REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 332 OF 2013

PAUL KAMAU MURIITHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the judgment and sentence of Hon. T. A. Odera PM in Criminal Case No. 619 of 2012, delivered on 19th September 2013 at the Principal Resident Magistrate's Court at Mavoko)

JUDGMENT

The Appellant herein was charged with three offences in the trial Court. Count 1 and 2 were both of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code, while Count 3 was being in possession of an imitation firearm contrary to section 34(1) of the Firearms Act. He was convicted of the three counts and sentenced to serve 20 years imprisonment for count 1, 20 years imprisonment for count 2, and 7 years of imprisonment for count 3, which sentences were to run concurrently.

The Appellant has appealed the conviction and sentence, and his grounds of appeal are in the amended grounds of appeal and written submissions dated 1st February 2017 that he availed to the Court. The Appellant has raised eight grounds. The first is that the trial magistrate erred in matters of law and fact by not finding that the charge sheet was defective for failure to disclose particulars of a dangerous weapon. Reliance was placed on the decisions in **Joseph Kaberia Kahinga & 11 others vs Attorney General, (2016) eKLR** and **David Odhiambo & Another vs Republic, (2005) eKLR** for the position that in order to distinguish between section 295 and 296 (1) and (2) of the Penal Code, it is imperative to explicitly state in the charge sheet that there was a dangerous weapon used.

However, that in the present charge, no such information was provided, other than simply stating that the accused was armed with a toy pistol. Further, that under section 89(4) of the Penal Code, the test of whether an article can be described as dangerous or offensive is the use or the purpose for which the person possessing it intends to put it to.

The second ground was that the trial magistrate erred in matters of law and fact by holding that the offence was proved beyond reasonable doubt, whereas the elements of the offence of robbery with violence as articulated in **Johana Ndungu vs R, Criminal Appeal No. 116 of 1995**, were not spelt out in the evidence.

It was contended in this regard that there was no proof that the assailant was armed with any dangerous weapon or instrument, as there existed a lot of uncertainty in relation to the description and recovery of that instrument as to whether the toy pistol fell from the pocket of the suspect as stated by PW1, or was

retrieved by PW4 in accordance with his testimony. Reliance was placed on the decision in **Erick Otieno Arum v Republic, [2006] eKLR** for the submission that the evidence relating to the description and recovery of the weapon of offence was both contradictory and insufficient to prove beyond reasonable doubt that there was a dangerous weapon used against the complainants.

It was also contended that there was lack of evidence to prove that the suspect was in company of one or more other person or persons, in that although the witnesses claimed that there were two assailants, and that both of them were pursued, the Appellant was arrested alone, charged alone and stood trial alone. Further, that PW4 who claimed to have effected the arrest did not confirm that the suspects were two.

Lastly, it was contended under this ground, that there was lack of proof that the accused at, or immediately before, or immediately after the time of robbery. wounded, beat, struck or used any other violence to any person. The Appellant argued that PW1's testimony was that he sustained injuries on his head after being hit with the pistol but a P3 form was not issued to him, and therefore there was no proof of actual violence since none of the complainants were medically examined.

The third ground was that the trial magistrate erred in matters of law and fact by failing to resolve the apparent inconsistencies in the evidence relating to recovery of the mobile. It was alleged in this respect that it was PW1 and PW2's allegations that the mobile phone fell from the suspect's pockets during his beating by members of the public, while PW4 claimed to have recovered the said phones from the suspect's pockets when he searched him .

The fourth ground was that the trial magistrate erred in matters of law and fact by holding that the offence was proved beyond reasonable doubt as would otherwise be required in law, whereas the identification of the Appellant as the perpetrator of the offence charged was not proper.

The Appellant submitted that his identification was difficult since it was nighttime and the source of light and its intensity were not described. In addition that upon arrest, there was no description given to the effect that the Appellant was wearing the type of clothes described by the witnesses, and furthermore, that he was seriously injured and disfigured following the beating from the public, making accurate identification impossible.

