REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO 73 OF 2017

FRANCIS MATU MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence Thika Chief Magistrates Court

Criminal Case of 520 of 2007 (Hon. L. W. Gicheha (SRM) dated 1st July 2008)

JUDGMENT

1. The appellant, Francis Matu Mwangi, was charged alongside Peter Gituya Ndung'u with the offence of robbery with violence contrary to section 296(2) of the Penal Code, Chapter 63 of the Laws of Kenya. The particulars of the offence were that on the 18th Day of January 2007, they, jointly with others not before the court, while armed with dangerous weapons namely a homemade gun and a sword, robbed E W M of one bed, one mattress, one mosquito net, a pair of shoes, one suit, three trousers and one shirt, all valued at Kshs 10,680.00, and at the time of such robbery used actual violence to the said E W M. After a full hearing, the appellant was convicted of the offence as charged and sentenced to suffer death as provided by law.

2. The appellant was aggrieved with both his conviction and sentence and he filed the present appeal. He raised six grounds of appeal in his Amended Grounds of Appeal filed in court on 20th September 2018.

3. As the first appellate court, I am under a duty to re-evaluate the evidence led before the trial court and reach my own conclusions. In doing so, I am required to pay due regard to the fact that the trial court had the advantage which I do not have, of seeing the witnesses and observing their demeanour. I am guided on this by the sentiments of the Court of Appeal in **Isaac Ng'ang'a Kahiga & Another v Republic [2006] eKLR (Criminal Appeal 272 Of 2005)** where it was held that:

> ***"…[A] court hearing a first appeal (i.e. a first appellate court) also has a duty imposed on it by law to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanour and so the first appellate court would give allowance of the same."***

4. The evidence led before the trial court was as follows. E W M (PW1), the complainant, was on the 18th January of 2007 asleep at her home with her children. At about 10:30 p.m., she heard her door being hit. She woke up and headed to the door but found it open. When she reached the door, she realized that a group of four people had entered the room. One of the assailants pulled her out of the house and demanded money from her. She told him that she had none, and he raped her. He then took her back into the house and instructed his accomplices to take her household goods outside. They carried a wooden bed, a mosquito net, some clothes and shoes. These goods were carried by three of the assailants, and she was left with one, who continued to demand money from her.

5. This assailant took her away to an estate called Fort Jesus about a half kilometer away. There, she found other victims of robbery being held by other robbers. The assailants raped the women victims in turn until morning when they left. E returned to her home but did not report the incident to the police because she was afraid that her child would be killed. After some time, she heard voices outside her home and got out to find out what was happening. She found the police there, together with some of her items which had been recovered, some of them from the appellant.

6. George Kimaru Kanambio (PW2) was at the time working as a watchman in Gitambaya. On the night of 18th January 2007, he and his colleagues were on duty patrolling the area together when they saw three people carrying a bed. When they flashed their torches, two of the people escaped leaving the appellant behind. George and his colleagues chased him and called out to members of the public for assistance, and they managed to arrest him. They then searched the appellant and found a gun, a Somali sword and a rope inside his jacket.

7. The appellant was arrested by PC Mwinzi Kaviu (PW3) and Constable Richard Simiyu (PW5), along with two other officers who were on duty. PC Kaviu was called on the material night and informed that there had been a robbery in Gitambaya and that one of the robbers had been arrested by members of the public. They found the appellant who had been beaten up and tied up. There was also the bed that he was found transporting, as well as a sword and an imitation gun. They re-arrested the appellant and took the items that he had been found with to the police station.

8. The firearm that was recovered was examined by Johnstone Musyoki Mwongela (PW7) who after his examination found that it was an imitation firearm that was incapable of being fired.

