REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 27 OF 2014

LEWIS NJOGU NDIRANGU..............................APPELLANT

-VERSUS-

REPUBLIC..RESPONDENT

(An appeal from the conviction and sentence of the Principal Magistrate's Court (T. M. Mwangi) at Gichugu, Criminal Case No. 190 of 2013 dated 12th June, 2014)

JUDGMENT

1. The appellant **LEWIS NJOGU NDIRANGU** was charged before Gichugu Principal Magistrate's Court with the offence of Robbery with violence contrary to **Section 296 (2)** of the **Penal Code** vide Criminal Case No. 190 of 2013. The particulars of the charge are that on 12th March, 2013 at Rwambiti Market Kirinyaga East District within Kirinyaga County jointly with others not before Court while armed with offensive weapon namely AK 47 rifle, robbed Jane Wambui Karioko of cash Ksh.18,000/= and one Nokia mobile phone make 1208 valued at Ksh.2000/= all valued at ksh.20,000/= and immediately before or immediately after the time of such robbery threatened to use actual violence to the said Jane Wambui Karioko.

2. The appellant Lewis Njogu Ndirangu hereinafter to be referred to as the appellant denied the charge and a plea of not guilty was entered. The trial commenced and after a full trial the Appellant was found guilty, was convicted and sentenced to death. The Appellant was dissatisfied with the conviction and sentence and filed this appeal.

3. The appeal raises seven grounds, namely:

> ***1. That the learned trial magistrate erred in both law and facts by failing to consider that the identification parade conducted by the investigating officer was not error free as per chapter 46 of Police Forces Standing Order.***
>
> ***2. That the learned trial magistrate erred in both law and facts by relying on a single evidence.***
>
> ***3. That the learned trial magistrate erred in both law and facts by relying on uncollaborative statement/evidence.***
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> ***4. That the learned trial magistrate erred in both law and facts by failing to consider that the prosecution did not avail any exhibit.***
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> ***5. That the learned trial magistrate erred in both law and facts by being biased towards one side. He favoured the prosecution.***
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> ***6. That the learned trial magistrate erred in both law and facts by failing to consider my sworn defense which was not challenged by the prosecution side.***
>
> ***7. That the learned trial magistrate erred in both law and facts by failing to consider that P.W. 2 did not produce any document to prove that he owned the said premise.***

He prays that the appeal be allowed. The conviction be quashed, the sentence imposed be set aside and he be set at liberty.

4. Directions were given that the appeal be disposed off by way of written submissions. The appellant filed submissions and Mr. Sitati prosecutions counsel filed a reply. This being a first appeal, the first duty of the Court is to analyse the evidence and come up with its own independent finding while bearing in mind that it did not have the advantage to see the witnesses when they testified and leave room for that. This is as held in the case of **Okeno V R (1972) E.A. 32**.

5. From the record, evidence was adduced by P.W. 1 Jane Kariuko Wambui who is the complainant. She testified that on 12th March, 2013 at about 8.40 a.m. she was in her Mpesa shop at Rwambiti when two men went there and one said he wanted withdraw money. P.W. 1 agreed and as she waited for a confirmation message the 2nd person produced a firearm. He ordered her to give them money or they would shoot her. The armed man entered the counter and ordered her to lie down on the floor. He removed Ksh.18,000/= from the counter and took one Nokia Mobile phone. He then left and the two were carried on a motor cycle and fled towards Kutus. She reported to the police. Later on 1st April, 2013 she was called for an identification parade where she identified the Appellant as one of the robbers. Evidence of this witness was credible. The robbery was committed in broad daylight, the robbers talked to her for some time before executing their mission. There was no possibility of mistake. The Complainant was able to identify the Appellant from an identification parade. I find the identification was reliable. Evidence of the Complainant was not shaken in cross-examination.

6. P.W. 2 Victor Mate Kathiru who operated Mpesa business and had employed P.W. 1 confirmed that he received a call from her reporting the robbery. He rushed to the scene. He could not tell the identity of the robbers.

7. P.W. 3 P.C. Mwalaru testified that he accompanied other Police officers on 29th March, 2013 and they went and arrested the suspect who is the Appellant in this case. He was then charged.

8. P.W. 3 testified that they recovered a motor cycle registration number KMCY 939Z inside the bedroom of the Appellant hidden under the bed. It was produced as exhibit – 1. He could not confirm whether the complainant had reported that the Appellant robbed her.

