REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO 12 OF 2017

ONESMUS WAMBUI GATERI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 5 of 2015 in the Senior Principal Magistrate's Court at Kikuyu by Hon E. Michieka (PM) on 20th December 2016)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Onesmus Wambui Gateri was jointly charged with Peter Mwangi Macharia (hereinafter referred to as his Co-Accused person) on two (2) Counts of the offence of robbery with violence contrary to Section 295 as read with Sections 296 (2) of the Penal Code Cap 63 (Laws of Kenya). The particulars of Count 1 were that on the 13th day of November 2014 at Kingeero village in Kikuyu sub-county of Kiambu county, jointly and while armed with crude weapons namely pangas, they robbed Anthony Munene Mugambi (hereinafter referred to as "PW 1"), of two mobile phones make Nokia 301, Samsung Galaxy Note II, a wrist watch make casio, a wallet, two ATM's of KCB and Chartered Banks (**sic**), a credit card and cash Kshs 1,400/= all valued at Kshs 24,000/= and immediately before the time of such robbery used personal violence to the said PW 1.

2. The particulars of count II were that on the aforesaid date and place jointly and while armed with crude weapons namely pangas, they robbed Faith Wairimu Itegi (hereinafter referred to as "PW 2"), of cash Kshs 100/= and immediately before the time of such robbery used actual violence to the said PW 2.

3. They were also charged with an alternative charge of handling stolen property contrary to Section 322 of the Penal Code. The particulars of this offence were that on the 7th day of February 2015 at Njiru market Nairobi County, otherwise than in the cause of stealing, dishonestly retained one mobile phone make Nokia 301 IMEI No 357885051609447 knowingly or having reasons to believe it to be stolen property or having been unlawfully obtained.

4. The Learned Trial Magistrate, Honourable E. Michieka, Senior Principal Magistrate convicted him of the offence of robbery with violence and imposed on him the death sentence as was prescribed under the law. His Co-Accused was, however, acquitted on both counts.

5. Being dissatisfied with the said judgment, the Appellant filed an Appeal. He relied on five (5) Grounds of Appeal. On 21st March 2018, he filed Amended Grounds of Appeal and Written Submissions. This time he relied on seven (7) Amended Grounds of Appeal.

6. When the matter came up for hearing on the said 21st March 2018, the State tendered oral submissions.

LEGAL ANALYSIS

7. As this is a first appeal, this court analysed and re-evaluated the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

> **"On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanor".**

8. Having considered the Appellant's and States' Written Submissions, this court found the following issues to have been placed before it for determination:-

1. Whether or not the Charge Sheet was defective;

2. Whether or not the Prosecution proved its case against the Appellant beyond reasonable doubt.

9. The court therefore dealt with the said issues under the distinct and separate heads shown herein below.

I. CHARGE SHEET

10. Amended Ground of Appeal No (1) was dealt with under this head.

11. The Appellant submitted that the Charge Sheet as drafted was wrong due to duplicity. He relied on the case of **Joseph Njuguna Mwaura & 2 Others vs Republic [2013] eKLR** where it was held that it was incorrect to charge an accused person under Section 295 and Section 296 (2) as that amounted to a duplex charge.

12. He also placed reliance on the case of **Juma vs Republic [2003] EA 471** which pointed out the importance of drafting a charge under Section 296 (2) of the Penal Code as it was the life of an individual at stake. It was his submission that he did not know which offence he was answering to and consequently the same prejudiced him.

13. The State did not submit on this issue.

14. Section 295 of the Penal Code provides as follows:-

"Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery."

15. Section 296 (2) of the Penal Code stipulates as follows:-

a. the offender must be armed with any dangerous or offensive weapon or instrument; or

b. the offender must be in the company of one or more other person or persons or;

c. 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.

16. This court was of the view that there was no duplicity of charges where an accused person is charged with robbery contrary to Section 295 **as read with** (emphasis court) Section 296 (2). Indeed, Section 295 of the Penal Code defines what generally constitutes the offence of robbery while Section 296 (2) of the Penal Code prescribes the penalty of the offence of robbery with violence. The penalty for simple robbery under Section 296 (1) of the Penal Code is imprisonment of upto fourteen (14) years. There would, however, be duplicity of charges if such accused person is charged with robbery contrary to Section 295 of the Penal Code **and** (emphasis court) Section 296 (1) of the Penal Code which was the purport of the case of **Joseph Njuguna Mwaura vs Republic.**

17. Be that as it may, this court was of the view that there would be no prejudice to an accused person if there was a defect in the charge sheet. Indeed, Section 382 of the Criminal Procedure Code provides as follows:-

"Subject to the provisions hereinbefore 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:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

18. In the absence of any demonstration by the Appellant of what prejudice he suffered this court was not persuaded to find that the Charge Sheet as drafted was defective.

