REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 69 OF 2015

JACOB NGANDA KALUNDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the original conviction and sentence of Hon. D. G. Karani PM delivered on 5th March, 2015 in Kithimani Principal Magistrate's Court Criminal Case No. 503 of 2011)

JUDGEMENT

1. The Appellant has filed this appeal on the following grounds:

a. That the entire proceedings are incurably defective in that the trial court failed to comply with the mandatory provisions of section 200 (3) of the Criminal Procedure Code.

b. That the learned trial magistrate erred in both law and fact in failing to consider that the identification/ recognition in court by PW1 was not supported with evidence of the earliest report to the police as required by the law.

c. That the learned trial magistrate erred in both law and fact by failing to summon essential witnesses for the just determination of the case in contravention of Section 146 (4) and 150 of the Criminal Procedure Code.

d. That the testimonies tendered to establish the appellant's mode of arrest was riddled with doubts and was not enough to sustain a conviction.

e. That the learned magistrate erred in law and fact by failing to note that PW7 did not do any investigations and that if he did the same were shoddy.

f. That the learned trial magistrate erred in law and fact by rejecting the appellant's defence without assigning any good reason for so doing thereby contravening the provisions of section 169 of the Criminal Procedure Code.

2. The Appellant was on 18th August, 2011 charged with the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code. Particulars of the charge were that he on 12th December, 2010 at Kambi Mawe village in Yatta District within Machakos County, while armed with a dangerous weapon namely a knife, robbed Christine Muia Syombua of cash Kshs. 2,800/- and immediately after the time of robbery killed Rebecca Wanzila Kiluti alias Mama Mbithe. He was convicted of the offence and sentenced to suffer death.

3. The prosecution evidence was as follows. Esther Kalondu Nzoi (PW1) was on the material day at 6.50 pm in company of Rebecca Wanzila and her sister- in- law Christine Syombua. They were from Kambi Mawe heading home. On reaching a deserted area which had bushes on either side of the road and with no homesteads nearby, the Appellant who she said she knew well prior to the incident and who he schooled with emerged and pulled off Christine's shawl. He slapped her and demanded for money. When Rebecca told him that they had no money, he withdrew a knife from his waist and pointed it at Rebecca. He snatched Christine's bag which had PW1's Kshs. 2,800/-. PW1 ran away to get help. On her way, she met people but did not inform them of the incident. She went and called her sister-in-law by the name Faith Ndanu. She found her with neighbours who accompanied her to the scene. Upon reaching the scene, they only found Rebecca who had died. Christine had apparently run away too to seek help. Rebecca was said to have sustained a stub wound on the forehead. Yatta Police Station police were called and came together with the area sub-chief.

4. On 2nd April, 2011, Patrick Mutiso Munyasio was at Dr. Wambua's farm where he works. He at around 3.00 p.m. went to check on a goat that had delivered and found it missing. He alerted his colleagues and went for a search. They followed human footprints and of a goat. After walking for about 5 meters, they found the goat lying dead with its throat slit and liver removed. They also found a '*sufuria*' and a '*sufuria*'

holder which had been taken from the servant quarters. That when they went back home they realized some clothes had also been taken and some had fallen on the way. The house was found open. They followed the trail where the clothes had fallen. When they reached about 100 meters away, they saw a man carrying a five (5) litres plastic jerican. On seeing the search team, he dropped the jerican and a document. The document was said to be a list of women he had to kill whether or not they had money or mobile phones. That in the list there were the words '*Mama Mbithe, mama na watoto wawili*.' He later heard that a lady by the name Mama Mbithe had been killed. He reported the incidence of the goat to the police but retained the document. After some time, he heard that a suspect who had been terrorizing people in the area had been arrested. Yatta police station OCS informed him that the suspect was in police custody. He went there and gave the document to the police. The document was produced as P. Exhibit 1.

5. Chief Inspector Alexander Korir (PW3) from Yatta Police Station conducted an identification parade. He paraded the appellant and eight (8) other men of the same height and age as the appellant. He asked one of the witnesses to identify the man who killed Rebecca and she positively identified the appellant by touching his shoulder. The exercise was said to have ended well with no resistance or objection from the appellant. PW3 filled the form and it was signed by the appellant. The identification parade form was produced as P. Exhibit 2.

