REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 7 OF 2016

MILTON MUTHOKA KALEMBE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(This is an appeal against the judgement of the lower court held at Kajiado Chief Magistrate's Court in a decision delivered on 2/3/2016 by Hon. M.O. Okuche (SRM)

JUDGMENT

MILTON MUTHOKA MUASA alias KALEMBE hereinafter referred as the appellant was indicted before the Senior Resident Magistrate Court at Kajiado with the offence of robbery with violence contrary to section 296 (2) of the Penal Code Cap 63 of the Laws of Kenya. The brief facts of the charge being that on 30th day of May 2014 at Bissil Location within Kajiado County the appellant jointly with others not before court were armed with dangerous weapon namely pistols when they robbed Ibrahim Sheikh Eden of Ksh.180,000, a mobile phone valued at Ksh.15,000 and at or immediately before or after the time of such robbery used actual violence to the said Ibrahim Sheikh Eden.

The appellant pleaded not guilty to the offence necessitating the prosecution call six (6) witnesses to substantiate the case as required under section 107 (1) (2) of the Evidence Act Cap 80 of the Laws of Kenya. The appellant thereafter was placed on his defence in answer to the charge. The learned trial magistrate on consideration convicted the appellant and sentenced him to suffer death as prescribed under section 296 (2) of the Penal Code. The appellant was aggrieved with both conviction and sentence and has decided to appeal to this court.

GROUNDS OF APPEAL:

The appellant has appealed on the memorandum of appeal filed in court on 7/4/2016 crafted as follows:

> **(1) That the learned trial magistrate erred in law and facts in that the evidence relied upon was not satisfactory due to inconsistencies and contradictions.**
>
> **(2) That the trial magistrate erred in law and fact by relying on evidence of recognition whereas the first report to the police bore no names of the appellant thus doubtful to sustain a conviction.**
>
> **(3) That the trial magistrate made an error in both law and facts by failing to observe that identification parade conducted was illogical for the prosecution to rely upon given that the appellant was well known to the complainant.**

(4) That the provisions of section 169 (1) of the Criminal Procedure Code was not complied with in relation to his defence statement.

On the strength of these grounds, the appellant prayed that the appeal be allowed, his conviction quashed and the sentence set aside. The appellant was represented on appeal by Mr. Itaya advocate who filed written submissions. Mr. Akula the senior prosecution counsel filed written submissions as a rejoinder to the issues to the memorandum of appeal on behalf of the state.

This being the first appellate court is duty bound to re-evaluate the evidence adduced at the trial and to draw its own conclusions, bearing in mind that it has not had the advantage or seeing and hearing the witnesses. See the legal proposition in the cases of (1) ***Shantilal M. Ruwala v Republic [1975] EA 570, (2) Okeno v Republic [1972] EA 32, (3) Njoroge v Republic [1987] KLR.***

SUMMARY OF THE PROSECUTION EVIDENCE AT THE TRIAL:

PW1 IBRAHIM SHEIKH EDEN testified that on 30/5/14 on or about 4.30 pm while at the shop some armed men with a pistol confronted him together with the customers. During the incident PW1 stated that the robbers managed to steal Ksh.180,000. In the course of the robbery PW1 confirmed that he managed to recognize the appellant who frequented the premises as a loader and also worked at the neighbouring premises.

PW2 ONESMUS KIKUVI a salesman in the complainant's (PW1) wholesale at Bissil deposed that on the material day he was working at PW1's wholesale when suddenly thieves entered the premises. It is on record from PW2 testimony that the thieves whom he was able to observe were armed with a pistol. This commotion between PW2 and the thieves attracted the action of PW1 who was not at the time in the scene where this incident was taking place. On arrival and being spotted by the attackers, according to PW1 and PW2 a demand for cash was made to PW1 at a gun point. That is when as per the testimony of PW1 the attackers forcibly carried away Ksh.180,000 from the wholesale shop. It was the evidence by PW1 and PW2 that in the midst of that incident he managed to recognize one of the men as the appellant by virtue of an earlier acquaintance as a worker in the neighbouring shop.

