REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 124 OF 2017

BETWEEN

MAXWELL SHIHUNZA :: APPELLANT

AND

REPUBLIC :: RESPONDENT

(Being an appeal from the original conviction and sentence of death for the offence of Robbery with Violencecontrary to Section 295 as read with Section 296(2)of the Penal Codein a judgment delivered by Hon.E. Malesi, Senior Resident Magistrate, on 14th September 2017 in Kakamega Chief Magistrate's Court Criminal Case No. 1600 of 2015)

CORAM:BEFORE LADY JUSTICE RUTH N. SITATI

JUDGMENT

Background

1.The appellant was charged together with other people with the offence of ***Robbery with violence, contrary to section 295 as read with 296(2) of the Penal Code.*** The particulars are that on the 14th day of January 2015, at Sanjero village, Shingoto sub-location, Shibuye location in Kakamega East district within Kakamega County, the appellant jointly with others, while armed with crude weapons namely a gun, Somali sword and rungus, robbed Kennedy Lutenyo Aronya of cash Kshs. 10,200/-, two mobile phones make *Nokia,* 5 bedsheets, 3 pairs of suits, 1 set of hot pots, national identity card, Equity bank ATM card, Family Bank ATM card all valued at Kshs. 27,600/- and immediately after such robbery wounded the said Kennedy Lutenyo Aronya.

2.At the conclusion of the trial, the learned trial magistrate found the appellant guilty as charged, convicted him and sentenced him to death.

The Appeal

3.This appeal was filed by the appellant on 17th October 2017.He sets out the following grounds **THAT:-**

i. The learned trial magistrateerred in law and fact in convicting the appellant against the weight of the available evidence to prove the nature of this case.

ii.The learned trial magistrate grossly erred in convicting the appellant when the prosecution had failed to prove its case against him beyond reasonable doubt.

iii.The learned trial magistrateerred in law and fact by failing to find that the evidence on record was not corroborated as he found it.

iv.The learned trial magistrate erred in law and fact in believing the complainant's testimony as a wholesale truth despite glaring gaps in their testimony.

v.The learned trial magistrate gravelyerred in law in purporting to shift the burden of proof to the appellant contrary to the law.

vi.The decision of the trial court was made without proper justification and the same was totally biased on anticipation not warranted by evidence on record hence unsafe to make such a finding as it did which was contrary to the law.

vii.The learned trial magistrate erred in law and fact in failing to discharge his statutory duties in evaluating the evidence on record and arriving at a wrong decision.

viii.The learned trial magistrate erred in law and facts in finding the appellant was properly placed at the scene of the crime.

ix.The learned trial magistrate erred in law and fact by holding that the appellant was properly identified without warning himself of the danger of possibility of error under such difficult circumstances without any evidence to back such findings hence causing miscarriage of justice.

4.This is the first appeal, and as such the principlesset out in the case of ***David Njuguna Wairimu V – Republic [2010] eKLR*** are applicable.In the case, the Court of Appeal pronounced itself on the duty of a first appellate court thus:-

> ***"The duty of the first appellate court is to analyze and 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 appellate 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."***

5.In ***Okeno vs. Republic [1972] EA 32***the Court held, *inter alia*, THAT:-

> ***"An Appellant on a first appeal is entitled to expect theevidence 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."***

Issues For Determination

6.From the evidence on record, the law and the submissions, the following issues arise for determination:-

Whether the appellant was in the company of one or more persons.

Whether the appellant was armed with either a gun, Somali sword or rungu.

Whether the appellant wounded the complainant /PW1 in the process of stealing.

Whether the appellant was positively and properly identified.

Whether the sentence imposed by the learned trial court was harsh and/or excessive in the circumstances.

a) Whether the appellant was in the company of one or more

7.One of the ingredients necessary to prove the offence of robbery with violence is that the offender must be in the company of one or more persons. (See the Court of Appeal in ***Oluoch –VS – Republic [1985] eKLR*** and a 3-judge bench decision in the case of ***Joseph Kaberia Kahinga & 11 others v Attorney General [2016] eKLR).***

8.The complainant, **Kennedy Lutenyo Aronya,** testified as PW1 and stated that on the material day, he was attacked in his house by people disguised as police officers, with one of them being the appellant and added that he saw about three people. **Kennedy Musonye** testified as PW2 and stated that he was a grandson staying with PW1 when they were attacked by four people. **Jedida Tivina Isiongo** testified as PW3 and stated that she was together with PW1 when they were attacked and robbed by "many people" she said were in police uniform clad. **Cpl Erick Ngetich** testified as PW6 and stated that he was the investigating officer in the case and that he was informed by PW1 that he and PW3 had been attacked by people who had identified themselves as police officers.

