REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 145 OF 2014

THOMAS MOKAYA……….APPELLANT

VERSUS

REPUBLIC ……..………… RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera in Cr. Case No. 1678 of 2013 delivered by Hon. Onyina, Ag. SPM on 7th October, 2017).

JUDGMENT

Background

The Appellant was in Count I charged with the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. The particulars of the offence were that on 21st May, 2013 at Ngando in Riruta within Nairobi County, jointly with others not before the court while armed with dangerous weapons namely pangas robbed ISN of her Nokia Na G-DE mobile phones and Kshs. 2,000/- in cash all valued at Kshs. 40,000/- and at the time of the robbery threatened to use actual violence to the said ISN.

In Count II he was charged with compelling an indecent act contrary to Section 6(a) of the Sexual Offences Act. The particulars of the offence were that on 21st May, 2013 at [particulars withheld] in Riruta within Nairobi County, intentionally and unlawfully compelled ISN to suck his penis against her will, an act which was indecent.

The Appellant was arraigned before the court and after the trial found guilty of both offences. He was sentenced to death in count I and no sentence was passed in the second count which was held in abeyance. Being dissatisfied with the decision of the trial court, he filed the instant appeal. In his amended grounds of appeal he is dissatisfied that he was convicted on the basis of identification evidence of a single witness which was not free from error, that the charge was fatally defective, that the case was improperly investigated, that the evidence adduced was inconsistent and contradictory and that his defence was not considered.

Submissions

The Appellant filed written submissions which he relied on. He submitted that he was not positively identified in light of the fact that he was allegedly identified by a single witness who was in shock. He submitted that the sanctity of the identification should have been tested using the first report the

complainant made to the police, a fact that did not take place. He also faulted his identification because after his arrest he was exposed to the complainant instead of an identification parade being conducted.

He submitted that he was charged on a fatally defective charge sheet as it read that he was charged of committing “robbery with violence contrary to section 295 as read”. He submitted that although the judgment stated that he was charged under section 295 as read with 296(2) of the Penal Code the same could not secure a sentence of death penalty upon conviction as section 295 does not provide a death penalty. He relied on **Joseph Kaberia Kahinga & 11 others v. Attorney General[2016]eKLR** to buttress this submission.

The Appellant faulted the manner in which investigations were carried out. He cited the drafting of the charge sheet which indicated that two items were stolen but when the complainant testified she stated that a number of items were stolen including clothes, phones, a Google meter and suitcase. He submitted that that most of the items used as exhibits were collected from the complainant’s house and produced as exhibits. He submitted that the failure of the police to keep the exhibits until they were produced at the trial was in contravention of the laid down procedure of the police having safe custody of exhibits. He submitted that the complainant could not claim ownership of phones she had not reported as stolen as provided under **Section 322(3)(b) of the Penal Code**.

He submitted that the evidence adduced against him was contradictory and inconsistent and could therefore not be relied upon. This was with regard to the evidence relating to his arrest and recovery of goods from his possession. He submitted that he gave a sworn statement of defence setting out the circumstances surrounding his arrest but the same was not adequately considered which led to a shift of the burden of proof to him. It was his view that he had a meritorious appeal. He prayed that his conviction be quashed and sentence set aside.

Learned State Counsel, Ms. Sigei for the Respondent opposed the appeal. She submitted that the complainant had informed the police she could identify the Appellant as she had noticed what he was wearing after she switched on the lights when the robbers attacked. Counsel submitted that the complainant identified the Appellant through the help of a torch. She submitted that the case was proved beyond reasonable doubt and that the Appellant’s defence that he was a passerby was untruthful as he could not explain how he came by the stolen goods which were recovered from him. She submitted that evidence was consistent and corroborative. She thus urged that the court to dismisses the appeal.

Evidence

PW1, ISN, was the complainant. She lived in [particulars withheld] near Dagoretti corner. She recalled that on the evening of 21st May, 2013 she was in her house sleeping when she heard a knock on the door. She did not open the door since she was not sure who was knocking. The door was then broken. She identified the Appellant as the person who broke her door. She turned on the light on and saw three men. She recalled that the Appellant was wearing a red jacket, black trouser and a shirt with boxes. She was asked to cover herself with a blanket. The Appellant took her Samsung and Tecno phones whereas one of his cronies took her Nokia phone. They also took her google meter. She identified the phones and google meter in court. Her clothes were also stolen.

