REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 19 OF 2015

JULIUS MAGONJO SHINYANJUI ………………………….…… APPELLANT

VERSUS

REPUBLIC ……………………………………...……………………. STATE

(Being an appeal from the Judgment of Honourable H. M. Nyaga Senior Principal Magistrate, delivered on 21st November, 2014 in Molo Chief Magistrate's Court Criminal Case No. 1910 of 2013)

JUDGMENT

1. The Appellant, Julius Magonjo Shinanjui, was charged before the Senior Principal Magistrate's Court at Molo with a single count of robbery with violence contrary to section 296(2) of the Penal Code. It was alleged that on the night of 20th – 21st September, 2013 at Mayassel Farm Salgaa, Rongai District in Nakuru County within the Rift Valley Province, jointly with others not before Court, while armed with a dangerous weapon namely an axe, robbed Michael Kimutai Koech of one Laptop, two mobile phones, nine spanners and cash Ksh 2,150/= all valued at Ksh 117,150/= and at or immediately after the time of such robbery wounded the said Michael Kimutai.

2. The Appellant pleaded not guilty to the charge and the case proceeded to full trial. At the trial, the Prosecution called five witnesses and closed its case. The Learned Trial Magistrate ruled that the Appellant had a case to answer and put him on his defence. The Appellant gave an unsworn statement. The Learned Magistrate then delivered his verdict, finding the Appellant guilty as charged and sentenced him to twenty years imprisonment.

3. The Appellant is aggrieved by both the conviction and sentence and has appealed to this Court against both.

4. As a first appellate Court, this Court is obligated to re-evaluate and re-analyze all the evidence adduced at the lower Court de novo and come to its own independent conclusions of fact and law. At the same time, this Court is obliged to bear in mind that it neither heard nor saw the witnesses. It must, therefore, make allowance for that in its analysis. The Court of Appeal stated the obligation of the first Appellate Court in ***Okeno vs. Republic [1972] EA 32*** as follows:

> *An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (**Pandya vs. Republic (1957) EA. (336)**) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (**Shantilal M. Ruwala Vs. R. (1957) EA. 570**). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings 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, see **Peters vs. Sunday Post [1958] E.A 424**.*

5. The evidence that emerged from the trial was as follows.

6. Michael Kimutai testified as PW1. He testified that he was in his house on the night of 20th-21st September, 2013 late at night. He was awake because his child was sick and he was soothing him in the sitting room. He heard some noise outside at the front door. It was dark. Frightened, he started retreating to the inside of the house. Before he could do so, however, three men burst into the house after forcefully breaking down the front door. The three men confronted him and demanded money. They ordered him to switch off the lights of the house. They were armed with axes, *pangas*, and iron bars. They attacked him as they demanded for money. They inflicted injuries on him – in particular, a deep cut on the right side of his face and right shoulder. He identified a P3 Form which was filled out at the Rongai Health Center by Bildad Bargage, a Clinical Officer and produced as Exhibit 4. The form was consistent with the narrative as far as the injuries were concerned.

7. Michael Koech testified that the robbers took the Kshs. 2,000/- he gave them as well as other items including a lap top and at least two mobile phones. According to Mr. Koech, the robbers fled the scene when the neighbours raised an alarm. Michael did not recognize any of the assailants.

8. Michael Koech's mother, Hellen Chebet Koech was also present during the robbery. She testified as PW2. She said that she was in her room when she heard screams coming from her son's room. She ran towards the room but was immediately confronted by a man near the door. The man demanded money. She retreated towards her room but the man followed her. He held the door to prevent her from closing it. The man demanded for money. He then grabbed Hellen's handbag and a phone which was on the table. He fled when Hellen raised an alarm and neighbours came. She was not able to identify any of the assailants.

9. The testimony of Beatrice Cherotich Koech, Michael's wife, was much to the same effect. She also was not able to recognize any of the assailants.

