REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NOS. 136 OF 2018 and **10 OF 2019**

(CONSOLIDATED)

PATRICK MAKAU MUSEMBI.....1ST APPELLANT

JOHN MUSYOKA MUTUNGA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Being an appeal from the conviction and sentence passed by G.O. Shikwe (SRM)*

*in Kithimani Criminal Case 552 of 2015 on 7.9.2015***)**

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

JOHN MUSYOKA MUTUNGA.....1ST ACCUSED

PATRICK MAKAU MUSEMBI.....2ND ACCUSED

JUDGEMENT

1. The Appellants herein, **PATRICK MAKAU MUSEMBI** and **JOHN MUSYOKA MUTUNGA** were jointly charged with two of their co-accused with two counts of the offence of robbery with violence contrary to Section 295(1) as read with Section 296(2) of the Penal Code. The particulars in respect of count one were that on the night of 23rd to 24th December, 2014 at Kasioni village within Machakos county jointly with others not before court robbed Dennis Matolo Matheka of a mobile phone make Nokia 520, a pair of gumboots, a pair of shoes, an inverter all valued at Kshs 25,499/- and cash Kshs 10,000/- and 55 US Dollars and after the time of such robbery used actual violence to the said Dennis Matolo Matheka. In respect of count two the particulars were that on the night of 23rd to 24th December, 2014 at Kasioni village within Machakos county jointly with others not before court robbed Beatrice Wangui of a mobile phone make Samsung G350E, assorted Airtel/Safaricom scratch cards and assorted foodstuffs all valued at Kshs. 26,499/- and after the time of such robbery used actual violence to the said Beatrice Wangui.

2. After hearing the evidence, the learned magistrate on 7th September, 2018 found the 1st to 3rd accused persons guilty, convicted them accordingly and sentenced the 1st and 2nd appellants to 10 years imprisonment each, the 3rd accused to 4 years. In respect of the 4th accused he was convicted on a cognate offence of handling stolen property because the court found that he was not identified. The trial court framed one issue for determination being that of identification and placed reliance on the case of **Wamunga v R (1989) KLR 424** and found that the circumstances were favourable for identification of the 1st and 3rd accused persons. The appellants were dissatisfied with the findings of the trial court hence this appeal.

3. This is a first appellate court. I am expected to analyze and evaluate afresh all the evidence adduced before the lower court and draw my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a 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 findings and draw its own conclusions. Only then can it decide whether the magistrate's findings 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, see Peters vs. Sunday Post [1958] E.A 424."

4. In that regard, the evidence of the trial court was from 9 witnesses as follows. Pw1 was Dennis Matolo Matheka who testified that on 24.12.2014 he was at home and at 2.00 am he was woken up by the sound of three dogs barking. He switched on the lights and the security lights were on to enable him see six people who started hitting the grills and later they cut the grill window to the sitting room and got inside. He was able to identify the 2nd appellant known by his local name as "Tali" and the said 2nd appellant took the Nokia 520 and Samsung K 350E that was given to him after he demanded for them. He told the court that six people got into the house and the 3rd accused cut his head and leg with a panga and he gave them Kshs 10,000/- and 55 US Dollars and they took airtime credit worth Kshs 3,000/- that his wife sells, beat his wife with a rungu and took gum boots, an inverter, a pair of shoes, a raincoat and Christmas shopping. It was his testimony that they went to Hospital and were issued with P3 forms then they went to Donyo Sabuk police station and further that on 30th he met the 3rd accused at the market and had him arrested then on 31st he got a call that Tali had been arrested and was able to identify him at the police station. He presented in court the receipts for the three mobile phones that were stolen and the P3 forms. On cross examination, he testified that he had spotted the 2nd appellant severally at the market and he saw him when he was handing the cash and mobile phones to him during the ordeal; he identified the 3rd accused as the one who cut him with a panga and the 4th accused was found with the stolen phone.

