REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 48 OF 2016

JAMES KARIUKI WAGANA.....APPELLANT

VERSUS

REPUBLIC.....STATE

(Being an Appeal from the Judgment of the Chief Magistrate's Court at Molo Hon. W. Kagendo – Chief Magistrate delivered on the 10th March, 2016 in Criminal Case No.* 1266 of 2015*)

JUDGMENT

1. The Appellant, James Kariuki Wagana, was one of the two Accused Persons charged in ***Molo Chief Magistrate's Court Criminal Case No. 1266 of 2015*** with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars contained in the charge sheet were that on the night of 12th May, 2015, at Tayari location in Molo Sub-county of the Nakuru County, the two Accused Persons robbed Ishmael Ng'ang'a Njoroge ("Complainant") of his cash (Kshs. 8,700/-) and a torch valued at Kshs. 120/- and at, immediately before or immediately after the time of such robbery, struck the Complainant.

2. The Appellant pleaded not guilty to the charge and the case proceeded to trial. At the conclusion of the Prosecution case during which six witnesses were called, the Learned Trial Magistrate found that the Appellant and his Co-Accused Person had a case to answer. They both gave unsworn statements. In her judgment delivered on 10/03/2016, the Learned Trial Magistrate convicted the Appellant and sentenced him to suffer death.

3. The Appellant is dissatisfied with both the conviction and the sentence and has appealed to this Court. His Counsel raised three grounds of appeal as follows:

> *i. That the Learned Magistrate erred in law and facts by failing to appreciate that the Police did not carry out parade as required by law.*
>
> *ii. That the Trial Magistrate erred in law and fact by failing to appreciate that the Prosecution refused to produce the 1st report to prove that the Complainant had given names and description at the time of reporting.*
>
> iii. *That the Learned Magistrate erred in law and in fact in dismissing the Appellant's plausible defence and failed to advance any cogent reasons for [her] findings.*

4. The State opposed the appeal. Learned State Counsel, Mr. Motende argued the appeal orally.

5. As the first appellate Court, my obligation is to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. In doing so, I am to be guided by two principles. First, I must recall that I must make appropriate allowance for the fact that I did not have a chance to see or hear the witnesses. This means that I must give due deference to the findings of the Trial Court on certain aspects of the case. Second, in re-evaluating and re-considering all the evidence, I must consider the evidence on any issue in its totality and not any piece in isolation. This principle constrains me to reach my own conclusions on the totality of the evidence as opposed to merely using the Trial Court's findings as a foil to endorse or reject its findings. See ***Okeno v Republic*** **[1973] E.A. 32**; ***Pandya vs. R (1957) EA 336***, ***Ruwala vs. R (1957) EA 570***.

6. The Complainant testified at length about the robbery. He lives in Kinangop. On 12/05/2009, the Complainant travelled to Molo. His ultimate intention was to visit his uncle in Nyakinyua to condole him for the loss of his son. However, his visit was interrupted by heavy rains in Nyakinyua. Hence, when the Complainant got to Molo town, his uncle advised him to get a place to sleep in Molo town and travel the following day since the heavy rains would not allow safe passage for a *boda boda* – the only means of transport to Nyakinyua at night.

7. With this information, the Complainant went to Jewas Lodging and paid for a room. He then ordered for some food. As he was eating,

two things happened. First, he realized that the lodging was a little too noisy and was apprehensive that he would be unable to sleep well. He asked the Lodging Caretaker if there was an alternative lodging he could go to for the night. The Caretaker, Mr. Jathan Chege, recommended Topstar Hotel as an alternative although with the caution that he would be unable to refund the funds already paid by the Complainant. Second, as the Complainant was conversing with Mr. Chege, the Appellant reportedly came into the room in his *boda boda* rider gear. The Complainant called him to find out if he could ride him to Topstar. A friendship was struck and the Complainant invited the Appellant to share his meal. They ate together and departed for Topstar.