PW3 JAMES KALONZO an employee in PW1's wholesale testified that while working on 30/5/2014 a gang of robbers armed with pistols attacked them and went away with cash 180,000. According to PW3 the pistol was aimed at PW1 whom they demanded that he surrenders money or they shoot him on the head. In the course of that robbery PW3 alluded to having identified the appellant as he used to supply them with goods.

PW4 IP MARTIN SEWE testified on how he was requested to conduct an identification parade on 4/6/2014 involving the appellant. According to PW4 evidence he took the appellant through the rights as envisaged under the identification force standing orders guidelines (Cap 46). PW4 further testified that the appellant consented to participate in the parade where he was positively identified by PW1, PW2 and PW3 from the parade of eight members. The parade form was admitted in evidence as exhibit 1 to corroborate the evidence on identification by the three witnesses.

PW5 AG. IP KIMULU of Bissil police post as at 30/5/2014 testified as having received the robbery report the same day it happened. In his testimony PW5 acted on the report by visiting the scene where he confirmed occurrence of the robbery. That is also the time he was given a description of one of the robbers by PW2. PW5 armed with the information proceeded to effect arrest against the appellant.

PW6 CPL BOAZ investigated the offence, arranged for an identification parade to be conducted which identified the appellant. PW6 further testified that with the confirmation from PW1, PW2 and PW3 placing the appellant at the scene, they managed to track him using Mobile Phone No. 0718154436.

The appellant defence was that he was arrested at his house on 1/6/2014 when four people unknown to him identified themselves as police officers. He denied the offence as alleged in the prosecution case. In cross-examination the appellant confirmed knowing the complainant PW1 and did allege that he is owed

money by PW1 which has not been settled upto date.

APPELLANT'S SUBMISSIONS:

Mr. Itaya learned counsel for the appellant submitted that the prosecution did not establish the guilt of the accused beyond reasonable doubt. Mr. Itaya contended that the testimony by PW1, PW2 and PW3 was materially contradictory and inconsistent leaving gaps in the prosecution case. It was Mr. Itaya's contention that some of the crucial witnesses who could have been called were the customers in the wholesale of the complainant PW1. Learned counsel faulted the prosecution for failing to call the crucial witnesses who are said to be present when the alleged robbery took place. It was Mr. Itaya submissions that the testimony of PW1, PW2 and PW3 seems to be stand alone in the sense that none corroborated the other and yet they speak of the same robbery incident. Mr. Itaya faulted at alleged the investigations conducted by PW6 which did not confirm the authenticity of the claims as to failure by PW1 not to mention the mobile phone in his testimony and the investigating officer not to conduct thorough investigations as it relates to the appellant being involved with the commission of the offence.

THE RESPONDENT'S SUBMISSIONS:

Mr. Akula, the learned counsel for the respondent in reply opposed the appeal stating that the appellant had been positively identified by PW1, PW2 and PW3. According to the learned counsel the encounter had taken place at 4.20 pm and moreover the appellant was known to PW1, PW2 and PW3 prior to the 30/5/2014. The learned counsel reiterated the evidence by PW1, PW2, PW3, PW4, PW5 and PW6 as credible evidence that there was a robbery at Bissil in which the appellant was involved as one of the robbers. According to the learned counsel for the respondent the findings on the lower court regarding identification of the appellant was not perverse as there is sufficient evidence on record to support the ingredients against the appellant. In this case learned counsel opined that the prosecution did establish the ingredients of robbery with violence under section 296 (2) of the Penal Code to warrant this court not to disturb the findings. Learned counsel further submitted that the appellant defence is a mere denial which was improbable in the circumstances of the evidence tendered by the prosecution. He cited the following authorities to buttress the submissions of a firm case established against the appellant constituting the essential ingredients of the offence under section 296 (2) of the Penal Code that; the offender was armed with a dangerous weapon or offensive instrument namely a pistol. The offender was in company of one or more persons at the time of the robbery. That at the time or immediately before or immediately after the time of the robbery the offender threatened by the use of violence against the complaint. The case of ***Michael Nganga Kinyanjui v Republic [2014] eKLR, Maitanyi v Republic [1986] KLR 198, Eric Ouma Ndutu v Republic [2013 eKLR.***

The learned counsel urged this court to dismiss the appeal on both conviction and sentence for lack of merit.

