REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.78 OF 2017

(An Appeal arising out of the conviction and sentence of Hon. S. Jalang'o – SRM delivered on 30th June 2017 in Makadara CMC. CR. Case No.2780 of 2013)

JOSHUA OKELLO ONYANGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Joshua Okello Onyango was charged with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 17th June 2013 at South C in Industrial Area within Nairobi County, the Appellant, jointly with others not before court, while armed with a toy pistol robbed Raphael James Ngigi of a wallet containing Kshs.600/- and personal documents and at or immediately before or immediately after the time of such robbery, wounded the said Raphael James Ngigi (the complainant). When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged. He was sentenced to death. He was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of contradictory and inconsistent evidence of prosecution witnesses. He faulted the trial magistrate for reaching the verdict finding him guilty as charged yet the prosecution had failed to adduce sufficient evidence to establish his guilt to the required standard of proof. The Appellant was aggrieved that he had been convicted yet critical and crucial witnesses were not called to testify in the case. He took issue with the fact that he had been convicted on the basis of the evidence of identification yet that evidence did not sufficiently establish that he was the one that committed the crime. He was aggrieved that he had been convicted yet the trial court failed to consider his cogent defence, which, in his view, exonerated him from the crime. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the custodial sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. He urged the court to allow the appeal. Ms. Kimiri for the State opposed the appeal. She submitted that the prosecution had adduced sufficient culpatory evidence to connect the Appellant with the offence. In the premises therefore she urged the court to disallow the appeal and uphold the conviction of the Appellant. On the issue of sentence, she was of the view that the death sentence imposed on the Appellant was harsh in light of the circumstances that the offence took place. She therefore left the issue of the sentence to the court. The court shall revert to the arguments made on this appeal after briefly setting out the facts of this case.

The complainant in this case testified as PW1. He told the court that he was a teacher working at Bellevue Primary School. At the material time, he was a resident of South C Estate. He testified that on 17th June 2013, he was accosted by a gang of two robbers as he was walking home from a nearby estate. It was about 7.30 p.m. One of the robbers pointed a pistol at him. He noticed that the pistol was fake. He resisted. One of them grabbed his mobile phone from him while the other wrestled him to the ground. They took his wallet from his pocket and ran away. In the wallet was Kshs.600/- and an ATM card. The complainant recalled that in the course of the struggle, he hit one of the robbers who had the fake pistol. He dropped the pistol to the ground. After they had robbed him, the two robbers ran away. The complainant screamed seeking help from the people who were around there. According to PW2 Inspector Abdul Aziz Mohamed based at Industrial Area Police Station, two watchmen brought the Appellant to the police station. PW2 was informed by the two watchmen that they had apprehended the Appellant after rescuing him from a mob that had attacked him for robbing the complainant. This was about 11.00 p.m. on the material night of the 17th June 2013. He conducted a search on the Appellant and recovered a wallet and Kshs.600/-. The toy pistol found at the scene of the robbery was handed to PW2. The wallet and the cash were positively identified as the property that was robbed from the complainant. PW3 was assigned to investigate the case. After concluding investigations, PW3 formed the opinion that a case had been established for the Appellant to be charged with the offence.

When he was put on his defence, the Appellant denied that he had robbed the complainant. He testified that he was a mechanic at South C.

On the material evening of 17th June 2013, he was accosted by a group of motor cycle riders who accused him of being a motor cycle thief. They then assaulted him until he lost consciousness. They took him to Industrial Area Police Station where he regained consciousness. He was later taken to hospital where he was treated after which he was taken back to Industrial Area Police Station where he was charged with the current offence. He was surprised that he was charged with the offence yet he had not committed the crime.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced during trial so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22**:

> ***"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)".***

The issue for determination by this court is whether the prosecution established to the required standard of proof beyond any reasonable doubt the charge of robbery with violence contrary to **Section 296(2)** of the **Penal Code** that was brought against the Appellant.

