REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 38 OF 2018

GIDEON SICHENGA OPICHA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(from the original conviction and sentence, in Maseno PMC

Criminal Case No. 292 of 2011 by A. R. Kithinji, PM dated 28/5/2013)

JUDGMENT

1. The appellant was convicted of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code and the sentenced to serve 14 years imprisonment. He was aggrieved by the conviction and the sentence and filed the instant appeal. The grounds of appeal as filed by the law firm of K. N. Wesutsa & Co. Advocates, were that:-

> ***(1) The learned trial magistrate erred in law and fact by convicting the appellant upon insufficient evidence on record.***
>
> ***(2) The punishment meted out to the Appellant of 14 years is irregular as the appellant being a minor at the time of the alleged offence was liable to be sentenced to a maximum of 3 years upon conviction.***

2. The particulars of the charge were that on the 2nd day of December, 2010 at Ebusikhale area within the County of Vihiga, jointly with others not before court while armed with pangas, jointly robbed Victor Isiche Okonji (herein referred to as the complainant) of cash Ksh. 2,200/= and at or immediately before or immediately before or immediately after the time of such robbery used actual violence to the said Victor Isiche Okonji.

3. The state relied on the record of the lower court.

Case for the Prosecution -

4. The case for prosecution was that the complainant PW1 was a butcher at Luanda town. He was residing at Ebusikhale village in Emayekha. That on the material day at 8 p.m. he was walking home from Luanda town. That when he reached Central Villa Bar at Ebusikhale village he met with a group of about 6 people. He recognized three of them as there was electricity light emanating from the gate of the aforesaid bar. The people he recognized were his neighbours. He greeted them by their names. The appellant whom he referred to as George protested against him calling out their names. He cut the complainant with a panga on the left cheek. Another one called Samuel cut him with a panga on the right shoulder joint. The appellant cut him again twice on the left shoulder. The third one cut him with a panga on the right hand. The complainant fell down. The people ransacked his pockets and removed Ksh. 2,200/=. Samuel then called out at George and told him that they had succeeded on their mission. They disappeared. The complainant went home and informed his mother and a brother called Amayi, PW3. He gave them the names of the attackers. PW3 took the complainant to hospital where he was admitted overnight. PW3 reported at Lwanda Police Station. On the following day the complainant reported at the police station. PC Gaturi PW5 issued him with a P3 form. It was completed by a clinical officer PW4 of Maseno ACK Hospital. The clinical officer found the complainant with multiple deep cut wounds on the left and right shoulders and double cuts on the right forearm. The clinical officer classified the degree of injury as grievous harm. The appellant and one other person were thereafter arrested and charged with the offence. During the hearing the clinical officer produced the treatment notes and the P3 form as exhibits, P Exh.1 and 2 respectively.

Defence Case -

5. When placed to his defence the appellant gave an unsworn statement in which he stated that he was a hawker at Luanda town. That on

10/3/2011 he was at Luanda township when police officers found him with uncustomed cigarettes and fake dry cells. He was taken to Luanda police station where he was locked up for 2 days. His cousin went to check on him and he was also arrested. He was charged over a case he knew nothing about.

Submissions -

6. The advocate for the appellant, **Mr. Malalah**, submitted that the trial magistrate erred in sentencing a minor to serve a prison term of 14 years. That the age of the appellant was brought to the attention of the trial court and that the trial magistrate acknowledge that the appellant was a child offender when he stated that:-

> ***"I have considered the circumstances of the case and the apparent age of the accused."***

That although the proceedings recorded in the lower court do not capture how the magistrate arrived at the apparent age of the accused, it is clear that the appellant was a minor.

7. It was further submitted that the trial court sentenced the appellant and his colleague to 14 years imprisonment despite the sentence for the offence of robbery with violence being a mandatory death sentence.

