REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 75 OF 2018

JOSEPH MUTIE MUTUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Being an appeal from the conviction and sentence passed by M. Opanga (SPM) in Kangundo Criminal Case 222 of 2017 on 30.8.2018***)**

JUDGEMENT

1. The appellant herein, **JOSEPH MUTIE MUTUA** was charged with one count of the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code with the particulars being that the appellant on the 12th Day of January, 2017 at Matuu wa Mwiitu, Matuu Wendano Location, Matungulu Sub-county within Machakos County jointly with others not before court, while armed with crude weapons namely panga and iron bar robbed Phylix Ruth Musyoki of an amplifier GLD, DVD LG and KEG Pump all valued at Kshs 60,000/- and at the time of the robbery seriously injured PIUS NGAO KILONZO and killed one namely CHARLES NDOO NZIOKA.

2. After hearing the evidence, the learned magistrate on 30th August, 2018 found the appellant guilty, convicted him accordingly and sentenced the appellant to life imprisonment. The trial court framed two issues for determination being that of participation of the appellant and the commission of the offence of robbery with violence. The appellant was identified as the boda boda man common in the area; the theft of the items from the complainant's bar was confirmed and injuries vide the P3 form were confirmed. The appellant was dissatisfied with the findings of the trial court hence this appeal. The grounds of appeal are that the court did not consider his defence; that no weapon was produced in court; that the prosecution case was not proved to the required standard; that the charge sheet was defective.

3. The appeal was canvassed vide submissions. The appellant submitted that the charge was duplex because it combined the death and the injury to two different persons and this occasioned injustice. Reliance was placed on the case of **Ombogan v R (1983) KLR 340.** The appellant submitted that the court failed to caution itself on the danger of a sole identifying witness and relied on the case of **R v Turnbull (1976) 3 All ER.** It was the appellant's case that the prosecution's case was not proven beyond all reasonable doubt and added that his arrest was based on suspicion and that the trial court based the conviction on circumstantial evidence. He prayed that the appeal be allowed and the conviction quashed and the sentence set aside.

4. The state submitted that the appellant was arrested at the scene of crime hence mistaken identification does not arise. Counsel submitted on the issue of a defective charge sheet in placing reliance on the case of **Sigilani v R (2004) 2 KLR 480** that the test is prejudice occasioned to the appellant and in this regard

the appellant pleaded to one offence meaning there was no prejudice occasioned on him. Counsel submitted that the trial court considered all the evidence on record and agreed with its decision hence urged the court to dismiss the appeal and uphold the conviction and sentence of the trial court.

5. 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 v 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."**

6. In that regard, the evidence of the trial court was from five witnesses as follows. Pw1 was Phylix Ruth Musyoki who told the court that she is a bar owner and on 12th January, 2017 at 3.00 am she discovered that the appellant was in the club with a wounded head and she found that an amplifier, GID DVD LG and Keg pump were missing. She was informed by Pw3 that a watchman called Chris Ndolo had been murdered at night.

7. Pw2 was Pius Ngao Kilonzo who testified that he knew the appellant as a boda boda rider and that on 12th January, 2017 when he was at the subject bar he saw the appellant who beat him on his hand, legs and back with an iron rod and that the appellant was in the company of persons who had pangas. He told the court that he was carried to a thicket where he remained till 3.00 am and when the police came he went back to the bar where he found the appellant. It was his testimony that he was taken to Kangundo Level 4 Hospital and later to Machakos and he was given a P3 form. When Pw2 was recalled, he produced the P3 form, treatment notes and CT scan.

8. Pw3 was APC Duncan Ogweno who told the court that he was on patrol on 12th January, 2017 when he received information that there was an imminent break into a bar and when he reached the scene he found the appellant, a boda boda man in the area who was injured and wondered what he was doing there. On cross examination he told the court that the watchman identified the appellant as the one who hit him on the back.

