REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 145 OF 2016.

DANSON MWANGI WAMBUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara Cr. Case No. 4112 of 2013 delivered by Hon. S. Jalango, SRM on 28th October 2016).

JUDGMENT

Background

Danson Mwangi Wambui, herein the Appellant, 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 offence were that on 15th April, 2012 at Korogocho slums in Nairobi within Nairobi County, jointly with another not before the court, while armed with a dangerous weapon namely a pistol robbed Ifra Isaac Ibrahim of a phone make Nokia X2 and hair weaves all valued at Ksh. 7,750/- and at the time of such the robbery used actual violence against the said Ifra Isaac Ibrahim.

The Appellant was arraigned in court and at the conclusion of his trial found guilty and sentenced to suffer death. He was dissatisfied by both the conviction and sentence as a result of which he preferred the instant appeal. His grounds of appeal which were filed contemporaneously with the written submissions were that Sections 200 and 214 of the Criminal Procedure Code were not complied with, that he was not identified as the culprit and that his defence was not considered.

Submissions

The Appellant relied on written submissions filed on 27th November, 2017. He submitted that Section 200 of Criminal Procedure Code was not complied with by the succeeding magistrate who took over the conduct of the matter from the initial magistrate. He submitted that the non-compliance with this provision violated his right to a fair trial. He also took issue with the prosecution by not amending the charge sheet under Section 214 of the Criminal Procedure Code. He submitted that throughout the trial, the prosecution intimated that they intended to amend the charge sheet but closed their case before the amendment was effected. He submitted that this also violated his right to a fair trial as he was tried for an offence he did not commit.

He took issue with reliance on evidence of identification by way of recognition**.** According to him, PW1 and 2 testified that they did not know him which was buttressed by the first report which indicated that the person who robbed the complainant was one '*Mwash*' a name they did not mention in their evidence. He urged the court to note that by the fact that the complainant did not testify and PW1 and 2 stated that they did not know him it was misdirection on the part of the trial court in holding that he was identified by way of recognition. He relied on the case **of R vs. Turnbull and others [1976} 3 ALL ER, 549** to buttress this submission. He also took issue with the fact that the learned trial magistrate did not take into account his alibi defence which was corroborated. He thus urged the court to allow the appeal.

Learned State Counsel, Ms. Nyauncho opposed the appeal. She submitted that the Appellant was properly identified and that the name Mwash that was recorded in the first report was his nick name. Furthermore, the robbery was witnessed by PW1, 2 and 4. She urged the court to take into account that the complainant could not testify because she was paralyzed but that the absence of her evidence notwithstanding, the prosecution discharged its burden in proving the case beyond a reasonable doubt. It was her case that the appeal was unmerited and pleaded with the court to dismiss it.

Evidence

In total, the prosecution called five witnesses. It was their case that on the material date 15th April, 2012 at about 1.00 p.m. PW1 was accompanied by her daughter (complainant) to Korogocho playground to pick up her son who was playing football. PW1 approached her son in the field leaving the complainant besides the field. As she conversed with her son she looked behind and saw the complainant struggling with a person. She then heard a gunshot and saw the Appellant shoot the complainant on the neck. Her daughter fell on the ground and the Appellant fled. She saw him try to stop a motorcycle but on the cyclist seeing him armed with a gun sped off. She started screaming for help and also tried to run after the Appellant. One of the onlookers around was **PW2 Noor Hassan** who stopped her from running after the Appellant as he was armed. According to PW2, he stood about 20 meters away when he saw the appellant struggling with the complainant. He then heard a gunshot and the complainant fell down. The Appellant ran towards a motorcycle which did not stop but sped off. He also confirmed that he stopped PW1 from running after the Appellant after noticing he was armed. Both PW1 and 2 confirmed that they knew the Appellant as a neighbor in the area. Another onlooker was **PW4, Ali Issa Ibrahim**. He was around Korogocho playing ground when he saw PW1's son talking to PW1. About the same time, he heard a gunshot. He also saw the Appellant who had shot the complainant trying to stop a motorcycle which sped off. His evidence is that he used to see the Appellant within the area and that people used to call him Mwangi.

The complainant was taken to hospital where she remained for a period of over six months. She sustained serious injuries that left her paralyzed on the left side of her body from the neck. After discharge, she saw a police doctor who examined her and filled her P3 Form. The same was produced in court by **Dr. Maundu (PW3)** who testified on behalf of Dr. Kamau. The case was investigated by **PW5, PC Bernard Achola**. The Appellant was arrested two years after the robbery when he reappeared within Korogocho area. The witness recorded relevant statements and also preferred the charges against the Appellant. He confirmed that the first report recorded in occurrence Book No. 26 of 15th April, 2012 indicated that the suspect was known by the name Mwash. He also confirmed that nothing was recovered from the Appellant.