19. In the circumstances foregoing, his Amended Ground of Appeal No (1) was not merited and the same is hereby dismissed.

II. PROOF OF THE PROSECUTION'S CASE

20. Amended Grounds of Appeal Nos (2), (3), (4), (5), (6) and (7) were dealt with under this head.

21. The Appellant submitted that he was not positively identified at the scene of the offence as the incident was said to have occurred at 10.30 pm when lighting conditions were not favourable for a positive identification. He contended that the Learned Trial Magistrate ought to have interrogated the source and intensity of light. He contended that the description that the attacker was short and had a panga was not sufficient to prove positive identification of him as having been the attacker.

22. He relied on the cases of **Wamunga vs Republic [1989] KLR 424**, **Maitanyi vs Republic [1986] KLR 198**, **Daniel Muthoni M'arimi vs Republic [2013] eKLR** and **Victor Mwendwa Mulinge vs Republic [2014] eKLR** to buttress his argument.

23. He further contended that PW 1 and PW 2 contradicted themselves as to where the attacker with a panga came from. He said that whereas they had both stated that the attacker emerged from the front side of the vehicle, in his Cross-examination, PW 1 said that the man came from the rear of the vehicle. He added that PW 1 also contradicted himself when during his Examination-in-chief and Cross-examination, he said that it was the Appellant and his Co-Accused respectively who struck him with a panga.

24. He also submitted that No 79888 PC James Wanjohi (hereinafter referred to as "PW 6") never adduced in evidence Safaricom data even after having been stood down and given an opportunity to present the same in court. He further contended that failure by the Prosecution to avail an expert witness to adduce the said data was contrary to Section 65 (8) (9) of the Evidence Act Cap 80 (Laws of Kenya). He relied on the case of **Charles Matu Mburu vs Republic [2014] eKLR** in this regard.

25. His other submission was that the Prosecution failed to tender evidence of recovery of other items he was purported to have stolen from PW 1 and PW 2. He contended that the signatures of those who signed the inventory were not verified.

26. It was his evidence that Francis Muiruri who PW 1 said was shown by Safaricom data to have had the phone and the expert witness ought to have been called as witnesses in the case herein. He submitted that failure to call the two (2) witnesses dealt a fatal blow to the Prosecution's case.

27. He averred that he had explained how he was sold the phone by a second hand dealer and would not have known that it was stolen property. It was his contention that possession of the said phone did not link him to the robbery. He also urged this court that, although he still pleaded innocence, to order that he be referred for re-sentencing in line with the case of **Petition No 15 of 2016 Francis Karioko Muruatetu & Another.**

28. On its part, the State submitted that the Appellant was positively identified by PW 1 and PW 2 as there was sufficient light and that PW 1 adduced in evidence a receipt showing that the recovered phone belonged to him. It added that a Cyber Crime Report placed the Appellant at the scene of the incident.

29. It added that there was no contravention of Section 65 (8) and 65 (9) of the Evidence Act because this case related to the production of a Cyber Report. He also submitted that the Prosecution had the discretion to call the number of witnesses to prove a fact and consequently, failure to call Francis Muiruri and the Expert witness did not render the Prosecution's case to be defective.

30. It pointed out that the Appellant was placed as the scene of crime and was found in possession of PW 1's phone and as a result, the Learned Trial Magistrate acted correctly when he termed his defence of alibi as an afterthought. It therefore urged this court to dismiss the Appellant's appeal.

31. This court found it prudent to address the issue of the admissibility of the Cyber Crime Report in the first instance. It was the view of this court that analysing the merits or otherwise of the Appellant's submission on this issue added no value to his case as he admitted that he was found in possession of PW 1's phone. This court did not therefore find Amended Grounds of Appeal Nos (4) and (6) to have been material in the circumstances of this case. How he came to be in possession of the same was a different case altogether.

32. This court noted that the incident occurred at 10.30 pm. According to PW 1, he was changing a tyre when a man flashed a torch in his face and the Appellant struck him with a panga on his face and he fell down. He said that he saw the Appellant and his Co-Accused clearly as the head lights were on. He also stated that he saw the Appellant's Co-Accused clearly when he entered the vehicle as the lights were on. They then went to a coffee plantation. After they had taken another card from the vehicle, the Appellant's Co-Accused suggested that they kill him because they had seen their faces but the Appellant dissuaded him from doing so. They then ran away.