6. Dr. Simon Kioko Muli carried out a post mortem on Rebecca Wanzila Kiluti on 19th December, 2010. He stated that Rebecca's clothes were blood stained and was obese. Blood was oozing from her nose and she had penetrating wounds on the chest. That the injury was on the 2nd interiostal space. That it was a stab wound. His findings were that she died as a result of cardiopulmonary arrest from a penetrating chest wound. He produced the report to that effect as P. Exhibit 3.

7. Festus Kiambi (PW5) took the appellant's statement and found the charge of robbery with violence the necessary and not murder. He was handed over P. Exhibit 1 and he got specimen handwriting, P. Exhibit 4 from the appellant. He prepared an exhibit memo (P. Exhibit 5) forwarded to a documents examiner. He got a report (P. Exhibit 6) on the same date from the Government analyst dated the same date 2 nd September, 2011.

8. Alex Mwongela (PW 6) who is a document examiner received the handwriting specimen. The examination was however carried out by Inspector Daniel Gutu whose handwriting he stated he was familiar with. Inspector Gitu was away on leave and PW6 was called to produce the exhibit memo (P. Exhibit 5 (a) and (b) and the report of the document examination on his behalf.

9. Police Constable Joseph Kibor (PW7) on 12th December, 2010 at about 9.00 p.m. received information from the area chief Mavoloni that Rebecca had been stabbed to death while on her way home. He and Corporal Nancy proceeded to the scene where they found Rebecca's body lying in a pool of blood along a footpath. Rebecca had a deep stab wound on the right side of the chest. The chief informed him that Rebecca had gone to withdraw money in company of her daughters. That the assailant emerged from the bush and stabbed the deceased forcing the daughters to run away. They moved the body to Matuu Nursing Home and later a postmortem was conducted. That the CID Matuu commenced investigations and the Appellant was arrested and charged.

10. The Appellant was put on his defence but declined to testify stating that he knew nothing about the case. He was convicted of the offence and sentenced to death.

11. In his submissions, the appellant contended that section 200 (3) of the Criminal Procedure Code was not complied with. He particularly lamented that he was not asked whether or not he wished to re-call any witness. That the magistrate did not specifically inform him of his right to demand the re-call of witnesses who had already testified. In support of the argument thereof, the appellant cited **Rebecca Mwikali Nabutola v. Republic [2012] eKLR**, **Raphael v. Republic [1969] EA 544**, **Bob Ayub alias Edward Gabriel Mbwana alias Robert Mandiga v. Republic [2010] eKLR**, **Antony Musee Matinge v. Republic [2012] eKLR**, **David Kimani Njuguna v. Republic, COA Criminal Appeal No. 294 of 2010** among others.

12. The Appellant further submitted that his rights to fair trial were infringed. That the trial court made orders that he be supplied with witness statement but commenced trial without inquiring whether or not he had been supplied with the said documents. Under this head, the appellant cited **Paul Thiba Ndungu v. Republic, Criminal Appeal No. 152 of 2012**, **Thomas Patrick Gilbert Cholmondeley v. Republic [2008] eKLR**, **Cord and others v. Republic [2015] eKLR**, **Samuel Githua Ngari & another v. Republic Criminal Appeal No. 34 of 2012** and **Republic v. H & C [2004] 2 AC 134**.

13. The Appellant faulted the prosecution's evidence of identification. He contended that the prosecution evidence on identification having revolved around PW1 must be water-tight. Referring to the Occurrence book, the appellant submitted that it is doubtful that PW1 told Faith Ndanu that she had recognized the appellant. That the first report to the police was said to have been made by the area chief of Mavoloni location and that PW1 never mentioned the appellant's name to the police despite the fact that she alleged she knew him. In this regard, the appellant cited **Republic v. Eria Sebwato [1966] E.A.**, **John Bosco Ziro Kalume v. Republic COA Criminal Appeal No. 41 of 1998**, **Karar Singh Bheraj v. Republic [1913] 20 EACA 137** and **Mohamed Bin Allui v. Republic [1942] EACA 72** among others wherein the courts emphasized the importance of a complainant mentioning an assailant's name while making a report when it is claimed that such an assailant was recognized. That failure to so do weakens such evidence.