Therefore, that his identification was one of dock identification and was not reliable. Reliance was placed in this regard on the decisions in **James Tinega Omwenga vs Republic, [2014] eKLR, Maitanyi vs Republic, (1986) KLR 198, Michael Norman Mbachu Njoroge & another vs Republic, [2016] eKLR** and **Gabriel Kamau Njoroge vs Republic, [1982- 88] 1 KLR, 134** in this respect.

The fifth ground of appeal was that the trial magistrate erred in matters of law and fact by not finding that the prosecution witnesses did not prove ownership of the recoveries since no ownership documents were produced.

The sixth ground relied on by the Appellant was that the. trial magistrate erred in matters of law and fact by denying him the right to recall witnesses in violation of section 146 (4) of the Evidence Act, thereby occasioning him prejudice. Further, that the trial magistrate failed to consider that the Appellant's request to recall witnesses was lawful since it was at a time immediately after the prosecution had amended the charge under section 214 of the Criminal Procedure Code on 3/4/2013. The decision in **Jason Akumu Yongo vs Republic, (1983) eKLR** was cited in this respect.

The seventh ground was that the trial magistrate erred in matters of law and fact by not resolving the explicit contradictions apparent in the prosecution case in favour of the defence as would be required by law. The Appellant pointed out the various inconsistencies in the evidence of PW1, PW2 and PW4.

The last ground of appeal was that the trial magistrate erred in matters of law and fact by not failing to find that essential witnesses necessary to prove basic facts were not procured, thereby leaving a lacuna in the prosecution case in relation to the Appellant’s identification and mode of arrest. The Appellant

contended that the evidence by the prosecution was that he was pursued by PW2 together with another passenger and the motorcyclist(s), and that it is the said motorcyclist who knocked him down with his motorcycle's windscreen.

However, the non-procurement of such essential witnesses (the motorcyclists) left a lacuna in the prosecution case thereby breaking the chain of events from the alleged robbery to his arrest, and was fatal to the prosecution case as held in **Juma Ngodia vs Republic, (1982-88) KAR 454.**

Ms. Rita Rono, the learned Prosecution counsel, filed a notice of enhancement of sentence dated 10th March 2017, wherein she urged this court to exercise its powers under Section 354 of the Criminal Procedure Code to alter the sentence of the trial court and enhance it to the mandatory sentence of death as the trial court made an error in sentencing 20 years in count 1 and count 2 which is an illegal sentence.

The learned counsel also filed submissions in response to the Appellant's appeal dated 30th June 2016, wherein it was argued that the charge sheet was properly drafted as section 295 of Penal Code was not indicated in charge sheet. Further, that the Appellant was charged with offence of robbery with violence contrary to section 296 (2) of the Penal Code and the charge sheet contained all ingredients and the particulars, and disclosed the offence and the weapon the Appellant was armed with.

On the issue of identification, the counsel submitted that PW2 testified that he identified the Appellant by clothes he was wearing- a black stripped shirt with yellow stripes. PWl also identified the Appellant's appearance at scene as having a dark face, while PW4 saw the Appellant running away and the motor cyclists who pursued him hit him with a side mirror and he fell down, and upon searching the Appellant he recovered a toy pistol and a techno mobile phone fell from the pocket of the Appellant which belonged to PW1. Further, that the doctrine of recent possession applies as the phone that belonged to PWl was recovered from the Appellant, which was corroborated by PW2 and PW3. Reliance was placed on the decision in **Martin Kirimi Mugambi & Anor vs Republic, Criminal Appeal No.334 of 2013**

On the ground raised that the Appellant's right to a fair trial was breached, the Prosecution counsel submitted that the Appellant failed to convince the trial court why the witnesses should be recalled for cross examination, and he had an opportunity to move the High Court on appeal which he did not.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

The prosecution called four witnesses, PW1 (Reuben Muithe Reuben) and PW2 (Edina Ntamba Nzosyo) were the complainants, and they recounted the events of the night of 22nd September 2012 at 8.30 pm when they alleged they were robbed of their mobile telephones and cash by the Appellant. PW3 was Police Inspector Joseph Ngaira who testified that he visited the scene of the crime on 22nd September 2012 and found the Appellant having been arrested by, and being beaten by members of the public. He produced the toy pistol and techno phone recovered from the Appellant as exhibits. The last witness was Peter Nguii who testified that he was walking on 22nd September 2012 at Pepe area when he saw people chasing the Appellant, and he got hold of the Appellant and recovered the toy pistol and techno mobile from him, and called the police.