On consideration of the matter, evidence at the trial, memorandum of appeal and submissions by both counsels, the four grounds of appeal can be safely reformulated and consolidated to two central issues:

> ***Whether the prosecution proved the case against the appellant beyond reasonable doubt to warrant this court to affirm the judgement of the magistrate court delivered on 2/3/2016 on both conviction and sentence?***
>
> ***The second issue revolves around compliance with section 169 of the Criminal Procedure Code by the learned trial magistrate.***

GROUND 1:

The first point to make under this ground is the law applicable under section 296 (2) of the Penal Code. This is critical in view of the fact that from the evidence though there were threats of violence and the robbers were armed nobody was injured.

I draw guidance from the Court of Appeal Case of ***Ganzi & 2 Others v Republic [2005] 1KLR*** where the following elements were set out as constituting the offence of robbery:

> **(1) The offender is armed with any offensive weapon or instrument**
>
> **(2) The offender was in company with one or more other persons; or**
>
> **(3) At or immediately before and or immediately after the robbery the offender wounds, beats, strikes or use other personal violence to any other person.**

In the same court in the case of ***Ajode v Republic [2004] 2 KLR 81*** the court observed:

> **"It is clear that injury of the victim itself is not the only ingredient of the offence of robbery under section 296 (2) and to reduce the charge to that of simple robbery under section 296 (1) because none of the witnesses was injured is not correct in law."**

In deciding a similar circumstance and provisions of section 296 (2) of the Penal Code the Court of Appeal in the case of ***Opoya v Uganda [1967] EA 752*** held thus citing ***Munene Ngumbao Mangi v Republic [2006] eKLR:***

> **"The word robbed is a term of art and connotes not simply a theft but a theft preceded accompanied or followed by the use of actual violence to any person in order to obtain or retain stolen property."**

The question which begs for an answer is whether the prosecution proved any one of the ingredients which constitutes the offence. As deduced from the evidence at the trial the case wholly rested on identification of the appellant.

I start with the law applicable on identification. In the persuasive case of Wamunga v Republic Cr. Appeal No. 20 of 1989 the Court of Appeal held interalia that:

> **"It is trite law that where the only evidence against a dependant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."**

The same court in the case of ***Mwenda v Republic Cr. Appeal No. 51 of 1989*** the court observed as follows:

> **"Whenever the case against an accused person depends wholly or substantially on correctness of one or more identification of the accused special need for caution before convicting in reliance of correctness of the identification is necessary. The court should warn itself of the possibility that a mistaken witness could be a convincing one and that a member of such witnesses could be mistaken. The court should further examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?**
>
> **Recognition might be more reliable than identification of a stranger, but even then, the court should remind itself that mistake in recognition of close relatives and friends have been made sometimes. It is therefore important that the evidence touching on identification especially the description of the alleged offender should be recorded at the first opportunity by the police**

when the report is being made. This is due to the fact that a comparison must be made between the description of the person identified in the first report and that made during the identification parade conducted later when a suspect is arrested."