33. In his Cross-examination, he stated that the Appellant came from the rear of the vehicle and flashed a torch on his face. He said that he did not see his face at the time and that it was the Appellant's Co-Accused who he saw as the head lights were on. He told the Trial Court that it was the Appellant's Co-Accused who hit him with a panga.

34. On her part, PW 2 said that the Appellant was the one who had a panga and that she did not see the face of his accomplice. She corroborated PW 1's evidence of how he was taken to the coffee plantation.

35. In his judgment, the Learned Trial Magistrate stated that both PW 1 and PW 2 clearly saw the Appellant herein. However, it was clear from the evidence of the two (2) witnesses that they saw the faces of different persons. PW 1 was not certain from his evidence if he saw the Appellant or his Co-Accused while PW 2 testified that she saw the Appellant's face and that he was the one who had a panga.

36. The Learned Trial Magistrate also observed that the Appellant's Co-Accused's identification was not free from error because PW 1 did not disclose whether their interaction at the time yielded a positive identification because he did not speak of any lighting in the coffee plantation.

37. Following the reasoning of the Learned Trial Magistrate, this court found and held that because PW 1 initially stated that he did not see the Appellant's face when he shone the torch on his face and he approached the vehicle from the rear, the Appellant's identification was not free of error. Notably, PW 1 did not allude to the source and intensity of the light at the coffee plantation that would have persuaded this court to find the same to have been sufficient to have identified the Appellant herein. The contradictions by both PW 1 and PW 2 were not insignificant. Indeed, they were material contradictions that this court could not ignore.

38. Going further, in his defence, the Appellant stated that he had lent his Co-Accused his phone when he went to meet his in-laws. His Co-Accused confirmed this fact and stated that he had borrowed the Appellant's phone when he went to pay dowry for his wife.

39. The movement of the phone from the Appellant to his Co-Accused was confirmed by No 66135 CPL Omar Babiya (hereinafter referred to as "PW 5"), the Investigation Officer, herein who stated that the Appellant gave his phone to his Co-Accused on 28th November 2014 at 19.40 hours.

40. It was evident from the Appellant's evidence that his Co-Accused had only come to bail him out when he was arrested. The question that came to the mind of this court was, whether PW 1 had been mistaken when he categorically stated in his Cross-examination that it was the Appellant's Co-Accused who hit him with a panga because it was the Appellant's Co-Accused who was acquitted by the Learned Trial Magistrate.

41. Turning to the doctrine of recent possession, this court came to the conclusion that because the Prosecution's case had created doubts in the mind of this court, there was a possibility that the Appellant may very well have purchased the phone as he told the Trial Court. Indeed, PW 5 testified that the last call from the phone was made on 14th November 2014 at 11.36 pm at Thome wa Kahuti by Francis Muiruri and that the Appellant got the phone on the same date at 18.20 hours. He admitted that the said Francis Muiruri could have been one of the robbers.

42. In view of the possibility of the said Francis Muiruri having been a robber, a possibility that was entertained by the Investigation Officer, and the fact that he was never arrested as having been the first person who had possession of the phone after it was stolen thus leaving a gap in the *res gestae*, this court was thus hesitant to say that the doctrine of recent possession was applicable merely because the phone was found in possession of the Appellant.

43. The said phone may very well have been stolen property. However, the Prosecution did not adduce cogent evidence to link the Appellant to the robbery on the material date and time. It did not discharge its burden of proof to demonstrate that the only way the Appellant came to be in possession of the phone was through the robbery.

44. It was thus the considered view of this court that the Prosecution did not prove the offence of robbery with violence against the Appellant. As the phone had been in possession of another person, Francis Muiruri, who could have been a robber, this court was also not persuaded that it should find that the Appellant was guilty of the alternative charge of handling stolen property.

45. In the premises foregoing, this court found that the Amended Grounds of Appeal Nos (2), (3), (4), (5), (6) and (7) were merited and the same are hereby upheld.

DISPOSITION

46. For the foregoing reasons, the Appellant's Petition of Appeal was merited and the same is hereby allowed.

47. In view of the fact that the evidence that was adduced before the trial created doubt in mind of this court, that benefit of doubt leads it to quash, set aside the conviction and sentence that was meted upon the Appellant by the trial court as it would be clearly unsafe to confirm the same. The court hereby orders that the Appellant be set free forthwith unless held or detained for any other lawful reason.

48. It is so ordered.

DATED and DELIVERED at KIAMBU this 14th day of August 2018

J. KAMAU

JUDGE