REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 4 OF 2011

ABDALLA MALOBA ANYANGA .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of E.K. Usui-Macharia, SRM, delivered on 6th January, 2011 in Kwale Senior Resident Magistrate's Court Criminal Case No. 1474 of 2009)

JUDGMENT

1. The appellant herein was charged with two counts. The 1st count was for the offence of robbery with violence contrary to Section 296(2) of the Penal Code.

2. The particulars of the charge were that on the 3rd day of May, 2009 at Mwachinga village in Kinango District within Coast Province, jointly with another not before court, while armed with a dangerous weapon namely a penknife, robbed Abdalla Omar Dosho of one motorcycle (unregistered) make Yinhe engine number HYN 157 FM 8667811 valued at Kshs. 77,500/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence on the said Abdalla Omari Dosho.

3. The 2nd count was for the offence of resisting arrest contrary to Section 253(b) of the Penal Code. The particulars of the charge are that on the 9th day of October, 2009 at Mtwapa Estate in Mombasa District within Coast Province, resisted the lawful arrest of No. 71614 Cpl Bonface Thadayo, who at the time of the said resistance was acting in due execution of his duty.

4. The appellant was found guilty of both counts and convicted accordingly. He was sentenced to suffer death in count I. The sentence in Count II was held in abeyance.

5. Being dissatisfied with the decision of the lower court, he filed a petition and grounds of appeal on 18th January, 2011. His appeal was heard by the High Court and dismissed. He thereafter filed an appeal to the Court of Appeal. On 30th May, 2018 the Court of Appeal at Malindi in Criminal Appeal No. 70 of 2014 made an order for several criminal appeals that had been heard by Judges of the Environment Court and Employment and Labour Relations Courts to be remitted back to the High Court for rehearing by courts with requisite jurisdiction in order to rehear and determine the same in accordance with the prevailing provisions of the Criminal Procedure Code.

6. On 4th February, 2019 the appellant was granted leave to amend his grounds of appeal. He filed the same on 19th February, 2019. They are as follows:

(i) That the Learned Trial Magistrate erred in law and fact by considering the evidence of a Safaricom print out and convicting and sentencing him without finding that the production of the same was unlawful for it was not attested to by an the authorized person contrary to Section 71 of the Evidence Act;

(ii) That the Learned Trial Magistrate erred in law and fact by convicting and sentencing him by considering the evidence of the mobile phone number alleged to have been supplied to Safaricom Company to be his without seeing that there was no evidence to connect him with the same;

(iii) That the Learned Trial Magistrate erred in law and fact by failing to hold that the said Safaricom printout did not meet the rule of law as per Section 80 of the Evidence Act;

(iv) That the Learned Trial Magistrate erred in law and fact in convicting and sentencing him by relying on the identification

evidence of a single witness, PW1, without considering that the same was not free from the possibility of error hence unreliable to sustain a proper conviction. When given that:-

(a) The robbers were strangers to the victims; and

(b) Chapter 46 of the Police Act standing orders was not complied with.

(v) That the Learned Trial Magistrate erred in law and fact by failing to consider the source of his arrest had nothing to do with the offence since the alleged police informer who led to his arrest did not testify to clear the doubt surrounding his arrest;

(vi) That the Learned Trial Magistrate erred in law and fact by failing to bring the alleged Tract person (sic) who could have linked him to this offence.

(vii) That the Learned Trial Magistrate erred in law and fact in convicting and sentencing him by failing to consider that the prosecution case was not proved as required by the law under Section 109 of the Evidence Act; and

(viii) That the Learned Trial Magistrate erred by failing to consider his reasonable defence statement.

7. In his written submissions, the appellant stated that his source of arrest was not established and he was shot by drunk police officers who had taken drinks at Kenda village. He contended that for the said reason they failed at the first instance to arrest the person who was pointed out by Saidi as the owner of mobile number 0710569055 and secondly that Saidi escaped from them. He also stated that 3 Police Officers and the DO failed to subdue 1 person, the appellant. He argued that the Safaricom print out did not show that the owner of mobile phone number 0710569 055 was ever at Kakamega thus the evidence of PW2 to that effect should be disregarded.

8. He decried the fact that mobile phone number 0710569055 was not his because when PW1 called the said number when the Trial court told him to do so on the request of the appellant, it was in use and a man's voice was on the line. The appellant denied that the said mobile phone number was registered in his name. He contended that PW2 and PW3 did not say he was arrested with the mobile phone and number which was investigated. He referred to the evidence of PW3 who said he was not arrested with anything.