14. It was further submitted that the appellant was not arrested because the complainant pointed him out to the police but for some other reasons and that the failure to call the persons who arrested him was fatal to the prosecution case. In this regard the appellant cited **Bukenya & others v. Uganda [1972] EA 549** among others where the court held that it was the duty of the prosecution to call or make available all witnesses necessary to establish the truth. The appellant also cited James Muchene Kambo v. Republic, Nakuru Criminal Appeal No. 63 of 2003 where the court held:

> **"In the circumstances of this case, we are of the clear view that the prosecution's failure to call the police officer who arrested the Appellant left an unbridgeable gap in the prosecution case."**

And **Rwawu Mwangi v. Republic [2007] eKLR** where it was held:

"We are very perturbed by the careless and shoddy manner in which this serious case was handled. We do not see why the case was not fully investigated by an independent investigation officer. No clear record of arrest and detention of the accused at Chogoria police patrol base or any other where accused was detained and later charged, were put in evidence during the prosecution of the case."

15. On the other hand, the respondent contended that when the next witness was called to testify and after examination in chief, the Appellant made an application to be excluded from the proceedings since he did not have interest to participate in the proceedings thereby there was contravention of section 200 of the Criminal Procedure Code. Citing Article 50 (2) of the Constitution, particularly, 50 (2) (c), (g) (h) and (m), it was submitted that the appellant indicated to court that he was ready to proceed without raising any issue that he did not have witness statements. That when the prosecution indicated to the court that he had three witnesses in court the Appellant raised an issue that he did not have statements but stated that if he was supplied with statements he would be ready in an hour's time. That later on that day around 2.15 pm the case proceeded where the Appellant actively participated by cross examining the witness. That the appellant on 16th February, 2012 raised an issue that he had not been supplied with witness statement which occasioned an adjournment, on 10th May, 2012, the appellant asked for an adjournment on grounds that he did not have sufficient time to prepare for his case. That this was a ploy by the appellant to occasion adjournment since he was never ready to proceed with the matter. It was contended that at no point did the appellant tell the court that it had not been supplied with statements as ordered by the court.

16. On failure to call a crucial witness, it was submitted that section 143 of the Evidence Act provides that the prosecution is not under obligation to call a particular number of witnesses to prove any fact. The respondent further cited **Julius Kalewa Mutunga v. Republic Criminal Appeal No. 31 of 2005** and **Bukenya** case (supra). It was submitted that the witness referred to by the appellant does not prejudice the appellant's case since he was a person who arrested the appellant before he was re-arrested.

17. On the charge sheet, citing **Sigilani v. Republic [2004] 2 KLR 480** and section 134 of the Criminal Procedure Code, it was submitted that from the onset, the appellant knew the charge he was facing. That its particulars were clearly spelt out and further that he participated in the trial in a manner suggesting that he understood the charge he was facing. It was submitted that the defect in the charge sheet was curable under section 382 of the Criminal Procedure Code.

18. It was finally submitted that the trial magistrate in the judgment analyzed the evidence in detail and proceeded to make a finding. That when the appellant was placed in his defence, he refused to give evidence and alleged that he knew nothing about the offence.

19. I have carefully re-considered and re-evaluated the evidence on record with a view of arriving at my independent decision in this appeal bearing in mind that it is a first appeal. in my view, the following issues fall for this court's determination:

a. Whether or not section 200 (3) was complied with.

b. Whether or not the appellant was positively identified.

c. The effect of failure to call as a witness the person who arrested the Appellant.

d. Whether or not the evidence on arrest was doubtful.

e. Whether or not PW 7 did investigations.

f. Whether or not the trial magistrate rejected and or failed to consider the appellant's defence.

