IN THE HIGH COURT OF KENYA AT KAKAMEGA

CORAM: MAJANJA J.

CRIMINAL APPEAL NO. 119 OF 2018

BETWEEN

ATNAS NANDI SHITANDI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. B. Ochieng, CM delivered on 19th July 2018 at the Kakamega Magistrate's Court in Criminal Case No.3920 of 2016)

JUDGMENT

1. The appellant, **ATNAS NANDI SHITANDI**, was charged, convicted and sentenced to 33 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 charge were that on 14th October 2016 at Murram area in Kakamega Township, Kakamega Central Sub-County within Kakamega, jointly with others not before the court while armed with dangerous weapons namely pangas and crude weapons robbed **OSCAR AJEKA LUMBASHO**, a motor vehicle Toyota Probox registration number KBT 261G, cash Kshs. 300,000/-, a HTC mobile phone, a Sony Home theatre, a Ramton microwave oven, a sandwich toaster, a 36 inch Samsung flat screen television, a 13kg gas cylinder, a 6 kg gas cylinder, one brown leather jacket, a travelling bag, two I-pads, a golden wedding ring, a necklace and other household goods valued at Kshs. 2,000,000/- and immediately after the said robbery used actual violence on the said **OSCAR AJEKA LUMBASHO**.

2. The appellant now appeals against conviction and sentence based on the grounds of appeal set out in his petition of appeal, amended grounds of appeal and written submissions. The appellant complained that the prosecution failed to prove the case against him beyond reasonable doubt and in particular the evidence against him was full of inconsistencies. He complained that the trial magistrate failed to find that he was not properly identified at the scene in light of the circumstances. He further contended that identification parade in which he was identified was carried out in contravention of the law and applicable procedures. The appellant also submitted that the trial magistrate erred in depending on the evidence of recovery of stolen property which did not implicate him in the offence. He also complained that the prosecution failed to call material witnesses to support its case.

3. Learned counsel for the respondent supported the conviction and sentence. She submitted that the prosecution through the witnesses proved the offence against the appellant. Counsel added that the appellant was identified at the scene and his identity confirmed by a properly conducted identification parade. She maintained that his identity was buttressed when he was found with recently stolen items recovered from him and for which he could not explain the possession.

4. Before I deal with the issues raised in this appeal, it is important to recall the role of the first appellate court. The first appellate must subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see ***Okeno v Republic*** **[1972] EA 32**). In order to fulfil this duty, is important to set out the evidence emerging at the trial.

5. The complainant, Oscar Ajeka Lumbasho (PW 1), recalled that on 13th October 2016, he retired to bed at about 11.00pm when he was awoken by a loud bang and three flashlights directed at him. The assailants demanded money as they threatened to shoot him if he did not co-operate. He gave them Kshs. 25,000/- he had in his trouser pocket and Kshs. 109,000/- being proceeds from his M-Pesa shop. They also demanded PIN numbers for his phones. He told the court that from the light he was able to identify two assailants. The assailants told him to lie on his bed and while he did so, they hit him with a blunt object. He recalled that one of the assailants had a knife and the other one had something in his pocket which he touched and threatened to shoot him. After they hit him, he lost consciousness but later recovered. A neighbour took him to Nala Hospital where he was admitted and treated for head injuries. When Police officers arrived, he informed them that the assailants had taken off with his Toyota Probox vehicle registration number KBT 261 G. At 7.00am, he was informed that the vehicle had been discovered. He proceeded to the police station on 16th October 2016, where an identification parade was conducted and he was able to identify the appellant. On 18th October 2016, he was called to the police station where he was shown several household items which he identified as his.

6. PW 1 was examined by Patrick Mambili (PW 5), the Chief Medical Officer at Kakamega County Referral Hospital, 14th October 2016. PW 5 completed the P3 medical report which he produced in evidence. He confirmed that the appellant was admitted at Nala Hospital after being violently beaten on the head with an iron bar whereupon he lost consciousness. At the time of examination, the appellant complained of head and neck pain. Although there were no signs of a fracture, PW 5 assessed the injury as harm and opined that a blunt object had been used to inflict the injury.

7. Sergeant Patrick Sululu Wafula (PW 2), APC Peter Ouma (PW 3) and PC Baraka Konde (PW 4) testified that they were in the company of other officer patrolling the Webuye – Eldoret Highway when they were informed by the Commanding Officer, Matete Police Station that a motor vehicle involved in a robbery was heading towards Eldoret. The officers laid an ambush and blocked the white Toyota Probox registration KBT 261G. The vehicle had 4 occupants, 3 of them opened the door and attempted to escape. One of them was shot dead, two managed to escape and the appellant, who was the driver of the vehicle, was arrested. The officers recovered Kshs. 71,000/-.

8. The investigating officer, PC Peter Maritim (PW 6), recalled that on 13th October 2016, he was on duty with another officer when he received a call that a robbery had taken place at Murram area and the victim taken to Nala Hospital. He proceeded to the hospital where he found PW 1. PW 1 informed him that his vehicle Toyota Probox registration KBT 261G had been stolen together with his phones and several household items. He was able to track the mobile phone which showed that the robbers were heading towards Eldoret. He alerted the Commanding Officer, Matete Police Station who laid an ambush. After the appellant was arrested, he led the police to his co-accused where they recovered the appellant's household items and led to the arrest of the other co-accused. PW 6 arranged for an identification parade to be conducted by Inspector Samuel Kimutai (PW 7) on 16th October 2016.