5. Pw2 was Beatrice Wangui who told court that on 24.12.2014 she was at home with Pw1, her husband and at 2.00 am her husband was woken by dogs barking whereupon she overheard people telling him that they wanted Kshs 60,000/- and he gave them Kshs 10,000/- and 3 mobile phones and she gave them Kshs 700/- and they took airtime worth Kshs 3,000/- that she had in her purse. It was her testimony that they took US Dollars from her purse and hit her on her back, hands, legs and she later found out that gum boots, an inverter and a raincoat were missing. She was able to identify the 1st appellant because he is the one who said he would rape her and when the ordeal was over, neighbours came and took them to hospital and after they reported to Donyo Sabuk, they were given P3 forms. She told the court that on 31.12.2014 she identified the 2nd appellant at the police station and on cross examination, she testified that she was able to identify the 1st appellant and saw him by his face on the day of the ordeal.

6. Pw3 was Kelvin Gikundi Murungi who told the court that on 28.1.2015, Michael Njoroge Wanjiku sold him a phone that was later discovered to have been stolen and the police arrested the 4th accused and the Nokia 520 was taken by the police.

7. Pw4 was Chief Inspector Joyce Njeri Mbote who told the court that she received instructions on 31.12.2014 to conduct an identification parade and 8 persons were availed whereupon she paraded them and Pw2 was able to pick out Patrick Makau Musembi then the identification parade form was signed by the 1st appellant and produced in court. She testified that she also paraded 8 persons together with the 2nd appellant and Pw1 was able to identify the 2nd appellant by touching him and that the 2nd appellant signed the identification parade form and it was produced in court.

8. Pw5 was Cpl Ezekiel Omise who received a report on 24.12.2014 of a robbery and he went to the scene where he saw two broken window grills and Pw1 and Pw2 narrated to him on the incident and Pw1 informed him that he was able to identify Mutunga Musyoka.

9. The court observed that Section 200 of the CPC was not complied with hence the trial started afresh and Pw1 to 5 reiterated their testimonies.

10. Joseph Mwaniki was the clinical officer who testified as Pw3 when the trial started afresh and he presented the P3 forms in respect of examination that was carried on Pw1 and Pw2 on 30.12.2014 and assessed the injury as harm. The P3 forms were tendered in evidence. The burden of proving the guilt of the accused is on the prosecution. The accused does not bear the burden of proving his innocence.

11. Pw 7 was Pc Geoffrey Gakuna who testified that he was the investigating officer and that he received the report on 24.12.2014 whereupon he visited the scene and recovered a shoe; he told the court that Pw1 was able to identify 'Tally' which was the street name of Musyoka who is the 2nd Appellant. It was his testimony that he arrested the 2nd appellant on 30.12.2014 and that Thomas Mutisya was brought the same day whereas the 1st appellant was arrested on 29.12.2014 after being tipped by an informant. On cross-examination, he testified that he was not there when the 2nd appellant was being arrested.

12. Pw8 was Pc James Wanjohi Mwangi who testified that he was able to track a Lumia S20 that had been reported stolen.

13. Pw9 was IP Dennis Njageb Kibara who testified that he was able to track a Nokia Lumia S20 that had been reported stolen.

14. The trial court found that the appellants had a case to answer and they were put on their defence. The 2nd appellant told the court that he was brought to court on 5.1.2015 and he did not know the charges. The 1st appellant testified that he was arrested on 29.12.2014 and he did not know why and the defence closed their case.

15. In a case of robbery with violence, the prosecution must prove beyond reasonable doubt that:

(i) There was theft of property;

(ii) There was violence involved;

(iii) There was a threat to use a deadly weapon or actual use of it; and

(iv) The accused took part in the robbery.

16. I note that the trial court did not address itself as to the elements of the offence and I will do so. As to whether there was theft of property, there is evidence of Pw1 and Pw2 that on 24.12.2014 at night they were attacked by thugs who robbed them of property namely phones, money, an inverter, gum boots, shoes and a raincoat as well as airtime from their home. The offence was investigated by police according to the evidence of Pw6, 7, 8 and 9. I have seen no cause to doubt the evidence of these witnesses. In the circumstances, I find as a fact that the prosecution has proved beyond reasonable doubt that theft was committed on 24.12.2014 to the prejudice of PW1 and his wife (Pw2).