9. Pw4 was Dominic Mbindyo from Kangundo Level 4 Hospital who handled the P3 form in respect of Pius Ngao Kilonzo as well as the CT scan report. He told the court that Pius was assaulted by thugs and had suffered injuries and examination revealed a fracture on the head, internal bleeding and the weapon used was opined to be a blunt injury. He told the court that the injury was grievous and that he signed and stamped the form on 2nd March, 2018.

10. Pw5 was Cpl Dominic Muthike who testified that he received a report of a robbery at Matuu and when he went to the scene he discovered that the robbery was at a bar owned by Pw1. He told the court that he had a post mortem report of Charles Ndoo who was killed in the robbery as well as a report that Pius was badly injured. It was his testimony that the appellant was found at the scene and he could not explain what he was doing there but however PW2 identified the appellant as being in the company of other robbers hence he was arrested and charges preferred against him.

11. The trial court found that the appellant had a case to answer and he was put on his defence. The appellant testified that he operates boda boda and that on 12th January, 2017 he woke up and ferried

children to school and went back home at 10 pm to attend to his sick child and when he was on his way to a pharmacy he was hit on the head. It was his testimony that he was sent to Kangundo Police Station to help with investigations and the defence closed its case.

12. 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

(iv) use of it; and

(v) ***The accused took part in the robbery***.

13. I shall address myself to the elements of the offence in performing the duty of the 1st appellate court. As to whether there was theft of property, there is evidence of Pw1 that on the material day, she found that an amplifier, GID DVD LG and Keg pump were missing from her bar. Whether the offence was investigated by Police is not clear from the evidence of Pw5. Be that as it may, I have seen no cause to doubt the evidence of Pw1. In these circumstances, I find as a fact that the prosecution has proved beyond reasonable doubt that theft was committed on 12.1.2017 to the prejudice of PW1.

14. As to whether or not there was violence, PW1 and PW3 testified that the door to the bar was broken and so was the padlock. Pw2 and Pw4 testified to the fact that Pw2 was beaten and sustained injuries. It is my considered opinion that these acts of the attackers upon PW1's bar 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.

15. 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 Act as means 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 Pw2 and Pw4, the P3 form that was tendered in evidence, it is clear that use of an offensive weapon was proved by the prosecution. The appellant has assailed the fact that there was no weapon presented in evidence. For clarity, i wish to observe that there are exhibits which are not recoverable because they are either hidden or destroyed. In this case what is required of the prosecution is to adduce evidence giving a description of the items which was indicated in the P3 form as well as the evidence of Pw2 and Pw4. In this case, the weapons used were not recovered but the description of the weapons and the injuries found on the victims were sufficient proof that objects described by the Pw2 as pangas or iron bars had been used.

16. In view of the evidence mentioned, I find that this ingredient of the offence has been proved beyond reasonable doubt. As to whether the appellant took part in the robbery, the whole issue hinges on the question of identification made by Pw2 as well as the circumstances under which Pw3 found him.

17. I will start with direct identification evidence as contained in the testimony of Pw2. PW2's evidence is that he met face to face with an assailant in the doorway. It was his evidence that he knew the appellant as a boda boda rider and that on 12th January, 2017 when he was at the subject bar he saw the appellant who beat him on his hand, legs and back with an iron rod and that the appellant was in the company of persons who had pangas. He told the court that he was carried to a thicket where he remained till 3.00 am and when the police came he went back to the bar where he found the appellant. His 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 appellant was under observation;

(ii) The distance between Pw2 and the appellant;

(iii) The lighting conditions at the time; and

(iv) The familiarity of Pw2 with the appellant.

18. As regards the length of time the appellant was under observation, it seemed to be a glimpse. And for the distance between them, he said that the distance was from 20 metres and later he got closer when he was hit at the scene. As for the source of light at the time, he said that the security lights were on and there is no evidence that it was switched off. As to the familiarity of Pw2 with the appellant, Pw2 said that the appellant was a boda boda man and the appellant corroborated this evidence. In his defence, the appellant told the court nothing that was of assistance to controvert the evidence of the prosecution witnesses. He imputed an alibi that he was at home nursing a sick child. However in my view, this was identification made under favourable conditions. In the instant case, he was found at the scene with a cut wound on his head; his presence was unexplained in these circumstances. I am of the view that Pw2 had no doubt in the identity of the appellant as the persons who robbed Pw1.