After the close of the prosecution case, he court ruled that Appellant had a case to answer and was accordingly put on his defence. He gave a sworn statement of defence in which he denied committing the offence. He stated that on the fateful day 15th April, 2012 he was in the house of his grandmother and was therefore not aware of the offence. He also denied that he was known by the name Mwash and has never been referred by that name. In cross examination, he maintained his name was Mwangi and not Mwash. He contradicted his statement in chief by adding that on the date of the incident, he was not with his grandmother but was at his work place where he occupied himself as a hawker. He called his grandmother Wambui Mwangi as a witness to his defence. She testified as DW2. Her evidence was that on the material date of offence, the Appellant was in her house and could therefore not have participated in, or committed, the robbery.

Determination

After considering the parties' respective submissions and the evidence on record I have crystallized the issues arise for determination to be whether Section 200 of the Criminal Procedure Code was complied with, whether the failure to amend the charge was fatal to the prosecution case or prejudicial to the Appellant, whether the charge sheet was defective and whether the offence was proved beyond a reasonable doubt

On whether Section 200 of the Criminal Procedure Code was complied with, the Appellant submitted that the succeeding magistrate, Hon. Jalang'o failed to explain to him of his right to choose to recall the witness who had testified or have the matter heard de novo. For avoidance of doubt, the relevant part of Section 200 is sub section (3) which provides as under;

> **"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".**

A look at the record shows that the matter was first heard by Hon. Ocharo, PM on 5th May, 2014. On this date the prosecution was ready to proceed but the defence applied for adjournment. The same was allowed but the court allowed the complainant who was in court but could not speak to identify the Appellant through her mother, PW1. It is clear from the record that the learned magistrate did not record as evidence what the complainant said. Instead, it was recorded as a statement from her mother Ifra Isaac Ibrahim. The prosecution next availed witnesses on 9.10.2015. A similar mistake was made by the succeeding magistrate, Hon Jalang'o. The complainant was in court but the court only noted that he she had identified the Appellant as the culprit. The mode of the identification was not recorded. It was also not recorded whether she was aided in identifying the Appellant. The court did not also record whether the process of pointing at the Appellant was part of the evidence the court would rely upon. In that case, it is the view of this court that the process through the complainant identified the Appellant when Hon. Ocharo was in conduct of the matter could not be regarded as evidence per se. Furthermore, the same process was repeated when Hon. Jalang'o took over the conduct of the trial. Nothing under those circumstances will be considered by the court as evidence of the complainant. Respectively, the fact that the requirements of Section 200 were not explained to the Appellant did not in any way violate his right to a fair trial.

The Appellant did also submit that his right to a fair trial was violated because the prosecution failed to amend the charge sheet despite severally indicating that they intended to amend the same. He was of the view that the failure to amend the charge sheet was an indication that he was charged with the wrong offence. The court is of a divergent view because what was paramount was whether the prosecution did charge its burden in proofing the offence charged. Furthermore, the privilege of amending the charge sheet under Section 214 of the Criminal Procedure Code according to the prosecution is discretionary. In the present case, they must not have deemed it necessary to effect the intended amendment. The court is then left with only one task; to determine whether the case was proved beyond a reasonable doubt. I then hold that the failure to amend the charge sheet did not in any way prejudice the Appellant or violate his right to a fair trial.

There is however that fact that the charge sheet was drawn under both Sections 295 and 296(2) of the Penal Code which renders it duplex. The test though is whether the Appellant was prejudiced by the duplicity. Suffice it to state, he pleaded to the offence of robbery with violence for which he was tried and convicted. It is also the same offence for which he defended himself. He thus knew from the outset what offence he was facing. Accordingly, the mere fact that the charge sheet was drawn under both provisions of the law did not render the trial a nullity or prejudice the Appellant.

On proof of the case, I have deduced that this is a case in which the Appellant was identified by way of recognition. I add by emphasis that the complainant was not able to testify since after the robbery, she suffered paralysis of her neck, upper and lower limbs. She was brought to court on a wheel chair. Despite the fact that by indication (sign) she was able to point at the Appellant as the assailant, her evidence is of little evidentiary value unless it was corroborated. However, she did not point to the Appellant as a witness but as a matter that the court needed to note that she was not in a position to talk. That said, therefore, the court would rely on any other available evidence to determine the merit or otherwise of the appeal.

The testimony of PW2 was that he saw the complainant and the Appellant struggling over a mobile phone after which he heard a gunshot rent the air and the Appellant flee after robbing the complainant of her mobile phone. In addition to PW2, PW1 and 4 were also within the vicinity, Korogocho playground. PW1 and 4 were conversing when they heard the gunshot and saw the Appellant running from the scene. According to PW2, he knew the Appellant by the name Mwangi and that he came from the neighborhood. PW4 on the other hand testified that he had been seeing the Appellant within the neighborhood although he did not know his name. PW1 testified that he did not know the Appellant until on the fateful day when he heard members of the public calling him Mwangi. According to the Appellant, his recognition by the three witnesses was not full proof because none of them recorded a statement or reported to the police that they knew him by the name Mwash which is the name that appeared in the OB extract. His emphasis was that if they knew him by the name Mwash, they would have called him by that name when they recorded their statements.

