REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 54 OF 2014

CHARLES MBURU WANJIRU...........APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera Cr. Case No. 3 of 2012 delivered by Hon. Onyina, Ag. SRM on 26th March 2014).

JUDGMENT

Background

Charles Mburu Wanjiku, herein the Appellant, was charged in two counts of offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the Count I were that on 31st December, 2011 at Kware slums area in Ongata Rongai township within Kajiado County, jointly with others not before court while armed with a dangerous weapon namely a knife and offensive weapons namely rungus, robbed Dickson Maina of his cell phone make Samsung, valued at Kshs. 10,000/-, and at or immediately before or immediately after the time of such robbery stabbed the said Dickson Maina to death.

The particulars of the Count II were that on 31st December, 2011 at Kware slums area in Ongata Rongai township within Kajiado County, jointly with others not before the court while armed with a dangerous weapon namely a knife and offensive weapons namely rungus, robbed Esther Wanza Mutiso of her cell phone make Nokia 1616 valued at Kshs. 2,800/- and at or immediately before or immediately after the time of such robbery injured the said Esther Wanza Mutiso.

The Appellant was found guilty in "Count II". He was accordingly sentenced to death. He was dissatisfied with that court's decision against which he has preferred the instant appeal. He relied on amended grounds of appeal annexed to the written submissions filed on 1st November 2017. He has appealed on grounds that Section 207(1) of the Criminal Procedure Code was not complied with, that the trial court admitted evidence that was obtained contrary to Sections 122(a), (b) & (d) of the Criminal Procedure Code, that crucial witnesses did not testify, that the prosecution evidence was contradictory and inconsistent and that his defence was not considered.

Submissions.

The appeal was canvassed before me on 1st November, 2017. The Appellant relied on the written submissions which he heighted. The Respondent through learned State Counsel, M/s Atina made oral submissions. The Appellant submitted that Section 207(1) of the Criminal Procedure Code was violated as the plea was not unequivocal. He submitted that the trial magistrate at the time he took the plea failed explain to him the substance and every element of the charge and ensure that he understood the same. He stated that the failure to do so violated his right to a fair trial as envisaged Article 50(2)(b) of the Constitution.

He then submitted that the manner in which DNA samples were taken contravened Section 122(a),(b) &(d) of the Penal Code (Amendment Act No. 5 of 2003). This, he submitted, was because the police officer who ordered for the DNA examination was not of the rank of an Inspector of Police and above. He relied on **Morris Gikundi Kamunde *v.* Republic[2015] eKLR** to buttress the submission.

He also took issue with the manner of his arrest which he submitted was questionable. He submitted that the witnesses gave contradictory evidence relating to his arrest, with some stating he was arrested by the police and others by members of the public. He faulted the evidence adduced with respect to the location of his arrest which he stated was not properly described. He submitted that this was buttressed by the fact that the offence was committed at 10.00 p.m. when it was dark. It was thus difficult for the culprit to be chased from the scene as visibility was poor. He relied on **Ali Ramadhan *v.* Republic(Criminal Appeal No. 70 of 1985)** to buttress this submission. With regard to the assertion that an informant gave the police details concerning the robbery, he urged the court to consider such evidence as hearsay as the

informant did not testify. He relied on **Gikecha *v.* Republic [1963] EA** to buttress this point.

He submitted that the trial magistrate failed to acknowledge the defence advanced that he was an innocent bystander who was roped into the offence when he failed to explain to the police where the culprits they were chasing had gone. He supported this by the fact that he was arrested on 31st December, 2011 but it was recorded in the occurrence book that he was arrested on 1st January 2012. He concluded by urging the court to reassess the evidence and make a different verdict than that of the trial court.

Ms. Atina opposed the appeal. With regard to the Appellant's submission that Section 207(1) of the Criminal Procedure Code was not complied with, she submitted that the same was complied with save that some proceedings were not typed.

On non-compliance with Sections 122A, 122B and 122D of the Penal Code she submitted that the investigating officer testified that the samples were taken by the doctor and not PC Mayaka. She submitted that Section 122A is not couched in mandatory terms as the use of the word "may" gives discretion for an officer of another rank other than an Inspector of police to order for DNA sampling. She submitted that this was further buttressed by the fact that the Government Chemist testified without the objection from the Appellant.

On the Appellant's contention that crucial witnesses were not called, counsel submitted that he did not specify which witnesses were not called. In any case, Section 143 of the Evidence Act gave the prosecution the discretion to call any number of witnesses as would be necessary to prove their case.