9.From the evidence, it is clear that the attack on PW1 and PW3 was committed by more than one person.

b) Whether the appellant was armed with either a gun, Somali sword or rungu

10. Another ingredient necessary to satisfy the offence of robbery with violence is the fact of the offender being armed withany dangerous and offensive weapons or instrument (See the Court of Appeal in ***Oluoch –VS – Republic*****(supra).**

11. PW1 testified that he saw the appellant with a long rungu. PW3 testified that the attackers were armed with rungus, Somali swords and pangas with the appellant being armed with a Somali sword. PW6 testified that he was informed by PW1's children that the attackers were armed with crude weapons and a gun with PW1 informing him that the appellant was armed with a Somali sword. While some instruments or weapons would be obvious without the need of defining them, there are others which are not as obvious. For instance, under the definition of dangerous or offensive weapon, is included at one extreme, a stone or stick and the other extreme a firearm ***(Joseph Kaberia Kahinga & 11 others v Attorney General case)(supra)***.Pangas, rungus, Somali swords are such dangerous weapons that do not need defining.In the instant case, I find that the respondent was able to satisfy this ingredient that PW1 and PW3's attackers were armed withdangerous and offensive weapons.

c) Whether the appellant wounded the complainant /PW1 in the process of stealing

12. Another ingredient necessary to prove the offence of robbery with violence is the fact that the offender immediately before or immediately after the time of the robbery, wounds, beats, strikes or threatens to use other personal violence (See the Court of Appeal in the ***Oluoch –VS – Republic Case (***above)**;** as well as the ***Joseph Kaberia Kahinga & 11 others v Attorney General Case***(above).

13. PW1 testified that the appellant hit him with a rungu on the face which left him unconscious. PW2 testified that he saw the attackers beating up PW3. PW3 testified that the attackers beat her up as well and demanded money from her. PW3 added that they beat up PW1 and tied his legs on the bed. On cross-examination, PW3 stated that she was cut in the abdomen with the Somali sword. PW6 also testified that PW3 had been stabbed in the lower abdomen and was beaten on the shoulder and back. **Peter Shitoshe,**

who testified as PW5 stated that he treated PW1 and produced his P3 medical report and treatment notes as *Pexhibit1* and *Pexhibit2* respectively. PW5 testified that PW1 had injuries on the head and his left eye was swollen and reddish. PW5 classified the injuries as '**harm**' which were likely caused by a blunt object.

14. PW5 further stated that he treated PW3 who had injuries on the lower abdomen and bruises on her right hand. Similarly, PW5 classified her injuries as harm and produced her P3 medical report and treatmentnotes as *Pexhibit 3* and *Pexhibit 4* respectively. This evidence corroborates that of PW1 who stated that he was hit on the head by a blunt object and that of PW3 who stated that she had been stabbed in the abdomen.

15. Based on the evidence above, I find that the respondent firmly established through cogent evidence that the attackers of PW1 and PW3 wounded both of them during the robbery.

d) Whether the appellant was positively and properly identified

16. Identification is a crucial ingredient in this case. The ultimate question in all criminal proceedings is whether the person(s) brought before the trial court actually committed the offence(s) with which they have been charged.

17. PW1 testified that he recognized and knew the appellant at the time of the robbery. PW1 added that he used to see the appellant in the village where he stayed and that he was able to identify the appellant during the robbery with the help of light from a chimney lamp that he had. PW2 testified that he knew the appellant but he did not see him that night. PW3 testified that he knew the appellant by his nickname and that PW1 was able to identify him and call him out on the material day. PW3 added that they had a lantern lamp while the attackers had torches. PW6 testified that he was informed by PW1 that the appellant was one of the attackers and PW1 was able to identify him using light from the lantern lamp PW3 had lit as the robbers broke into the house.

18. In his defence, the appellant testified that he knew PW1 and lived four kilometers from PW1's home. The appellant added that PW3 was a neighbor of his in-laws and that the he used to be PW3's customer.

19. The Court of Appeal, in the case of ***Jali Kazungu Gona v Republic [2017] eKLR*** held that:-

> ***"In Wamunga vs. Republic [1989] KLR 424 this Court while discussing the caution to be taken where the only evidence against an accused is of identification succinctly stated: -***
>
> ***"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".***
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> **(See Court of Appeal in Maitanyi vs. Republic[1986] KLR 198 and D.K Kemei J inHassan Abdallah Mohammed v Republic [2017] eKLR,)**

20. I find that the appellant, the complainant and PW3 all knew each other even before the incident going by the evidence of the three of them. The evidence on record indicates that PW1 was able to immediately identify and recognize the appellant at the door as the robbers forced their way into his house. The evidence further indicates that the appellant and his accomplices were in PW1's house for close to an hour and they engaged both PW1 and PW3 in conversation even as with the appellant hit PW1 with a rungu and stabbed PW3 in the abdomen. I find no reason to doubt the identification of the appellant by both PW1 and PW3.

