REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO.48 OF 2014

DAVID MIX…………………………………………………..………….1ST APPELLANT

SAMUEL WAFULA NYARANGA……………………………..……….2ND APPELLANT

JOHN WAFULA MASINDANI………………………………..……….3RD APPELLANT

CALISTUS WAFULA SIMIYU………………………………….….….4TH APPELLANT

CONSTANT WAFULA SIFUNA…………………………..…...……..….5TH APPELLANT

PATRICK WAFULA KULUKU………………………………...……..….6TH APPELLANT

VERSUS

REPUBLIC………………………………………………………………..RESPONDENT

JUDGEMENT

1. The appellants herein namely David Mix, Samuel Wafula Nyaranga, John Wafula Masindani, Calistus Wafula Simiyu, Constant Wafula Sifuna and Patrick Wafula Kuluku with one other at large were charged with the offence of Robbery in Chief Magistrate's Court at Bungoma in Case No.602 of 2013.

2. The matter proceeded for a full trial where they were convicted and sentenced to suffer death. They were dissatisfied and each preferred an appeal. All the said Appeals were consolidated.

3. In the appeals the issues raised by the appellants were similar to wit, the evidence of the minors was not tested as no *voire dire* examination was carried out, identification was not proper and where identification parade was done it was done irregularly, the trial was irregular; the appellants were denied witness statement and their defence rejected.

4. This Court has the duty of considering evidence a fresh, evaluating and analyzing the same in order to arrive at an independent opinion.

5. The Prosecution called a total of 6 witnesses and two exhibits; a P3 form and identification parade forms for five of the accused namely Accused 3-6 produced in evidence.

6. The Prosecution case was that; on the night of 7th & 8th April 2011 all the accused and one who absconded after judgement robbed PW1 at Lumao village, Kware in Bungoma. They broke into her house, stole several items; all valued at Kshs.50,000 and at the time of the robbery used actual violence

on PW1 Rukia Nasikanda Asman. The robbery took about an hour; the lights were on and in the process PW1 was able to identify all the robbers who were armed with rungus and pangas as they were people from the locality, apart from robbing PW1 they ordered her to take them to her son's house next door where two girls were. They demanded money, assaulted and attempted to rape one of the girls. There was a lantern and the girls were able to identify the robbers who were also known to them. In the process of the robbery the robbers aiming at killing the PW1 inflicted serious injuries upon her.

Neighbours came to PW1's rescue, immediately after the robbery and took her to Bungoma district hospital where she was admitted for two days. She thereafter together with the 2 girls wrote their statement. While in hospital she identified the 5th Appellant a boda boda rider and she caused his arrest, the rest of the Appellants were subsequently arrested and an identification parade done where they were identified.

7. On being placed on their defence all the appellants denied the offence stating that they had been framed.

8. In order for an offence of robbery with violence to be sustained, the offender has to have been armed with a dangerous and offensive weapon or instrument, or be in the company of one or more persons or if at or immediately before or immediately after the time of such robbery, he wounds, beats, strikes or uses any personal violence on any one.

9. From the evidence of **PW1 – PW5,** PW1 was robbed and attacked and sustaining serious injuries by several people. The issue is whether the 6 appellants were part of the group that attacked and robbed her.

10. PW1 in her evidence was able to identify all the appellants by name and gave details of what they do. She testified that they were neighbours and people known to her and during the robbery they demanded money as she is a revenue clerk with the Municipal Council and there are times that she does not bank all the money and keeps the same overnight.

She stated further that when her door was broken she lit her torch which was taken from her and at which point she lit the generator and that emitted sufficient light. She recalled the weapon each one of the attackers had. She testified that they took Ksh.800/- that she had kept under the pillow, her phone. The 6th appellant asked for her M-Pesa Pin and transferred Kshs.5,000/- from her M-Pesa account, 5 sacks of fertilizer, a DVD Player, 1 jacket, 1 kikoi and a purse were also stolen. She was cut by the second appellant on her neck and index finger.

PW2 and PW3 were sleeping they were woken up by PW1 and lit a lantern. The 1st appellant attempted to rape PW2, asked her to stand and remove her clothes. PW2 testified that she was able to see him. She had known him before along with 5th Appellant and the one at large. She was 16 years. **PW3** on her part said that she was 16 years at the time. She saw the 1st accused attempt to defile PW2 and he also cut PW1 there was a lantern on.

11. In his submission Counsel for the Appellants took issue with the identification parade which he contended was improper and irregular as the witnesses alleged to have known the appellants before.

