARD GITONGA KARANU...............APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(An appeal against the original conviction and sentence of Hon. R.

Odenyo SRM in Criminal Case No. 1137 of 2012, delivered on

13th October 2014 in the Chief Magistrate's Court at Mombasa)

JUDGMENT

The Appeals

1. The Appellant was jointly charged with another accused person with the offence of robbery with violence contrary to section 295 as read with 296(2) of the Penal Code. The particulars were that on 1st April 2012 at around 10.30am at Utange village in Bamburi location of Kisauni District within Coast Province jointly with others not before the Court while armed with a dangerous weapon namely a firearm, he robbed Simon Ngethe of Kshs 80,000/= and at, or immediately before, and immediately after the time of such robbery threatened to use actual violence to the said Simon Ngethe.

2. The Appellant pleaded not guilty to the count in the trial Court on 10th April 2012, and after trial, he was convicted of the count of robbery with violence and sentenced to death. The Appellant is aggrieved by the judgment of the trial magistrate and has preferred this appeal against the conviction and sentence. The Appellant's grounds of appeal are in his Petition of Appeal filed in Court on 1st November 2016 as further amended by Amended Grounds of Appeal filed in Court on 6th December 2018. He also availed written submissions on the said date, as well as further written submissions that he filed on 18th December 2018.

3. The Appellant's grounds of appeal are as follows:

> **1. THAT the learned trial magistrate erred in law and fact on the issue of identification and therefore arrived at a wrong decision of convicting the Appellant to serve a death sentence.**
>
> **2. THAT the learned trial magistrate erred in law and fact by convicting the Appellant to serve the death sentence without close examination on the source of his arrest to allow for safe conviction.**
>
> **3. THAT the learned trial magistrate erred in law and fact to allow harsh and unsafe conviction of the Appellant without relying on any corroboration evidence to strengthen the prosecution evidence to allow for safe conviction.**
>
> **4. THAT the trial court magistrate failed on the issue of proper examination and evaluation of the evidence before it as a matter of fact and law, and therefore gave prosecution more weight that the defendant's evidence.**

4. The Appellant in made lengthy submissions on the issue of his identification and arrest in his written submissions and oral submissions made during the hearing. He in this regard analysed the evidence of PW1 and PW2 who identified him at the scene of the crime, and relied on various judicial decisions on identification including **Wamunga vs Republic (1989) KLR 424** , **R vs Turnbull & Others (1973) 3 All ER 549,** and **Mwaura vs Republic, (1987) KLR 645**.

5. The Appellant submitted that the evidence of PW1 and PW2 did not corroborate each other; both PW1 and PW2 testified that they did not know the Appellant before the day of commission of the crime; and the two witnesses did not give any description of the Appellant.

Therefore, that there was no positive identification of the Appellant at the scene of crime, and his was a case of mistaken identity even though the offence happened at 10.00am in the morning in broad daylight.

6. In addition, that the *boda boda* (motorcycle) riders who arrested the Appellant were not called as prosecution witnesses to explain the circumstances of his identification and arrest, neither was the *boda boda* rider or motorcycle that carried the Appellant from the scene of crime arrested and/or produced as a witness or exhibit. Lastly, that his defence was not considered.

7. Mr. Masila, the learned prosecution counsel, opposed the appeal and relied on written submissions dated and filed in Court on 10th December 2018 Court by Sarah Ogweno, a Prosecution Counsel. It was the Prosecution's case that the conditions for the visual identification of the Appellant were favourable, and that PW1 and PW2 positively identified the Appellant and their testimonies corroborated each other.

8. Furthermore, that there was overwhelming evidence as to how the Appellant was arrested and escorted to the police station, and the chain of identification was not broken as he was brought back to PW1 for identification after the arrest. Lastly, that the complainant was attacked in his house by a gang of three men armed with firearms which satisfied the ingredients of robbery with violence. The case of **Daniel Muthoni M'arimi vs Republic (2013) eKLR** was cited for this proposition.

