REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 12 OF 2016

JOSEPH OMBATI ONYANGO.....APPELLANT

-VRS-

REPUBLIC.....RESPONDENT

[Being an Appeal against the conviction and sentence of Hon. Were – PM delivered on the 28th day of November 2014, in the Original Nyamira Chief Magistrate's Court Criminal Case No. 753 of 2014]

JUDGEMENT

The appellant was the 1st accused at the trial in the court below. He together with his co-accused who was acquitted for lack of evidence, were charged with Robbery with violence contrary to Section 296 (2) of the Penal Code.

The particulars of the charge were that on 6th July 2014 at Mageri Sub-location in Nyamira North District within Nyamira County jointly with others not before court while armed with dangerous weapons namely pangas and metal bars robbed Cosmus Momanyi Gesibo of 30,000/=, 7 pieces of Menengai bar soap worth 1,050/= and 3 ½ kilogrammes of sugar worth 350/= and immediately before the time of such robbery threatened to use actual violence to the said Cosmus Momanyi Gesibo.

The appellant and his co-accused pleaded not guilty to the charge but after evaluating the evidence of the five prosecution witnesses, the sworn defence of the appellant and his co-accused and the testimonies of their witnesses, the trial magistrate found the appellant guilty, convicted him and sentenced him to death.

Being aggrieved by the conviction and sentence, the appellant, through the firm of Oguttu Mboya & Co. Advocates, preferred this appeal. The appeal is premised on grounds that: -

> **"1. The Learned Trial Magistrate erred in law in finding and holding that the Ingredients necessary towards proving and/or establishing the Offence of Robbery with Violence, pursuant to and under the Provisions of Section 296 (2) of the Penal Code, Chapter 63, Laws of Kenya were proved and/or established by the Prosecution, in respect of the matter touching and/or concerning the Appellant herein. Consequently, the finding and holding of the Trial Magistrate, has occasioned a Miscarriage of Justice.**
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> **2. The Learned Trial Magistrate erred in proceeding to convict the Appellant on the basis of the Evidence of a sole and single Identifying witness (PW 1), without subjecting the said evidence to thorough and rigorous scrutiny and circumspection, to avoid Mistaken, but honest mistake, that are occasionally attendant to and/or inherent in the course of (sic) Identification and/or Recognition.**
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> **3. The Learned Trial Magistrate erred in finding and holding that the Appellant was Positively Recognized by PW 1, (sic) on the basis of Solar light, without ascertaining the location, Extent, Nature and Intensity of the alleged lights, taking into account that the alleged offence (sic) took place at 12.30 a.m, when PW 1 was already asleep and hence the possibility that (sic) the lights were off, is neither Remote nor unimaginable.**
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> **4. The Learned Trial Magistrate erred in law in convicting the Appellant of the offence charged, whereas there was Confusion and/or Contradiction concerning the manner and how the Appellant herein was (sic) arrested, which confusion and/or contradiction negated the Probative value of the evidence tendered by the Prosecution and thereby generated Doubt, which ought to have been resolved in favour of the Appellant.**
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> **5. The Learned Trial Magistrate erred in law in failing to properly evaluate, appraise and/or analyze the evidence on record and thereby failed to appreciate the Material and relevant contradictions/discrepancies, which were apparent and evident in the evidence of PW 1, PW 2 and PW 5, respectively, which Contradictions defeat proof of the offence charged Beyond**

Reasonable Doubt.

6. The Prosecution having failed to call the wife of PW 1, as a witness (whereas same was said to be present at the time of the incident) without tendering any reasonable explanation, cause and/or basis, for such neglect and/or failure, the Learned Trial Magistrate erred in failing to form an Adverse opinion, which opinion would no Doubt have negated the weight and value of the Prosecution's evidence.

7. The Learned Trial Magistrate erred in law in failing to take into account and/or consider the sworn evidence tendered by the Appellant and thereby disregarded and/or ignored the Defence Evidence, without assigning any credible reasons and/or basis for such omission. Consequently, the Appellant herein was not granted a Fair hearing, in line with the Provisions of Article 50 (1) of the Constitution, 2010.

