REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 65 OF 2014

JOHN MAINA NJOKI ……..……APPELLANT

-VERSUS-

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

(Being appeal from the conviction and sentence of the Principal Magistrate's Court (S. Jalang'o)

at Baricho, Criminal Case No. 2 of 2014 delivered on 24th December, 2014)

JUDGMENT

1. **JOHN MAINA NJOKI**, the appellant herein was charged with Robbery with violence contrary to ***Section 296 (2)*** of the **Penal Code** before Baricho Principal Magistrate's Court Criminal Case No. 2 of 2014. The particulars of the charge were that on the 23rd November, 2013 at Makutano Market in Mwea West District within Kirinyaga County, the Appellant robbed Joseph Nzuli Nzei of a motorcycle Registration Number KMDB 407N make Skygo valued at Kshs.75,000/- and at or immediately before or after the time of such robbery beat the said Joseph Nzuli Nzei. The Appellant together with Paul Mburu Mundia co-accused in the case denied the offence and the matter proceeded to full trial whereupon the Appellant was found guilty of the offence and got convicted in accordance with the law. The co-accused was acquitted for lack of evidence connecting him with the said crime.

2. A brief summary of the facts presented before the trial court indicates that the prosecution called 4 witnesses in support of their case but the case mainly centred on the evidence of the complainant P.W.2 (Joseph Nzuli Nzei). In his evidence P.W.2 told the trial court that the motor cycle Registration No. KMDB 407N robbed belonged to P.W.1 (Silvester Muli Mutuku) who had employed him to operate the same as a "boda boda" and that on 23rd November, 2013 at around 10 p.m. he was summoned to paradise Motel in Makutano area by his boss who was from Nairobi and had wanted to be taken to his home. As he waited at the said motel he was approached by the Appellant in the company of another person whom he did not recognize and was requested to ferry the two to a nearby destination. The complainant further stated to court that he knew the Appellant well and agreed to ferry him and his companion only to be robbed of his motorcycle and left for dead after being beaten and strangled. He further said that he lost consciousness and only came to at Kimbimbi hospital. P.W.3 (**John Ngatia Githaiga)** confirmed the injuries suffered by the complainant and classified them as harm vide P3 form (Prosecution Exhibit 4) and treatment card (Prosecution Exhibit 2) respectively. Silvester Muli Mutuku (P.W.1) gave evidence which largely corroborated the evidence of the said Joseph Nzuli Nzei (P.W.2).

3. In his sworn defence the Appellant raised defence of alibi stating that at the material time he was away in Limuru to see his mother. He further told the trial court that his grandmother called him back whereupon his return on 26th November, 2013 he was attacked by boda boda riders on allegations of theft

of a motorbike and that he was saved from lynching by the leader of the riders. He further stated that he was arrested on 29th November, 2013. He further testified that he did not know either of the complainants – Joseph Nzuli Nzei (P.W.2) or Silvester Muli Mutuku (P.W.1).

4. The learned trial magistrate on the basis of the evidence tendered found that the complainant had been violently robbed of the motorcycle belonging to his employer (P.W.1) and the evidence tendered pointed beyond reasonable doubt that Appellant was involved. He convicted him and handed him the mandatory death sentence. Aggrieved by both the conviction and the sentence, the Appellant preferred this appeal and initially raised eight grounds and later with the leave of this court added two other grounds which I shall summarise as follows:-

(i) That the learned trial magistrate erred in law by amending the charge of stealing contrary to Section 275 of the Penal Code to that of robbery with violence contrary to Section 296 (2) of the Penal Code.

(ii) That the learned trial magistrate erred in law by relying on the evidence of a single witness.

(iii) That the learned trial magistrate erred by not considering that nothing was recovered from him during his arrest and thereafter.

(iv) That the learned trial magistrate erred in law and fact by not considering that the complainant had indicated that he did not know the assailants.

(v) That there was no investigation done as the investigating officer only depended on the leads provided by the Appellant.

(vi) That the learned trial magistrate erred by not considering his defence of alibi which he had raised.

(vii) That the trial magistrate erred in law and fact by not considering that the Occurrence Book number was not indicated on the charge sheet rendering the charge defective.

(viii) That the learned trial magistrate erred in law and fact by failing to note that recognition was not proved beyond reasonable doubt.

(ix) That the appellant's constitutional rights under Article 49 (1) F (1) of the Constitution were violated at the trial.

(x) That the trial magistrate erred by using a language at the trial that the Appellant did not understand.

(xi) That the trial magistrate erred by not considering contradictions by the prosecution witnesses.

5. The Appellant preferred to proceed in this appeal through written submissions and I will consider the grounds of appeal raised in the order adopted in his submissions and the response made by the state through the written submissions by E. P. O. Omooria learned counsel for the respondent.