9. The appellant challenged the evidence of PW4 as to not having disclosed the make of the mobile phone he was found with. He asserted that the Safaricom printout disclosed 2 mobile phone models had been used by the said telephone number, namely Nokia Corporation 1110i and Nokia Corporation 3310.

10. He submitted that the maker of the print out did not prepare a certificate as required under Section 71 of the Evidence Act.

11. The appellant further submitted that PW1 testified that he attended an identification parade with 4 people, yet no identification parade forms were produced. On the other hand PW5 said no identification parade was held as it would not have been possible to do so as there were no other people with gun wounds similar to what the appellant had. The appellant relied on the case of **Francis Ajode vs Republic**, Criminal Appeal No. 87 of 2004 (unreported) in submitting that dock identification by PW1 was worthless.

12. On the issue of the sentence, the appellant cited the case of **Francis Karioko Muruatetu and Another vs Republic** [2017] eKLR to submit that the Supreme Court held that the death sentence was unconstitutional. He prayed for this appeal to be allowed and at the same time urged this court to look at his submissions on mitigation.

13. The ODPP through Ms Marindah, Prosecution Counsel opposed the appeal. She submitted that the appellant's source of arrest was established. In referring to the evidence of PW2, she submitted that it was corroborated by that of PW3 and PW4 who participated in the investigation and arrest of the appellant. She indicated that the submissions by the appellant did not shake the prosecution's evidence. She pointed out that he attempted to run away from the police and a scuffle ensued even after Police Officers had identified themselves to him.

14. On the issue of the Investigating Officer's failure to hold an identification parade, Ms Marindah submitted that identification parades are useful but not always mandatory. She relied on the decision in **Muiruri and Others vs Republic** [2002] 1 KLR to support her submission.

15. The Prosecution Counsel submitted that the Trial Magistrate properly addressed himself on the issue of the appellant's identification.

16. On the issue of the sentence imposed against the appellant, Ms Marindah submitted that a court has to consider the circumstances under which the offence occurred to impose an appropriate sentence. She stated that what was declared unconstitutional was the mandatory nature of the death sentence and not the death sentence itself, which can be imposed in appropriate cases.

17. On 4th April, 2019 the appellant filed submission in response to the ones made by the respondent. He submitted that Saidi who pointed him out to the police was not called as a witness. He cited the case of **Bukenya and Others vs Republic** [1972] EA 349. The rest of his submissions are a reiteration of his earlier ones.

ANALYSIS AND DETERMINATION

18. The duty of the first appellate court is to analyze and re-examine the evidence adduced and come to its own conclusion while bearing in mind that it has neither seen nor heard the witnesses testify. In **Okeno vs Republic** (1972) EA 32, the court explained the said duty in the following terms:-

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the 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 finding and draw its own conclusions only then can it decide whether the magistrate's finding 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."

19. The issues for determination are:-

(i) If the appellant was positively identified; and

(ii) If the prosecution proved its case beyond reasonable doubt.

If the appellant was positively identified

20. In his evidence PW1 stated that he attended an identification parade which had 4 people. PW5 however said that no identification parade was held as it would have been unfair to do so as the appellant had a wound. He further stated that it would not have been possible to get other people with gunshot wounds to put in the parade.

21. It is therefore obvious that no identification parade was held. The only evidence on identification of the person who robbed PW1 was therefore dock identification. Dock identification has been said time and again to be the weakest kind of evidence on identification.

22. There is however an exception to the rule as was held by the Court of Appeal in the case of **Nathan Kamau Mugwe vs Republic** [2009] eKLR where the Court of Appeal cited the case of **Muiruri and Others vs Republic** (supra) at pg 227 as follows:-

"But the holding in Gabriel Njoroge case (supra) appears to us to be too broadly couched. We do not think it can be said that all dock identification is worthless. If that were to be the case then decisions like Abdulla bin Wendo v. Rep (1953) 20 EACA 166, Roria v. Republic (1967) EA 583, and Charles Maitanyi v. Republic (1986) 2 KAR 76, among others, which over the years have been accepted as correctly stating the law concerning the testimony of a single witness on identification will have no place in our jurisprudence. In those cases courts have emphasized the need to test with the greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to found a conviction. We do not think that evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification."

23. In this case, the Trial Magistrate carefully analyzed the evidence that was tendered before him and found that the failure by the Investigating Officer to hold an identification parade did not prejudice the appellant in any way. He found the dock identification sufficient as PW1 had spent a considerable amount of time with his passengers who were the appellant herein and another on 3rd May, 2009 after they hired him to taken them to Mwachenga (sic) from Kwale.

