REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 122 OF 2017

JACOB KIPNYANGO MAIYO ALIAS KORIR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(from the original conviction and judgment of J. A. Orwa, PM,

in Vihiga PMC Criminal Case No. 1021 of 2010

delivered on 15/5/2017)

JUDGEMENT

1. The appellant was convicted of count 1 of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code and sentenced to serve life imprisonment. In count 2 and 3 he was convicted of the offences of being in possession of a firearm and ammunition without certificates contrary to section 4 (2) of Firearms Act Cap 114 of the Laws of Kenya and sentenced to serve 7 years imprisonment on each of the two counts. Count 2 and 3 were suspended awaiting execution of count 1. The appellant was aggrieved by the conviction and the sentence and filed this appeal. The grounds of appeal as per the amended petition of appeal are:-

a. That the trial court failed to comply with the provisions of section 198 of the CPC;

b. That the trial court failed to observe that the identification evidence relied upon by the learned trial magistrate did not measure to the required standard as per conditions coupled with circumstances prevailing at the time of the act;

c. That the trial magistrate based the appellant's conviction on the issue of identification parade but failed to observe that the same was not conducted in accordance with the parade rules chapter 46 of the force standard orders;

d. That the trial court convicted the appellant but failed to observe that the prosecution failed to avail essential witnesses to prove their case;

e. That the trial court failed to comply with the provisions of Section 63(3) of the Evidence Act;

f. That the appellant's conviction was based on contradictory evidence of the prosecution witnesses and irregularities and

g. That there was no direct or circumstantial evidence linking the appellant to the offence.

2. The state opposed the appeal.

Case for the Prosecution

3. The evidence for the prosecution was that the complainant was a motor cycle taxi operator (boda boda) at Serem trading centre. That on the 28/11/2012 at 11 pm he was at the trading centre when he was approached by two people to ferry them to Chemombo. He was hesitant to do so. But then a policeman, PC Zoka PW6, passed by. He talked to the people. The complainant offered to ferry the people to the place. On the way they told him to stop. One of them whipped out a pistol. They robbed him of the motor cycle and Ksh. 300/=. They left on the motor cycle. He had a mobile phone in his jacket. He called his fellow motor cycle riders. They came and they gave chase to the people. On seeing them the thieves abandoned the stolen motor cycle and disappeared into the bush. They reported at Serem Police Station.

4. That PC Ngatia PW4 of Serem Police Station received a report of the robbery and that the appellant was involved. He knew him before. On the 29/12/12 at 11 p.m. he spotted the appellant at a bar at Shamakhokho. He alerted the OCS PW3. The OCS called for reinforcement. They went to where the appellant was at the bar. The OCS searched him and found him with a pistol housted in his left trouser pocket. The pistol had 13 rounds of ammunition. The appellant was arrested and taken to Serem Police Station.

5. That on the 30/11/2012 the complainant was summoned to the police station. C.I. Busienei PW5 conducted an identification parade on the appellant. The complainant picked him in the parade. The matter was taken over by Vihiga Police. PC Kerich PW7 of Vihiga Police Station investigated the case. He charged the appellant with the offences.

6. PC Kerich prepared exhibit memo forms and forwarded the pistol and the ammunition to the ballistics expert, Nairobi. They were examined by a ballistics expert S. M. Mwongela of Ballistics Section of the Directorate of Criminal Investigations who found that the exhibit marked "A" was a Taurus pistol of 9 mm caliber of serial number B40001. It was in good mechanical condition. The pistol was capable of being fired. The said officer examined the ammunition and found them to be ammunition of 9 mm caliber. He test fired 6 of them and concluded that the 13 rounds were capable of being fired. He concluded that the two exhibits were a firearm and ammunition respectively.

7. During the hearing the exhibit memo, the firearm, the ammunition and the report of examination by the ballistics expert were produced as exhibits. The parade officer PW5 produced the parade forms as exhibits. The test fired spent cartridges were produced as exhibits.

8. It was the evidence of PC Zako PW6 that on the evening of the material day he and a colleague were at Serem Market. They met with the appellant and his colleague. He knew the appellant by name. He had a conversation with him. The appellant told him that they were looking for a *boda boda* to ferry them to Shamakhokho. He then left Serem market and started heading towards Shamakhokho. He met the appellant and his colleague a few metres away from Serem market. The appellant was talking to a boda boda rider, the complainant, who was a person known to him. He talked to the appellant again who told him that he was still looking for a rider. The appellant and his colleague boarded the complainant's motor cycle and left towards Nandi Hills direction.

