REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D. S. MAJANJA J.

CRIMINAL APPEAL NO. 6 OF 2019

BETWEEN

SAMSON BOYII NKULET..... APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence of Hon. R.M Oanda, PM dated 11th January 2019 at the Magistrates Court at Kilgoris in Criminal Case No. 170 of 2017

JUDGMENT

1. The appellant, **SAMSON BOYII NKULET**, was charged, convicted and sentenced to 20 years' imprisonment for 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 16th February 2017 at Kilgoris town in Transmara West District of the Narok County, jointly with others not before the court being armed with rungus and swords robbed **MOSES ORAMAT** Kshs 48,750/-, a wrist watch, one pair of shoe, two wallets, national identity card and a voters card and immediately before the time of such robbery used actual violence on the said **MOSES ORAMAT**.

2. The appellant has appealed against the conviction and sentence on the grounds set out in petition of appeal. He contends that he was not accorded fair trial, the prosecution case had glaring contradictions and that the prosecution failed to prove its case to the required standard.

3. Before I deal with the issues raised by the appellant, I must recall that I am guided by the principle that the duty of the first appellate court is to re-appraise the evidence and reach an independent conclusion as to whether to sustain the conviction bearing in mind that the court neither heard or saw the witnesses testify ***(Okeno v Republic [1972] EA 32)***. In order to proceed with this task, it is necessary to set out the evidence as it emerged before the trial court.

4. Moses Oramat Ole Sei (PW 1) testified that on 16th December 2017 he was traveling on a motor cycle from Ogwethi market. He arrived at Kilgoris at about 11:00pm and as he was looking for another motorcycle, he heard people walking behind. They suddenly got a hold of him, threw him on the ground, took away the rungu he had, pinned him down and began hitting him. The assailants robbed tore the jacket he was wearing using a knife and took Kshs 40,000/- that he had. They also took his wallet which had Kshs 8,750/-. He testified that they also robbed him of his wrist watch and stabbed him on the leg. The assailants escaped when he raised alarm. When he went to report the matter to the police station, he was informed that the accused had been arrested and found with his shoes and wallet. He also told court that there was some light and he could identify the accused person.

5. A bouncer at a local club, Dennis Wechuli (PW 2, testified that on the material day at 11:00pm, he received a call to proceed to Damacho where he found that two people had been arrested. He took them to the club before he took them to the police station. He told court that one of them had shoes and a wallet belonging to a victim. John Ongeri Mosota (PW 3) testified that he is a manager at Damacho Bar and on 16th February 2017 he found PW 2 interviewing the suspect and he advised that they report the matter to the police station. He told court that the suspect that had a wallet, shoes and Identity Card belonging to the victim.

6. The investigating officer, Willis Ochieng' (PW 4) testified that around 2.10am on the 17th December 2017 while on duty, he received information that that some suspects had been arrested. Together with other officer, he rushed to the scene and found the accused had already been arrested. He told court that PW 1 also found that accused had also been arrested by the members of the public. The accused was found to be in possession of the PW 1's shoes and upon being searched he was found with a black wallet that contained the PW 1's identity card. He told court that they did not conduct and identification parade since the accused had been positively identified at the scene.

7. A clinical officer at Transmara District Hospital, Festus Kurgat (PW 5), testified he examined PW 1 on 17th February 2017 and found that

he had tenderness on the head, marks on the buttocks, bruises on the left hand and a cut on the leg. He produced PW 1's P3 medical form in evidence.

8. In his unsworn statement, the accused denied that he committed the offence. He told the court that he was a boda boda motor cyclist. He recalled that on 16th February 2017 he was at Garissa Hotel eating when he was arrested by three people.

9. When the appeal came up for hearing the appellant relied entirely on his written submissions. It was his case that he was not positively identified since there was no source of light and that no identification parade was conducted. He also urged the court to find that the charge sheet was incurably defective as it did not indicate the date of the arrest or time of the alleged offence. He also contended that the charge sheet was amended at the close of the prosecution case contrary to **section 214** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***. He further submitted that the prosecution did not seek leave as required by **section 33** thereof nor did it furnish reasons for amending the charge sheet.

10. I have now considered the appellant's submissions and the evidence on record and concluded that the only issue arising for determination is whether the case was proved beyond a reasonable doubt. Before I delve into this, I shall first make a determination on the appellant's contention that charge sheet was incurably defective and amended at the close of the prosecution case contrary to **section 214** of the ***Criminal Procedure Code***.

11. The record shows that the accused was initially charged together with another accused of the offence of robbery with violence contrary with **section 295** as read with **section 296(2)** of the ***Penal Code***. Before the trial began, the charges against the 2nd accused were withdrawn under **section 87A** of the ***Criminal Procedure Code***. The amended charge containing the robbery with violence contrary to **section 296(2)** of the ***Penal Code*** as the principal charge and handling stolen property contrary to **section 322(2)** of the ***Penal Code*** as an alternative charge were read to him and a plea of not guilty entered against him. The case then proceeded for hearing thereafter.

12. After the defence closed its case, the court directed it would deliver its judgment on 2nd October 2018. Before the trial magistrate could render his judgement the prosecution applied to amend the charge sheet on 14th December 2018 in order to removed the provisions of **section 295** of the ***Penal Code*** from the charge sheet. The substance of the charge was read to the accused and he pleaded not guilty to the amended charge.