He relied on **Criminal Case No.299 of 2009. Mohammed Wekesa Musumba Vs R.**

12. Further on identification he stated that the position of the lantern and intensity of the light was not stated and since the witnesses were told to lie down they did not say the point at which they identified the robbers. On this ground he relied on the case of **Julius Mjomba Mwakisau & Another Versus R. Criminal Appeal No.79 of 2011.**

13. It was further argued by the defence that no independent witness was called and further that the trial Court had failed to consider the defences raised.

14. On its part the Prosecution opposed the appeal on grounds that the evidence of PW1, PW2 & PW3 pointed to the Appellants who failed to raise a defence on the robbery and only testified about their arrests. As regards identification the Prosecution maintained that there was sufficient light that enabled identification. That PW1 had her generator on, she was able to see the robbers and identified them by name; and that since not all the seven were known by the witnesses, there was need for the identification parade. That PW2 did not know all the robbers and PW3 knew 4 of them and that indeed the parade did not prejudice the appellants.

15. I do agree with the Prosecution that the identification parade was necessary as PW2 and PW3 did not know all the Appellant. It is only PW1 who knew them. The identification by PW2 and PW3 at the parade fortified and corroborated the evidence of PW1 and settled doubt if any as to identification of the robbers and indeed resolved the issue of intensity of light and position of lantern and whether it enabled favourable condition for recognition.

Not to mention that the robberies took time and engaged for a while with the witnesses, their faces were uncovered creating an opportunity of them being recognized.

16. As to the issue of witness all the three eye witnesses were called and their testimony was largely corroborative.

Any other witness would have narrated incidences which occurred after the robbery. This would not have been of any evidential value.

17. Next to consider is whether lack of ***voire dire*** examinations of the two girls PW2 and PW3 was fatal to the Prosecution case.

18. Both PW2 & PW3 were 17 years of age and the issue raised touches on the competence of the two. It was confirmed that their evidence was not tested by the trial Court.

Section 125(1) of the Evidence Act stipulates as follows;

> ***"All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, old age, disease (whether of body or mind) or any similar cause".***

19. Section 19(1) of the Oaths and Statutory Declaration Act on its part provides;

> ***"where in any proceedings before any Court or person having by Law or consent of parties authority to receive Evidence, any child of tender years called as a witness does not, in the opinion of the Court or such person, understand the nature of an Oath, his evidence may be received, though not given upon Oath, if, in the opinion of the Court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and is possessed of sufficient intelligence to justify the reception of evidence, and understands the duty of speaking the truth".***

Section 2 of the Children's Act defines " a child of tender years to mean,

"a child under the age of 10"

20.20. In **<u>Criminal Appeal No.16 of 2014 (Nyeri) Samuel Warui Kirimi Vs Republic a 2016</u>** decision, the Court of Appeal discussed this subject extensively as follows;

> ***"… in our own understanding of the above provisions of the Law Voire dire is an examination for two purposes; one, it is a test of the competency of the witness to give evidence and two, a means of testing whether the witness understands the solemnity of taking Oath".***

21. In the above case the Court considered a leading case **Kibangenu Arap Korir Vs Republic (1959) E.A. 92** where the Court of Appeal of Eastern African held that tender years meant a child under the age of 14 years.

22. The Court in arriving at its decision went ahead to distinguish the definition to the used of **"child of tender age"** under the Children's Act and in offences under the Criminal Law and was of the view that the confirmation under the Children's Act cannot be globally imported in Criminal matter.

23. The Court also considered the holding of yet another case in the Court of Appeal sitting in Nyeri **Patrick Kathuruma Vs Republic (2015) e KLR** where the Court held;

> ***"we take the view that this approach resonates with the need to preserve the integrity of viva voche Evidence of young children, especially in Criminal proceedings. It implicates the right to a fair trial and should always be followed. The age of 14 years remains a reasonable indicative age of purposes of Section 19 of Cap 15. We are aware that Section 2 of the Children's Act defines a child of tender years to be one under the age of ten years. The definition has not been applied to the Oaths and Statutory Declaration Act, Cap 15. We have no reason to import it thereto in the absence of express Statutory direction given the different contexts of the two statutes"***

24. The above authorities give a good guidance of when ***voire dire*** evidence is necessary. PW2 and PW3 were both 16 years at the time of giving Evidence and the trial Court cannot therefore be faulted for not carrying out ***voire dire*** Examination. The trial Magistrate was correctly guided. This ground therefore has no basis and must fail.

25. I find concurrence with the trial Courts in finding that the defences by the Appellants were denials that did not dislodge the overwhelming evidence placed against them by the Prosecution.

26. I do also agree with the sentence the trial Court meted out.

27. The appeal therefore fails. It is dismissed.

DATED and DELIVERED at BUNGOMA this 23rd day of October, 2017

ALI ARONI

JUDGE