The Determination

9. My duty as the first appellate court is to re-evaluate the evidence and draw independent conclusions as held in **Okeno v Republic (1972) E.A. 32**. However, I am alive to the fact that I did not have the advantages enjoyed by the trial court of seeing and hearing the witnesses, as was observed in **Soki v Republic (2004) 2 KLR** 21 and **Kimeu v Republic (2003) 1 KLR 756.**

10. I have considered the arguments made by the Appellant and the Prosecution, as well as the evidence before the trial court. I find that there are three issues for determination in this appeal. The first is whether there was positive identification of the Appellant as the person who committed the offence he was convicted of; second, whether the Appellant was convicted of the offence of robbery with violence on the basis of sufficient and credible evidence, and lastly, whether the sentence meted on the Appellant is legal.

11. Three prosecution witnesses gave evidence during the trial. The evidence of PW1 (Simon Ng'ethe Nyutu) who was the complainant, and that of PW2 (Beatrice Wakio Mwamili), a businesswoman operating an Mpesa shop at Utange, was crucial as they were the eyewitnesses to the crime, and will be reproduced later on in the judgment. The last witness (PW3) was Cpl Martin Mwaisa, who was the investigation officer, and his testimony was that on 1st April 2012 he was the duty officer at Bamburi Police Station when the Appellant was brought by members of the public, after having been arrested after a robbery. That he visited the scene of crime, and did not find any spent cartridges, and no weapon was brought to the station. He thereafter charged the Appellant.

12. On the issue raised of the Appellant's identification, PW1 testified as follows in this regard:

> **"I am called SIMON NG'ETHE NYUTU. I live at Shanzu. I am a businessman. On 1st April 2012, at about 1030am. I was at home resting on bed. I heard a knock on the door. I went and checked from the window. I saw a man at the door as 2 other men stood behind him. I asked what they wanted. They told me they wanted me to sell their timber. My house (residence) is adjacent to my shop.**
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> **I went to open the door. As I opened the door, the man who was knocking on the door pushed me back to the house and told me to lie down. One of the two who had been behind him had a rifle. He pointed the rifle at me as they demanded money from me. He then started to remove me clothes as two od his colleagues went into the bedroom to look for money after I had told them money was there. I looked up and saw that he was now holding the gun loosely. I shouted "thief thief". I run and on looking back. I saw one of the thieves after me and also shouting "ndio hao" ("there they are").**
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> **I ran and crossed the road as that thief jumped on a boda boda (motor cycle taxi). As I had looked back while escaping, I saw 2 of the thugs jump out of my compound (wall). Shortly thereafter I heard the sound of a gunshot. The boda boda people whom I had told I was being robbed following the boda boda that had carried one of the thugs. I went back to my house and found that the thieves had taken away Kshs 80,000/=.**
>
> **On coming out of the house, I noted a crowd had assembled I went there. I saw that three who had escaped on the motor cycle had been brought back and was being beaten by the mob. Officers from prisons came and rescued him. He is now sitting there (pointing at accused)."**

13. PW2's evidence was as follows:

> **"I am Beatrice Wakio Mwamili. I am a residence of Utange village. I am a business person operating an M-pesa shop at Utange village opposite Annex.**
>
> **On 1st April 2012 at about 10.30 am, I heard the sound of gun shots. I got out of the shop. I saw my neighbour called Simon. He was shouting "thief thief". I saw a man running. The man who was running had earlier on been sitting outside my shop and I realized it was him by his dressing. He was wearing a short sleeved yellow short and a camouflage short. I saw the man stop a motor cyclist and board it. The man fled on the motor cycle.**
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> **After about 10 minutes, the fleeing man was brought back by other motor cyclist who had pursued him. I called Simon (PW1) who came out and identified the mas as the one who had stolen from him. The public started to beat him. As he**

started to run towards the church, some prison warders intervened and rescued him from the mob. He was then away by the askaris. The next day I went and recorded my statement at Bandari Police Station."

14. The law on identification is settled by various judicial decisions. I*n* ***Maitanyi vs Republic*** **, *(1986) KLR 196* the** Court set out what constitutes favourable conditions for a correct identification by a sole testifying witness as follows:

> **"Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error".**

15. I have also reminded myself of the guidelines in the case of **Mwaura v Republic [1987] KLR 645**, in which the Court of Appeal held, *inter alia*, that:

"In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light".