6. On identification, the Appellant has submitted that there were doubts whether the Appellant knew his attackers well and that the prosecution did not produce the 1st report made on the Occurrence Book to prove that the complainant positively recognized him. He further submitted that the clinical officer (P.W.3) who treated the complainant indicated that the complainant did not disclose who had attacked him showing that he may not have known his attackers. He has also pointed out that the prosecution failed to establish at the trial that there was sufficient light to enable the complainant recognize him. In his submissions he has contended the source of the light should have been stated and that in the absence of the same it was unsafe to convict him on the assumption that the light must have been sufficient.

7. The Respondent has submitted in response to this issue of identification that the evidence tendered by the complainant (P.W.2) on identification was in its view watertight as the complainant stated that he had known the Appellant well prior to the incident because he was a regular customer. The state has further submitted that there was no need for conducting an identification parade because the Appellant was known to the complainant. On the non production of the Occurrence Book during trial, the state has submitted that the same was not fatal to the prosecution case and that the Appellant during the trial did not seek for its production. Mr. Omooria faulted the appellant for bringing up the issue of the Occurrence Book as an afterthought.

8. I have considered this ground carefully because in my view the issue is important and central in this appeal. The complainant (P.W.2) at the trial told the trial court that "he knew the Appellant very well" and that is why he decided to carry him and his companion at that hour in the night. The Appellant was clearly known to the complainant as he even told the trial court that his home was in a place called Kiruara. From his evidence, it is apparent that the witness knew the Appellant well. He clearly stated that he did not know the appellant's companion. I do agree that the evidence tendered by the prosecution did not explain either the source or the intensity of the light outside the motel where the complainant picked the Appellant and it is true that it is not safe to base a conviction on assumptions and the assumption here being that the lights outside the said motel must have been sufficient for the complainant to positively recognize the Appellant. I am however, persuaded from the evidence tendered that there was sufficient light at the scene where the Appellant was recognized and picked. This is due to the following reasons; The complainant (P.W.2) told the trial court that the Appellant was "carrying a black paper bag" indicating that the light was sufficient to enable complainant see what the Appellant was carrying and even tell the colour of the paper bag. The contents of the paper bag of course shortly thereafter turned out to be a rope used to strangle the complainant in order to subdue him in the robbery incident. I am also not persuaded by the Appellant's contention that the complainant did not reveal the identity of his attackers. This is because P.W.3 clearly stated that the patient (P.W.2) gave a history of having been assaulted by people known to him. The P3 (Exhibit 1) clearly indicates that the attackers were known to the complainant. The injuries described are consistent with the rope that was used to strangle him. I am in agreement with the Respondent's contention that there was no need or basis for conducting an identification parade to pick out the Appellant as the complainant had said he knew him well. He had even told his fellow riders about the Appellant and that perhaps is why the Appellant said that he was almost lynched by boda boda riders when he returned to Makutano area from Limuru.

9. The Appellant has pointed that the Occurrence Book was not produced at the trial but this Court finds that he should have also applied during trial for the Occurrence Book to be produced if he thought that the complainant made a different report on identification other than the evidence adduced at the trial. I have re-evaluated the evidence tendered by P.W.1 and P.W.2 in regard to the positive identification of the Appellant as one of the persons who robbed the Appellant, and I am satisfied that the assessment of the evidence by the learned trial magistrate was correct. The conclusion made in his judgment that the Appellant was well recognized and identified was sound. It is true that when identification is based on the evidence of a single witness, a trial court should exercise some caution in relying on such evidence to find a conviction due to mistakes which can happen. I am however, satisfied that the learned trial magistrate, though he did not specifically state so, had basis to find that it was safe based on the evidence tendered to convict the Appellant. In my view identification of the Appellant was clearly established and proved beyond reasonable doubt.

10. The Appellant has submitted that the charge against him was improperly amended from stealing contrary to ***Section 275*** to robbery with violence contrary to ***Section 296 (2)*** of the **Penal Code**. I have however, perused the proceedings at the trial and noted that the charge was amended on 9th July, 2014 upon an application by the prosecution. The amendment was in my view legally sound and proper as it was done pursuant to the provisions of ***Section 214*** of the Criminal Procedure Code and the trial complied with the provisions of the law by calling upon the Appellant to plead to the altered charge which he did before the trial commenced. It is not true that the amendment was done after the close of prosecution case.

11. The Appellant has contended that the prosecution's case was riddled with inconsistencies and

contradictions. He has pointed out that P.W.2 stated he knew the appellant before the incident but later on stated that he knew him at paradise hotel. He has also pointed out that the prosecution witnesses were not consistent on where the scene of crime was. I have considered the evidence of the investigating officer (P.W.4) who stated that the incident occurred at a place called Mark Five resort while the complainant referred to the place as "Mulango". It is unclear from the evidence whether the two places are one and the same or are located in the same area. What is however, clear is that the discrepancy is insignificant and did not materially affect the weight of the prosecution's case. I am guided in this regard with the decision of the Court of Appeal in the case of **DANIEL NJOROGE -VS- REPUBLIC [2014]eKLR** where the Court of Appeal made the following observations:-

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

The complainant (P.W.2) was firm and categorical in his evidence that he knew the Appellant well prior to the incident and that is why he agreed at that hour of the night (10 p.m.) to carry him to the requested destination. The discrepancy on the description of that destination in my view was minor and insignificant in so far as the weight of the prosecution case was concerned.