8. At some point after getting to Topstar and confirming availability of a room, the Complainant testified that the Appellant persuaded him that it was not too slippery to ride him to Nyakinyua. His proposal was that instead of the Complainant spending his money on a lodging, he could, instead, pay for the *boda boda* ride to Nyakinyua for only Kshs. 350/-. The Complainant was sold on the idea and they departed. Before heading to Nyakinyua, however, the Appellant allegedly told the Complainant that he needed to pick up a second passenger going on the same route – which would make the ride safer and less slippery. So, they picked a third person who sat as the second pillion passenger while the Complainant was sandwiched between him and the Appellant. The Complainant conceded that he did not get a good look at that third person.

9. On the way to Nyakinyua, the Appellant allegedly stopped the motor cycle and demanded to be paid Kshs. 1,500/- to continue with the journey due to the treacherous road conditions. He began to negotiate with the Appellant for a way out – including paying only for the part of the journey they had covered. At some point he realized that his fellow pillion passenger was not assisting with negotiations. Indeed, as he made a move to remove money from his pockets to settle the now agreed sum of Kshs. 350/- for the distance covered, the pillion passenger reached for the Complainant's pocket and attempted to rob off his money. The Complainant resisted. A struggle ensued as the two tumbled from the motor cycle. It is at that point that the Appellant threw down his motor cycle and joined the fray in support of the pillion passenger. While the Complainant says he did not see him, he felt pain as he was blindsided by being hit on the shoulders by a blunt object. He was then quickly overpowered by the duo. They ransacked his pockets, took away all the money he had in his pockets (Kshs. 8,700/-) and his torch. They gave him back his phone and then they left.

10. The Complainant found his way back to Molo that night and slept at a lodging. The following morning, after calling his uncle, he went to Jewas to inquire from Mr. Chege whether he could identify the *boda boda* rider whose services he had taken the previous evening. Mr. Chege is the one who offered the name – Kariuki since he knew the Appellant by name. He even showed the Appellant and his uncle the Appellant's mother's shed where the Appellant apparently used to hang out. Indeed, the Complainant says the Appellant was there that morning but on seeing him and his uncle approaching, he fled.

11. The Complainant reported the matter to the Police where he gave the name of the Appellant as he had learnt it from Mr. Chege. The Police were familiar with him and they promised to arrest him. Meanwhile, the Complainant was given a P3 and went to the hospital.

12. The Complainant received a call from the Police that his assailants had been arrested. He went to the Police Station and two male adults were brought out: one was the Appellant whom he recognized immediately. He did not recognize the second person and he so told the Police Officers. He maintained that position during the trial. That second person was charged as a Co-Accused to the Appellant in the Trial Court. On the strength of the Complainant's evidence, he was acquitted since the Learned Trial Magistrate found no evidence linking him with the crime.

13. Mr. Chege confirmed this account at least on the parts involving him. PC Steve Kelele, the Investigating Officer, also confirmed the report the Complainant made to the Police and the efforts made to trace and arrest the Appellant and the person they thought was his accomplice. PC Juma Omar and PC Joel Ng'etich were the arresting officers and they also testified. Finally, Ruth Sande, the Clinical Officer from Molo District Officer who treated the Complainant on the day after the incident produced the P3 Form filled in respect of the Complainant. It showed that he had injuries on his left shoulder and on the left lower joint (ankle). She characterized the degree of injury as harm.

14. When put on his defence, the Appellant insisted that he was being framed by the Investigating Officer because they had a "deal" whereby the Officer would protect him as he did illegal charcoal business. The deal had gone sour and the Officer threatened him with dire consequences. He insisted that he knew nothing about the offence he was charged with. He also said that the Police beat him up and forced him to "confess" that his Co-Accused was involved in the crime.

15. The Learned Trial Magistrate considered all the evidence given and concluded that there was sufficient evidence to convict the Appellant. She sentenced him to death.