21. From all the above, it is my finding that the respondent discharged the burden of proof to the required

standard of beyond reasonable doubt for the offence of ***robbery with violence contrary to section 296(2) of the Penal Code*** as against the appellant. The respondent proved that PW1 was robbed by the appellant together with his accomplices.The respondent also proved thatthe appellant, together with his accomplices were armed with dangerous weapons namely gun, Somali sword and rungus which weapons were used to inflict injuries on PW1 and PW3 during the robbery. The respondent also proved that during the robbery, PW1 lost cash, mobile phones, bed sheets, suits and other items all valued at Kshs.27,600/-.

22. I am satisfied that PW1 and PW3 were able to identify the appellant by recognition and I am in agreement with the learned trial magistrate that the appellant was rightly placed at the crime scene.

e) Whether the sentence imposed by the learned trial court was harsh and/or excessive in the circumstances

23. The Supreme Court of Kenya in the case of ***Francis Karioko Muruatetu & Another versus Republic [2017] eKLR*** declared the mandatory death penalty unconstitutional for the reason that such a sentence deprives a trial court of its discretionary power in sentencing. The Court went further to state that courts ought to take into account the following factors before deciding what sentence to mete out:-

> ***"(a) age of the offender;***
>
> ***(b) the fact of being a first offender;***
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> ***(c) whether the offender pleaded guilty;***
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> ***(d)character and record of the offender;***
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> ***(e) commission of the offence in response to gender-based violence;***
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> ***(f) remorsefulness of the offender;***
>
> ***(g) the possibility of reform and social re-adaptation of the offender;***
>
> ***(h) any other factor that the Court considers relevant."***

24. The Court of Appeal in the case of ***William Okungu Kittiny v Republic [2018] eKLR,*** while noting that ***section 296(2) of the Penal Code prescribed*** a death penalty stated:-

> ***"The appellant was sentenced to death for robbery with violence under Section 296 (2).The punishment provided for murder under Section 203 as read with Section 204 and for robbery with violence and attempted robbery with violence under Section 296 (2) and 297 (2) is death.By Article 27 (1) of the Constitution, every person has inter alia, the right to equal protection and equal benefit of the law.Although the Muruatetu's case specifically dealt with the death sentence for murder, the decision broadly considered the constitutionality of the death sentence in general.***
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> ***In the Mutiso case which was affirmed by the Supreme Court, the Court of Appeal said obiter that the arguments set out in that case in respect of Section 203 as read with Section 204 of the Penal Code might apply to other capital offences.Moreover, the Supreme Court in paragraph 111 referred to similar mandatory death sentences.***
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> ***[9]From the foregoing, we hold that the findings and holding of the Supreme Court particularly in paragraph 69 applies mutatis mutandis to Section 296 (2) and 297 (2) of the Penal Code.Thus, the sentence of death under Section 296 (2) and 297 (2) of the Penal Code is a discretionary maximum punishment.To the extent that Section 296 (2) and 297 (2) of the Penal Code provides for mandatory death sentence the Sections are inconsistent with Constitution.***

……

"ByArticle 163 (7)of the Constitution, the decision of the Supreme Court has immediate and binding effect on all other courts."

25. In this present case, the record indicates that the appellant had no previous criminal records meaning that he was a first offender. In mitigation, the appellant showed no remorse by insisting that he knew nothing about the case. The appellant inflicted serious injuries on PW1 and PW3 that were classified as 'harm' by PW5.There is no indication that the items stolen from PW1 and PW3 were ever recovered. Further, the appellant gave no mitigation and showed no remorse.In light of the aforementioned circumstances, it is my considered view that the appellant does not deserve any leniency from the court.The society would be at great risk with the appellant in its midst.However, considering the SupremeCourt jurisprudence in the ***Muruatetu Case (above)*** and the subsequent application of the same by the Court of Appeal, I find it necessary to interfere with the death penalty imposed by the trial court in this case.

Conclusion

26. In conclusion, I make the following orders on this appeal:-

a. The appellant's appeal on conviction has no merit and is accordingly dismissed.

b. The appellant's appeal on sentence is allowed to the extent that the death sentence be and is hereby set aside and substituted with imprisonment of forty (40) years with effect from 18.9.2017.

c. Right of appeal within 14 days from the date of this judgment.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kakamega on this 29th November, 2019

WILLIAM M. MUSYOKA

JUDGE

In the presence of:-

Appellant present in person

Ms. Omondi for respondent

Erick – Court assistant