I have considered the arguments made by the Appellant and Prosecution and evidence in the trial Court. The three issues raised by the Appellant are firstly, whether he was convicted of the offences of robbery with violence on the basis of a defective charge, secondly, whether there was proper identification of the Appellant; and lastly, whether the Appellant's conviction for the offences of robbery with violence and being in possession of an imitation firearm was based on consistent and sufficient evidence.

On the issue of the defective charge, I note that the charges of robbery with violence to which the Appellant pleaded not guilty on 27th September 2017 indicated in the particulars that on 22nd September 2012 at Athi River township in Athi River District of Machakos County, while armed with a toy pistol, he

robbed Reuben Kimanzi Muithya and Edina Nthamba Nzosio of mobile phones and cash, and at the time of such robbery threatened to use actual violence on the said complainants.

Section 296 (2) of the Penal Code provides for the offence of robbery with violence as follows:

> **"If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, 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, he shall be sentenced to death**

The Appellant claims that a toy pistol is not an offensive weapon and the charge was therefore defective in this respect. A dangerous and offensive weapon is not defined in section 296 of Penal Code, but the Court of Appeal in **Kimemia & Another vs Republic (2004) 2 KLR 46** defined a 'dangerous or offensive weapon' to mean "any article made or adapted for use for causing injury to the person or intended by the person having it in his possession or under his control for such use"

The Court of Appeal in the cited case declined to treat a toy pistol as a dangerous and offensive weapon on the basis that it did not fit the definition of a firearm in section 2 of the Firearms Act. Likewise in **Njoroge vs Republic, (2006) 1 KLR 145** it was held that a non-firing home-made gun could not be classified as a dangerous and offensive weapon.

To this extent the counts of robbery with violence in the charge were defective as they did not disclose a key element of the offence namely the dangerous and offensive weapon used. In addition, I agree with the Appellant that as ownership of the mobile phone recovered from him was not proved by PW1 and PW2, the element of theft as **a central element of the offence of robbery with violence was also not proved. Lastly, there was no medical evidence brought of any injuries caused on PW1 and PW2 to prove the element of personal violence . I therefore find that the offences of robbery with violence were also not proved beyond reasonable doubt.**

Notwithstanding these findings, and given the apprehension and positive identification of the Appellant at the scene of the alleged offence by PW4 who also recovered the toy pistol from the Appellant, I find that the elements of the count on being in possession of an imitation firearm contrary to section 34(1) of the Firearms Act were proved.

Under Section 34(1) of the Firearms Act the offence is committed if a person "makes or attempts to make any use of a firearm or an imitation firearm with intent to commit any criminal offence." In the present appeal PW4 testified that he recovered the toy pistol from the Appellant after catching him as he was being chased by members of the public after having been suspected of committing an offence. In my view there was no contradiction or inconsistencies in the evidence of PW1, PW2 and PW4 as to recovery of the toy pistol, as their testimony was that it was on the person of the Appellant.

I accordingly hereby quash the conviction of the Appellant for the two counts of robbery with violence, and set aside the sentence imposed upon the Appellant of 20 years imprisonment for each of the two counts. I however uphold the conviction of the Appellant for the offence of being in possession of an imitation firearm contrary to section 34(1) of the Firearms Act, and confirm the sentence of seven (7) years imprisonment for this offence, which sentence is to run from the date of conviction by the trial Court.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 27TH JUNE 2017.

P. NYAMWEYA

JUDGE