Defence Case

9. When placed to his defence the appellant gave a sworn statement and stated that he is a retired immigration officer. That on 27th and 28th November, 2012 he was at his home. On the 28/11/12 he went to Kapsabet. He left that place and went to Kobujoi. He went to Shamakhokho. A police officer called Muriithi called him and told him that he was required at a bar situate at Shamakhokho. He went to the bar at around 8 p.m. He sat on a chair and waited for the person who had called him. All over a sudden he was approached by about 10 armed police officers. They asked him whether he was armed. He told them no. They conducted a search on him and did not recover anything. He was taken to Serem Police Station and placed in the cells. He had not known why he was arrested. He was arraigned in court.

Submissions

10. The appellant submitted that there was a serious defect in the trial in that he was not provided with an interpreter during the testimony of PW1 as the record does not disclose the language used by PW1. That the conditions for positive identification of the appellant were not favourable. That PW1 did not state the source of light he used to identify his attackers at the time of the incident. That there is no record that PW1 had given a description of the appellant to the police. That he identified him in an identification parade from appearance and a gap in his teeth cannot be reliable evidence. That the parade was not properly conducted as it is only the appellant who had a gap in the upper teeth among the eight persons lined up in the identification parade. That there is nowhere in the parade form to indicate that PW1 asked the members of the parade to open their mouth for identification. That it is not clear what exactly made the complainant to identify him. That it is trite law that before an identification parade is conducted a witness should be asked to give a detailed description of the suspect as was held in **Ajode –Vs- Republic (2004) 2 KLR 81**. That in this case this was not done.

11. The appellant further submitted that the scenes of crime officer who photographed the motor cycle was not called to testify. That the bar waitress who was serving customers at the bar where he was arrested was not called. That failure to call these witnesses renders the conviction unsustainable.

12. The appellant questioned why the motor cycle was not produced in court as exhibit. He submitted that there was contradictory evidence as to the registration number of the motor cycle and the type of pistol. That PW2 did not indicate the serial number of the pistol. That PW3 did not prepare an inventory of the recovered pistol and ammunition. That all this puts doubt as to whether there were such exhibits recovered from him.

13. He further submitted that his defence was weighty enough to warrant for an acquittal.

14. The learned prosecution counsel **Mr. Ng'etich** submitted that the charge of robbery was proved beyond reasonable doubt. That PW6 saw the appellant boarding the complainant's motor cycle. That the complainant identified the appellant in an identification parade by touching him. That there was no error in identification as the witnesses had sufficient time to see him.

15. The state submitted that use of force was proved. That at the time of arrest the appellant was found in possession of a firearm. He did not have a licence for it. That the ballistics expert proved that it was a firearm. The prosecution counsel urged the court to dismiss the appeal. He left the sentence to the discretion of the court.

Analysis and Determination

16. This is a first appeal and as such the court is guided by the principles set out in the case of **David Njuguna Wairimu –Vs- Republic [2010] eKLR** where the Court of Appeal stated that:

"The duty of the first appellate court is to analyse the re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

17. The appellant contended that the trial did not comply with Section 198 of the Criminal Procedure Code which requires that where evidence is given in a language not understood by the accused to be interpreted to him in a language that he understands. The appellant submitted that the court record does not indicate the language that PW1 used in his evidence. That the language was not interpreted to him.

18. Indeed the language that PW1 used in court when he testified on 26/1/2015 is not indicated. However the appellant cross-examined the witness at length. That can only mean that the witness was communicating in a language that the appellant understood or the language was being interpreted to him. The error in not stating the language PW1 communicated in did not occasion a failure of justice. The error is curable under the provisions of section 382 of the Criminal Procedure Code.

19. The appellant contended that the circumstances of the robbery were not favourable for positive identification. When the complainant testified in court on the 26/1/2015 he was not questioned as to how he was able to identify the appellant during the robbery. However when he had testified on 19/2/2013 before a different magistrate he had stated that he had identified the appellant from the motor cycle's indicator lights which were flashing and that the appellant was wearing a mavin cap. He stated that a policeman talked to the appellant before he agreed to ferry people to Chemombo. He stated that he picked the appellant in an identification parade by touching him. Though he said that the appellant had a gap between his teeth no such a thing was mentioned during the parade.