9. P.W. 4 Cpl Ezra Serem testified that he received the report and investigated. He received information that the Appellant was involved He went with other Police officers and arrested him. He also recovered a motor bike KMCY 939Z which he suspected was used during the robbery. He confirmed that there was a float of Ksh.12,000/- in the Mpesa float. He then asked a Police officer to conduct an identification parade. The Complainant identified the Appellant from the parade. The Appellant was then charged.

10. The P.W 5 IP Boru Dida testified that on 1st April, 2013 the D.C.I.O requested him to conduct an identification parade. The suspect refused to sign the parade form alleging that he was the only one in the parade with a scar on the forehead. P.W. 5 signed the identification parade.

11. I find that the evidence adduced by the prosecution was cogent. Though identification was by a single witness, the circumstances favoured a positive identification. Any possibility of mistake was eliminated by the fact that the Appellant was identified from the identification parade. Though the Appellant stated that he was the only one in the parade with a scar, the P.W. 1 did not identify him with a mark of a scar. The witness (P.W. 1) stated that the Appellant had worn a cap on his head covering the hairline. This is the area where the scar was. As such the parade was conducted in a proper manner.

12. P.W. 4 received information. Police officers are allowed to receive information from informers who they are not supposed to disclose. He investigated and recovered a motor bike from the Appellant which fitted the description given by the P.W. 1. The information received by P.W.4 was corroborated by the fact that the Appellant was identified from the identification parade and a motor bike used in the robbery was recovered. The Appellant in his defence admitted that he owns the motor bike. The Appellant said in the defence that he only saw the lady when she came to identify him. As such P.W. 1 could not have seen him before the parade. Though Appellant said the lady could have been tipped, he at the same time said he did not know whether Serem had told the lady anything. The Appellant admitted that he had no sour relationship with any of the witnesses. This shows that the witnesses had no reason to frame him. I am of the view that the evidence was reliable and the trial court was right to rely on it to convict. The Appellant faults the conviction on the above listed grounds.

13. The first issue is on identification parade:

The contention by the Appellant is that the identification parade was not error-free as per **Chapter 40** of the **Police Force Standing Orders.**

Identification parade procedures are regulated by Police Force Standing Orders now under the National Police Service Act 2011. The procedure for identification parades includes the following:

> ***a) The accused has the right to have an advocate or friend present at the parade.***
>
> ***b) The witness should not be allowed to see the suspect before the parade and the suspects on parade should be strangers to the witness.***
>
> ***c) Witnesses should be shown the parade separately and should not discuss the parade among themselves;***
>
> ***d) The number of suspects in the parade should be eight (or 10 in the case of two suspects).***
>
> ***e) All people in the parade should be of similar build, height, age and appearance, as well as of similar occupation, similarly dressed and of the same sex and race.***
>
> ***f) Witnesses should be told that the culprit may or may not be in the parade and that they should indicate whether they can make an identification; and***
>
> ***g) As a recommendation, the investigating officer of the case should not be in charge of the parade, as this will heighten suspicion of unfair conduct in the courts.”***

P.W. 5 who conducted the parade stated that he paraded nine (9) members with the appellant. They were of almost similar height and dark colour. The Appellant chose the position where he wanted to be, that is between No. 5 and 6. He asked whether he wanted a lawyer and his wife present but he declined. The Appellant was the only one with a scar on the forehead and he agreed to the conduct of the parade. Thereafter, he was identified by being touched.

P.W. 1 stated that she saw a group of 9 people at the identification parade who were of mixed body physique.

As seen above, the identification parade was conducted according to the procedure laid down.

14. The trial magistrate properly analysed the evidence of the identification parade in her judgment and found the evidence of the parade officer credible. It was an afterthought for the Appellant to state that P.W. 5 beat him. This was not put to him when he (P.W.5) testified. P.W. 5 remarked that Appellant refused to sign and was very arrogant. **Okeno -V- R (supra)** this Court should give room for the fact that the trial magistrate had a chance to see the witness. I am of the view that the parade was properly conducted and the Appellant was properly identified from the identification parade as the person who committed the robbery with others not before the Court.

2. Failure to arraign the Appellant in Court within time.

15. The Appellant faults the Court on the ground that he was not produced in Court within time. He states that he was kept in the Police custody for more than 24 hours as he was arrested on 29th March, 2013 and arraigned in Court on 2nd April, 2013.