9. When put on his defence, the appellant, in his sworn testimony, denied the offence. He told the court that on the material day, he was at Matete where he was doing some repair work on a motor vehicle when an officer passed by and arrested him on the ground that he had absconded in another court case. He was taken to court and charged.

10. The offence of robbery with violence under **section 296(2)** of the ***Penal Code*** is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see ***Dima Denge Dima & Others v Republic*** **NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR,** ***Oluoch v Republic*** **[1985] KLR 549** and ***Ganzi & 2 Others v Republic*** **[2005] 1 KLR 52)**.

11. I am satisfied from the totality of the evidence that the prosecution proved that the offence of robbery with violence was committed. The testimony of PW 1 was that he was attacked by three assailants who were armed with weapons and inflicted injuries on him as confirmed by PW 5. PW 1's vehicle and household goods were stolen on that material night.

12. The issues raised by the appellant in this appeal are twofold. First, whether the appellant was identified as the assailants and second, whether the there was sufficient of evidence of recovery of recently stolen property implicating the appellant in the robbery.

13. As regards the issue of identification, the principles upon which the court must assess identification in difficult circumstances are now well settled. The duty of the trial court is to examine the evidence carefully in order to avoid a case of mistaken identity and therefore a miscarriage of justice. I accept the exhortation of the Court of Appeal in ***Wamunga v Republic*** **[1989] KLR 424** where it was stated 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 one or more identifications 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.*

14. Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him (see ***R v Turnbull*** **[1967] 3 ALL ER 549)**.

15. The prosecution relied on the evidence of a single witness, PW 1, who told the court that when the assailants came into the house, they had torches. He stated that the electric light was on and he was able to see two assailants. In cross-examination, PW 1, stated that the light in the house was off. The question then is whether, in those circumstances, the identification of the appellants was positive and free from error. It is true that assailant was a stranger to appellant but the prosecution did not lead evidence of the nature and intensity of light and the time assailants spent together with the appellant to enable the court come to a conclusion that the circumstances obtaining at the time of the robbery were favourable for positive identification. In such circumstances, an identification parade, which would have tested PW 1's recall, would be fraught with error and it would have been unsafe to convict the appellant on the basis of the testimony of PW 1.

16. The appellant's conviction also stood on the basis of 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. 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.

17. The proof as to time will depend on the easiness with which the stolen property can move from one person to another. Once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for the possession. This burden is evidential only and does not relieve the prosecution from proving its case to the required standard. That explanation need only be a plausible (see ***Malingi v Republic*** **[1988] KLR 225**). In ***Paul Mwita Robi v Republic*** **KSM Criminal Appeal No. 200 of 2008**, the Court of Appeal observed that;

> *Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is (sic) especially within the knowledge of the accused and pursuant to the provisions of section 111 of the Evidence Act Chapter 80, the accused has to discharge that burden.*

18. According to PW 2, PW 3 and PW 4, the appellant was the driver of PW 1's vehicle that had been stolen on the material night. This was positive evidence that PW 1's motor vehicle was found in the appellant's possession on the night it was stolen. The appellant was the driver, while one passenger was shot at the scene and the other escaped. The appellant did not explain why he was driving a vehicle that was stolen on the night of the robbery. He did not claim ownership. The appellant did not suggest to PW 2, PW 3 and PW 4 in cross-examination that he was framed because of other cases he was facing. All in all, I am satisfied that the appellant was properly convicted on the basis of doctrine of recent possession.

19. The appellant complained that the prosecution failed to call material witnesses. In his written submissions, he contended that the prosecution ought to have called the people who took PW 1 to hospital after he gained consciousness. I am aware that under **section 143** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** states that, *"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for proof of any fact."* In ***Bukenya and Others v Uganda*** **[1972] EA 549**, the Court held that that where essential witnesses were not called, the court was entitled to draw an inference that if their evidence had been called, it would have been adverse to the prosecution case. In this case, the person who assisted to take PW 1 to hospital came after the fact of the robbery and his testimony would not be would neither add nor subtract to the prosecution evidence.

20. I now turn to consider the issue of the sentence. The appellant was sentenced to 33 years' imprisonment on the ground that he was a repeat offender having been convicted twice for the offence of escaping from lawful custody. In ***Mumias Criminal Case No. 616 of 2015***, he was sentenced to serve 18 months' imprisonment on 20th July 2017 and in ***Butali Criminal Case No. 293 of 2017***, he was sentenced to serve 3 years' imprisonment on 12th September 2017. When called upon to offer mitigation, the appellant contended that there was no evidence of such convictions yet when the prosecution put the facts to him, he admitted that he was serving both sentences.

21. In considering whether the sentence is harsh and excessive, I have taken into account the fact the death sentence under **section 296(2)** of the ***Penal Code*** is no longer mandatory (see ***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)**. In case of robbery with violence, the courts have imposed sentences in the range of between 15 and 20 years' imprisonment. I therefore hold that even taking into account two previous convictions, the sentence of 33 years' imprisonment is excessive in the circumstances given the sentence imposed in this case would be consecutive to the previous sentences. I therefore impose a sentence of 15 years' imprisonment.

22. For the reasons I have given above, I affirm the conviction and allow the appeal only to the extent that I quash the sentence of 33 years' imprisonment and substitute it with a sentence of 15 years' imprisonment.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED and DELIVERED at KAKAMEGA this 26th day of September 2019.

W.MUSYOKA

JUDGE

Appellant in person.

Ms Ombega, Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.