24. This court is of a similar view that even though PW1 did not identify the appellant at an identification parade, on the day he was hired to take the two passengers to Mwachinga in Mwaluganje in Kwale, he spent a considerable amount of time with them. PW1 gave a clear account of how he was approached by one man who offered to pay him Kshs. 600/= for a trip to Mwachinga. The said man said he was with his friend. PW1 told them to hire 2 motor cycles at Kshs. 600/= each. The man refused and said it was too much. PW1 agreed to ferry the 2 men at Kshs. 800/=. He said that the friend to the man who had hired him arose from under a shade. They told him they had been sacked and were going to a traditional medicine man. They gave him Kshs. 50/- to buy udi (incense) for them.

25. PW1 told the man to sit between him and the passenger who had hired him. He narrated that on the way to Mwachinga, the man who was seated behind him said he wanted to relieve himself at Shimba Hills Forest. PW1 told him it was dangerous and rode onto Marere bridge where he stopped and the said man got off from the motorcycle to relieve himself. PW1 testified that they talked a lot on the way.

26. After reaching their destination, the man who was sitting behind PW1 gave him his mobile phone number to him and said he would call him later so that he could pick them up. PW1 saved the said mobile number as Mteja No. 13. At 3:00 p.m., he received a call from the mobile phone number he had been given and he was asked to go back for the two passengers. He did so. On their journey back at the junction of Mwaluganje forest, his passengers said they wanted to relieve themselves. He stopped. As he waited for them aboard his motorcycle, he was attacked from the back and pulled from the motor cycle. The man who had been sitting behind him held PW1's hands at the back and produced a knife from his waist. He was ordered to give his motorcycle or they would take it by force and kill him. PW1 stated that the passenger who had hired him rode the motor cycle with the other man onboard as a passenger.

27. Going by the evidence adduced in the lower court by PW1, this court has no difficulty in arriving at the conclusion that PW1 had ample time to take in the features of the man who was seated behind him and recollect that he was the appellant. PW1's evidence and description gives in minute details the role played by the appellant in this case. He even recollected that the appellant bought bananas and ate them enroute to Mwachinga. At Kinango Police Station, PW1 gave a description of the appellant as short, dark and stout, which this court notes aptly fits the appellant herein. I therefore hold that in the circumstances of this case, the Trial Magistrate did not misdirect himself in relying on dock identification of the appellant.

If the prosecution proved its case beyond reasonable doubt.

28. Apart from the dock identification of the appellant the other evidence that plays a central role in this case is the evidence of mobile

phone No. 0710569055 which PW1 testified to having being given by the appellant after he dropped them at Mwachinga on 3rd May, 2009. According to PW1, when he was robbed of his motorcycle he called his brother (cousin) who was an officer at the General Service Unit (GSU) and informed him about it. It turned out that PW2 had assisted PW1 in the purchase of the motorcycle.

29. PW2 took keen interest in the case and was instrumental in obtaining a letter from the DCIO Kwale which directed Safaricom Police Liaison Officer as per the letter dated 3rd September, 2019 to obtain the following particulars of mobile phone No. 0710569055 –

(i) Imei history;

(ii) MSISDN history from 1st June 2009 to date;

(iii) Print out of outgoing/incoming calls from 1st June to date;

(iv) The current location; and

(v) Subscribers details if any.

30. After the Safaricom print out was received by the Investigating Officer, it was established that the owner of mobile phone No. 0710569055 was frequently communicating with mobile phone No. 0725802271. Mobile phone No. 0710569055 was being used in Kakamega while mobile phone No. 0725802271 was being used in Mtwapa.

31. Further investigations led PW2, PW3, PW4 to Mtwapa on 9th October, 2009 to track the owner of mobile phone No. 0725802271. PW2 managed to put a call through to the said number and tricked the owner of the said mobile phone to meet him at Mtwapa as he needed transport to Shanzu. The person identified himself as Saidi. They arrested him and took him to Mtwapa Police Station. They interrogated him about mobile phone No. 0710569055. He denied knowing anything about it but when he was shown the Safaricom print out he admitted that he knew the owner of the said number as Haraka Upesi, who was his friend. PW2 conversed with Saidi in their mother tongue and told him that their interest was in the man from Kakamega. Saidi offered information that the said man had traveled to Mtwapa from Kakamega. PW2 informed the other Police Officers about the information given by Saidi and they did not handcuff him. They proceeded to Kenda village and had some drinks. PW2 said that Saidi took Guinness.