She testified that her phone had Kshs. 10,000/- M-Pesa balance and that the Appellant asked for the M-Pesa PIN number. They then asked her to take them back into the house and show them where she kept the money. She had a purse with Kshs. 2,000/- in the house which she gave to the robbers. They then took her behind a bush where they asked her to strip. The Appellant then asked her to suck his penis while threatening her with pangas which she did for fear of losing her life. She testified that one of the robbers was acting like a sentry by the road. While this was going on the latter robber alerted the others that Administration police officers, hereafter AP officers, were coming and they all lay down. The AP officers noticed them and tried to head in their direction which caused the robbers to bolt.

It was around 3.00 a.m. and PW1 went home and woke up at 6.00 a.m. the following morning and headed to the chief’s camp to make a report. The chief informed her that he was aware of her case since they had

recovered her photographs. She told the AP officers that the Appellant was wearing a red jacket, black trousers, white shirt with boxes and a cap that had white, brown and purple colours. One other robbers had dreadlocks while another had a scarf on. The AP officers then opened the door and she identified the Appellant who was wearing a white, brown and purple coloured cap. She also saw the underwear he was wearing as she had seen it when he asked her to suck his penis. She also identified his face.

PW1 recalled that she was shown the phones, clothes and photographs that were recovered from the Appellant. She identified them as hers. The matter was reported to Riruta Satellite police station. She testified that she identified the Appellant with the help of a torch he had. In cross examination she stated that she gave the officers the PIN numbers to the phones which they used to confirm that they had her telephone lines.

PW1 was recalled to testify during which time she stated that testified that the phones recovered were a Tecno and Samsung which had YU telephone lines but had no PIN numbers. She added that the money the money that was in her phone was transferred to another line.

PW2, APC Lawrence Chando of Ngando AP post in Dagoretti District recalled that he was on patrol with APC Albanus headed to their camp when he saw people standing near a bar at around 3- 4 a.m. When they approached them they ran away and when they got to the place where the men had been standing they found a bag with clothes inside. A few meters from where they were standing they heard some movement and they decided to keep quite to monitor the movement. They waited for about three minutes before advancing when suddenly someone ran and jumped over a fence. They decided to chase the person and they noticed he had a cap and bag on. They arrested him after he failed to jump over a black gate. They escorted him to their post.

As they were entering the post a girl and some people arrived and he identified her by the photographs that were in the bag. Inside the bag were two phones and something that looked like a phone. The lady then reported about the incident to the police.

PW3, APC Albanus Mangeli Macandi who was in the company of PW2 entirely corroborated the evidence of PW2. **PW4, No. 54317 CPL Zebedi Mabeya of** Riruta Police Station recalled that the Appellant was escorted to the police station by AP officers on 21st May, 2013 at 8.00 a.m., in the company of PW1. He recorded the witness statements and preferred the charges against the Appellant.

In his sworn statement of defence the **Appellant** testified that he was a garbage collector. He stated that he was a case of mistaken identity and that he found himself at the scene of crime as he went to work. He stated that the police officers at the scene arrested him and took him to a chief's camp where he was placed in a cell. He was thereafter escorted to Satellite Police Station and charged accordingly. He denied he committed the offence.

Determination

It is now the duty of the court to reevaluate the evidence on record and come up with its own finding. In so doing however, the court must bear in mind that it has neither seen nor heard the witnesses and give due regard for that. See **Okeno v. Republic[1972] EA 32.**

I have deduced the issues for determination to be, whether the charge was defective, whether some of the exhibits were admissible and whether the offence was proved beyond reasonable doubt.

On the issue of defective charge sheet, it relates to the fact that the offence was set out as "**Robbery with violence contrary to section 295 as read".** The charge was framed after a substitution of the charge sheet on 17th October, 2013. The original charge sheet clearly stated the offence as robbery with violence contrary to **Section 295 as read with 296(2) of the Penal Code**. The particulars of the offence in both charge sheets were similar and the only difference was the introduction of the second count. Thus, the omission was occasioned by a typographical error which is curable under Section 382 of the Criminal Procedure Code.

I also add that although the intention was to draft the charge under **Sections 295 as read with Section 296(2) of the Penal Code**, the defect did not occasion any prejudice to the Appellant. This is in light of the fact that he pleaded to the offence of robbery with violence and the evidence adduced was intended to prove the same offence. The particulars of the offence also disclosed the offence of robbery with violence.

