REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 146 OF 2014.

FRANCIS KINYUA NGUGI…...….APPELLANT

VERSUS

REPUBLIC ….……...…...….RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's court at Makadara Cr. Case No. 6704 0f 2012 delivered by E. K. Nyutu, Ag PM on 8th October 2014.)

JUDGMENT

BACKGROUND.

Francis Kinyua Ngugi, the Appellant herein was charged with two counts of robbery with violence. The particulars of count I were that on 25th December, 2012 at Nairobi River, Kamukunji Police Station Area in Nairobi within Nairobi county, jointly with another not before the court, while armed with dangerous weapons namely pangas and a knife robbed Samuel Mutinda Mutilu of Kshs. 1,050/- cash and a Tecno Tv 30 mobile phone all valued at Kshs. 5549/- and that immediately before the time of the robbery threatened to use actual violence on the said Samuel Mutinda Mutilu.

The particulars of count II were that on 25th December, 2012 along Nairobi River in the Kamukunji Police Station Area in Nairobi within Nairobi County, the Appellant, jointly with others while armed with dangerous weapons, namely pangas and a knife, robbed Andrew Mutiso Ndisya of Kshs. 12,000/- in cash and a Nokia 2600 mobile phone all valued at Kshs. 17,500/- and that immediately before the time of such robbery threatened to use actual violence on the said Andrew Mutiso Ndisya.

The Appellant was found guilty in both counts and upon conviction was sentenced to death. He was dissatisfied with both the conviction and sentence as a result of which he preferred this appeal. In his amended grounds of appeal dated 6th March, 2017, he has appealed on grounds that; his right to a fair trial under Article 50(2)(c) & (j) was infringed on by the failure of the prosecution to furnish him with witness statements and the first report made by the complainants at the police station, the learned trial magistrate overlooked the fact that the first report did not identify him as the perpetrator of the offence and in relying on weak evidence of recognition. He was also dissatisfied that the learned trial magistrate erred when he failed to note that the witnesses were coached, that investigations were done after the Appellant was arrested, that the prosecution had failed to discharge the burden of proof, and lastly, that his defence was rejected without reasonable grounds.

SUBMISSIONS.

The Appellant relied on written submissions which he filed on 6th March, 2017. In summary, he submitted that his right to a fair trial was violated under Article 50 (2)(c) and (j) in that he was not furnished with both the prosecution witness statements and the OB extract relating to the first report made by the complainants in the police Station. On identification, he submitted that he was not properly identified by both complainants because if they had, they would have reported to the police that they knew who had robbed them. This was in view of the fact that in their evidence in chief, they testified that they knew him yet when they made the report at the Police Station they did not state that they knew the person who robbed them. In this regard, he was of the view that the learned trial magistrate totally ignored the content of the first report to the police which if she had adequately considered, would not have convicted him. His further submission was that the investigations were poorly done as it was clearly evident that the witnesses were couched and investigations were done after his arrest. He also submitted that the elements of offence of robbery with violence were not proved and that his defence was not considered in the judgment of the trial court. He urged that the appeal be allowed.

Learned State Counsel, Ms. Atina opposed the appeal. She submitted that the Appellant was duly supplied with prosecution witness statements as well as the OB extract relating to the first report made by the complainants at the police station. She urged the court to look at the record of proceedings which attests to this fact. She conceded that the complainants did not state they knew the person who robbed them in the first report. However this did not dent the fact that the Appellant was known to them and so identification was by way of recognition. In addition, the conditions for identification were conducive; the Appellant was therefore not mistaken as the assailant. Furthermore, they had sufficient time to identify him.

Counsel submitted that there was no evidence that the witnesses were coached or that the investigations were carried out after the arrest of the Appellant. She submitted that the prosecution's evidence was consistent and corroborated. She was also of the view that the elements of the offence were proved as the Appellant carried out the robbery in the company of others while armed and he used force in robbing the victims. Finally, she submitted that the trial magistrate properly evaluated the Appellant's defence. She urged that the appeal be dismissed.

EVIDENCE.

