REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL APPEAL NO. 6 OF 2017

WYCLIFF ONGERI MBOYA.....APPELLANT

=VRS=

THE REPUBLIC.....RESPONDENT

[Being an Appeal against the Judgement and Conviction of Hon. J. Were – SRM

in the original Keroka Principal Magistrate's Court Criminal Case No. 1304 of 2010]

JUDGEMENT

The appellant was the 1st accused in a case where together with his five co-accused they were charged with Robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars for the charge were that on 28th October 2010 at Keroka Township in Masaba District within Nyanza Province jointly being armed with dangerous weapons, namely pangas and crowbar they robbed Samuel Michira Machogu of cash Kshs. 15,000/=, four mobile phones make Nokia 2760, Samsung N710, Nokia 1100 and Nokia 1200 all valued at Kshs. 30,000/= and immediately before and immediately after the time of such robbery used actual violence to the said Michael Michira Machogu.

The appellant as well as his co-accused pleaded not guilty to the charge and the prosecution then called four witnesses to prove its case. After the close of the evidence for the prosecution the trial magistrate put the appellant and his co-accused persons on their defence and the appellant made an unsworn statement in which he maintained his plea of innocence. However, after evaluating and considering the evidence and the statements of both sides, the trial magistrate found the appellant guilty and convicted him. Thereafter after holding a sentence hearing, the court, relying on the case of **Godfrey Ngotho Mutiso Vs. Republic C/A No. 17 of 2008** sentenced the appellant to 12 years in jail.

Being aggrieved by the conviction and sentence, the appellant preferred this appeal. The Petition of Appeal filed herein on 27th September 2011 is premised on grounds that the prosecution did not prove its case against him beyond reasonable doubt; that the evidence of Pw1 and Pw2 was merely speculative and insufficient and lacking in accuracy; that the trial magistrate failed to take into consideration that the case was a frame up arising from disagreements between the appellant and Pw1 and Pw2 and that the sentence of 12 years' imprisonment was overly harsh and excessive.

At the hearing of the appeal, the appellant relied on written submissions to which prosecution Counsel responded orally. The appellant urged this court to reconsider the evidence of identification and to subject the evidence of the witnesses, more especially that of Pw1 and Pw2 to closer scrutiny and find that it was contradictory and that they were not truthful witnesses. He stated that the evidence of the investigating officer was wanting and was not credible and as a whole there was not sufficient evidence to convict him. He wondered why the panga alleged to have been used during the robbery was not produced in evidence. To support his arguments, the appellant relied on the following cases: -

- **Gikongo Karume and Another Vs. The Republic [1980] (citation incomplete).**
- **Abdalla bin Wendo & Another Vs. The Republic [1953] EACC 166.**
- **Buaneka & Another Vs. Uganda [1967] (citation incomplete).**
- **Kimemia & Another Vs. The Republic [2004] EA 00 KLR 46.**

On his part, Mr. Ochieng, Counsel for the Respondent urged this court to find that there was overwhelming evidence to convict the appellant

and uphold the conviction and sentence.

In **Okeno Vs. Republic [1972] EA 32 at page 36** the court stated: -

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to fresh and exhaustive examination (Pandya Vs. Republic [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala Vs. Republic EA 570). It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings, and conclusions, it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In so doing it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses - See Peters Vs. Sunday Post [1958] EA 424."***

In line with the aforegoing principle, I have reconsidered and evaluated the evidence in the court below while at the same time bearing in mind that I neither saw nor heard the witnesses. I have also taken into consideration the submissions of the appellant and the prosecution Counsel. I am satisfied that the appellant was positively identified by Pw1 and Pw2 as one of the people who attacked them and robbed them. Although the robbery took place in the night (2.30am), the electricity in the living room was on throughout the robbery. Both Pw1 and his wife (Pw2) testified that the ordeal lasted for fifteen (15) minutes which in my view gave them sufficient opportunity to see the attackers. Their house had only two rooms and I am satisfied that one could see clearly in the bedroom with the electricity in the sitting room. Pw1 and Pw2 knew the appellant prior to that incident. Pw1 had met the 1st accused at Tropical Hotel Keroka – where the 1st accused had waited on him while Pw2 had seen him before although she did not know his name. I am satisfied that the prevailing circumstances were favourable for a positive identification. Their evidence of recognition was fortified by the fact that the day after the robbery the appellant was caught with one of the phones stolen during the robbery. Pw1 identified the phone as his and immediately reported the matter to the police who swung into action and arrested the appellant. I am satisfied that Pw1 positively identified that phone as his. His evidence was corroborated by Pw2. The evidence of recognition and of recent possession provides proof of the appellant's guilt beyond reasonable doubt. The ingredients of robbery with violence were proved as not only was the appellant armed with a dangerous or offensive weapon or instrument (they were armed with a panga and a crowbar), but he was in the company of one or more persons. There is also evidence that they wounded Pw1 during the robbery. Any one of the above ingredients would have sufficed but in this case they were all proved. It is my finding that the evidence of the prosecution was so credible and cogent that the unsworn statement of the appellant could not stand to it. The evidence of Pw1 and Pw2 was consistent and credible.

As for the sentence, **Section 296 (2) of the Penal Code** which creates the offence of Robbery with violence provides for a mandatory death sentence. However, in the case of **Godfrey Ngotho Mutiso Vs. Republic [2010] eKLR** the Court of Appeal held that the mandatory nature of that sentence was unconstitutional. The trial magistrate relied on that decision of the Court of Appeal to avoid sentencing the appellant to death instead sentencing him to twelve years (12) imprisonment which considering the circumstances of this offence was just and reasonable. Accordingly, I find no merit in the appeal against either the conviction or the sentence and the appeal is dismissed. The appellant shall continue serving his sentence.

It is so ordered.

Dated, signed and delivered in open court this 20th day of December 2018.

E. N. MAINA

JUDGE