9. When put on his defence, the appellant elected to give an unsworn statement. He stated that on the 18th January 2007, he woke up and went to work at his casual job in Juja. At the end of the day, he went back to his home in Ruiru. He got home at 8:30 p.m. He then decided to go to the shop about 600 meters away and on his way home, someone flashed a torch at him and asked him what he was carrying. Some members of the public arrived on the scene and started beating him up and tied him up with rope. Sometime later, some police officers who were nearby came and rescued him. They took him home and searched his house, but despite not finding anything, they arrested him and took him to Ruiru where he was locked up in a cell.

10. In her judgment and after considering the evidence, the trial magistrate held that the evidence had shown that the complainant had been the victim of a violent robbery. She was also satisfied that the evidence demonstrated that the appellant was one of the people who had robbed the complainant. She therefore dismissed the appellant's defence and convicted him of the offence of robbery with violence, and after receiving mitigation, sentenced him to death as provided by law.

11. The appellant challenges his conviction and sentence on various grounds. He argues, first, that the learned trial magistrate erred by basing her conviction on a defective charge sheet, contrary to section 214 of the Criminal Procedure Code. He submitted in this regard that there were various contradictions in the OB Numbers as well as on the dates that he was arrested. He contended that the first charge sheet indicated that the incident was reported as OB No. 2 of 19/1/2007 which was cancelled for reasons not explained before the court. The one replacing it bore OB No. 12 of 3/3/2007 which was two months after the incident. He submits that the only reason for this was that the first report to the police was cancelled and made to appear as if he was arrested after the report made on 3rd March 2007. In his view this was an indication that there was mischief on the part of the police.

12. The appellant further faults the trial court's reliance on the earlier OB number to release his co-accused. This earlier OB, according to the appellant, showed that at the time of the incident of the robbery, the 2nd accused had already been arrested and was in custody, and as a result, he could not have been one of the people who was assaulting the complainant. The appellant submits that the charge sheet based on the earlier OB number was improperly cancelled without invoking the provisions of section 214 of the Criminal Procedure Code.

13. The appellant further challenges his conviction on the basis of the identification evidence. He contends that this evidence was flawed because the circumstances surrounding his identification were not conducive for a positive identification. That the complainant had testified that there had been no light in her house and the incident in question took place at night. In his view, there was no way that there could have been a positive identification, and he urged this court to test the evidence of identification carefully, particularly because the conditions were difficult.

14. The appellant's third ground relates to his conviction on the basis of circumstantial evidence. He submits that the trial court erred by convicting him on the basis of the circumstantial evidence related to the recovered exhibits, which he submits were not recovered in his possession. It is his submission that some of the recovered items were never found in his possession, and secondly, the bed which he was said to have been in possession of was not produced in evidence, and instead, a photograph was produced.

15. The appellant is also aggrieved that some witnesses were not called to testify. He submits that there were various witnesses, particularly the members of the public who arrested him and the Officer Commanding Ruiru Police Station, who were not called by the prosecution, which in his view weakened the prosecution case.

16. The appellant reiterated his defence in his submissions and argued that the trial magistrate did not consider his defence as required by section 169(1) of the Criminal Procedure Code. It had simply rejected his defence without considering it or even offering a reason for such rejection, thus prejudicing him. For these reasons, the appellant asked this court to set aside his conviction and sentence and set him free.

17. Learned Prosecution Counsel, Ms Muthoni, opposed the appeal on behalf of the state. She submitted that all the elements of the offence were proved beyond a reasonable doubt. The complainant had given evidence of the robbery when she gave an account of the items that were stolen from her house. Photographs of these items were produced as exhibits in court. Further, that there was proof of violence occurring during the robbery as shown by the complainant's testimony that there were four assailants who were armed.

18. Ms. Muthoni further submitted that the identification of the appellant was free from error. The complainant had stated that she knew the appellant and had recognized him as one of the assailants who invaded her house. In addition, even though it was night time, she was in a position to see since there was security light from across the road. The ordeal had lasted the whole night, from around 10:30 p.m. to around 6:00 a.m. the following morning, thus the complainant had sufficient time to properly see and identify the appellant. She also stated that the appellant had a knife which he was using to demolish the wall to her house while saying that he would kill someone, and she stated that it was the appellant, whom she identified as Matu, who was doing this.

