



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.81 OF 2015

(An Appeal arising out of the conviction and sentence of Hon. Onginjo – CM delivered on 23th April 2016 in Kibera CMC. CR. Case No.3916 of 2012)

CHRISTOPHER ONYANGO OTIENO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Christopher Onyango Otiemo was charged with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 23rd August 2012 at Mugaa Road, Ongata Rongai Township in Kajiado County, the Appellant, jointly with others not before court while armed with an AK 47 rifle robbed Elias Langat of his Nokia 6300 and cash Kshs.140/- and at or immediately before or immediately after the time of such robbery wounded the said Elias Langat. He was further charged with another count of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on the same day and in the same place, while similarly armed and in company of others not before court, the Appellant robbed from Robert Mutai motor vehicle registration No.KBS 692P make Toyota Premio and a mobile phone make E7 and at or immediately before or immediately after the time of such robbery, threatened to injure the said Robert Mutai. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, he was found guilty as charged on the two counts. He was sentenced to death. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial magistrate for conducting an illegal trial that resulted in his conviction on account of the fact that the convicting magistrate did not comply with **Section 200(3)** of the **Criminal Procedure Code** before convicting him. The Appellant was aggrieved that he was convicted on the basis of charges that were fatally defective. He was of the view that the plea recorded was equivocal since it was taken by an incompetent magistrate. He took issue with the fact that he had been convicted on what was essentially visual identification that was made in circumstances that did not favour positive identification. He explained that he was convicted purely on dock identification. He faulted the trial magistrate for convicting him on the basis of an irregularly conducted trial. He faulted the trial magistrate for sentencing him to death yet essential witnesses were not called by the prosecution. He was finally aggrieved that his defence had not been considered before the trial magistrate reached the impugned decision.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. He further made oral submission urging the court to find that he had not been properly identified. He explained that according to the testimony of the alleged identifying witnesses, a gang of robbers ambushed a motor vehicle in which PW1 and PW2 were occupants. They bundled three of the witnesses into the motor vehicle and drove away with them. It was while he was walking home from work that he saw a crowd of people gathered around an old man. The old man told the crowd that he had been carjacked. He was shocked when he was apprehended by members of the public and accused as one of the carjackers. He denied involvement in the robbery and insisted that he was an innocent person who was mistakenly accused of being a member of the gang that carjacked the complainants. He lamented that his explanation to the police that he was a victim of mistaken identity was not considered. He reiterated that the evidence adduced by the identifying witnesses could not be relied on because it was made in difficult circumstances that were not conducive for positive identification and was therefore inadmissible. He was firm that he was convicted on the basis of dock identification which is worthless as a form of identification. He further submitted that under **Section 200(3)** of the **Criminal Procedure Code**, the convicting magistrate was supposed to inform him of his right to recall any witness who had appeared before the previous magistrate. This right was not read to him. He therefore submitted that his conviction was on the basis of irregular proceedings which could not be sustained on this appeal. He urged the court to allow the appeal.

Ms. Aluda for the State opposed the appeal. She submitted that the Appellant was in a gang of three robbers who pretended to be police officers. They waylaid the complainant as he was arriving at his home. The identifying witnesses noted the clothes that the Appellant was wearing. The robbers managed to convince the victims of the robbery that they were police officers and that they would take them to the police station for further questioning. It was when the motor vehicle took a wrong turn when they reached the main road that the victims

realized that they were in trouble. One of the identifying witnesses opened the door of the vehicle and managed to fall out of the motor vehicle with the Appellant. He held on to the Appellant while shouting for assistance from members of the public. The members of the public responded to the victim's cries for help. They apprehended the Appellant and took him to the police station. Meanwhile, the other victims who had been carjacked managed to make good their escape. They made a report to the police station. At the police station they positively identified the Appellant as one of the robbers.

Learned State Counsel therefore submitted that the Appellant was properly identified in the circumstances. As regard any deficiency in the charge sheet or in the proceedings, she submitted that any defect or irregularity in the proceedings did not invalidate the Appellant's conviction which was proper in the circumstances. As regard sentence, applying the Supreme Court decision of **Francis Karioko Muruatetu & Another –vs- Republic [2017] eKLR**, Ms Aluda submitted that taking into account all the circumstances of the case, the Appellant should serve a sentence of twenty (20) years imprisonment. On his part, the Appellant was of the view that the period of seven (7) years imprisonment that he had served was sufficient punishment.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22**:

*“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see **Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570**)”.*

In the present appeal, the issue for determination is whether the prosecution established the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

According to the prosecution, on 23rd August 2012, PW1 Robert Mutai and his brother PW3 Elias Langat were returning home from work. Their home is at Mugaa area in Ongata Rongai. The time was about 8.00 p.m. PW2 and PW3 testified that they had returned to their home using PW1's motor vehicle, a Toyota Premio Registration No.KBS 692P. The two witnesses testified that when they branched off from the main road towards a minor road leading to their home, they saw a group of suspicious men by the road side. They drove on towards their compound. PW3 alighted to open the gate. PW1 was in the driver's seat. At that point, the group of men arrived to where the motor vehicle was parked. One of the men had an AK 47 rifle. They identified themselves as police officers. PW1 was suspicious. He left the vehicle and took off into a neighbour's house where he hid.