20. I shall address the issues seriatim. Section 200 (3) of the Criminal Procedure Code provides as follows:

"200. **(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and re-heard and the succeeding magistrate shall inform the accused person of that right."**

21. In a situation where some witnesses have been heard by the predecessor judicial officer, the hearing need not start afresh. The court may however re-summon a witness or witnesses and re-hear them with the intention of ensuring that he/she is able to personally assess their demeanor. The essence of applying this section is to ensure that an accused person is not prejudiced. See **Ndegwa v. Republic [1985] KLR 535** where it was held:

"…*No r*ule of natural justice, no rule of statutory protection, no rule of evidence and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosanct individual in the system of our legal administration…."

22. The said Section in my view is two-fold. While this section demands of an accused person to request for the witnesses to be re-summoned, it on the other hand demands of a succeeding judicial officer to inform an accused person of their right to re-call a witness. In this regard the words of Judge Dulu in **Anthony Musee Matinge v. R [2012] eKLR** are relevant:

"The legal requirement which has to be complied with while taking over proceedings from a previous magistrate by a succeeding magistrate is contained in Section 200 of the Criminal Procedure Code. The relevant part of which provides:

200 (3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be summoned and reheard and the succeeding magistrate shall inform the accused person of that right.

. . .The above provisions of law are couched in mandatory terms... In our present case, there is no record that the appellant was informed of his right to recall witnesses. Nor is there a record that he elected not to recall witnesses. ... The omission by the trial court was fatal to the proceedings. Therefore, the appeal has to succeed on this technicality."

23. A perusal of the lower court record for the 8/11/2012 reveals that that the prosecution indicated that it was ready to proceed with three witnesses and that the Appellant stated that he was ready. The Appellants words were as follows:-

"**Ready to proceed from where the matter reached**"

This is what the trial court ordered:-

"**Directions taken under Section 200 Criminal Procedure Code. Matter to proceed from where it reached"**

It is noted that the trial court proceeded with the evidence of the remaining witnesses after the Appellant opted to be excused from the proceedings. The Appellant had earlier cross-examined at length the first four witnesses and sought to be excused and excluded in the further proceedings. Three other witnesses tendered their evidence on the 8/11/2012 as soon as the Appellant expressed his wish not to participate in the proceedings. The court record further reveals that the Appellant did avail himself in court on other occasions save that the prosecution was unable to avail more witnesses as it sought adjournment in which the Appellant did not object until the trial court ordered the prosecution's case closed whereupon the Appellant was put on his defence to which he responded that he knew nothing about the case. The trial court thereafter rendered its judgment in which it found the Appellant guilty as charged. I am satisfied that the provisions of Section 200(3) of the Criminal Procedure Code had been complied with by the trial court. Even though the particular provision had not been cited prior to Appellant making an election, I find the Appellant indeed exercised his rights under Section 200 (3) of the Criminal procedure Code when he exercised his option to have the case proceed from where it had reached.

24. As regards the issue of whether or not the Appellant had been positively identified, the evidence of Esther Kalondu Nzoi (PW.1) is that she had known the Appellant quite well as he used to live in their village and also attended the same school. She testified that the incident took place when it was not yet dark and she was able to see him very well and witnessed him accosting Christine Muia Syombua and snatching a bag and pointing a knife at the deceased Rebecca Wanzia Kiluti alias Mama Mbithe. The said witness stated that she had no reason to frame him for the offence. The witness had screamed while rushing for help and left the Appellant still wielding a knife at her mother. Hence it is clear that the Appellant was the last person left with the deceased and was obviously the killer. Indeed the Appellant was later picked out in an identification parade conducted by Chief Inspector Alexander Korir (PW.3) who confirmed that the Appellant was identified by the witnesses. The identification parade further buttressed the identification by recognition by the witnesses. Hence I find the Appellant was positively identified. Again the issue of the Appellant's handwriting on a piece of paper that was picked by PW.2 at the scene was not rebutted by the Appellant and therefore placed him at the scene of crime.

