



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 177 OF 2018

BRIAN KAMAU GIKONYO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrates court at Makadara Criminal Case No. 5966 of 2014 delivered by Hon. J. Kibosia, SRM on 30th July, 2018

JUDGMENT

1. The Appellant herein was charged with the offence of robbery with violence contrary to **Section 295** as read with **Section 296(2) of the Penal Code**. The particulars of the charges are that on the 24th day of December 2014 at Muthaiga in Nairobi within Nairobi County, jointly with another not before court and being armed with offensive weapons namely pistols robbed Eunice Njeri Ndungu of her mobile phone make Samsung Galaxy S Duos valued at Kshs. 18,000/=.

2. After conviction the Appellant was sentenced to serve 20 years imprisonment. He was dissatisfied by both the conviction and sentence against which he preferred the instant appeal. In a Memorandum of Appeal filed on 8th October, 2018, he raised six grounds of appeal which I have summarized into four as follows;

- a. That the prosecution failed to prove the offence beyond a reasonable doubt on account that no adverse report against him was made.
- b. That he was not positively identified.
- c. That the identification parade was a fraud in that the Force Standing. Orders governing how identification parades should be conducted were not followed.
- d. That the prosecution case was riddled by material contradiction and inconsistencies.
- e. That the prosecution failed to call crucial witnesses and
- f. That his defence was not considered.

3. The Appellant who was in person relied on written submissions filed on 22nd October, 2019. The Respondent represented by learned State Counsel, Ms. Nyauncho made oral submissions. On his part, the Appellant faulted the learned trial magistrate for holding that he was positively identified. He submitted that the conditions prevailing at the scene of robbery were not conducive for a positive identification. It was his case that since the key prosecution witnesses PW1 and 2 testified that there was an eye witness during the robbery, the said witness ought to have been called to corroborate their evidence. It was the Appellant's further submission that the manner in which he was arrested cast doubt on whether he participated in the robbery. He stated that the prosecution advanced a case that his arrest was after information of his involvement in the robbery by an informer. That unfortunately, the said informer was not called as a witness. In that case therefore, the key prosecution witnesses having not guided the police to his arrest was an indicator that they did not know who had robbed them.

4. The Appellant also raised the issue that his right to a fair trial under **Article 50 (2)(c) and (j) of the constitution** were violated. He cited the failure by the court to have him produced on several occasions and the failure by the prosecution not to provide him with witness statements that would have enabled him to conduct his defence. In this regard, he cited the case of **Thomas Patrick Gilbert Cholmondeley vs Republic (2008) eKLR**.

5. On the part of the Respondent, Ms. Nyauncho submitted that the prosecution proved its case beyond a reasonable doubt. She supported both the conviction and the sentence. As regards identification, she submitted that the robbery took place during broad daylight and furthermore, the complainant was in the company of PW2 who witnessed the robbery take place. In addition, the oral testimonies of PW1 and 2 on identification were corroborated by an identification parade that was carried out by PW4. On sentence, she submitted that the same was commensurate with the offence. She urged the court to take note of the fact that the Appellant was armed with a dangerous weapon namely a gun and that had another person one Mama Mwangi not intervened, the Appellant would have injured both PW1 and 2. Further, it was her view that in imposing the sentence the learned trial magistrate took into account both the Appellant's mitigation and the social inquiry report filed in court.

Summary of the evidence.

6. In brief, the case for the prosecution was that on the 24th day of December, 2014 at about 5.00 pm, **PW1 Unice Njeri Ndungú** as accompanied by **PW2 Lilian Karwitha** near Muthaiga Police station where they had gone to buy firewood. PW1 had gone to collect the firewood in a motor vehicle Reg. No. KAX 396 make Noah which he parked at the road side. Meanwhile, they both approached the firewood seller one, Mama Mwangi. As they spoke to her, PW1 was accosted by a man who demanded that she hands over everything she had. She had cash 1,000/= which she surrendered. The man brandished a gun at which point Mama Mwangi pleaded with him not to harm her and PW2. Meanwhile, PW2 fearing that she also would be robbed threw her phone into the car where the firewood had been parked. Nevertheless, her phone make Samsung was also stolen. She also surrendered after two boys approached her as one other was robbing PW1. According to PW2, Mama Mwangi also pleaded with the robbers not to harm them. After the robbers fled, a good Samaritan gave them a mobile phone which they used to call the office and thereafter they proceeded to Muthaiga Police Station where they reported the matter.

7. On 26th December, 2014 at around 5.45 pm, PC Joash Mwolenje of Muthaiga Police Station whilst in the company of Stephen Mbutithia was informed by an informer that the suspect in the robbery had been spotted at Mlango Kubwa area. They both proceeded to the area and arrested him. They escorted him to the police station where and identification parade was conducted on 27th December, 2014 by **PW4, Inspector Alphonse Kimeng'wa** in which PW1 positively identified the Appellant. The Appellant was accordingly arraigned in court.

8. In his sworn defence, the Appellant stated that on 26th December, 2014, he went to his sister's chemist where he remained between 3.00 and 4.00 pm. On his way back home, he was stopped by three police officers who arrested him without informing him of the reason for the arrest. He was charged on 28th December, 2014.