16. Mr. Cheche, who orally argued the appeal to buttress the Written Submissions filed by the Appellant, focused on two aspects of the appeal. First, he insisted that the ingredients of robbery with violence were not proved. He insisted that the Appellant was not armed with an offensive weapon; and that he was alone. His argument was that since no one testified that they saw the Appellant and the Complainant in the company of a third person, it can only be concluded that the Appellant was alone.

17. Mr. Cheche also submitted that the injuries the Complainant suffered were consistent with a fall and not necessary being attacked. In any event, he submitted, the Complainant did not see who attacked him.

18. Finally, Mr. Cheche submitted that the failure to hold an Identification parade in this case was fatal since there was no evidence that the Complainant had given any description of the person who had attacked him.

19. The primary point argued by Mr. Cheche was on identification of the Appellant. It is true that our case law calls for caution in receiving identification evidence because of the grave possibility of a miscarriage of justice occasioned by misidentification. The predecessor to the Court of Appeal plainly stated in ***Roria v R [1967] EA 583***, that "a conviction resting entirely on identity invariably causes a degree of uneasiness." And, the Court of Appeal reminded us in ***Kiarie v Republic*** that "it is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken." Finally, the famous ***Charles Maitanyi v R [1986] 1 KLR 198*** admonished courts to exercise the

greatest caution and circumspection before convicting on testimony of identification especially where the evidence is that of a single identifying witness as was the case here.

20. Our decisional law has adopted the guidelines for receiving and considering identification evidence set out in the famous English case of ***Regina v Turnbull [1976] 3WLR 445*** to assist in the careful analysis of identification evidence. The ***Turnbul*** factors are nine as follows::

i. How long did the witnesses have the accused under their observation?

ii. What was the distance between the witnesses and the accused person?

iii. What was the lighting situation?

iv. Was the observation impeded in any way, as for example, by passing traffic or press of the people?

v. Had the witnesses ever seen the accused person?

vi. If the witnesses knew the accused prior to the current transaction, how often?

vii. If the witnesses had seen the accused only occasionally prior to the current transaction, did the witness have any specific reason for remembering the accused?

viii. How long elapsed between the original observation and the subsequent identification to the police?

ix. Was there any material discrepancy between the description of the accused given to the Police by the witnesses when first seen by them and his actual appearance?

21. In the present case, the Complainant gave clear, straight-forward and un-impeached evidence that he recognized the Appellant when he attacked him. The Complainant had spent quite some time with the Appellant: they shared a meal together at Jewas; they took a *boda boda* ride to Top Star Hotel and back to Jewas; they finally took the *boda boda* ride to the junction to Nyakinyua where the attack took place. At both Jewas and Top Star Hotel, the Complainant described conditions of good electric lighting.

22. The testimony of the Complainant respecting identification is corroborated by that of Mr. Chege. Mr. Chege knew the Appellant. He is the one who introduced him to the Complainant on the fateful night. He is the one who told the Complainant the Appellant's name the day after the attack. He is the one who showed the Complainant the business shed belonging to the Appellant's mother.

23. In the face of all this mutually reinforcing evidence, it is implausible to claim that there is possibility of mis-identification. The Learned Trial Magistrate was entitled to make a finding that identification was positive and I so hold.

24. In the circumstances of this case, it was, in my view not necessary to hold an identification parade. The Complainant had already known the name of his attacker after speaking with Mr. Chege – and when the Complainant gave the name to the Police and told him about his *boda boda* business, they, too, knew the person. There was no need to carry out an identification parade in those circumstances. It is instructive that the Appellant was forthright enough to decline to identify the Co-Accused in the Trial Court. This only adds to the credibility of his evidence.

25. Turning to the ingredients of the offence of robbery with violence, it is important to start with the text of the law. The Appellant was convicted of the offence of robbery with violence. Section 296 (2) of the Penal Code provides that:-

*If 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, he shall be sentenced to death***.**

26. Under this section, therefore, the Prosecution is required to prove one of the following in order to successfully establish the offence charged:

i. That the offender was armed with any dangerous or offensive weapon or instrument; or

ii. That he was in the company with one or more other person or person; or

iii. *That at or immediately before or immediately after the time of the robbery, he wounded, beat, struck or used any other violence to any person.*

See ***Oluoch v R (1985) KLR***.