32. PW4's evidence was that after they arrested Saidi, he scrolled through his mobile phone and found No. 0710569055. He asked Saidi for the name of the owner of the cell phone. He told them he was Haraka Upesi, a fellow boda boda rider who had gone to Kakamega but had returned to Mtwapa. It was the evidence of PW2 that he placed a call to mobile phone No. 0710569055 and posed as a customer who had been referred to him by his client. He asked the said man to pick him from Kenda village in ten minutes. He did not. PW2 placed another call to the said number after ten minutes and the man said he was ferrying a client. He told PW2 that he would send him another boda boda. PW2 told the appellant he feared to deal with another boda boda. He agreed he would go and collect PW2. When PW2 called him the third time, his number was off.

33. PW3 testified that after they arrested Saidi, he told them that he knew the person who had mobile phone No. 0710569055 as Haraka Upesi and that he was from Western Province but he was at Mtwapa at that time. They told Saidi to use his mobile phone number to call mobile phone No. 0710569055 so that they could meet at a designated place. The call went through but he did not talk. After 30 minutes Saidi received a call from mobile phone No. 0710569055 and they talked. PW4 also placed a call to the said mobile phone and said he was John. The other man said he did not know him and he was busy. They told Saidi to call mobile No. 0710569055. He did so and the other person asked for 2 hours and he would turn up. When Saidi called again after 2 hours, the other man's phone was off. They told Saidi they would not release him until they found Haraka Upesi

34. It was the evidence of PW2 that Saidi pointed out the man they were looking for as he was passing by. He also told them that the said man operated from Kilifi stage. They proceeded there but missed the appellant. They went to the Police Station (Mtwapa) where they stayed for 30 minutes. They went back to Kilifi Stage and Saidi pointed out a man who was leaning against a motorcycle as the one who was being looked for. PW2 stated the man was wearing a checked shirt. The man was identified in court by PW2, PW3 and PW4 as the appellant. After Police Officers approached him and introduced themselves, he made a run for it but was cornered by PW4 at a Kiswahili house. He attempted to grab PW4's pistol and in the process of wrestling for it, he sustained a gunshot wound on his shoulder.

35. The appellant challenged the evidence by the prosecution that mobile phone No. 0710569055 was found to be in use in Kakamega but the Safariom printout did not show that information or who the owner of the phone number was. Further, that two phone handsets had been used by sim card number 0710569055.

36. The evidence of PW4 was that after he received the Safaricom printout he analyzed it and found that the handset used to call PW1 by the appellant on the day of the robbery was a Nokia 1110i, equipment No. 351874011781720. It is my finding that being a Police Officer, PW4 had the knowledge and expertise of how to analyze the Safaricom data printout and establish the geographical location the mobile phone No. 0710560055 was being used from as well as the phone model that was being used by the person who had the said mobile phone number.

37. Although the Safaricom print out does not show who the owner of the mobile phone number was, the appellant was found in possession of the said phone and line (sim card) when he was arrested. The evidence of PW5 was that the Police Officer who arrested the appellant handed the said exhibits over to him. PW4 when cross-examined by the appellant stated that when they searched him, they recovered the phone he had been using. PW4 testified that he scrolled through the appellant's mobile phone in his presence and confirmed that he had been calling Saidi's number several times. PW4 added that even the mobile phone equipment number tallied with the details given by Safaricom. The foregoing evidence shows that the appellant was found in possession of the mobile phone that was used to call PW1 on the day the offence was committed.

38. The appellant submitted that the Safaricom phone print out did not show that his cell phone number communicated with PW1's phone. That might be so, however, PW1 was categorical that when he made his report to PW5 at Kinango Police Station he gave out cell phone No. 0710569055 as being the mobile phone number of one of men who had robbed him of his motorcycle.

39. This information was given to PW5 during the first report and PW1 also gave the same information to PW2. I therefore hold that since the said information was given to the said witnesses at the earliest opportunity on the date of the robbery, PW1 could not have come up with a cell phone number from the blues. I believe the said mobile phone number belonged to the appellant and he gave it to PW1 on the day of the robbery.

40. The appellant raised the issue that on 8th October, 2010 when PW1 was recalled for further cross-examination, the court allowed him to place a call to mobile phone No. 0710569055. The call went through and it was picked by a man. This court holds that nothing turns on that ground of appeal. This court takes judicial notice of the fact that Safaricom re-assigns phone numbers that have not been used for many months to other customers. The appellant was arrested on 9th October, 2009. As at the time PW1 called the said mobile phone number from court, one year had gone by. Such a mobile phone number that was no longer being used by the appellant could still not have been available to him as he would have wanted the Trial Court to believe. Even PW1 in cross-examination by the appellant said that he was surprised that a number which had previously been inaccessible had gone through when he called it.

41. The appellant alleged that PW2, PW3 and PW4 were drunk at the time they were arresting him. That claim is not supported by evidence. PW2 stated that they had drinks at Kenda village but he did not state that they were alcoholic in nature. As per the evidence, Saidi was the one who took a Guinness.