13. Both the initial charge sheet and the 1st amended charge sheet charged the appellant as follows, *"Robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code .."* **Section 295** and **296** of the ***Penal Code*** provides as follows;

> *295. Definition of robbery*
>
> > *Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.*
>
> *296. Punishment of robbery*
>
> > *(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.*
> >
> > *(2) 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."*

14. It would appear the original charge sheet was duplex as it contained charged the appellant with two offences; robbery and robbery with violence and the amendment was intended to make it clear that the appellant was facing the office of robbery with violence. The Court of Appeal in ***Paul Katana Njuguna v Republic*** **CA NAI Criminal Appeal No. 37 of 2015 [2016] eKLR** held that where the offences under **section 295** and **296 (2)** were not framed in the alternative, the charge was bad for duplicity but the defect was not necessarily fatal if the accused was not prejudiced (see also ***Simon Materu Munialu v Republic*** **. NAI CA Criminal Appeal No. 302 of 2005 [2007]eKLR**).

15. In this case, the amendment came after the appellant had closed his case. **Section 214** of the ***Criminal Procedure Code*** provides:

> *214 (1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:*
>
> *Provided that-*
>
> > *i. where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;*
> >
> > *ii. ii. where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.*
>
> *(2) ……...*

16. The trial court did not comply with **section 214** aforesaid as it did not give the appellant an opportunity to indicate whether he wished to recall any witnesses. On this issue the Court of Appeal in ***Josphat Karanja Muna v Republic*** **NYR CA Criminal Appeal No. 298 of 2006 [2009] eKLR** had the following to say regarding non-compliance with **section 214** of the ***Criminal Procedure Code***;

> *That the spirit of section 214 is to afford an accused person opportunity to recall and cross-examine witnesses where the amendments would introduce fresh element or ingredient into the offence with which an accused person is charged. It certainly was not meant to be invoked every time an amendment is made even if such an amendment is only to introduce a correction of name or of a word. Here the name Ben Chege Gikonyo was amended to read Ben Cheche Gikonyo. We do not accept that the non compliance with the provisions of section 214 of the Criminal Procedure Code resulted into injustice to the appellant.*

17. On consideration of the record, I do not find that the appellant was prejudiced, first by the duplex charge or the amendment of the charge sheet before judgement was rendered. The appellant understood the charge against him, participated in the hearing by cross examining the witnesses and mounted a defence at the close of the prosecution case. The court on realization that the charge was duplex admitted the 2nd amended charge to correct the provision of the law, read the substance of the charge to the accused and entered a plea of not guilty.

18. I now turn to whether the prosecution proved its case beyond reasonable doubt. First I am satisfied that the prosecution proved that essential elements of the offence of robbery with violence. PW 1 gave credible evidence that he attacked by more than one assailant. At any rate he was assaulted by a knife as confirmed by PW 5 and his money and personal items stolen.

19. The main issue for consideration is whether the appellant was identified as the assailant. This is a case where the incident took place at night and hence the issue of identification of the assailants was central. In ***Wamunga v Republic*** **[1989] KLR 424**, the Court of Appeal cautioned that:

> *Evidence of visual identification in criminal cases can bring about 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 mere identification of the accused which he alleges 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.*

20. PW 1 testified that on the material night, he was attacked by several people who stole his Kshs 40,000/- which was in his jacket, his wallet which had Kshs 8,750/- and his wrist watch. In his testimony, PW 1 told court that he saw the appellant as there was some light and that he knew the appellant as they hailed from the same clan. I am constrained to agree with the appellant that the prosecution did not establish the source and intensity of light that enabled PW 1 identify the assailants. Even if the assailant was a relative and was indeed recognised, the nature of the circumstances of such recognition have to be examined with caution to avoid error. I find and hold that the totality of circumstances were not favourable for positive identification and hence the conviction could not be based on identification or recognition.

21. The appellant's conviction also rested on the doctrine of recent possession. Under this doctrine, upon proof of the unexplained possession of recently stolen property, the trier of fact may draw an inference of guilt of theft or of offences incidental thereto. The testimony of PW 1, PW 2 and PW 2 was that the appellant was found with the appellant's shoes, wallet and identity card. In ***Arum v Republic*** **[2006] 1 KLR 233,** the Court of Appeal set out conditions that must exist before a court can rely on the doctrine of recent possession as a basis of conviction in a criminal case. These include proof that:

> *(a) The property was found with the suspect;*
>
> *(b) The property was positively the property of the complainant;*
>
> *(c) The property was stolen from the complainant;*
>
> *(d) The property was recently stolen from the complainant.*

22. From the evidence, the appellant was arrested by members of the public after PW 1 raised an alarm. PW 2 who was called to the scene immediately after the appellant was arrested by members of the public confirmed that the appellant had in his possession items belonging to the complainant, namely the complainant's shoes and wallet. PW 3 also confirmed that the appellant had in his possession a wallet and identity card belonging to PW 1. PW 4 testified that the complainant reported the case when he was bare foot as his shoes had been stolen. He also told court that the wallet recovered had Kshs 8,750/=.

23. The evidence puts the appellant at the *locus in quo* and in possession of stolen items which were identified by PW 1 as his. The appellant did not lay claim to any of those items or give a reasonable explanation as to how they came into his possession. The only inference that can be drawn from the prosecution evidence is that the appellant was one of the people who attacked PW 1 and stole from him. I therefore find his conviction safe.

24. As the mandatory death penalty was declared unconstitutional by the Supreme Court in ***Francis Karioko Muruatetu & Another v Republic*** **SCK Pet. No. 15 OF 2015 [2017] eKLR** and ***William Okungu Kittiny v Republic*** **KSM CA Criminal Appeal No. 56 of 2013 [2018] eKLR**, the appellant's was sentenced to 20 years' imprisonment. However, in line with other decisions of superior court in similar circumstances, I reduce the sentence to **ten (10) years' imprisonment** from the date of conviction, 11th January 2019, taking into account the time spent in pre-trial custody.

25. Save for variation of the sentence, the appeal is dismissed.

DATED and DELIVERED at KISII on this 28th day of JUNE 2019.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.