10. It was what happened immediately after the robbery what persuaded the victims that the Appellant was involved in the robbery. Each of Michael, his mother and his wife testified that after alarm was raised and the neighbours came, the attackers fled. All these neighbours lived in the same compound as the three victims. They quickly realized that the Appellant, who was one of the neighbours was not among them. All three witnesses testified that the Appellant showed up shortly after the robbery. He was dressed in gumboots, trousers and a jacket. The three victims and the neighbours became suspicious and asked him about his whereabouts. The Appellant told them that he too had been attacked by the robbers and that he escaped out of the plot for safety. Neither the victims nor the neighbours believed that story. They arrested the Appellant and called the Police. When the Police came, they discovered three pieces of equipment just outside the Appellant's house – by the window: a spanner; a pair of pliers and a wrench. All these three had been taken from the garage/store of Hellen during the robbery. The Investigating Officer concluded that these were the tools used to break into the house of the victims and that the Appellant was involved in the attack hence the charges brought against him. Another piece of evidence helped in making this conclusion: a few nights earlier, the Appellant had called Hellen on the phone late at night telling her that his wife was sick and needed to be taken to the hospital. Hellen told him it was too late in the night and declined. However, the following day, Hellen saw the Appellant's wife up and about which led her to think that she was really not sick but that the Appellant had merely wanted to ensnare her away from her house that night.

11. In his unsworn statement, the Appellant protested his innocence insisting that he stepped outside of his house and fled when one of the robbers entered the house. He said that he hid somewhere until he was sure the robbers had left before returning to the plot.

12. The main question at trial was whether the circumstantial evidence supported a guilty verdict. The Learned Trial Magistrate was persuaded that it did. He analyzed the evidence thus:

> *In my view, the Complainant and his witnesses were right to suspect him. The robbers fled immediately the alarm call went on. There was no time then for them to go to the Accused's house and put the tools there. They must have been taken there earlier before the robbers went to Michael's house. Also the Accused had a week earlier tricked the witness to take his wife to hospital. The Accused did not later tell him (sic) how his wife was faring. He also did not avail his wife as a witness to the case to corroborate his evidence.*
>
> *At 3:00am, the Accused ought to have been in his house asleep. His evidence is that he was in his house when the robbers struck. To the victims, his behavior raised eyebrows.*

The suspicion on the Accused is also explained by the fact that his house was not broken into as alleged. He had not raised alarm at all.

13. On appeal, Mr. Mairagia for the Appellant, points out that it is instructive that none of the recovered items were listed as among those that were stolen. It therefore follows that those items were not stolen property and cannot be a basis of conviction. This is because, he argues, the items were not recently stolen for the reasons that they were not listed in the charge sheet. As such, the argument goes, a conviction based on the alleged recovery cannot stand as that will be "very prejudicial and in fact it amounts to convicting someone for charges he/she has not been charged with."

14. In any event, Mr. Maragia argues that the items were found to be outside the Accused Person's house – and not inside the Accused's house. Moreover, argues Mr. Maragia, the alleged recovery was done in the absence of the Accused Person (who was, by the evidence of the Investigating Officer in Police custody at the time of recovery). There is a possibility, Mr. Maragia insists, that the items were planted there by PW1-PW3.

15. Mr. Maragia further submitted that the suspicion narrated by the Prosecution witnesses and believed by the Court was not so water tight to lead to a conviction. This was because, argued Mr. Maragia:

> a. The Appellant was not the only person who was not attacked in the compound; other tenants were equally not attacked;
>
> b. No independent neighbour was called to corroborate the evidence of PW1-PW3 who were all related;
>
> c. There was no good reason to doubt that the Appellant fled from the robbers;
>
> d. The narrative about the Appellant calling Hellen to help take his wife to the hospital was not evidence that pointed to the Appellant's collusion in the robbery.

16. After analyzing the full record of the Trial Court and the submissions of both the Appellant and the State, I agree that the whole appeal turns on the question whether it was justified for the Learned Trial Magistrate to conclude that the circumstantial evidence presented in the

case was sufficient to establish a case beyond reasonable doubts against the Appellant.

17. I should begin by pointing out three important aspects of the case. First, it is common between the parties that a robbery occurred on the material night, and the complainant was a victim of the crime. The only issue in the case is whether the Appellant was involved in the robbery. Two, it was established by evidence that none of the witnesses recognized the assailants. There was neither evidence of identification nor recognition. Three, the Trial Court did not rely on the doctrine of recent possession to convict the Appellant. While Mr. Maragia directed a lot of his arguments to this aspect of the case, in fact, there was no such reliance on the doctrine of recent possession. Instead, what the Learned Trial Magistrate relied on was the presence of the items taken from the garage/store of PW2 which were used to break in, near the house of the Appellant.