42. The appellant argued that the provisions of Section 71 of the Evidence Act were not complied with as the maker of the Safaricom printout did not prepare a certificate as to the processing of the said document. During the case in the lower court, the appellant was given the copies of the evidence that the prosecution was going to rely on. He never objected to production of the Safaricom printout by the Investigating Officer. He is now shut out from objecting to a matter which he ought to have objected to at the Trial Court. Moreover, the provisions of Section 71 of the Evidence Act are not relevant to the type of objection that the appellant has raised. The Safaricom printout did not require attestation by a witness. That ground of appeal is therefore without merit.

43. The appellant argued that Saidi who was a police informer was not called as a witness. The evidence of PW2 was to the effect that when the appellant started running away from the Police Officers who wanted to arrest him, he entered a house and started to fight off the said Officers and one of them shot him. The appellant was than overpowered and handcuffed. PW2 further stated that a big mob gathered and started accusing them of shooting an innocent man. Luckily, the District Officer (DO) who had accompanied them came to their rescue. It was during that commotion that Saidi got a chance to escape. PW2 in cross-examination told the appellant that Saidi was a suspect who was still at large. In cross-examination, PW3 said that if they got Saidi, they would still charge him. The claim by the appellant that Saidi was not charged because he spoke the same language as the Police Officers was a wild allegation.

44. When put on his defence, the appellant denied having committed the offence. He stated that on 9th October, 2009 he woke up and went to work and after 5:00p.m., he entered a shop near a bar and someone crossed his path. He said he was hit and started bleeding. He was told that he was hit by mistake as they had aimed to shoot someone else. He was taken to Msambweni Hospital and later to Diani Police Station.The appellant's defence was considered by the Trial Court and found wanting. I find it untruthful and farfetched.

45. It is the finding of this court that the prosecution proved its case beyond reasonable doubt. The ingredients of robbery with violence contrary to Section 296(2) of the Penal Code were satisfied. The appellant was in the company of another man at the time the offence was committed. He was armed with a knife and threatened to kill PW1 if he did not part with the motorcycle. The appellant and his colleague pulled PW1 from the motorcycle and threw him to the ground. A degree of violence was therefore used. They stole PW1's unregistered motorcycle from him. PW1 produced receipts to prove purchase of the said motorcycle. PW2 confirmed that he had assisted PW1 to purchase the same. The motorcycle was never recovered. This court therefore holds that the appellant's conviction for the offence of robbery with violence contrary to Section 296(2) of the penal Code was sound. I hereby uphold the same.

If the sentence harsh or excessive

46. The holding in **Francis Karioko Muruatetu vs Republic** (supra) gave courts the discretion to impose custodial sentences other than the death sentence depending on the circumstances of each case by holding that the mandatory nature of the death sentence is unconstitutional. In the circumstances of this case, PW1 was threatened with death. The only time when violence was used against him was when the appellant held his hands at the back and he and his colleague threw him to the ground from the motorcycle. W1 did not sustain any injuries. He however lost his motorcycle worth Kshs. 77,500/= which he was using to eke a living from. It is the finding of this court that the death sentence imposed against the appellant herein cannot hold. I set aside the death sentence and substitute it with a 17 years imprisonment. In line with the provisions of Section 333(2) of the Criminal Procedure Code, the sentence shall run from 16th October, 2009.

47. The appellant shall benefit from remission. To that end, I am persuaded by the decision of Odunga J in **Sammy Musembi Mbugua & 4 others vs Attorney General & another** [2019] eKLR, where it was held that all prisoners serving a fixed or definite or determinate period of imprisonment shall benefit from remission of sentences imposed against them.

48. The appellant was also convicted in Count 2 for the offence of resisting lawful arrest. After he was sentenced to death for Count 1, the sentence in Count 2 was held in abeyance. Having set aside the death sentence, this court is duty bound to determine if it should sentence the appellant on Count 2. This court having considered the evidence adduced is of the finding that the charge in Count II was fatally defective. The appellant should have been charged under the provisions of Section 253(a) of the Penal Code and not Section 253(b). Further the appellant resisted being arrested by PW4, PC Collins, and not Cpl Bonface Thadayo. Due to the said defect in the charge, I quash the conviction in Count 2.

49. The appeal succeeds only to the above extent. The appellant has 14 days right of appeal.

DELIVERED, **DATED** and **SIGNED** at **MOMBASA** on this **30th** day of **September, 2019**.

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present

Ms Mwangeka, Prosecution Counsel for the DPP

Ms. Peris Maina – Court Assistant