This court has carefully re-evaluated the evidence adduced before the trial magistrate's court. It has also considered the grounds of appeal put forward by the Appellant and the rival submission made by the parties to this appeal. It was clear from the evidence and the thrust of the Appellant's appeal that the Appellant was convicted by the trial court on essentially two pieces of evidence. The first piece of evidence is the alleged apprehension of the Appellant at the scene of robbery. PW2 testified that two watchmen brought the Appellant to Industrial Area Police Station on allegation that he had robbed the complainant. The police received the complainant and locked him up in the cells. The two watchmen who were critical witnesses in the case were not called to testify in the case by the prosecution. The complainant's testimony was short of material particulars in the sense that, although the complainant testified that he was accosted by two robbers and robbed of his mobile phone, wallet and Kshs.600/-, the complainant did not tell the court how he was able to be positive that the Appellant was the one that robbed him. Further, from his testimony, it was clear that the complainant was not at the scene when the Appellant was apprehended by the two watchmen. It is not clear from the evidence how the two watchmen were able to ascertain that it was the Appellant who robbed the complainant. There are gaps in the evidence regarding the circumstances under which the Appellant was apprehended after the alleged robbery. The evidence does not clearly point out the Appellant as having been identified at the scene as the perpetrator of the robbery.

If the prosecution relied on the sole evidence of identification, the Appellant's conviction would not have stood. However, the prosecution adduced further evidence which connected the Appellant to the crime. This evidence was the recovery of the wallet and the sum of Kshs.600/- which was positively identified to belong to the complainant. PW2 testified that upon the Appellant's arrest, he conducted a search on his person and recovered the wallet and Kshs.600/- belonging to the complainant. The Appellant did not claim that these items recovered from him were his property. The complainant was robbed at about 7.30 p.m. At 11.00 p.m., three hours later, the complainant's wallet containing the Kshs.600/- was recovered in the Appellant's possession. The complainant did not give a cogent explanation of how the complainant's wallet was found in his possession. The Appellant's defence to the effect that he was a victim of a vicious attack by motor cycle riders who suspected him of being motor cycle thief does not explain how the complainant's wallet with Kshs.600/- in it was found in his possession.

It was clear to this court that the Appellant's wallet with Kshs.600/- was found in the Appellant's possession because it was the Appellant who robbed the same from the complainant under the circumstances that the complainant narrated in his testimony. The doctrine of recent possession applied in this case. As was held by the Court of Appeal in **Athuman Salim Athuman –vs- Republic [2016] eKLR**:

> ***"The circumstances under which the doctrine will apply were considered in ISAAC NGANG'A KAHIGA ALIAS PETER NGANG'A KAHIGA V REPUBLIC CR. APP. NO. 272 OF 2005, where this court stated:***
>
> ***"It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, they must positive proof, first that the property was found with the suspect, secondly, that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again will depend on the easiness with which the stolen property can move from one to the other."***

In the present appeal, the prosecution established to the required standard of proof beyond any reasonable doubt that the items stolen from the complainant were found in the Appellant's possession so soon after the robbery in circumstances that clearly pointed out that the Appellant was the one who robbed the complainant. The Appellant's appeal on conviction lacks merit and is hereby dismissed.

On sentence, following the recent Supreme Court decision that outlawed mandatory death sentences in **Francis Karioko Muruatetu & Another –vs- Republic [2017] eKLR,** the sentiments expressed by Ms. Kimiri for the State regarding the severity of the sentence imposed on the Appellant has merit. The circumstances in which the offence took place does not merit the imposition of mandatory death sentence. The Appellant was a young man aged 19 years at the time of the crime. He may have been misguided by the daring of youth. The complainant was not injured during the robbery. The Appellant was assaulted and injured by the members of the public upon his arrest. The value of the stolen item is such that this court is of the view that a custodial sentence is called for rather than a mandatory death sentence. In the premises therefore, the Appellant's sentence of death is set aside and substituted by a sentence of this court sentencing the Appellant to serve five (5) years imprisonment with effect from 16th June 2017 when he was sentenced by the trial court. This court has taken into account the period of four (4) years that the Appellant was in remand custody prior to his conviction. It is so ordered.

DATED AT NAIROBI THIS 19TH DAY OF APRIL 2018

L. KIMARU

JUDGE