



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 63 OF 2016

(An Appeal arising out of the conviction and sentence of HON. C. OBULUTSA – (SPM) delivered on 13th May 2016 in Eldoret CM CR. Case No.7792 of 2014)

JOSEPH AREGETE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Joseph Aregete 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 16th December 2014 at Nangili Trading Centre in Kakamega County, the Appellant, jointly with another not before court robbed David Barasa (the complainant) of a mobile phone Nokia 1200 and cash Kshs.5,000/- and immediately before the time of such robbery used violence to the complainant. He was alternatively charged with **handling stolen property** contrary to **Section 322(2)** of the **Penal Code**. The particulars of the offence were that on 17th December 2014 at Nangili Police Patrol Base in Kakamega County, otherwise than in the course of stealing, dishonestly retained a Nokia 1200 mobile phone having reason to believe it to have been stolen. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was found guilty of the main count and sentenced to death. The Appellant 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 when the prosecution had failed to prove the charge against him to the required standard of proof beyond any reasonable doubt. He took issue with the fact that he had been convicted on the basis of a defective charge that did not properly set out the particulars of the charge. He was aggrieved that he had been convicted on the basis of contradictory evidence that did not support the prosecution's case. The Appellant took issue with the fact that he had been convicted on the basis of the application of the doctrine of recent possession when the prosecution had not established the ownership of the alleged robbed item to the required standard of proof. He faulted the trial magistrate for relying on the evidence of identification when no proper police identification parade was conducted. He was aggrieved that his rights as provided under **Section 200(3)** of the **Criminal Procedure Code** were not complied with, thus prejudicing his case. He was finally aggrieved that his defence had not been taken into account before the trial court reached the impugned decision. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed by the trial court.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. In summary, it was his submission that the charge upon which the conviction was based was defective, in that it did not set out the particulars of the charge in sufficient detail to enable him defend himself. The Appellant submitted that the P3 form that the prosecution relied on in its bid to prove that the complainant was injured was filled five (5) months after the alleged incident. He was of the view that the P3 form could not be relied upon by the court to establish that indeed the complainant was injured. The Appellant pointed out that his right to fair trial was infringed in that the succeeding magistrate did not read him his rights as provided under **Section 200(3)** of the **Criminal Procedure Code**. He was of the view that this failure vitiated the trial. As regard the alleged recovery of the mobile phone in his possession, the Appellant submitted that the alleged recovery amounted to a confession which ought to have been done in accordance with the law. He was aggrieved that the ownership of the mobile phone was not established before the trial court reached the verdict that the mobile phone belonged to the complainant.

On identification, he was of the view that the circumstances favouring positive identification were absent and therefore it was impossible for the trial court to agree with the complainant that he had identified him on the night of the robbery with the aid of moonlight. The Appellant was of the view that the circumstances were fraught with doubt that a court of law could not possibly arrive at the verdict that he had been identified. He was finally aggrieved that he was sentenced to death before the trial court had properly interrogated his mitigating circumstances. The Appellant was of the view that the circumstances in which the offence occurred did not justify the death sentence. He urged the court to allow the appeal.

Ms. Oduor for the State opposed the appeal. She submitted that the prosecution had established the charge brought against the Appellant to

the required standard of proof. The prosecution had relied on the evidence of identification and the application of the doctrine of recent possession to establish the guilt of the Appellant. Ms. Oduor stated that the complainant was robbed of his mobile phone as he was going home after taking a drink in a bar. He was robbed by two people who grabbed him, strangled him and then robbed him of his mobile phone and Kshs.5,000/-. The complainant was injured in the neck that he required medical attention. The Appellant was identified at the scene of robbery by a security guard who knew him prior to the robbery incident. When he was arrested, he was found in possession of a mobile phone which was positively identified to have been robbed from the complainant. The complainant identified the mobile phone by the SIM card found in the phone which was registered in his name. She urged the court to disallow the Appellant's appeal and uphold both the conviction and the sentence.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court 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, Ruwala v R [1957] EA 570)”.

In the present appeal, the issue for determination by this court is whether the prosecution established a case against the Appellant on the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

This court has carefully re-evaluated the evidence adduced before the trial court. It has also considered the submission made by the parties to this appeal. As regard the technical issues that the Appellant raised, this court holds that on perusal of the charge sheet, it was clear that the charge was set out in the charge sheet. The Appellant was charged with **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the charge were set out in the charge sheet and were read out to the Appellant. The Appellant's claim to the effect that the charge sheet was defective is not supported by evidence. As regards the Appellant's complaint that **Section 200(3)** of the **Criminal Procedure Code** was not complied with before the succeeding magistrate took over the trial, upon perusal of the proceedings, it was clear that the Appellant's trial was conducted before one magistrate (Hon. C. Obulutsa – SPM). It is the same magistrate who delivered the Judgment and sentenced the Appellant. The above two grounds of appeal have no basis and are disallowed.