It is now the onerous task of this court, as the first appellate court to reevaluate the evidence on record and come up with its independent conclusions. See: **Okeno v. Republic[1972] EA 32.**

The prosecution's case is majorly premised on the evidence of **PW1 and 2 Samuel Mutinde and Andrew Mutisu Ndisya** respectively. They both operated a business of buying and selling old tyres at Racecourse along Ngong Road in Nairobi. On the material date, the Appellant who was physically known to both of them approached PW1 asking him to go and view some tyres he had for sale. Since PW1 had some family engagements, he requested PW2 with whom he occasionally did the business jointly to accompany the Appellant. The Appellants led PW2 to Kamukunji area near Kamukunji Police Station. While there, PW2 found two other men. The Appellant produced a knife while the other two men were armed with pangas. They ordered him to call PW1 to which he obliged. When PW1 arrived, the Appellant with the other two robbers forced both PW1 and 2 to sit on the ground after which they robbed them. PW1 was robbed of cash Kshs. 1,050/= together with a mobile phone make Tecno TV30 while PW2 was robbed of Kshs. 12,000/=. The Appellant who was the main architect of the robbery shared Kshs. 1,000 to the other robbers. An argument ensured amongst them as the two robbers were complaining that they were given a small share of the loot. The robbers started chasing each other. That is when both PW1 and 2 got an opportunity to run away after which they reported the matter to the police. On 27th December, 2012, the witnesses got information that the Appellant had been seen drinking at a bar. They informed the police and on proceeding to the bar, found him and he was arrested and charged accordingly. Nothing was recovered from the Appellant.

PW3, PC Thomas Gikwae of Kamukunji Police Station investigated the matter. According to the witness, the robbery having taken place at about 10.00 a.m. both PW1 and 2 were able to identify the robbers. They also led the police to where the Appellant was arrested. He further testified that PW1

informed him that he knew the Appellant prior to the robbery.

After the close of the prosecution case, the learned trial magistrate ruled that a prima facie case has been established and thereby put the Appellant to defence. The Appellant chose to give a sworn statement of defence. He stated that on 27th December, 2012, he was at his place of work as usual but at tea break he went to a restaurant to take a cup of tea. That is where he met two people who asked him to identify himself. He did not have his identity card after which the persons told him to accompany them to Kamukunji Police Station where he was charged with the two counts of robbery. He denied he committed the offences and to the best of his knowledge, he thought that he would be charged with the offence of not carrying an identity card.

Determination

I have carefully considered the evidence on record and the respective rival submissions. This is a case where the robbery took place in the broad daylight. It is also a case in which both complainants (PW1 and 2) testified that they knew the Appellant prior to the robbery. In his evidence in chief, PW1 stated as follows:

> ***"He was arrested after I identified him to the police. I used to see him only but his name was not known to me."***

This testimony clearly shows that PW1 was physically known to the Appellant prior to the robbery. It is indeed vindicated by an earlier testimony that he identified the Appellant in a bar where he was drinking alcohol. For avoidance of doubt, PW1 testified as follows:

> ***"I told the police and myself and the police went to the said bar where we found the accused consuming the alcohol"***

PW2 on the other hand testified that himself and PW1 were well known to the Appellant prior to the robbery. His testimony was in the following words:

> ***"the accused was well known to us prior to that date. My phone was stolen by the accused."***

In cross-examination, PW2 re-confirmed this position by stating that;

> ***"I told the police Officer you were well known to me."***

From the foregoing, it is evident then, bearing in mind that the conditions of identification were conducive that the identification of the Appellant was by way of recognition. That would be a more assuring, reliable and satisfactory way of identification that would be convincing that when the victims saw the Appellant after the robbery, they would easily recognize him as one of the persons who had robbed them. **See Anjononi & others v Republic (1980) KLR, 59.** Accordingly, it would be expected that when both complainants went to report the matter to the police, they would indicate that they knew or would be in a position to recognize one of the robbers who was known to them prior to the incident. The court will now have to revisit the reports that were made at the police station as well as the evidence of PW3 to whom PW2 reported that he knew the Appellant.

The Appellant was furnished on his request, Police Occurrence Book abstract number 70 of 27th December, 2012. He had also requested for OB numbers 40, 43 and 49 of 25th December, 2012. Amongst these OB extracts, only number 43 of 25th December, 2012 and number 70 of 27th December, 2012 were relevant to his case. OB number 70 read as follows:

> ***"S/SGT Gitonga, PC Kikwai and PC Kiplaboit all take action against one male prisoner namely; Francis Kinyua Ngugi for the offence of stealing vide OB 43/25/12/2012 placed in cells while appearing drunk".***

I note at this stage that the Appellant properly quoted the content of this OB extract save that he distorted the statement that he was placed in cells while appearing normal."