19. There is also the circumstantial evidence as presented by Pw3 and Pw1. For a finding of fact to be made based on circumstantial evidence, the court must be satisfied that there are no other co-existing circumstances which would weaken or destroy the inference of guilt. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt. It is necessary before drawing the inference of the accused's responsibility for the offence from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference (see **Shubadin Merali and another v. Uganda [1963] EA 647; Simon Musoke v. R [1958] EA 715; Teper v. R [1952] AC 480 and Onyango v. Uganda [1967] EA 328 at page 331**).

20. There is evidence that the appellant was seen at the scene and there was no explanation what he was doing there; he was found injured at the scene by Pw1 and Pw3 and in his defence, there is nothing that he gave so as to weaken the inference that he was not part of the gang of robbers.

21. The appellant has also raised the issue of contradiction and I am unable to agree that there are contradictions and further that there are contradictions that touch on the proof of the elements of the offence that the appellant is charged with.

22. The appellant raised the defence of alibi and assailed the trial magistrate for failing to consider it. The law on alibi is now well settled. It is that a prisoner who puts forward an alibi as an answer to a charge does not assume any burden of proving it. The burden remains on the prosecution to disprove it. If evidence adduced in support of an alibi raises a reasonable doubt as to the guilt of an accused person it is sufficient to secure an acquittal. (see ***Leonard Aniseth v. Republic*** (1963) EA 206).

23. To counter this defence, the prosecution was required to adduce direct or circumstantial evidence proving that the appellant was the perpetrator of the unlawful actions. This was proved by the testimony of the prosecution evidence as analyzed above. In this case, the prosecution largely rests on the accounts of P.W.1 and that of Pw2 that placed him at the scene of the crime. I have examined closely the identification evidence of Pw2 and Pw3 and found it to be free from the possibility of mistake or error since both witnesses knew the appellant before and on the fateful day Pw2 was in close proximity to him. The events Pw1, Pw2 and Pw3 narrated enabled them to correctly identify the appellant. In light of that evidence, I reject the appellant's alibi. I am satisfied that there was ample evidence which put him at the scene of crime.

24. I also find that there was a joint action of the appellant and his fellow thugs in prosecuting a common purpose as stipulated in section 21 of the Penal Code. It is highly likely that the injuries sustained by the appellant might have been as a result of a struggle with the night guard who was eventually killed. It is also possible that the night guard might have recognized the robbers and hence the fatal injuries inflicted on the said night guard. All these lead me to agree with the finding by the trial court that found the appellant guilty of robbery with violence. I find the conviction was sound and I uphold the same.

25. The appellant has assailed the trial court for relying on a defective charge sheet and in agreeing with the finding in **Sigilani v R (2004) 2 KLR 480** I find that there was no injustice occasioned to the appellant for he faced one charge; and unless he wants to face a second charge of murder, the DPP could be directed to press murder charges against him. I find that this ground of appeal lacks merit.

26. In view of the foregoing analysis I find that the appeal against conviction lacks merit and is dismissed. With regard to sentence, Section 296(2) provides for a death sentence and therefore the sentence meted on the appellant is lenient. On considering 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, I do not see the need to interfere with the sentence herein.

27. In this regard, Section 354 of the Criminal Procedure Code allows the court to maintain the sentence. Therefore the sentence passed by the trial court is upheld and that the appellant shall continue to serve the same in accordance with the law.

28. In the result the appeal is found to lack merit. The same is dismissed. The conviction and sentence by the trial court is upheld.

It is so ordered.

Dated and delivered at **Machakos** this **25th** day of **November, 2019**.

D. K. Kemei

Judge