17. As to whether or not there was violence, both witnesses (PW1 and PW2) testified that they heard a bang on the door. PW1 woke up and moved out of their bedroom. As he was doing so, he came face to face with a man who was by now opening another door. That man beat him and his wife with a rungu and cut them with a panga and demanded money and phones and he complied. In law, where a demand is made by a person who has used violence it is my considered opinion that these acts of the attackers upon PW1 and Pw2 amounted to violence within the meaning of section 295 of the Penal Code Act. The second ingredient of the offence has also been proved beyond reasonable doubt.

18. This leads me to the issue of whether or not there was use of an offensive weapon or a threat to use it. A deadly weapon is defined in section 89 (4) of the Penal Code to mean any article made or adapted for use for causing injury to the person, or intended by the person having it in his possession or under his control for such use. From the evidence of Pw1 and Pw2, the P3 form that was tendered in evidence, it is clear that the use of an offensive weapon was proved by the prosecution. In view of that concession, I find that this ingredient of the offence has been proved beyond reasonable doubt. As to whether the appellants took part in the robbery, the whole issue hinges on the question of identification made by Pw1 and Pw2. There is also the issue of the doctrine of recent possession of stolen property.

19. I will start with identification evidence. It is contained in the testimony of Pw1 and Pw2. PW1's evidence is that he met face to face with an assailant in the doorway. It was his evidence that the assailant was locally known as "talli" and was the 2nd appellant herein. PW2 also testified that the thug who entered their home and threatened to rape her was the 1st appellant herein. Their evidence brings into focus the issue of visual identification. In determining the correctness of visual identification, I have taken into account the following factors:

(i) The length of time the thug was under observation;

(ii) The distance between Pw1 and Pw2 and the suspect;

(iii) The lighting conditions at the time; and

(iv) The familiarity of the witnesses with the accused.

20. As regards the length of time the thugs were under observation, both witnesses stated that it was for a reasonable time. And for the distance between them, both witnesses stated that the distance was short. This was in their living room. As for the source of light at the time, both witnesses stated that electric light had been left on and there is no evidence that it was switched off. As to the familiarity of the witnesses with the attackers, Pw1 stated that they had seen the appellant in the area before the incident. In their defence, the appellants told the court nothing that was of assistance to controvert the evidence of the prosecution witnesses. In my view, this was identification made under favourable conditions. In the instant case, the appellants were arrested few days after the incident and in these circumstances, I am of the view that the two witnesses themselves had no doubt in the identity of the appellants as the persons who robbed them and they had no difficulty in pointing them out during the identification parade.

21. I now move to the issue of the identification parade and I am satisfied that the evidence supplements the primary evidence of identification. The 1st appellant has alluded to a grudge, however I have failed to see the connection between such a grudge and this case. I am of the view that it is a fabricated grudge. I find that there was a joint action of the appellants in prosecuting a common purpose as stipulated in section 21 of the Penal Code and I agree with the finding that found the appellants guilty of robbery with violence and uphold the conviction of the trial court. I find the appellant's conviction was safe in the circumstances and I see no reason to disturb it.

22. With regard to sentence, Section 296(2) provides for a death sentence and therefore the sentence passed upon the appellants is lenient. On reviewing all the evidence and the relevant factors relating to the sentence I find that considering the injuries inflicted on the victim and the fact that the maximum sentence for robbery with violence is death as was found in **Francis Matu Mwangi v Republic [2019] eKLR,** where the death sentence in respect of robbery with violence was upheld. Nevertheless in **Leonard Kipkemoi v Republic [2018] eKLR,** death penalty was reduced to 20 years from the date of sentencing having placed reliance on the case of **Francis Karioko Muruatetu & another v Republic [2017] eKLR.**

23. In this regard, Section 354 of the Criminal Procedure Code allows the court to **alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence** therefore the sentence of the appellants ought to be enhanced. Going by the above authorities I find a sentence of twenty (20) years is appropriate in the circumstances. As the appellants remained in custody throughout the trial, the sentence should start from the date of arrest namely 30.12.2014.

24. In the result the appellants' appeal lacks merit. The conviction by the trial court is upheld and the sentence of ten (10) years is set aside and substituted with a sentence of twenty (20) years imprisonment from the date of arrest namely 30.12.2014.

Orders accordingly.

Judgement read, signed and delivered in open court at Machakos this 29th day of October, 2019.

D. K. Kemei

Judge