PW2 George Orao, PW1's neighbour heard the commotion. Being a former military officer, he walked out of his house armed with a panga. When he reached the scene, he found the three men who identified themselves as police officers. One of them was armed. According to the description given by PW1, PW2 and PW3, one of the men whom they later identified to be the Appellant wore blue jeans. The gang demanded that PW1, whom they had accused of calling them thieves, surrenders so that he can be taken to the police station. PW3 persuaded PW1 to come out from the place he was hiding. They all entered PW1's motor vehicle. PW1 insisted that PW2 accompanies him to the police station. PW2 accepted. The two of them together with three of the men sat at the rear seat of the motor vehicle. They drove towards the main road.

When they reached the main road, instead of the motor vehicle being driven towards the direction of the police station, it was driven on the opposite direction. That is the time PW1 and PW2 realized that they were in mortal danger. They started screaming seeking to alert members of the public of their kidnap. The vehicle was driven from the main road towards a side road. At that point, another vehicle was being driven towards the main road. The driver of the vehicle slowed down. It was at that juncture that PW2 took advantage of the situation, opened the rear door of the vehicle and jumped out of the vehicle. In the process, the Appellant was ejected from the vehicle. The vehicle then drove off leaving the two behind. PW2 held onto the Appellant while shouting for help from members of the public. Members of the public came to PW2's aid. The Appellant was apprehended. He was escorted to Ongata Rongai Police Station where he was detained. At the police station, he was identified by PW1 and PW2 who later arrived at the said police station.

From the above testimony, it was clear that PW2 was in contact with the Appellant from the time he hijacked PW1's motor vehicle to the time he tumbled out of the motor vehicle after PW2 had opened the rear door of the motor vehicle. PW2 held onto the Appellant until members of the public assisted him to subdue him and later take him to the police station. That being the case, this court cannot fault the trial court's finding which was to the effect that the Appellant was properly identified by PW1, PW2 and PW3. Although the robbery incident took place at night, it was clear from the above evidence that the Appellant, as a member of the gang that robbed PW1 of his motor vehicle, was in close proximity with PW2 until his arrest. The Appellant also was in close proximity with PW1 and PW3 who were able to positively identify him when they later went to the police station. The Appellant's defence to the effect that he was an innocent bystander is neither here nor there. He was at both scenes: at the point when the motor vehicle was robbed from PW1 and at the point where he was apprehended by members of public with the assistance of PW2. This court has also taken into consideration the fact that the robbery incident took place at night. There was no evidence to suggest that there were other people at the scene of the Appellant's arrest other than the Appellant and PW2.

This court found the Appellant's defence in that regard to be without merit. In the premises therefore, this court holds that the Appellant was properly identified at the scene of the robbery. The evidence of identification that was adduced by the identifying witnesses was water tight and placed the Appellant at the scene of crime. The prosecution established to the required standard of proof that the Appellant, in company of others, while armed with a dangerous weapon, namely an AK 47 rifle, robbed the complainant of his motor vehicle, and in the process threatened to cause bodily harm on him. The essential ingredients to establish the charge of **robbery with violence** under **Section 296(2)** of the **Penal Code** were established (See **Oluoch v Republic [1985] KLR 549**).

As regard the Appellant's complaint that he was not subjected to fair trial, this court, upon perusal of the proceedings of the trial court is satisfied that the Appellant's trial was fair. The Appellant's complaint has no merit. As regard sentence, it was conceded by the prosecution

that the Supreme Court decision of **Francis Karioko Muruatetu & Another –vs- Republic [2017] eKLR** applies. The Appellant was sentenced to serve what was then regarded as a mandatory death sentence. The above decision of the Supreme Court declared mandatory death sentence to be unconstitutional. This court has considered the Appellant's mitigation. It has also considered that the offence that the Appellant committed was serious and were it not for fate, the victims of the robbery would have been seriously, if not fatally, injured. That being the case, the Appellant's appeal on sentence partially succeeds. The death sentence that was imposed upon him is set aside and substituted by a sentence of this court. The Appellant is sentenced to serve fifteen (15) years imprisonment with effect from 23rd April 2015 when he was sentenced by the trial court. This court has taken into consideration the period that the Appellant was in remand custody before arriving at the above sentence. It is so ordered.

DATED AT NAIROBI THIS 20TH DAY OF FEBRUARY 2019

L. KIMARU

JUDGE