8. Counsel submitted that the sentence meted out on the appellant was in contravention of Article 53 (1) (f) (i) of the Constitution of Kenya, 2010, that provides that:-

> ***"(1). Every child has the right –***
>
> ***(f) not to be detained, except as a measure of last resort, and when detained, to be held-***
>
> ***(i) for the shortest appropriate period of time, and***
>
> ***(ii) separate from adults and in conditions that take account of the child's sex and age."***

9. That the appellant being an underage child is now being held with criminals. That in sentencing a child offender the court should consider the best interests of the child as provided by Article 52 (2) of the Constitution that provides that:-

> ***"A child's best interests are of paramount importance in every matter concerning the child."***

10. The advocate further submitted that the trial court erred in law by not considering the provisions of Section 191 of the Children Act which provides alternative methods of dealing with child offenders such as placing the child on probation, community service, ordering him to be sent to a borstal institution, discharging him etc. The advocate relied on the case of **Republic –Vs- Dennis Kirui Cheruiyot (2014) eKLR** and **JKK –Vs- Republic (2013) eKLR** where it was held that:-

> ***"The best interest of the appellant as a minor offender ought to have been of paramount consideration when passing the sentence. The life of a minor should be preserved, he must also be rehabilitated which in our view includes being brought to bear the consequences of his omission, errors of judgment and disregard of the rule of law. Due to his omissions, an innocent life of a Kenyan was lost. Although the appellant was a minor, he must be brought to bear the consequences of his omission and lack of proper judgment. The appellant has served 5 years …; we do not however know whether that sentence was done as per the provisions of the Children Act or the Penal Code under which he was sentenced.***
>
> ***Whatever the case, life imprisonment is not provided for under the Children Act, but when dealing with an offender who has attained the age of 16 years, the court can sentence him in any other lawful manner. We think that due to the gravity of the offence, and the current age of the appellant, he cannot be released to the society without being brought to terms with the consequences of his action or omissions by a custodial sentence. It is for this reason that we are inclined to allow the appeal against the life sentence imposed by the trial court and substitute it with imprisonment for a period of 10 years from the date of conviction."***

Mr. Malalah urged the court to set aside the sentence imposed on the appellant.

Analysis and Determination –

11. This being a first appeal, 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."***

12. The first ground of appeal is that the appellant was convicted on insufficient evidence. The advocate for the appellant did not make any submissions on that ground of appeal.

13. It was the evidence of the complainant PW1 that the appellant was his neighbour. That he recognized him and the other two by aid of electricity light that was emanating from the gate of Central Villa Bar. That the lights were about 8m away from the place of the attack. That they were very bright. That he called out the persons he had recognized by their names. That the appellant protested to him calling out their names and he attacked him with a panga. The other two also attacked him. They robbed him of Ksh. 2,200/=. That he went home and mentioned their names to his mother and a brother. That when he reported to the police he gave out their names to the police.

14. The complainant's brother PW3 stated in his evidence that on arriving home with panga cuts, the complainant told him that it is Opicha and Odera who had cut him. They were people known to him before.

15. The clinical officer PW4 stated that the complainant reported at their hospital that the assailants were people known to him.

16. The investigating officer PW5 testified that when the complainant went to the police station on 3/10/10 he gave out the names of his attackers as Sammy Onyango, Gedion Sichenga and Alex. That they were people known to him. That the complainant said that he was attacked near a hotel called Central Villa. That there were lights from the hotel. That he visited the scene of the attack.

17. The complainant was the only witness on identification of the appellant as one of the people who attacked him. It is trite law that evidence of a single witness on identification should be examined with a lot of care to ensure that the evidence is free from the possibility of error. In **Abdalla Bin Wendo –Vs-Republic (1953) 20 EACA 166** the then equivalent of the Court of Appeal held that:-

> ***"Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."***

18. It is evident that there was bright electricity light at the place where the assailants attacked the complainant. The appellant was a neighbour to the complainant. He was well known to the complainant. The complainant called him by name and the appellant protested why he was calling them by their names. The complainant gave the name of the appellant to his brother PW3 and to the investigating officer PW5 as being one of the people who had attacked him. There was no shadow of doubt that the appellant was one of the people who attacked and robbed the complainant. The complainant positively identified him as one of the attackers. The possibility of mistaken identity was remote. The appellant was convicted on solid evidence. The appeal on conviction is unmerited.