Counsel denied that there were contradictions with respect to how and who arrested the Appellant. She submitted that the record attested that the arrest was carried out by officers from Ongata Rongai Police Station. With regard to the failure of PW1 and PW2 to identify the Appellant she submitted that this was not due to the prevailing conditions but because PW1 focused his attention to helping his wife, PW2, who was on the ground after being attacked.

On the Appellant's assertion that he was not issued with witness statements, counsel submitted that it was clear from the record that he had been supplied with them as he agreed to proceed with the hearing on 9th October, 2012 whereas previously he had not due to the lack of the statements. Counsel submitted that the Appellant's defence was considered but was dismissed as lacking in merit. She urged the court to dismiss the appeal for want of merit.

Determination.

No doubt the Appellant was convicted in respect of count 1 **and not** count II. This is clearly discerned from the judgment from page 10 to 12 where the learned trial magistrate upheld that the DNA sampling linked the Appellant to the scene of the crime, his clothes having been found stained with the blood of the deceased, Dickson Maina. Back to the charge sheet, Dickson Maina is named as the complainant in count 1 and not count II. Thus, the learned trial magistrate made an oversight in his judgment in indicating that he had found the Appellant guilty in count II having found that he was linked to the death of the complainant in count 1. In the same manner he had found him not culpable in count II for lack of proper identification.

The court cannot agree more with the learned trial magistrate. This is in view of the fact that the prevailing circumstances at the scene were not conducive for identification. The identification of the Appellant was questionable given the prevailing conditions at the scene. It at night and although PW3 said that there were lights emanating from the surrounding shops, the distance of the shop from the scene was not described. In addition, the intensity of the lighting was also not described so as to assure the court that the culprits truly identified the Appellant. Further, the identification evidence of PW1, 2,and 3 was not of the strongest credibility with the first two testifying that they could not identify the Appellant whilst PW3 testified that the Appellant was brought to the scene after his arrest. All these circumstances, undoubtedly did not favour a positive identification.

With respect to count I, the Appellant was convicted based on positive DNA analysis of his clothes which linked him to the death of the deceased, Dickson Maina. The Appellant urges the court to reject it because the order for the sampling was ordered by by the investigating officer who of the rank of an Inspector of police as required by Section 122A (1) of the Penal Code. On the other hand, Ms. Atina argued that the use of the word "may" in the provision meant that discretion could be applied such that any other officer other than an Inspector of police can order for DNA sampling. In the view of this court however, the use of the word "may" in the provision is not an indicator of the discretionary nature of the officer who can order for DNA sampling but rather an indicator at the discretionary nature of the power to order the sampling. I say so because DNA sampling may be carried out by consent as outlined in Section 122C or by order of a police officer under Section 122A(1). Hence, where a police officer orders a DNA sampling, he must be an officer who has attained the rank of an Inspector of police. Suffice it to state then, the investigating officer who was a constable of police acted *ultra vires* his mandate. As such, the results of the DNA analysis were inadmissible and could not be a basis on which the Appellant could be convicted in Count I.

Save that as I have found that the DNA examination results were inadmissible, they constituted the only direct evidence which would have nailed the Appellant in Count I. The inadmissibility arose out of a technical error in the investigations thus rendering the entire trial a mistrial. Conversely, the only way by which the court can correct the defect is by ordering a retrial. However, this can only be justified if on evaluation of the evidence a conviction would result, a retrial would not aid the prosecution in filling up gaps in their case, it would not prejudice the Appellant and on the whole would be in the interest of justice. See **Mwangi *v.* Republic[1983] KLR 522.**

In the present case the positive DNA samples were collected from a boxer shorts belonging to the Appellant. Needless to say after the analysis, the exhibits were released to the police who had no capacity to store them as required by the Government Chemist. The court has also confirmed from the learned State Counsel handling the matter that the blood samples extracted from the deceased were destroyed. Therefore, ordering a retesting of the boxer shorts would not yield any results. The court cannot also order extraction of other samples as doing so would be to aid the prosecution to fill up gaps in their case which works against the interest of justice. This is an unfortunate case where a person lost his life but the circumstances of the case demand that justice can only be served by ordering the freedom of the Appellant. The simple rationale is that a retrial without the preserved DNA samples would most likely not result in a conviction. This being the primary consideration for ordering a retrial, there is no doubt that the case must come to an end.

In the result, 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 THIS 19TH DAY OF DECEMBER, 2017

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. Appellant present in person.

2. *M/s Nyauncho h/b for Ms. Atina for the Respondent.*