These are the principles of law to be applied in determining this appeal. In this appeal before me a robbery took place at Bissil on 30/5/2014 and the men who robbed PW1 were armed with a dangerous weapon to wit a gun as per the description by PW1, PW2 and PW3. The three prosecution witnesses were at the scene of the robbery which according to their evidence occurred on the material day on or about 4.20 or 4.30 there about. The issue of identification was strongly argued before me by both counsels. According to learned counsel for the appellant he was of the view that the evidence of PW1, PW2 and PW3 was contradictory and inconsistent in nature. Learned counsel for the respondent maintained that the evidence of PW1, PW2 and PW3 sufficiently recognized the appellant as the person who robbed the complainant of Ksh.180,000 and a mobile phone. Learned counsel for the respondent made reference to the evidence of PW1, PW2, PW3 to the effect of knowing the appellant before the day of the robbery. This identity was further confirmed during the conduct of an identification parade by PW6. During the commentary and remarks after this parade the appellant confirmed that he was well known to the witnesses who identified him at the parade. It is not in dispute that the robbery at Bissil where PW1 owns a wholesale occurred during the day. That act therefore of PW1, PW2, PW3 and the accused having known each other prior to this day of the robbery is not a disputed issue.

There are no circumstances to impede visibility between the attackers and the witnesses PW1, PW2 and PW3. The accounts given by the three witnesses as to the date of the robbery and possible suspects gave rise to the arrest of the appellant. The discrepancy as to PW1, PW2, PW3 testing alluded to by the learned counsel for the appellant is not fatal to the prosecution case. PW3 in his testimony informed pW5 and PW6 as to the description of one of the robbers who happened to be the appellant. The mobile number given out to PW6 reference number 0718-154436 was used to track down the appellant and effect arrest. PW1 and PW2 confirms that the appellant and three others pointed a gun at them with threats to kill aimed at PW1 demanding that he gives them money or else they will shoot. That evidence confirms that during the robbery there were threats to use actual violence against the complainant PW1.

The question of importance on this aspect of the case is whether on analyzing the evidence in totality this court can answer ground No. 1 in the affirmative. The gist of the prosecution case at the trial are that the circumstances for a positive identification of the appellant as one of the robbers is based on the evidence of PW1, PW2 and PW3 as described by each of them on what they saw on the material day of the offence. The witnesses gave evidence as to the time, lighting and visibility on the day the robbers entered the wholesale shop. PW1, PW2 and PW3 were categoric that it was on or about 4.20 pm. Given the time and proximity of the robbers to PW1, PW2 and PW3 they were able to positively pick the appellant from among the three men who came to their premises. The three witnesses PW1, PW2 and PW3 were able to demonstrate their prior knowledge of the appellant as the one they associated with as a loader and a worker in a neighbouring shop.

These factors as to how PW1, PW2 and PW3 identified the appellant were test in an identification parade performed by PW4. The accounts given by the three witnesses (PW1, PW2 and PW3) as to the occurrence of the robbery and identification of the appellant cannot be said to be contradictory or inconsistent as submitted by the defence counsel. The discrepancy if any as to the testimony of PW1, PW2 and PW3 as contended by the learned counsel is not fatal to the prosecution case. PW3 in his testimony stated to have informed PW5 and PW6 as to the description of the appellant. The mobile number given out to PW6 reference No. 0718154436 belonging to the appellant was used to track him down and effect arrest with the assistance of criminal intelligence unit. The identification parade gave credence to the evidence of PW1, PW2 and PW3 to the effect that their recognition of the appellant at the scene was free from error or mistake.

The prosecution case falls within the threshold of the principles set out in the ***Mwenda Case (Supra)*** in supporting a positive identification of the appellant where the circumstances prevailing at the time were favourable.

The appellant defence failed to rebut the evidence on identification relied upon by the prosecution to prove his guilt. It was also indicative from the appellant that PW1 owes him a debt which he has not settled and maybe it is a possible link to the robbery. In so far the evidence on the debt is concerned the appellant failed to furnish the trial court with better particulars and materials to render the veracity of the evidence against his suspect.