8. The Sentence Meted out by and/or at the instance of the Trial Learned Trial Magistrate, is Unconstitutional and contrary to the Provisions of Article 25 of the Constitution, 2010, which forbids Inhuman and/or Degrading Punishment."

Thereafter it was agreed that the appeal would be canvassed by way of written submissions. However, Counsel for the appellant merely summarized the evidence of the prosecution witnesses, restated the grounds of appeal and made submissions upon each of those grounds. Counsel submitted that the ingredients of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code were not proved and as such the trial magistrate ought to have sentenced the appellant to 14 years' imprisonment but not death. This because no evidence led by the complainant that he was injured by the attackers. Counsel drew the attention of the court to the charge sheet which merely states that the attackers threatened to use violence. On identification, Counsel submitted and faulted the trial magistrate for not subjecting the evidence of the complainant to thorough and rigorous scrutiny and circumspection. Counsel submitted that although the appellant stated that there was solar lighting that made it easier to identify the appellant, he did not tell the court how much time the attackers spent with them and whether the solar lighting was on throughout the attack. Counsel submitted that the complainant did not also tell the court the intensity of the lighting. Relying on the case of **John Kamau Kamaa V. Republic Nairobi Cr/Appeal No. 231 of 2004,** Counsel submitted that the complainant did not identify the appellant save to say that he used to buy goods from his shop and was from their neighbourhood. Counsel contended that the complainant should have told the court how the appellant was dressed. Still on the lighting, Counsel submitted that since the attack occurred at 12.30 am when the complainant was already asleep, it is possible that the lights were off. Counsel submitted that the appellant did not tell the court where the solar light was indicated so that it could enable him to recognize the appellant. Counsel stated that none of the witnesses testified that they saw the appellant at the scene.

On the arrest of the appellant, Counsel submitted that the witnesses contradicted each other and hence created doubt. Relying on the case of **Jared Ondanda Oguyo V. Republic Nairobi CR/APP No. 43 of 1984,** Counsel submitted that unless the variations that arise on the date of arrest and date of commission of an offence are resolved through an amendment on the charge sheet, then an appellant ought to be acquitted. Counsel submitted that in this case no witness told the court how, when or by who the appellant was arrested.

On the evidence of the prosecution witnesses, generally Counsel submitted that the same was marred with contradictions. Counsel reiterated that none of the witnesses was present at the scene and concluded that none of them could therefore give a true picture of what transpired. Counsel also took issue with the prosecution's omission to call the complainant's wife as a witness. Counsel contended that since no explanation was given for not calling her, the court should have formed an adverse opinion. Counsel further submitted that the appellant's defence in the lower court was disregarded or ignored without any reasons and that therefore the appellant was not given a fair hearing as required under Article 50 (1) of the Constitution. Counsel contended that since the offence was allegedly committed at 12.30 am then the correct date was 7th July 2014 but not 6th July 2014 as charged. Counsel submitted that since the charge was not amended to indicate the correct date the appellant suffered miscarriage of justice.

Counsel also submitted that the sentence is unconstitutional and in breach of Article 25 of the Constitution which forbids inhuman or degrading punishment. Counsel urged this court to allow the appeal and set the appellant at liberty.

The appeal was vehemently opposed. Principal Prosecution Counsel respondent to each and every ground raised by the appellant and submitted that the charge against the appellant was proved beyond reasonable doubt. He contended that all the ingredients in a charge of robbery with violence were proved and that even though no violence was meted, there was a threat to use violence which can be inferred from the order to the victim to sit down and the break in. Counsel contended that the evidence of the complainant remained largely unchallenged on cross examination. Counsel contended that the complainant positively identified the appellant. He contended that solar lighting is common in Kenyan households and that this was evidence of recognition which outweighs that of visual identification. Counsel disputed there were contradictions in the case for the prosecution and stated that the prerogative to call witnesses lies with the prosecution and explained that the wife of the appellant was not called to testify as she was not a helpful witness for she did not know the attackers. Counsel submitted that the defence was a mere denial as it narrowed down on the day of the arrest and ignored the day of the incident. On the legality of the sentence he submitted that the Supreme Court of Kenya has pronounced itself on that issue as well as the way forward. He urged this court to take judicial notice of that decision.