Sentence –

19. Sentencing is a discretion of the trial court. The grounds under which an appellate may interfere with a sentence imposed by the lower court are where it is shown that in passing sentence the trial court took into account an irrelevant factor or that a wrong principle was applied or that the sentence was so harsh and excessive that an error in principle must be inferred – See **Benard Kimani Gacheru –Vs- Republic (2002) eKLR.**

20. Mr. Malalah took issue with the sentence of 14 years imposed on the appellant. He submitted that the appellant was a minor at the time of sentence and should hence have been dealt with in accordance with the provisions of the Children Act. Mr. Malalah did however concede that the court proceedings did not indicate that the appellant was a minor. The trial magistrate did not state that the appellant was a minor. The magistrate only stated during sentencing that he had considered the apparent ages of the accused persons. That in itself does not mean that the accused were minors. It only meant that the court had considered the apparent age of the accused persons and hence opted to sentence each of them to 14 years imprisonment. The appellant did not lay any evidence before the lower court or before this court to indicate that he was a minor at the time that he committed the offence or when he was sentenced. If the appellant was a minor at the time of sentencing, the burden of proof was on him to prove so. Such evidence was most likely easily available to him but he declined to produce it for reasons best known to him. There is then no basis of holding that he was a minor at the time that he was sentenced. The trial court did not thereby fail to take into account a relevant factor in sentencing the appellant.

21. The appellant was sentenced to serve 14 years imprisonment for the offence of robbery with violence. The appellant and his colleagues cut the complainant with pangas and occasioned him serious injuries. They robbed him of Ksh. 2,200/=.

22. Section 333 (2) of the Penal Code requires a court when sentencing an accused person to take into account the time spent in custody awaiting trial.

23. I have considered sentences meted out in other cases involving robbery with violence contrary to Section 296 (2) of the Penal Code. In **Douglas Muthaura Ntoribi –Vs- Republic, Meru High Court Misc. Criminal Appeal No. 4 of 2015** where the accused had been sentenced to death, Chitembwe J. substituted the sentence with a prison term of 15 years upon considering that the robbers stole a paltry Ksh. 500/= and that the victim sustained minor injuries.

24. In **Benjamin Kemboi Kipkone –Vs- Republic (2018) eKLR** where 3 robbers armed with an AK 47 rifle robbed the complainant of Ksh. 250,000/= and a mobile phone Chemitei J. substituted the death sentence with 20 years imprisonment.

25. In **Paul Ouma Otieno –Vs- Republic (2018) eKLR** where the accused was armed with an AK 47 rifle and a kitchen knife robbed the complainant of Ksh. 450,000/= and 3 mobile phones, Majanja J. substituted the death sentence with 20 years imprisonment.

26. In **Wycliffe Wangugi Mafura –Vs- Republic Eldoret Criminal Appeal No. 22 of 2016 (2018)** the Court of Appeal imposed a sentence of 20 years imprisonment where the appellant was involved in robbing an Mpesa shop agent with the use of firearm.

27. The appellant was in custody for two years while undergoing trial. Having regard to the above cited authorities and putting into mind that the robbers cut the complainant severally thereby occasioning him serious injuries, I am of the considered view that the sentence of 14 years imprisonment was neither harsh nor excessive. The appeal on sentence is therefore unmerited.

28. The upshot is that the appeal has no merits and is accordingly dismissed in its entirety.

Delivered, dated and signed in open court at Kakamega this 31st day of October, 2019.

J. NJAGI

JUDGE

In the presence of:

Miss Ombega for state/respondent

Miss Mburu for appellant

Appellant

Court Assistant - Polycarp

14 days right of appeal.