25. As regards the issue of failure by the prosecution to call critical witnesses, I find that by dint of Section 143 of the Evidence Act, the Prosecution is not under any obligation to call particular number of witnesses to prove any fact unless there is a provision of the law to the contrary. The authorities cited in the case of **JULUS KALEWA MUTUNGU =*VS*= REPUBLIC - CR. APPEAL NO.31 OF 2005** and **BUKENYA & OTHERS =*VS*= UGANDA (1972] EA 549** by the courts held that the prosecution was not obliged to call a particular number of witnesses to prove a fact unless it is shown that their failure to call them had been influenced by some oblique motive or that the evidence of such witnesses would have been adverse to their case. However in the present circumstances of this case the record reveals that the Prosecution intended to call the remaining witnesses but their request was refused by the trial court and was compelled to close its case. This then leaves no doubt that they did not have any ulterior motive or fears that there would be adverse evidence against their case if the witnesses had been called. The Appellant has faulted the judgement of the trial court on the ground that the arresting officer was not called. I find that did not prejudice him in any way since he must have been rearrested upon arrival at the police station before the charges could be levied against him and which were based upon a valid complaint lodged by the complainants. This then disposes the third issue of whether the evidence on arrest was doubtful. The Appellant was arrested and charged pursuant to a valid and genuine complaint that had been lodged with the police.

26. As regards the issue of whether the Prosecution's witness (PW.7) conducted investigations, it is noted that the said witness PC. Joseph Kibor comprised of the initial team who rushed to the scene and had the body removed and taken to the mortuary. It was from there that the DCIO Matuu took over the case and the relevant witnesses involved and who presented their evidence before the trial court. The evidence of those witnesses established the prosecution's case against the Appellant and therefore his assertions that no investigations had been carried out lacks any factual basis.

27. As regards the issue of whether or not the trial court failed to consider the Appellant's defence, it is noted that the Appellant upon being placed on his defence stated that he knew nothing about the offence. Indeed the Appellant was not under any obligation to prove his innocence since the burden of proof lay upon the prosecution to discharge. The record shows that the trial court ensured that the Appellant had the opportunity to cross-examine witnesses and did cross-examine some and left out others as it was his choice to exercise. Further the record also shows that the Appellant of his own volition sought to be excused from participating in the proceedings which request was granted. This was after he had cross-examined about four witnesses and left out three others. I find the Appellant was not prejudiced in any way since he was thereafter accorded an opportunity to seek to recall the witnesses for cross – examination but did not exercise such a right and registered his presence in court all the way upto the delivery of the judgement by the trial court. Under those circumstances. I am unable to find that any of the Appellants defence evidence had not been considered by the learned trial magistrate.

28. The Appellant has also faulted the charge sheet as defective under Section 214 of the Criminal Procedure Code. Indeed the charge sheet

entailed an offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the penal code. The particulars also contained names of two complainants. On the face of it there appeared some confusion as to the exact and correct offences the Appellant was expected to know and face and hence there was likelihood of duplicity of the charges. Indeed the Appellant participated in the trial and did cross – examine some of the witnesses which then suggested that he understood the charge he was facing despite the fact that the charges might not have been properly drafted. Granted that the charges had not been properly drafted, the issue for consideration is whether the same occasioned a failure of justice. As the Appellant participated in the trial and did not raise any objection to the said charges at the early stages of the proceedings, I find the same did not occasion a failure of justice and that any such omissions or errors are curable under Section 382 of the Criminal Procedure Code. The East African Court of Appeal in the case of **CHERERE s/o GAKULI =VS= REPUBLIC [1995] 622 EACA** held as follows:-

> "**The test still remains whether or not a failure of justice has occurred. In our opinion, the result of the Application of this test must depend to some extent upon the circumstances of the case and the nature of the duplicity**."

29. In the circumstances, I am unable to find that the Appellant suffered any prejudice resulting from the manner in which the charge had been drafted since he participated in the trial and conducted his defence. The trial court considered the Appellant's defence and found that it did not shake the prosecution's evidence which was proved against him beyond any reasonable doubt.

30. In the result I find the Appellant's Appeal herein lacks merit. The same is dismissed and that the conviction and sentence by the trial court is upheld.

Orders accordingly.

Dated and Delivered at Machakos this 22nd day of February, 2018.

D. K. KEMEI

JUDGE

In the presence:-

Jacob Nganda Kalunda - the Appellant

Machogu - for the Respondent

Kituva - Court Assistant