OB 43/25/12/2012 on the other hand read as follows:

> ***"THEFT FROM PERSONS***
>
> ***Now to the station is one male adult namely Samuel Mutinda of cellphone 0723663285 a resident of Huruma Estate and Mutiso Ndisya of cellphone 0706600397 a resident of Huruma Estate who both of them reported that today at around 1100 hours while at Kamukunji the two reportees were stolen their money Kshs. 1,050/= and Tecno phone and Kshs. 12,000/= and phone Nokia respectively and now they seek police assistance."***

The evidence of PW3 on the other hand was that PW1 and 2 were able to identify the robbers and that they are the ones who led them in arresting the Appellant. He testified that PW1 told him that he very well knew the Appellant as a person who used to work at Racecourse Road where he also worked. The OB number 43/25/12/2012 which recorded PW1 as one of the persons who reported the robbery did not indicate that either he or PW2 were previously known to the Appellant. It then casts doubt in the mind of the court why if both complainants knew the Appellant, they did not report to the police that they either knew him or could be able to identify him on sight. I am unable, in the circumstances, to make a finding that the identification of the Appellant was satisfactory. I therefore agree with the Appellant that had the learned trial magistrate considered the first report made by the complainants at the police Station, she would have arrived at a different verdict.

I have no doubt in my mind that all the elements of the offence of robbery with violence were established. That is to say that the offenders were armed with dangerous weapons and in this case a knife and pangas, that they were more than one in numbers and that they used actual violence by way of threats to rob the complainants. However, there is no evidence sufficient enough to establish that the person who perpetrated this robbery was the Appellant himself. As such, the conviction of the Appellant was not safe.

Before I make my final disposition, it is important that I note that it is not true that the Appellant was not furnished with both the prosecution witness statements and OB extract relating to the first report made by the complainants at the police Station. Record of proceedings shows that the court made an order that he be supplied with the prosecution's witness statements. Thereafter, the matter was severally mentioned and up to the date of hearing, the Appellant did not complain that he had not been furnished with the witness statements. Indeed the trial went on uninterrupted without any complaint in this regard. With regard to the OB extract, on 14th May, 2013, the court made an order that he be furnished with OB extract of 25th December, 2012. On 28th August, 2013, the Appellant himself informed the court that ***"I have been given the OB extract I asked for but I need time to have it translated to me in Kiswahili".*** On that date, the matter was adjourned to enable the Appellant properly prepare himself. When PW1 was called to testify on 4th October, 2013, the issue of the OB extract did not arise. It is safe then to conclude that the Appellant was furnished with the said OB extract.

In this court, the Appellant played a goose chase game because he asked for several OB extracts including the one that he had requested for in the trial. These were OB numbers 40,43 and 49 of 25th December, 2012 and number 47 and 70 of 27th December, 2012. When the original OB book was brought to court, both the Appellant and the learned State Counsel, Ms. Atina agreed that the only relevant OB extract was number 70/27/12/2012 with which he was furnished. However, when this court retreated to write this judgment and upon reading the submissions of the Appellant, noted that he had made reference to OB number 43/25/12/2012. The court had to accordingly through the registry ask the learned State Counsel to provide it with the said OB extract. On perusal of the same, the court noted that this was the same OB extract that the Appellant had quoted in his submissions and it related to the first report that he had requested for at the trial. He therefore knew that he had the same OB extract even as he tired the prosecution counsel to provide the same. All the same, this court has adequately made reference to the

relevant OB extracts in making a finding that the Appellant was not positively identified.

Finally, on the submission that the Appellant's defence was not considered, I have had the liberty to look at the judgment of the learned trial magistrate and noted that at Page 3 of the same the court summarized the same. His submission in this respect is without merit.

In the result, I find that the case was not proved beyond a reasonable doubt. I quash the conviction and set aside the death sentence and order that the Appellant be and is hereby forthwith set free unless otherwise lawfully held. It is so ordered.

DATED AND DELIVERED THIS 12TH DAY OF APRIL, 2017

G. W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Appellant in person.

2. M/s Atina for the Respondent.