Analysis and Determination.

9. I have accordingly considered the evidence on record and I have deduced four issues for determination namely; whether the Appellant's right to a fair trial was violated, whether he was positively identified, whether crucial witnesses were called and whether the case was proved beyond the reasonable doubt.

10. As regards whether the Appellant's right to a fair trial was violated, the Appellant submitted that he was kept without production in court for a period longer than was necessary. This is factual as attested by the fact that he was arrested on 26th December, 2014 and arraigned in court on 28th December, 2014. The Constitution at Article 50(2)(c)(f) provides that a suspect should be presented in court within twenty four hours unless the date of the arrest falls on a weekend or a public holiday. Needless to state therefore is that the police violated the Appellant's right to be produced in court within twenty four hours. Be that as it may, this delay does not render the trial a nullity. The Appellant reserves the right to seek redress against the officer who violated his right by seeking civil damages.

11. He also submits that he was not provided with witness statements that would have enabled him to conduct a strong defence against the prosecution case. Without having to summarize the proceedings of each day, it is clear that on 29th June, 2017 before PW1 testified, he requested the court to accord him time to go through his statements which time had been earlier accorded to him. The same is attested by the proceedings of 20th June, 2017 where it is indicated that the court ordered that he be provided with statements forthwith. Nevertheless, on the 29th June, 2017 the hearing took off at 3.00 pm when in his own words he informed the court before PW1 testified that he was ready to proceed. In this regard, he cannot be had to say that he proceeded with the case without the prosecution witness statements. I find that submission and grounds of appeal without merit.

12. As regards his identification, this is a robbery that took place in broad daylight. Immediately after the robbery, the suspects fled. The Appellant who was one of them was later arrested after police were given a tip-off. PW1 was called to the police station to confirm whether he is the person who had robbed him before an identification parade was conducted. She and PW2 positively informed the police that he was one of the robbers. In my view therefore, the identification parade was not of much help. More so, because PW1 and her eye witness were first shown the Appellant before the parade was conducted. Further, an identification parade is useful where conditions prevailing at the time of robbery are difficult. It is subsequently conducted to affirm that indeed the victim was able to identify the assailant in difficult circumstances. This environment did not obtain in this case. It is a case where in broad daylight and with sufficiency of time PW1 and 2 were clearly able to see who robbed them. The witnesses therefore, did not labour to point out the Appellant when they met him in the Police Station.

13. As regards to whether crucial witnesses were not called, the Appellant cited the Mama Mwangi, the lady who was selling firewood to PW1. I agree she would have added weight as to whether the Appellant was indeed involved in the robbery. However, the evidence of PW1 was strongly corroborated by PW2 who too clearly was at the scene and saw what happened. As such, the failure to call mama Mwangi did not lessen the fact that the Appellant was properly identified.

14. The Appellant did also take issue with the fact that his defence was not considered in the judgment of the learned magistrate. I have had the opportunity of reading through the judgment. I agree with the Appellant. As a cardinal rule, the trial court must make a decision based on a proper evaluation of both the prosecution case and the defence of the accused. Reasons for the decision arrived at must also be given. The

judgement of the learned magistrate in this case appears to have been premised on the analysis of the prosecution case only.

15. Be that as it may, this being the first appellate court is charged with the duty of re-evaluating the entire evidence afresh and arrive at an independent conclusion. I have so done. A look at the Appellant's defence was that he was arrested for no apparent reason. This assertion was ousted by the strong prosecution evidence that he was properly identified and that he participated in the robbery.

16. On proof of the case, it is again my view that the necessary ingredients of the offence of robbery with violence as set out under **Section 296(2) of the Penal Code** were proved. The Appellant was accompanied by one other person, he was armed with a gun, he threatened to use violence against PW1 if she raised alarm and the robbers succeeded in stealing her money. The provision is clear that a proof of any of the elements set out is sufficient to warrant a conviction. The prosecution ably discharged its burden in establishing the requisite elements of the offence of robbery with violence.

17. Accordingly, it is my view that the offence was proved beyond all reasonable doubt. The conviction of the Appellant was therefore safe.

18. On sentence, the Appellant was sentenced to serve 20 years imprisonment. In so passing the sentence the learned magistrate stated that she had taken into account the Appellant's mitigation and a social enquiry report dated 27th July, 2018. Pursuant to the decision of the Supreme court in the case of Francis **Karioko Muruwatetu vs Republic [2017] eKLR** she imposed the sentence of 20 years imprisonment. On the part of this court, I agree with the learned State Counsel that the Appellant used a gun during the robbery. However, no one was hurt. It seems the robbers were only interested in the personal belongings of the victims. I therefore find that a sentence of 20 years was excessive in the circumstances. I set it aside and substitute with a ten (10) year jail term commencing the date of arrest which is 26th December, 2014. It is so ordered.

Dated and Delivered at Nairobi This 28th day of November, 2019.

G.W.NGENYE-MACHARIA

JUDGE.

In the presence of:

1. *Appellant in person*
2. *Ms. Kimani for the Respondent*