REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 189 OF 2016

BACK PUMA OCHIENG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Criminal Case Number 140 of 2015 in the Principal Magistrate's Court at Ukwala delivered by Hon. G. Adhiambo (SRM) on 20.12.15)

JUDGMENT

1. On 20th December, 2015; appellant was convicted for two offence of robbery with violence contrary to section 296(2) of the Penal Code and was sentenced to life imprisonment in each count.

Prosecution case

2. The prosecution called a total of 7 witnesses in support of its case. PW1 recalled that on the night of 29.12.14 and 30.12.14, three men who were armed with rungus and an axe went to a bedroom that she shared with 2 of her sisters. That she lit a rechargeable lamp before the 3 persons stole her LG Phone and kidnapped her and one of her sisters. That the said people who were demanding a ramson of between Kshs. 50,000/- to Kshs. 100,000/- in order to release them. It was her evidence that the men took them through Simerro Centre where there was electricity lighting after which they abandoned them in a bush at about 5.00 am. That when they arrived home, they learnt that their father had been injured and was admitted in hospital. She said that from shops at Simerro enabled her to identify appellant who had a broken tooth.

3. PW2 who was kidnapped together with PW1 stated that light from her father's phone that had been stolen and from shops at Shimerro enabled her to identify appellant who was tall and had a broken tooth. It was her evidence that she later identified appellant in the second identification parade.

4. PW3, testified that on 30.3.15, he arrested appellant and another who were identified by one Jane Auma Anyango as persons that had committed a robbery with violence and thereafter handed them over to Ukwala police station. The witness confirmed in cross-examination that appellant and another were intercepted and arrested while riding on a motor cycle and that appellant had in his possession a bottle of changaa.

5. PW4, CI Bondire called that on 30.3.15; he conducted an identification parade in which appellant was identified by PW2.

6. PW5, the investigating officer testified that during investigations, testified that PW1 and PW2 told her that they had identified one of the robbers who had a space on the upper part of his teeth using lighting from a mobile phone. That using the said description, appellant was arrested and was charged after he was identified by PW2 in an identification parade. In cross-examination by the appellant and upon being shown the initial report made by PW1 and PW2, the witness conceded that they did not give the description of the suspects.

7. PW6, the father of PW1 and PW2 stated that he was injured and his phone stolen on the material night but said he did not identify the persons that attacked him and kidnapped his two daughters. In cross-examination by appellant, he conceded that PW1 and PW2 did not inform him that they had identified any of the robbers.

8. PW7, a clinical officer testified that PW6 was examined by his colleague Howard Monya on 18.3.15 and he foundthat the victim had a cut wound on forehead and dislocation of right shoulder. He produced PW6's P3 Form in which the degree of injury was assessed as maim as PEXH. 1.

9. At the close of the prosecution case, appellant was ruled to have a case to answer and was placed on their defence. In his sworn defence, he denied the charges. He said on the night of 27.3.15, he was riding on a motor cycle with another person when they were intercepted and arrested because he had in his possession a bottle of changaa and the rider did not have a life jacket but was later charged with offences that

he did not commit. It was his evidence that PW2 was called to the identification parade twice and it was in the second instance that she purported to identify him.

10. On *20.12.15* the learned trial magistrate delivered a judgment in which she convicted the appellant of the two counts of robbery with violence and sentenced him to life imprisonment in each count.

The appeal

11. Being dissatisfied with the conviction and sentence, the appellant lodged the instant appeal. In the grounds of appeal filed on 19th February, 2018, appellant raised 4 grounds of appeal **THAT**:

1) He was convicted on a defective charge sheet

2) He was convicted on the basis of an identification parade that was worthless

3) He was convicted on the basis of contradictory evidence

4) His defence was not considered

12. When the appeal came up for hearing on 19th February, 2018, appellant whole relied on the grounds of appeal and the written submissions filed on 19.2.18. In his submission, appellant reiterated the grounds of appeal. Ms. Odumba, learned counsel for the state stated that appellant was identified with the light from a phone stolen from complainant's father and later in an identification parade and that PW6's phone was recovered from appellant.