Article 49 (f) of the **Constitution** states:

> ***"An arrested person has the right – to be brought before a court as soon as reasonably possible, but not later than –***
>
> ***(i) Twenty-four hours after being arrested; or***
>
> ***(ii) If the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day".***

29th March, 2013 was a Friday therefore he was to be arraigned in court on 1st April, 2013 but he was arraigned on 4th April, 2013. The delay was for 3 days since the day of arrest is excluded from the computation, as per **Section 57 (a)** of the **Interpretation and General Provisions Act** which provides:

> ***"In computing time for the purpose of a written law unless the contrary intention appears – a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done."***

16. The Appellant was arrested on a Friday and charged on a Monday. I am of the view that where an accused person is taken to Court after 24 hours in violation of his right, this should not bar the trial Court from proceeding with the trial as what is before the trial Court is a distinct charge which the prosecution has a burden to prove. The allegation of violation of rights does not mean he should not face trial, he ought to pursue the appropriate remedy which is by compensation by an award of damages as prescribed under **Article 23 (3)** of the **Constitution**. The issue of violation should not be taken in isolation but with other provisions in the Constitution. In a persuasive decision in **Peter Otieno Odiyo -V- R (2017) eKLR** it was held:

> ***"Noteworthy is the fact that there is no law which expressly bars the prosecution of an accused person brought to Court after the expiry of the 24 hours as provided under Article 49 (f)(i) of the Constitution. The right to be arraigned in court within 24 hours of arrest was not designed to avoid trials on the merits, but rather, to deter the unconstitutional extra judicial detention of suspects by the police. It is a right to be taken to court as soon as it is reasonably practicable.***
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> ***Guided by this reasoning, it is the view of this Court that to allow this appeal on the grounds of arraignment after 24 hours will be disproportionate and inappropriate. The delay in the arraignment of the Appellant in this case was not so long and extended as to lead to an outright negation of his rights to a fair trial as provided under Article 50 of the Constitution. The Appellant further failed to adduce any evidence to support his claims of being denied a fair trial in accordance with Article 50 of the Constitution. From the record of the trial court, the Appellant was fully aware of the proceedings. The appropriate remedy for the Appellant in this case is as prescribed by the Constitution under Article 23 (3). The Appellant would be entitled to a declaration and an award of damages in the form of monetary compensation from the person or authority in breach of this right."***

17. The Appellant did not raise any such complaint in the trial court for the prosecution to be given chance to explain the delay. Be that as it may, the Appellant was not arraigned in Court within the schedule time and as per the above case, his remedy lies in award of damages in the form of monetary compensation from the appropriate authority. He was charged in Court on 2nd which was a Monday which was the next court day. This seems to rule out his allegation that he was not charged in Court in time.

3. Relying on a single witness

In **Willingson Ntwiga Alias Tosha v Republic [2016] eKLR** the Court held:

> ***"The pertinent issue in this appeal turns on the sufficiency or otherwise of evidence of the single identifying witness. It is clear from the record that the only eye witness to the robbery was the complainant and his wife. After the wife died, it was only the evidence of P.W. 2 that remained. The Court of Appeal for Eastern Africa in Abdalla Wendo –V- Republic [1953] 20 E.A.C.A. 166 held that:-***
>
> ***"Subject to certain exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification, were difficult. In such circumstances what is needed is other evidence whether it be circumstantial or/direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."…………***
>
> ***It is clear from the foregoing that a court can still convict on evidence of a single identifying witness if the evidence is sufficient and the court properly warns itself of the danger of relying on such evidence. In this case, the trial court properly warned itself of the danger of only relying on the evidence of the complainant who was the single identifying witness."***

In this case, P.W. 1 was only eye witness who was able to identify the Appellant. The Court duly warned itself in page 20 of the judgment, therefore the Court was right in convicting the Appellant based on single witness of P.W. 1. In addition, the evidence adduced in this case was sufficient to convict the Appellant. Identification parade elucidates any possibility of mistake and affirms that P.W.1 had identified the Appellant.

18. The Court had to satisfy itself that the circumstances of identification were favourable and the evidence reliable and free from possibility of error. The trial magistrate was alive to this issue and properly warned herself on the evidence of the witness. The **Evidence Act** provides that a fact can be proved by the evidence of a single witness. There is no minimum number of witnesses needed to prove a fact in law. **Section 143** of the **Act** provides:

> ***"No particular number of witnesses shall in the absence of any provision of law to the contrary be required to the proof of any fact."***

The ground must fail.