19. Ms Muthoni contended that the identification evidence was strengthened by George (PW3) who identified the appellant as one of the people caught with the bed which had been stolen from the complainant. The appellant was arrested soon after the robbery while carrying the bed and he was armed with an imitation gun as well as a knife. The bed was photographed by the police and the photographs produced as an exhibit of the stolen item in court. Learned Counsel for the state submitted that the totality of the circumstances pointed to the appellant's involvement in the offence, and she therefore asked the court to uphold the conviction and sentence and dismiss this appeal.

20. In considering this appeal, I begin with the appellant's complaint that there was a variance between the OB numbers in the charge sheets that were presented before the court. The initial charge sheet under which the appellant was charged arose out of a report made under OB No. 2 of 19th January 2007. In that charge sheet, the appellant had been charged alone, and faced charges on two offences: one of robbery with violence, and another of handling stolen goods contrary to section 322(2) of the Penal Code. The appellant pleaded to these charges on 31st January 2007. On 22nd March 2007, the prosecution applied to consolidate the criminal case before the trial court with another, and this application was allowed as the appellant had no objection. A new charge sheet, with charges against both the appellant and his co-accused, was placed on the record, and the appellant was called upon to answer to the consolidated charge sheet.

21. I have noted the appellant's assertion that the trial court relied on the earlier charge sheet to discharge his co-accused. This is not the case. The record bears out the fact that a portion of the complainant's testimony contradicted the other evidence, particularly the investigation diary which showed that by 1:00 a.m. on 19th January 2007, the 2nd accused was already in custody, and therefore could not have been one of the people raping the complainant. When considering whether or not the 2nd accused had been implicated in the robbery, the trial court considered the identification evidence against both the accused persons and was of the view that it was full of contradictions and was therefore unreliable. There being no other evidence against the 2nd accused, the court had no choice but to acquit him.

22. To sustain a charge of robbery with violence, it is imperative that the evidence shows that in the course of a robbery, one or more of the following ingredients were present: that the offender is armed with a dangerous or offensive weapon or instrument or; the offender is in the company of one or more persons or; at, or immediately before, or immediately after the time of the robbery, the offender uses any form of violence against a person. Proof of any one of these ingredients is enough to prove the offence. See **Suleiman Kamau Nyambura v Republic [2015] eKLR (Criminal Appeal No. 5 of 2013)**.

23. In the present appeal, the complainant's evidence was that on the night of 18th January 2007 at around 10:30 p.m., she was home sleeping. She heard some noises and headed to the door, whereupon she realized that there were four intruders in her house. While one of the intruders pulled her outside the house and raped her, the other three were left in the house. When they could not find any money, they carried her household goods, including a bed, a mosquito net and some clothes. This evidence proves the element of robbery. In addition, since there were multiple assailants, all of whom, according to the complainant, were armed, either with guns or a knife, it is apparent that this was a case of robbery that was aggravated by violence.

24. In addition to proving that a violent robbery occurred, the evidence led by the prosecution is required to show that the accused is the one responsible for the robbery. In **Suleiman Kamau Nyambura (supra)** the court held that:

> ***"In addition [to the ingredients], and what is crucial in a criminal trial is also the requirement to prove in addition to there being one of the set out ingredient of robbery with violence is the need to positively identify the assailant/s in question."***

25. The only evidence of identification was led by the complainant. In narrating the ordeal she underwent, she stated that four people broke into her house. One of them took her outside the house and raped her, while the other three robbed her and carried her goods. She was then taken away from her house to the plot near Fort Jesus. The complainant first identified the appellant as being one of the assailants when she stated that the appellant took her away from the rest of the victims and raped her. She later on saw the appellant after she returned home the next morning, when she got out of her house and found the police together with her recovered items.