Analysis

13. As this is a first appeal, this court is enjoined to consider all the evidence afresh, evaluate it independently and reach its own conclusions having regard to the fact that it neither heard not saw the witnesses (***Okeno v Republic [1972] EA 32).***

14. I have carefully considered thegrounds of appeal, written submissions made by the appellant andoral submissions on behalf of the state. In dealing with this appeal, I will separately consider the grounds of appeal as follows:-

a. Defective charge sheet

15. The learned trial magistrate found that the charge was defective because it did not quote the section of the law that creates the offence of robbery with violence.

16. Section 382 of the Criminal Procedure Code provides as follows:

> ***Subject to the provisions herein before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice***

17. I am in agreement with the finding of the learned trial magistrate where she rightfully stated that appellant knew and understood the charges facing him and was therefore not prejudiced.

b. Identification parade

18. It is on record that the incident occurred at night and more particularly at between 1.00 am and 5.00 am. PW1 and PW2 testified that they did not know appellant before the material night but that they had been able to identify him with light emanating from the cell phone that had been stolen from their father which the robbers repeatedly used to make calls asking for ransom.

19. In the case of ***Maitanyi –vs- Republic(1986) KLR 198*** the Court of Appeal stated:-

> ***"That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into.***

20. This position was restated in the recent case of ***John Muriithi Nyagah v Republic [2014] eKLR***, where the Court of Appeal held:-

> ***"in testing the reliability of the evidence of identification at night, it is essential to make an inquiry of the relevant circumstances such as the nature of the light, the strength of the light, its size, its position relative to the suspects etc."***

21. It is on record that PW1 and PW2 did not lead police to the arrest of the appellant. The record shows that appellant was allegedly

identified by one Jane Auma Anyango, who is a stranger to these proceedings since she was not alleged to have been present during the robbery nor did she testify as to the reason why she led police to arrest the appellant.

22. Further to the foregoing, the phone light that allegedlyassisted PW1 and PW2 to identify appellant was not tested as there was no evidence of its intensity and position relative to the appellant. If all these factors were brought to bear, the trial court would have arrived at a different conclusion.

23. Moreover, PW5, the investigating officer conceded that PW1 and PW2 did not give the description of the suspects in their initial report. PW6, the father of PW1 and PW2 also conceded that PW1 and PW2 did not inform him that they had identified any of the robbers.

24. Although PW1 and PW2 stated that they identified the appellant on the ground that he was tall and had a gap in his teeth, they gave no explanation why they failed to report this serious matter to their father and the police and yet they knew that their father (PW6) was hospitalized from the injuries received during the robbery. PW1's identification of the appellant amounts to dock identification which is of no probative value. (See ***Gabriel Kamau Njoroge –vs- Republic (1982-1988) 1KAR 1134).***

25. Likewise, the purported identification of appellant by PW2 in an identification parade, in the absence of prior description of the appellant is suspect and I hold that evidence of identification of the appellant by PW1 and PW2 is neither credible nor worthy of belief. (See ***Michael Ochieng' Odongo v Republic [2008] eKLR).***

c. Contradictory evidence

26. The only contradiction that is apparent is the fact that the evidence of identification of the appellant by PW1 and PW2 was not supported by their initial report.

d. Appellant's defence

27. Appellant stated that he was riding on a motor cycle with another person when they were intercepted and arrested because he had in his possession a bottle of changaa and the rider did not have a life jacket. PW3, the arresting officer corroborated appellant's defence that he arrested him and another while they were riding on a motor cycle and that appellant had a bottle of changaa.

28. From what is stated herein above, I find that the evidence on record did disclose that appellant participated in the robberies herein. Had the trial court appropriately considered appellant's defence, it would not have faulted him for his failure to explain how the robberies occurred nor dismissed his defence as untruthful and baseless. I am of the considered opinion that the learned trial magistrate ought to have given the appellant the benefit of the doubt.

29. Finally, the evidence on record did not establish that PW6's phone was recovered from the appellant and the submission by the learned counsel to that fact is a misapprehension of the evidence on record.

Decision

30. In all the circumstances, I find no basis for upholding the appellant's conviction and sentence. I allow the appeal, quash the conviction and set aside the sentence of life imprisonment imposed on the appellant. The appellant shall be set at liberty unless he is otherwise lawfully held.

DATED AND SIGNED THIS 18TH DAY O*F* APRIL 2018

T. W. CHERERE

JUDGE

DATED, DELIVERED AND SIGNED AT SIAYA THIS 19TH DAY OF APRIL 2018

J.A.MAKAU

JUDGE

In the presence of-

Court Assistant -

Appellant -

For the State -