Therefore no evidence that the any of the three witnesses demonstrated being untrustworthy. Furthermore the evidence by the appellant on the alleged debt had nothing to do with the two witnesses PW2 and PW3 who I consider independent of PW1 testimony. There was no enemity or malice alluded to PW1, PW2 and PW3 between them and the appellant as they were either workers or friends within the same town centre of Bissil. I find no foundation or basis upon which the witnesses could have complicated the appellant involving the complainant PW1. In my view the prosecution discharged the burden of proof beyond reasonable doubt against the appellant in respect of the charge of robbery with violence of which he was convicted and sentenced to death.

The set of circumstances proven by the prosecution at the trial under section 296 (2) of the Penal Code are that; the appellant was a member of a gang of three one of whom was armed with a pistol which was used to threaten the complainant with violence in order to commit the offence of robbing him of Ksh.180,000. The second set of circumstances which exist through the evidence before the trial court are that the appellant was in company with two or other persons at the time of the said robbery at Bissil wholesale on 30/4/2014 at 4.20 pm.

I am satisfied that the evidence confirms that a robbery with violence contrary to section 296 (2) of the Penal Code took place.

I make this conclusion that the evidence on identification reached the degree of certainty free from error and mistake required to sustain a conviction in a criminal trial. The three witnesses stated quite frankly that they could identify the appellant who was one of the robbers at the shop and made away with the cash while armed with a pistol. The appellant failed to rebut the evidence on identification and further omitted to give better particulars as to the debt and possible link of it to the robbery. I therefore find no tangible grounds to fault the findings of the trial court as to the identity of the appellant. This was a case even the identification parade was not absolutely necessary when looking at the direct evidence of PW1, PW2 and PW3 as to who among the men who participated in the robbery. I am satisfied that the prosecution discharged the burden of proof beyond reasonable doubt against the appellant in respect of the charge of robbery with violence contrary to section 296 (2) of the Penal Code.

This ground of appeal therefore fails.

The other issue raised by the appellant relate to the provisions of section 169 of the Criminal Procedure Code. Under this section:

> **“Every such judgement shall except as otherwise expressly provided for by this code, be written by or under the direction of the presiding officer of the court in the language of the court and shall contain the point or points of determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.”**

Applying the above provisions to the instant case and impugned judgement by the appellant the following all supported with evidence. That the learned trial magistrate prepared and wrote a judgement delivered on 2/3/2016. The judgement is indicated to have been delivered in the open court and duly signed by the learned magistrate. The reading of the judgement reveals that there were two issues framed for determination by the trial court:

> **(1) Was the offence of robbery with violence contrary to section 296 (2) of the Penal Code committed?**

(2) Has the culpability of the accused person been proved beyond reasonable doubt in the circumstances?

The two issues were answered in the affirmative as examplified by the reasons elucidating to the arrival of the decision on conviction and sentence. I am alive to provisions under section 169 of the Criminal Procedure Code which are couched in a mandatory manner to give effect to the judgement and reasons for the decision. The learned trial magistrate did comply with the law and procedure as outlined therein on judgement, form, content and delivery of judgement.

This ground of appeal also fails.

In conclusion after careful consideration which this case has reached I am satisfied that the trial court finding on guilt and on the evidence such scrutiny undertaken herein, the appellant was rightfully convicted. As regards sentence despite the debate ignited on the death penalty within our criminal justice system no final resolution has been reached by the apex court. The death sentence remains a lawful sentence both under the constitution and statute. Having confirmed conviction I find no basis to interfere with the mandatory sentence of death provided under section 296 (2) of the Penal Code.

Accordingly the judgement of the lower court delivered on 2/3/2016 is hereby affirmed on both conviction and sentence. The appeal is dismissed on its entirety. 14 days right of appeal explained.

Dated, signed and delivered in open court at Kajiado this 13th day of March, 2017

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R. NYAKUNDI

JUDGE

Representation:

Appellant present

Mr. Itaya for the appellant present

Mr. Akula for Director of Public Prosecutions present

Mr. Mateli Court Assistant - present