Upon re-evaluation the evidence, it is clear that none of the three witnesses were involved in making the first report to the police. The same was made by one, Isaac Ibrahim who was the complainant's father. He had rushed to the scene upon receiving a report on the incident but found that her mother and brother had rushed the complainant to the hospital. Interestingly the said Isaac Ibrahim was not called as a prosecution witness. As such, the first report he made with the police as reflected in the respective OB extract cannot be used as evidence of identification against the Appellant. The court would then have to reevaluate the evidence of PW1, 2 and 4 and satisfy itself that it was sufficient evidence of identification.

The three witnesses' evidence was consistent and it raised an un-rebuttable fact that PW1 and 2 were familiar with the Appellant and that their identification of him was by recognition which is more satisfactory and convincing than if they had never seen the Appellant before. See **Anjononi & others vs. Republic [1980] KLR 59**:

> **"This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than the identification of a stranger because it depends upon the personal knowledge of the assailant in more form or other".**

The two testified that the Appellant lived in Korogocho and was their neighbor where they often saw him. In the circumstances, an identification parade with respect to PW1 and 2 would not have served any purposes. Furthermore, the robbery took place in broad daylight. There was also a struggle between the Appellant and complainant before he shot her which gave sufficient time to clearly see the Appellant. In my view, this was sufficient identification which leaves no doubt in my mind that the Appellant was involved in the robbery and is the person who shot the complainant.

I have also noted that the Appellant gave a sworn statement of defence which was subjected to cross examination by the prosecution. In his evidence in chief, he stated that he was at his grandmother's house when the incident took place. However, on cross examination, he retracted his statement by stating that "***when the incident occurred, I was not with my grandmother, I was at my work place, I am a hawker, I have my colleagues, they are not before court''.*** Although he called his grandmother, DW2 to corroborate his statement, by virtue of his contradictory statement, I have no doubt in my mind that he did not advance a convincing defence that would oust the strong prosecution's case. I do, as the learned trial magistrate did, dismiss his defence as unmeritorious.

Having found that the Appellant was properly identified, I now delve into determining whether the ingredients of the offence of robbery with violence were established. The fact that the complainant was injured and sustained paralysis is not in contestation. PW1, her mother and one of the eye witnesses to the incident confirmed that she took the complainant to both Kijabe and Kenyatta National Hospital following the shooting. She was in ICU for three days and in hospital for seven months. She also sustained paralysis which occasioned immobility of the neck, upper and lower limbs. Dr. Maundu of police surgery produced the medical examination form on behalf of Dr. Kamau who had examined the complainant. He confirmed that indeed the complainant suffered neck and right limbs paralysis. Of course, the injury was caused by a gunshot as attested by PW1, 2 and 4 which established the element of use of actual violence. In the process of the robbery, the complainant lost her mobile phone.

Under Section 296(2) of the Penal Code, a proof of any of the elements spelt out thereunder is sufficient to establish the offence of robbery with violence namely, that the offender is armed with any dangerous or offensive weapon or instrument, or is in the company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person. In the present case, at least two of the elements were established, namely; that the Appellant was armed with a gun and that he used actual violence by wounding the complainant. He in addition stole her mobile phone.

In sum, I find that the offence was proved reasonable doubt. I uphold the conviction. With respect to the sentence, I am alive to the Supreme Court Judgment in **Francis Karioki Muruatetu & another *v.* Republic [2017] eKLR** which declared the mandatory death sentence in our penal laws unconstitutional. It follows that before sentencing a court must look at the accused's mitigation as well as the circumstances of the case. That is to say that if the court is of the view that the circumstances of the case are grave and warrants a death sentence the court should not hesitate to pass the same. Simply stated, the sentence must be commensurate with the offence and the circumstances of the case.

In the present case, the Appellant shot the complainant in broad daylight leaving her paraplegic. She was brought to court on 16th April, 2014 by her mother who acted as an intermediary in identifying the Appellant in court. She was able to point to the Appellant as her assailant and more particularly that he stole her phone and shot her. She was in the ICU for three days and remained in hospital as an in- patient for close to seven months. A bullet was lodged in her head and was yet to be removed. She still was in a wheelchair. This are circumstances that in my view were serious pointing to the fact that the complainant survived by God's grace. She will have to live with the trauma of the disability

for the rest of her life. Although the Appellant mitigated that he was young and wholly dependent on others, remorseful and sought leniency as he was a first offender it is my view that a stringent sentence is warranted. He honestly did not have to shoot the complainant for a mere mobile phone. The violence visited upon the young soul was entirely uncalled for.

Pursuant to Section 354(3) (ii) of the Criminal Procedure Code this court is conferred with powers to vary the sentence so that it is in consonance with the **Muruatetu** (supra) **case**. I accordingly set aside the death sentence and substitute it with an order that the Appellant shall serve 40 years imprisonment commencing from the date of imprisonment. The period of one year nine months that he was in custody before paying cash bail shall be reduced from the sentence. It is so ordered.

Dated and Delivered at Nairobi This 15th February, 2018.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

1. Appellant present in person

2. Miss Atina for the Respondent.