The next issue relates to the Appellant's submission that some of the exhibits in the case were inadmissible. He relied on **Section 322(3)(b) of the Penal Code** to submit that the exhibits in question were not stolen items and could not therefore pass the threshold of being admitted as they had been returned to the complainant. Further that the chain of custody of the exhibits was also questionable. This was with respect to the fact that the particulars of the charge sheet set out only two items that were stolen, that is a Nokia phone and Kshs. 2,000/- in cash contrary to the what transpired in court.

In her testimony the complainant set out a number of stolen items which she identified in court. They included two phones, clothes, a google meter and photographs. She also gave evidence about the loss of a second phone and money. I agree with the Appellant's contention that the absence of mention of the said exhibits in the initial report, which forms the basis of the particulars of the charge sheet, raised serious concerns on whether they were goods stolen during the robbery. This finding is of course in light of the fact that the chain of custody of some of the exhibits was clearly breached the moment they were let out of the police officers possession to the complainant before they were adduced ax evidence. This related to the photographs and clothes. It is also clear that the complainant was recalled twice to adduce evidence. In the first instance it was to a Tecno and Samsung phone that were exhibits in the matter while in the second instance it was with respect to the identification of a bag.

The two phones were a crucial part of the prosecution evidence as, according to the arresting officers, they were recovered from the Appellant. The record does however show that the phones were not identified through conventional means. PW1, PW2 and PW3 testified that PW1 unlocked the phones by inserting the correct PIN which proved her ownership. But this is at variance with her testimony on 17th October, 2013 when she testified that the phones in question **"have no PIN numbers because YU lines do not have PIN numbers."** This flies in the face of the purported identification of the phones as belonging to her. Given further the fact that the phones were not set out in the particulars of the charge, I must agree with the Appellant that they could not be proved as constituting some of the stolen property.

On proof of the case, the Appellant submitted that the prosecution case was riddled with contradictions. PW2 and PW3, the arresting officers, gave differing testimonies pertaining to the events of that night. PW2 testified that they saw people standing beside a bar while on patrol who ran away when they saw them. That in the company of his colleague they went to the place where the people were standing and found a bag with clothes inside. That they then heard movement a few meters from where they were standing and after three minutes of silence they decided to advance towards the direction of the movement at which point a man bolted from the area and they gave chase. The evidence of PW3 was that he was on patrol with PW2 when they noticed unusual movement which they observed. That they noticed a group of people trying to hide and as they approached this group he decided to cock his gun which spooked the men who started escaping but they gave chase and arrested one whom they took to the place where they first saw the group after which they discovered clothing and foodstuff.

The contradiction on how the Appellant was arrested was material as it failed to dislodge the Appellant's contention that he was a victim of circumstances having been arrested as he went to work. It greatly weakened the prosecution case, casting a doubt on the culpability of the Appellant.

On proof of the case comes into play the question of identification of the Appellant. It is an offence that took place at night when conditions for identification were not conducive. The complainant was not forthright that she could have identified the culprit if she saw him thereafter. Although she testified that the Appellant had a torch, the strength of the torch and distance PW1 was from it was not described, casting how she identified him. This applied to the light in the house; its strength was not described so as to remove doubts that the Appellant was clearly seen by PW1. Therefore, only an identification parade would have erased doubts that she clearly saw her attackers both in the house and in the bush. The

Appellant was not subjected to an identification parade with PW1 identifying him in the police cells. The arresting officers asked the complainant if she could identify the Appellant which she averred she could and then proceeded to lead her to a cell where she identified him. This was not a proper identification and could be relied on.

The trial magistrate seems to have been convinced of the Appellant's culpability by virtue of his possession of stolen goods. This court has already discounted this line of this argument as it was not proved they were all recovered from the Appellant and properly identified by PW1. I thus hold that his conviction was not safe.

On sentence, the Appellant was found guilty of both offences but sentence was only passed on the first count. This did not accord with Section 215 of the Criminal Procedure Code which states that a court shall **"convict the accused and pass sentence upon."** The trial court only indicated that the sentence in count II would be held in abeyance. This was an error in law and fact as the sentence in Count II had not been passed and therefore there was nothing to hold in abeyance. But having found that the evidence did not establish the offences, I need not pass the sentence in Count II.

In the upshot, I find that the prosecution did not prove their case beyond all reasonable doubt. I allow the appeal. I quash the conviction, set aside the sentence and order that the Appellant be forthwith set free unless otherwise lawfully held. It is so ordered.

Dated and Delivered at Nairobi This 23rd Day of November, 2017.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

1. Appellant in person.

2. Miss Sigei for the Respondent.