20. The parade officer stated that he conducted the parade in accordance with the law. That there were 8 members in the parade who were of the same height and complexion. That the complainant identified the appellant by touching him.

21. PC Zoka PW6 testified that the accused was a person well known to him for a period of 2 years. That he even knew his home at Nandi. He even used to drive the appellant's motor vehicle. That on the material night he met the appellant at Serem trading centre and talked to him. That he saw the appellant boarding the complainant's motor cycle. That the complainant was a person known to him as he used to ferry him on his motor cycle.

22. Evidence of identification under difficult circumstances was well dealt with by the Court of Appeal in the case of **Cleophas Otieno Wamunga –Vs- Republic (1989) eKLR** where the court held that:-

"We now turn to the more troublesome part of this appeal, namely the appellant's conviction on counts 1 and 2 charging him with the robbery of Indakwa (PW1) and Lilian Adhiambo Wagude(PW3). Both these witnesses testified that they recognized the appellant among the robbers who attacked and robbed them…… What we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleged to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Lord Widgery, CJ in the well known case of R vs Turnbull [1976]3 All ER 549 at page 552 where he said:-

"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

23. The learned trial magistrate cited the case of **Njoroge –Vs- Republic (1987) KLR 9** where the Court of Appeal held that it is of no value to hold an identification parade unless a report had been made that a witness could identify the accused and given his description. Said the court:-

"Dr. Macharia was a single identifying witness, whose evidence had to be tested with the greatest care….. That cannot be done unless the identifying witness had made a report as to whether he could identify the accused and given a description. His ability to identify the accused is then to be tested on an identification parade."

24. However the same court held in **Nathan Kamau Mugwere –Vs- Republic, Criminal Appeal No. 63 of 2008** that failure by a witness to give the description of the appellants for purposes of organizing an identification parade does not make the parade worthless. Said the court:-

"……. The parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight put on the evidence regarding the identification parade. We reject the contention that because James had not given to the police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected."

25. The trial court believed the evidence of the prosecution witnesses. It was clear that PC Zoka PW6 knew the appellant before and met him and the complainant at Serem Market. He saw the complainant ferrying the appellant from Serem Market on the complainant's motor cycle. There was no reason to doubt the evidence of Zoka to that end.

26. There was no doubt that the identification parade was properly conducted. Though it was not clear how the complainant could have identified the appellant in the motor cycle's indicator lights, the fact that he picked him in an identification parade was confirmation that he had indeed identified him during the robbery. The evidence of PC Zoka corroborated the evidence of the complainant that the appellant is the person who hired the complainant on the material night. That he may not have given his description to the police did not make the identification parade worthless. The appellant was therefore positively identified as one of the people who robbed the complainant. His defence did not displace the strong evidence adduced by the prosecution.

27. There was overwhelming evidence that the appellant was found with a pistol and 13 rounds of ammunition at the time of his arrest. The arresting officers PW2 and PW5 gave candid evidence of the arrest. There was no reason to doubt the evidence. The two items were examined by a ballistics expert who confirmed them to be a firearm and ammunition respectively.

28. Though the motor cycle was not produced in court it was identified in court when the complainant testified before the magistrate who initially heard the case. The existence of the motor cycle was therefore not in doubt.

29. The fact of the appellant's arrest was sufficiently proved by the two arresting officers PW2 and PW5. There was no need to call the bar waitress as a further witness in the case. The prosecution was under no duty to call a battery of witnesses to prove the same fact.

30. The appellant submitted that there were some contradictions in the prosecution case. Two of the contradictions he pointed out were the registration number of the motor cycle and the serial number of the pistol. There was no contradiction on the serial number of the pistol. The contradiction on the registration number of the motor cycle was a minor contradiction that did not go to the root of the case.

31. The upshot is that the appellant was convicted on cogent and credible evidence. This court sees no reason to interfere with the finding of guilty returned on the appellant. The appeal on conviction is bereft of merit and is thereby dismissed.

32. For the offence of robbery with violence, the appellant was sentenced to suffer death. In view of the fact that the death sentence is no longer a mandatory sentence for the offence of robbery with violence the appellant can proceed to mitigate on the sentence.

Orders accordingly.

Delivered, dated and signed in open court at Kakamega this 30th day of May, 2019.

J. NJAGI

JUDGE

In the presence of:

Mr. Juma for State

Appellant - present

Court Assistant - George

14 days right of appeal.