16. Similarly, in the case of ***Wamunga vs. Republic, (1989) KLR 424*** it was held *inter alia* as follows:-

> ***"1. Where the only evidence against a defendant is evidence of identification, or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.***
>
> ***2. Recognition may be more reliable than identification of a stranger but mistakes in recognition of close relatives and friends are sometimes made."***

17. In addition it has been stated by the Court of Appeal in **Anjononi and Others vs Republic, (1976-1980) KLR 1566** that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.

18. In the present appeal, the offence was committed during daylight, at 10.30am in the morning. From his evidence, PW1 was able to observe the Appellant for an adequate time before, during and after the robbery. In addition PW2 also observed the Appellant for some time before the robbery and was able to give a description of the clothing he was wearing. The Appellants' arrest was also contemporaneous with the commission of the offence. There was therefore no danger of any lapse in the memory of PW1 and PW2.

19. Lastly, it is evident that the accounts of events by PW1 and PW2 corroborated each other as to the events before and after the identification of the Appellant. It is thus my finding that considering the prevailing conditions, there was a positive identification the Appellant.

20. On the issue of whether there was sufficient evidence to convict the Appellant for the offence of robbery with violence, section 296 (2) of the Penal Code provides as follows:

> **"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 the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."**

21. The prosecution must prove theft as **a central element of the offence of robbery with violence, as the offence is basically an aggravated form of theft. The** other elements of the offence of robbery with violence were elaborated by the Court of Appeal in ***Ganzi & 2 Others v Republic*** **[2005] 1 KLR and** in **Johanna Ndungu Vs Republic, Cr. App No. 116 of 2005 (unreported)** as follows:

> **1. If the offender is armed with any dangerous or offensive weapon or instrument, or**
>
> **2. If he is in the company with one or more other person or persons, or**
>
> **3. 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.**

22. I am alive in this regard to the requirement that proof of any one of the ingredients of robbery with violence is enough to base a conviction of robbery with violence under section 296 (2) of the Penal Code as was held in **Oluoch vs Republic, (1985) KLR 549**.

23. In the present appeal the robbery was witnessed by both PW1 and PW2, and PW1 testified that he was robbed of Kshs 80,000/=. This Court has already found that the Appellant was positively identified by PW1 and PW2 as one of the robbers. The only element that raises a charge of robbery with violence that was present in this appeal was PW1's evidence the Appellant was in the company of other persons at the time of the robbery. No offensive or dangerous weapon used by the Appellant in the robbery was brought in evidence, neither was there any

evidence of any injury or harm caused to the PW1 by the Appellant .

24. In order to interrogate if this evidence was sufficient to convict for the charge of robbery with violence, the rationale for the requirement of more than one person during the robbery must be appreciated. This requirement is to illustrate that there was some overwhelming force used or meted on the victim of the robbery, so that even in the absence of an offensive weapon or injury, and such force will qualify as violence.

25. The lack of evidence of any injuries caused to the PW1 and of any weapon that was recovered from the scene of the crime should in my view be construed in favour of the Appellant, particularly on the issue as to whether there was force used by more than one person on PW1. I therefore find that there was insufficient evidence to sustain a charge of robbery with violence as against the Appellant. However, the evidence adduced before the trial Court disclosed a lesser cognate offence of simple robbery contrary to section 296(1) of the Penal Code, which offence carries a maximum sentence of 14 years imprisonment.

26. This Court is empowered under section 179 of the Criminal Procedure Code to substitute an offence with one for which the evidence is established, provided that the offence being substituted is cognate and minor to the offence the accused person was initially charged with. The said section provides as follows:

> **"(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.**
>
> **(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."**

27. Pursuant to the provisions of section 179(2) of the Penal Code, I hereby quash the conviction of the Appellant for the offence of robbery with violence contrary to section 295 as read with 296(2) of the Penal Code, and substitute it with the conviction of the Appellant for the offence of simple robbery simple robbery, contrary to section 296(1) of the Penal Code.

28. I also substitute the death sentence imposed on the Appellant with a sentence of five (5) years imprisonment for the conviction for simple robbery, which sentence is to run from the date of conviction by the trial Court.

29. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 21ST DAY OF FEBRUARY 2019.

P. NYAMWEYA

JUDGE