18. Was it justified for the Learned Court to rely on circumstantial evidence to convict the Appellant in these circumstances? In ***Joan Chebichi Sawe versus Republic [2003] eKLR*** the principles that guide the Court in evaluating circumstantial evidence were laid out in three tests as follows:-

> a. *The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;*
>
> b. *Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;*
>
> c. *The circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.*

19. Earlier on, ***Kipkering Arap Koske versus R. [1949] 16 EACA 135,*** long considered a *locus classicus* on this issue, had compressed the principles into two thus:

> (a) *The inculpatory facts must be incompatible with the innocence of the accused.*
>
> (b) *The facts must be capable of no other conclusion or explanation except the guilt of the accused.*

20. However, as several Courts have pointed out, even where the Court is satisfied that the above threshold has been met, the Court is enjoined to exercise caution before applying the above thresh hold to the facts before it. As the Court of Appeal remarked in ***Simon Musoke versus Republic [1958] EA 715*** while citing ***Teper versus R. [1952] AC 480,489*** before drawing the inference of an Accused Person's guilt from circumstantial evidence it is necessary for the court to be sure that there are no other existing circumstances which would weaken or destroy the inference.

21. Applying these principles to the present case, can we truly say that the "*circumstances taken cumulatively… form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused Person and none else"*? I am persuaded that this is the case here.

22. First, the appearance of the Appellant all dressed up in gumboots, trousers and a jacket in the wee hours of the morning is a tell-tale sign. If the Appellant was in fact in his house sleeping and only fled to escape the assailants, it is unlikely that he would have had the time to put on his clothes and gumboots before he fled. Indeed, his sartorial presentation does not match his narrative: he says he fled as soon as one of the attackers came into his house. This is incredulous because it requires one to believe that he was asleep in his house in his gumboots while being fully clothed.

23. Second, if the Appellant's narrative was to be believed, then the robbers must have broken into his house. However, his house was not broken into. This calls into question his claim that he fled as one of the robbers entered his house.

24. Third, the Appellant did not raise alarm as he fled. He apparently stealthily fled and planned to return as stealthily did he not find a crowd at the scene. The normal reaction would have been to raise alarm after he was safe.

25. Fourth, the tools taken from the victims' garage were found by the wall of his house – and just by the window. This suggests that they were dumped there before the victims were attacked. This is because after alarm was raised, the attackers fled. There was no time for them to have passed by the Appellant's house to drop the tools there and then flee.

26. In my view, these circumstances point ineluctably to the conclusion that the Appellant was, in fact, one of the planners of the robbery. They are inconsistent with his innocence. I therefore conclude that the Learned Trial Magistrate was justified in convicting the Appellant.

27. After the conviction, the Learned Trial Magistrate considered the Appellant's mitigation and imposed a prison sentence of twenty years. The Appellant thinks that that is excessive because he says he was not the principal offender but an abbetor; he should, therefore, not be given the sentence of the principal offender.

28. The evidence does not suggest that the Appellant was merely an abettor to the crime. They, instead, show that he was chiefly involved in its planning and execution. He was a principal actor who acted in concert with others. As such, it was not erroneous for the Learned Trial Magistrate to convict and sentence him as a principal offender. The sentence of twenty years was, in my view, all considered, not excessive at all. There is no reason for this Court to interfere with it.

29. In the end, therefore, this Court, after re-considering and re-evaluating all the evidence and the entire trial court record concludes that all the elements of the offence of robbery with violence have been proved beyond reasonable doubt. The conviction was safe and free from error and it is hereby affirmed. The sentence imposed was also lawful and proportionate in the circumstances. It is also affirmed.

30. The orders that the Court shall give, therefore, are as follows:

> **a. For the reasons stated above, the appeal is dismissed and the conviction is hereby affirmed.**
>
> **b. The sentence imposed by the Trial Court of imprisonment for twenty (20) years is affirmed**.

31. Orders accordingly

Dated and delivered at Nakuru this 30th day of May, 2019

JOEL NGUGI

JUDGE