I have considered the submissions by both sides carefully but as the first appellate court, I also have a duty to reconsider and evaluate the evidence in the court below so as to arrive at my own conclusion. I do so bearing in mind and making provision for the fact that I neither heard nor saw the witnesses giving evidence.

The complainant testified that on the material day he was asleep at the back of his shop when at around 12.30 am he heard a loud bang on the door. The door was broken and three people entered. It was his evidence that he saw those three people as the solar lights were on. The three people who got in through the sitting room ordered him to sit down. It was his evidence that one of the three men had a spring bar, another a pistol and another a panga. He obeyed their orders to give them cash as did his wife who had been ordered to sit where he was. It was his evidence that of those three people, he recognized the appellant as he used to buy goods from the shop. Before leaving, the attackers took sodas and more cash from the shop. They also made away with 7 bars of Menengai soap and some sugar. After that they ordered the complainant to close and remain inside. They did not use any violence. That same night he informed his brother and neighbours about the attack and in the morning reported the matter to Ekerenyo Police Station. Police officers visited the scene and commenced investigations.

PC Josephat Onsinyo (Pw5) confirmed that the complainant reported the matter on 7th July 2014. He also confirmed that the complainant reported that he had recognized the 1st accused as one of the attackers. The appellant was arrested by police officers from Ekerenyo and members of community policing. The complainant is also said to have identified some goods that were recovered by one PC Kagongo of Nyamira Police Station as the ones stolen from the shop during the attack.

It is my finding that the appellant was positively identified by the complainant as one of the attackers. The appellant was well known to the complainant as he used to purchase goods from his shop and that he had done so for a long time. There was solar light during the incident and this certainly helped the complainant to see the attackers. He could even remember what the appellant had as a weapon. It is instructive that the police officer (Pw5) testified that the complainant told him that he had recognized the appellant. I am therefore satisfied that the complainant was a truthful witness. The items stolen during the attack were produced in evidence. The complainant positively identified them as his. The other witnesses although they were not present during the attack confirmed that an attack indeed took place. They even mounted a search that very morning of the attack but the man they apprehended ended up being the wrong one.

The appellant when he gave his evidence only spoke of how he was arrested but did not in any way controvert the evidence of the complainant. His defence was weak and could not withstand that of the complainant. Robbery with violence is committed if the offender is armed with a dangerous or offensive weapon or instrument, or is in company with one or more person(s) 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 – (See Section 296 (2) of the Penal Code. The attackers in this case were three so the appellant was in company with one or more persons. They were all armed with weapons or instruments which qualify to be termed as offensive or dangerous. It is therefore immaterial that no violence was meted out upon anyone during the attack. The appellant's complaint that the evidence did not meet the ingredients of the offence is without basis. The evidence in this case proved an offence under Section 296 (2) of the Penal Code and whereas a three Judge Bench of this court has in **Joseph Kaberia Kahinga & 11 others V. Attorney General [2016] eKLR** made a declaration "***that the section does not meet the constitutional threshold of setting out in sufficient precision, distractively clarifying and differentiating the degrees of aggravation of the offence of robbery……with such particularity as to enable those accused to adequately answer to the charges and prepare their defences"*** the law is yet to be amended. As for the legality of the sentence, what the Supreme Court held is that the mandatory nature of the sentence provided under Section 296 (2) of the Penal Code is unconstitutional. It did not outlaw the death sentence. That is left to parliament to determine. As for those sentenced to death, the Supreme Court made certain recommendations on the way forward and that is yet to be attained (see Francis Karioko Muruatetu & Another V. Republic [2017] eKLR).

Accordingly, I find no merit in this appeal. The same is dismissed. It is so ordered.

Signed, dated and pronounced in open court this 31st day of October 2018.

E. N. MAINA

JUDGE