The Appellant submitted that he was not properly identified at the time of the robbery because the conditions favouring positive identification were absent. According to the complainant, he was attacked by two people as he was walking from the bar where he had had a few drinks, to the stage where he was to seek a boda boda rider to take him home. He told the court that he was grabbed by the neck, strangled and then robbed off his mobile phone and Kshs.5,000/-. During the robbery, there was a struggle where one of the robbers left his T-shirt and fled from the scene. The T-shirt was produced in court as a prosecution's exhibit. The complainant told the court that during the robbery, he was able to identify the Appellant. He was able to identify the Appellant by the security lights outside the bar and by moonlight.

In regard to the identification of the Appellant, PW3 Patrick Wafula corroborated his evidence. He testified that on the material night, while on security guards duties at the bar where the complainant had taken drinks, he heard a commotion. He went to check. He found the complainant holding a T-shirt. He told him that he had been robbed of his mobile phone. The complainant made the report to the police. On the following day, while he was at the bus stage, he saw the Appellant. He pointed him out to the police who were on patrol. He was arrested and taken to Nangili Police Patrol Base. At the police patrol base, He was searched by PW4 Sergeant Gathogo who found a mobile phone in one of his pockets. An inventory was taken. The complainant positively identified the mobile phone. He inserted his Personal Identification Number (PIN) that enabled him to switch on the mobile phone. When the Appellant was put on his defence, he denied that he committed the offence. Other than denying committing the offence, he said nothing in connection with the offence. It was this evidence that the prosecution relied on to secure the conviction of the Appellant.

In his appeal, the Appellant challenges the evidence of identification. He submitted that the circumstances in which he is said to have been identified was not ideal for positive identification. He pointed out the fact that the source of light was such that it was not possible for the complainant to have identified him as being one of the persons that robbed him. In **Maitanyi -Vs- Republic [1986] KLR 198 at P.200** held thus:

“Although the lower courts did not refer to the well-known authorities Abdulla Bin Wendo & Another vs Reg (1953) 20 EACA 166 followed in Roria vs Rep (1967) EA 583, it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition:-

“Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error”.

In the present appeal, having re-evaluated the evidence of identification, this court agrees with the Appellant that the circumstances favouring positive identification were absent when the complainant says that he was able to identify the Appellant. The incident took place at night. Although the Appellant said that there was moonlight, the complainant did not give the description of his assailant in the first report that he made to the police. Although PW3 testified that he had known the Appellant prior to the robbery incident, it was clear from his evidence that he arrived at the scene when the robbery had already taken place. That being the case, the evidence of identification by the complainant is that of a single witness. This court cannot safely convict the Appellant on the basis of such evidence unless there is other evidence

corroborating that evidence of identification.

In the present appeal, the prosecution provided other evidence. That evidence is the recovery of the mobile phone that was robbed from the complainant. The complainant positively identified the recovered mobile phone. In fact, he switched it on using a personal identification number which the complainant alone was privy to. The mobile phone was recovered from the Appellant within a day of the robbery. The period of recovery of the mobile phone points to the Appellant either as the robber or a receiver. In the present appeal, upon evaluating the evidence, it was clear to this court that the Appellant had possession of the mobile phone as the robber because he failed to give an explanation of how he came to be in possession of the said mobile phone. Indeed, he had no objection to the mobile phone being released to the complainant after the same had been produced into evidence. In the premises therefore, this court holds that the Appellant's appeal against conviction lacks merit because the prosecution proved the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt. The prosecution established that the complainant was robbed of his mobile phone and cash, and in the course of the robbery, was injured. The injury was confirmed by the P3 form which was produced into evidence. The appeal against conviction is hereby dismissed.

On sentence, this court has considered the circumstances in which the robbery took place. It has also considered the mitigation of the Appellant and the fact that he is a first offender. It has also taken into consideration the fact that no offensive weapon was used during the robbery. The injury that the complainant sustained was minor and not life threatening. Following the Supreme Court decision in **Francis Karioko Muruatetu & Another -vs- Republic [2017] eKLR**, this court is of the view that the above circumstances are not deserving of the ultimate penalty: the sentence of death. In the premises therefore, the death sentence imposed by the trial magistrate is set aside and substituted by a sentence of this court sentencing the Appellant to serve ten (10) years imprisonment with effect from 13th May 2016 when the Appellant was sentenced by the trial court. In arriving at this sentence, this court took into consideration the period that the Appellant was in remand custody. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF SEPTEMBER 2018

L. KIMARU

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 31ST DAY OF OCTOBER 2018

HELLEN OMONDI

JUDGE