26. The complainant stated during her examination in chief that: ***"I saw it was Matu who was being asked by police where he had recovered the items. I did not know him before but I saw him when they came with police. I learnt he was Matu when he was writing his statement."*** She later contradicted herself, stating that ***"I saw the accused in court. Before the incident, I know him. We have lived in their plot. He is Matu's Child" (sic)*** However, on cross examination, she placed the appellant at the scene the night before, stating that ***"I saw you when the offence occurred. I saw you destroying my house saying you would kill someone."***

27. The evidence of a single identifying witness must be treated with great caution due to the potential to bring about a miscarriage of justice. Thus, a court must be satisfied that the identification evidence is free from any possibility of error before accepting it and using it as a basis for conviction. In the present appeal, the complainant's evidence was not consistent as to whether or not she knew the appellant before the incident. It raises questions as to whether or not she truly knew the appellant prior to the attack, whether she first saw him during the course of the attack, or if she first saw him when she went to the area where her stolen bed had been recovered. Thus, I cannot accept her evidence for identification as it is not free from error.

28. George (PW2) who was a watchman who was on patrol in the area on that fateful night was one of the people who first arrested the appellant when he saw him carrying a bed. Thus, the appellant was also linked to the crime by virtue of being in possession of the bed that had only that night been stolen from the complainant's home. In **Isaac Ng'ang'a Kahiga & another v Republic (supra)** the Court of Appeal held that:

> ***"It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property".***

29. The appellant was found transporting a bed on the night in question. This was about 150 meters from the complainant's home. Together with his colleagues and other members of the public, George chased the appellant down and tied him up. When PC Mwinzi Kaviu and his colleagues arrived at the scene, they found the appellant tied up. They also recovered the bed that the appellant had stolen, which the complainant identified as the one that had been stolen from her. Thus, there is ample evidence to demonstrate that the appellant was found in possession of a bed that had been stolen from the complainant only hours before.

30. The appellant submitted that the prosecution did not meet its burden due to the fact that it did not call various witnesses, among them the members of the public who arrested him as well as the other watchmen with whom George (PW2) was with and who arrested the appellant. This claim has no basis. Section 143 of the Evidence Act provides that ***"no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."*** There is no requirement for the prosecution to call any particular number of witnesses to prove its case. As stated by the Court in **Joseph Kiptum Keter v Republic [2007] eKLR (Criminal Appeal 250 of 2005)**:

> ***"[t]he prosecution is not obliged to call a superfluity of witnesses but only such witnesses (as) are sufficient to establish the charge beyond any reasonable doubt."***

31. In this appeal, the witnesses who were called all placed the appellant as having being arrested while in possession of the stolen bed. The allegation by the appellant that there was no basis to support his identification as one of the persons involved in the robbery therefore has no basis.

32. The appellant has also faulted the trial court for relying on photographs of the bed as opposed to requiring that it be produced in evidence. These photographs were taken by Sergeant Justinare Mallit (PW6), a scenes of crime officer from the Thika Criminal Investigations Department. His report and the photographs were produced in court as exhibits numbers 5 and 3(a)-(i) respectively. Photographs taken by the police at the scene of crimes may be produced in evidence, and once this is done, the object itself need not be brought to court for identification.

33. I have considered the defence led by the appellant, which was that he was not involved in the crime for which he was charged and that he was arrested while coming from the shops. However, the uncontroverted evidence by George (PW3) and PC Mwinzi Kaviu (PW4) was that the appellant was arrested a short distance from the scene of the robbery. Moreover, he was arrested after being seen in possession of the bed that had been stolen from the complainant. This evidence was not controverted by his defence, and in the premises, it is clear that the prosecution proved its case against the appellant to the required standard. The conviction was safe and the sentence meted out on the appellant was proper as it is what is spelt out in law. It is therefore my finding that this appeal has no merit, and it is hereby dismissed.

Dated and Signed this 7th day of March 2019

MUMBI NGUGI

JUDGE

Dated Delivered and Signed at Kiambu this this 10th day of April 2019

C. MEOLI

JUDGE