4. Relying on uncorroborated and contradictory evidence

Uncorroborated evidence:

19. The Appellant states that P.W. 2 did not adduce any supporting evidence to prove he was the owner of the Mpesa premises or that the alleged phone was legally owned by him. He also failed to produce records that there was money transaction. The ownership of the premises was not in dispute and therefore whether or not P.W. 2 did not produce documentation does not have a bearing on the case. The trial Court duly considered the lack of documentary proof of the cash of Kshs.18,000/= and stated so at page 17 and 18 of the judgment. The Court proceeded to state that though there was no documentary proof of ownership of the cell phone, there was sufficient evidence to prove that the Mpesa shop had a nokia cell phone that had been stolen.

Contradictory evidence:

P.W. 2 raised a contradiction on the name of the shop. He testified that it was called Jufro Communication but the supporting documentary evidence indicates it as Richomu Ents Marty Phones and Accessories R.

In the case of **Daniel Njoroge Mbugua v Republic [2014] eKLR** the Court of Appeal stated:-

> ***"From the record, we find that the evidence of P.W. 1 and P.W. 2 was consistent and their testimonies corroborative. Any discrepancies or inconsistencies in the evidence adduced by the prosecution were minor and did not weaken the probative value of the evidence on record."***

The contradiction of the name of the shop was minor and did not weaken the evidence that the Appellant robbed P.W.1 on the incident date.

The witnesses corroborated each other on material particulars. The testimony of P.W. 1 was corroborated by the testimony of P.W. 2 pm the items stolen and by P.W. 4 who confirmed that a report of robbery was made and confirmed that there was a robbery. P.W. 4 received information from an informer. He arrested the Appellant and he was identified from an identification parade. It is not true for the Appellant to state that evidence was not corroborated.

5. The Appellant's sworn defence was not challenged

20. The Appellant's defense was that he was cultivating together with Mzee Kungu on 12th March, 2013 at South Ngariama. That from 11th March, 2013 he was at South Ngariama. He raised his alibi defence the first time during adducing his evidence in court.

His witness stated that the Appellant went to borrow plough and 4 bulls on 11th March, 2013 and returned them on 15th March, 2013. He also left him with his black motorcycle but he confirmed that the Appellant had the keys and he does not live in the house full time.

The trial court duly considered the Appellant's alibi defence at page 7 and 8 of its judgment before proceeding to conclude that it was false at page 16 of the judgment.

21. In any case when the Appellant gave his defence, he was cross-examined. His defence was challenged and particularly on the fact that he raised it at a very late stage of the trial. Raising such a defence at a very advanced stage of the trial, raised doubts on its credibility. It was not a plausible defence in the circumstances. The trial magistrate was right to hold that it was an after thought. The D. W. 2 could not account for the whereabouts of the Appellant on 12th March, 2014. The Appellant had the keys of the motor bike. The Appellant was placed at the scene of robbery by P.W. 1. This dislodged his defence of alibi.

Did the prosecution prove its case beyond any reasonable doubts?

22. It is trite law that the burden of proof always lies with the prosecution to prove their case. **Section 296 (2)** of the **Penal Code**:

> ***"If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other 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."***

Daniel Njoroge Mbugua v Republic [2014] eKLR the Court of Appeal stated:

> ***"The ingredients of the offence of robbery with violence were further elaborated by the Court of Appeal in the case of Oluoch vs***
>
> ***republic (1985) KLR where it was held that robbery with violence is committed in any of the following circumstances:***
>
> ***(a) The offender is armed with any dangerous and offensive weapon or instrument; or***
>
> ***(b) The offender is in company with one or more person or persons; or***
>
> ***(c) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person……." Emphasis supplied.***
>
> ***The use of the word "or" implies that if any of the three conditions is fulfilled then the offence would be said to have been committed***.

In this instance the Appellant was in company of another when he produced a firearm, robbed P.W. 1 and threatened to shoot her. Therefore, all the conditions above have been fulfilled.

23. Looking at the whole evidence adduced, the prosecution has proven his case beyond all reasonable doubts. The entire evidence on record left no doubt, as the trial court found, that the Appellant robbed P.W. 1 in the manner described. The trial court considered all the evidence presented and having done so came to a proper and inevitable conclusion. The guilt of the Appellant was proved beyond reasonable doubt by overwhelming evidence on record.

24. **Conclusion**:

From the foregoing my view is that the Appellant was properly convicted based on the cogent evidence presented before the trial magistrate. The conviction of the Appellant should be upheld. I find that the appeal is without merits and so I dismiss it.

Dated and delivered at Kerugoya this 23rd day of November, 2017.

L. W. GITARI

JUDGE

Judgment read out in open Court Mr. Sitati P.C. for State, Appellant present court assistant Naomi Murage this 23rd November, 2017.

L. W. GITARI

JUDGE

23.11.2017