27. In the present case, the Complainant gave clear evidence that the Appellant was accompanied by a second assailant who is the one who initially attacked him. The Trial Court found the Complainant's evidence to be truthful. This in itself would be sufficient to prove robbery with violence since our case law is now clear that the Prosecution need only prove one of the ingredients. However, here, the Prosecution also proved the use of personal violence on the Complainant. Again, the Complainant testified, and his testimony remained unchallenged on

cross examination that he was attacked and he suffered injury. The Appellant was one of the two people who attacked him.

28. Finally, it is not correct that the Trial Court did not consider the Appellant's defence. The judgment is quite clear in its analysis and rejection of the Defence theory. The Court concluded: "The Court did not believe the defence given by the Accused 1 of a deal gone sour over charcoal trade."

29. After analysis the entire corpus of evidence in the trial, it is my finding that the Trial Court was perfectly justified to reach that conclusion. The Defence theory is so implausible as to have almost no inherent possibility that it is true. It is, thus, incapable of raising reasonable doubts. Apart from the strength of the identification evidence described above, the Defence theory does not explain how or why the Complainant, a visitor to Molo, would assist an allegedly rotten Police Officer to frame him over an illegal trade arrangement with the Police Officer.

30. All considered, therefore, there can be no reasonable doubt that the Appellant was one of the two people who attacked the Complainant on the night of 12/05/2015 and stole Kshs. 8,700/- and a torch from him.

31. On sentence, Mr. Motende conceded that in light of the recent jurisprudence by the Supreme Court, the Court should substitute the death penalty imposed with a prison sentence. He recommended thirty years. Mr. Motende was referring to the Supreme Court decision in ***Francis Karioko Muruatetu & Another v Republic [2017] eKLR***. In that case, the Supreme Court held that mandatory death penalty for murder is unconstitutional. The Court of Appeal extended the reasoning to all similar mandatory death penalties in ***William Okungu Kittiny v R [2018] eKLR***.

32. The law of the land as it stands today, therefore, is that the maximum penalty for both murder and robbery with violence is the death penalty but the Court has discretion to impose any other penalty that it deems fit and just in the circumstances.

33. In light of this, I will, therefore, proceed to determine the appropriate sentence. First, it is true that all the elements for the offence of robbery with violence were proved. However, there are no truly aggravating circumstances which would lift this case to the scales of the death penalty. Death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder. That is not the case here. While force was used, one cannot say here that the Appellant used excessive force; and neither did he unnecessarily injure the Complainant during the robbery. He was not armed with any offensive weapon.

34. In his mitigation, the Appellant submitted that he was a first offender and that he was youthful and had a young family to take care of. I have taken these mitigating circumstances into consideration. I, therefore, sentence the Appellant to fifteen years for the conviction for robbery with violence. Given that "simple" robbery under section 296(1) of the Penal Code attracts a minimum sentence of fourteen years imprisonment, it seems logical that the minimum sentence for robbery with violence should begin at fifteen years imprisonment. Since there are no aggravating circumstances to take the crime here to the realm of heinous robbery with violence beyond the ingredients of the crime, it is fair and proportionate to give the minimum sentence logically possible. In my view, that is fifteen years imprisonment.

35. The upshot, then, is that the appeal against conviction is dismissed as unmeritorious. However, the appeal against sentence succeeds. The sentence imposed on the Appellant for the conviction for the offence of robbery with violence is set aside. In its place, a prison sentence of fifteen years is imposed. The sentence will start running from 08/05/2015 when the Appellant was first arraigned in Court.

36. Orders accordingly.

Dated and delivered at Nakuru this 21st day of June, 2018.

……..

(PROF.) J. NGUGI

JUDGE