12. On the language used at the trial, the appellant has submitted that the language used "was not recorded" and that there was no interpretation to the language he understood. The Appellant however, has not stated what language was used at the trial or pointed out in this appeal that he only understood a specific language which was not the language used in court. It is true that in the proceedings the learned trial magistrate did not indicate on record the language used apart from the time when the plea was taken where it is indicated that the charge and the particulars of the offence was read in both Kiswahili and Kikuyu languages which the accused persons stated that they understood well. I have also observed and noted active participation by the Appellant in the proceedings by cross-examinations which appeared to have been extensively done. He also clearly gave a lengthy sworn statement of defence and gave answers when cross-examined by the prosecutor at the trial. From this it can clearly be discerned that the language used was clearly understood and the point raised in this appeal is clearly an after thought. In the case of **M. M. -VS- REPUBLIC [2014] eKLR** the Court of Appeal made the following relevant observation;

> ***"We also find no merit in the appellant's claim that he did not understand the proceedings on account of the language used at the trial. It is plain to us from the record that the charges were read in Kiswahili language. Throughout the trial, the record shows an active accused person, cross-examining witnesses making various applications and giving a long unsworn defence. ……."***

This Court finds no basis in the Appellant's contention that his rights under ***Article 50 (2) (m)*** of the **Constitution** was breached at his trial because the record shows that he fully participated and could only mean that he was conversant with the language used at the trial notwithstanding the fact that the language is not indicated.

13. The Appellant has further alleged that his constitutional right under ***Article 49 (1) F (1)*** was violated as he was not taken to court within 24 hours after his arrest as stipulated by law. I am however, persuaded by the Respondent's contention that the Appellant's remedy if aggrieved lies elsewhere but not this appeal. The Appellant should have also raised the issue when first brought to court in order to provide avenue to the Police to give an explanation if at all. It is also not clear from the charge sheet to tell when the Appellant was actually arrested. The dates appearing on the Charge Sheet appear misleading in so far as the date of arrest is concerned. The date of arrest indicated on the Charge Sheet is 1st May, 2014 when it is clear from the record that the Appellant was arraigned in court on 2nd January, 2014. In fact the investigating officer (P.W.4) stated in her evidence that the Appellant was arrested on 31st December, 2013 by Police officers from Makutano Police Station. If that is the correct position, it does mean that the Appellant may not have basis to complain because he could not be arraigned in court on 1st January, 2014 because it was a public holiday and this Court take judicial notice of that fact. He

was arraigned in court on 2nd January, 2014 which perhaps explains the reasons why he did not complain that he had been held in custody beyond the stipulated period. This ground of appeal therefore lacks basis and must fail.

14. I have considered the defence of alibi raised by the Appellant and contrary to his contention that the trial court did not consider the defence raised, the same was considered. The Appellant claimed in his defence that on the material day and time he was away in Limuru with his mother. He however, never called his mother to back up his alibi or tender any evidence to support his defence. In my view the trial court was right in giving due weight to the defence raised. It is true that the burden of proof always lies on the prosecution to prove their case and not for the defendant to prove his innocence. In my considered view the burden of proof was clearly discharged by the prosecution. The ingredients of the offence of robbery under ***Section 296 (2)*** of the **Penal Code** were established by the prosecution. Those ingredients are clearly illustrated by the law which provide as follows:-

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

In this instant appeal, the evidence tendered showed that the Appellant was in the company of one person and had a rope (which can be dangerous if used to strangle one) and also inflicted injuries on the complainant which were confirmed by a medical officer (P.W.3). The conditions or ingredients set by law were well established by the evidence tendered.

The prosecution proved its case beyond reasonable doubt in my considered opinion. The entire evidence tendered left no doubt, as the trial court found that the Appellant robbed the complainant (P.W.2) in the manner described. The trial court considered well the evidence presented to it and came to the inevitable conclusion that the Appellant was guilty as charged. In light of this, this Court finds no merit in this appeal. The same is dismissed. The conviction and sentence passed are upheld.

Dated and delivered at Kerugoya this 27th day of October, 2016.

R. K. LIMO

JUDGE

27.102016

Before Hon. Justice R. K. Limo J.,

State Counsel Mr. Sitati

Court Assistant Naomi Murage

Appellant present

Interpretation English/Kikuyu

Sitati for State present.

Appellant present in person

COURT: Judgment dated, signed and read in the open court in presence of John Maina Njoki the appellant appearing in person and Mr. Sitati counsel for the Respondent.

R. K. LIMO

JUDGE

27.10.2016

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