REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 25 OF 2013

JUSTUS MUTUNGI KITELA ……APPELLANT

VERSUS

REPUBLIC ……RESPONDENT

(Being an appeal from the original conviction and sentence in Chief Magistrate's Court - Machakos, Criminal Case No. 159 of 2012 by Hon. P.N. Gesora Senior Principal Magistrate on 27th February, 2013)

J U D G M E N T

The appellant herein was charged with the offence of Robbery with violence contrary to **Section 296(2)** of the **Penal Code.**

The particulars of the charge were that on the 21st day of January, 2012 at Kitengi area of Mumandu sub-location in Lumbwa location within Machakos county Eastern province, jointly with another not before the court and while armed with offensive weapons namely claw hammer and a metal robbed **Martin Kioko Makuthi** his motor cycle registration number KMCR 643X make SkyGo valued at Kshs. 76,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said **Martin Kioko Makuthi.**

The appellant was convicted and sentenced and being dissatisfied with the same, he has appealed to this court. In his amended Memorandum of Appeal, he raised the following grounds of appeal:

a. ***That the learned trial magistrate erred in law and in fact in convicting the appellant while relying on the identification evidence by PW1 and PW2 whereas the evidence were not favourable for positive identification.***

b. ***The trial magistrate erred in law and in fact in failing to appreciate that there were enough doubts created by the prosecution to secure an acquittal.***

c. ***The learned trial magistrate erred in law and in fact by failing to appreciate that the prosecution had failed to prove its case to the standard required in law that is prove beyond reasonable doubt.***

d. ***The trial magistrate erred in law and in fact in failing to take into account or failed to consider or failed to give reasons as to why he disregarded the appellant's alibi defence.***

e. ***The learned trial magistrate erred in law and in fact in failing to take into account and consider***

PW2's evidence or failed to give reason why he disregarded the PW2 evidence in that he did not know the appellant and whereas, its alleged that PW1 and PW2 chased and never lost sight of the appellant thus doubtful.

f. ***The trial magistrate erred in law and in fact in accepting the complainant's evidence as safe whereas the evidence was insufficient and incredible.***

g. ***The learned trial magistrate erred in law and in fact by convicting the appellant whereas the appellant's constitutional rights to a fair hearing under Article 50(2) (c) (j) of the Constitution were flouted and violated.***

h. ***The trial magistrate erred in law and in fact in failing to appreciate the doctor who is alleged to have treated the complainant had not been heard, thus doubtful.***

At the hearing of the appeal the appellant presented to the court written submissions in support of his appeal. He further submitted that during the hearing PW2 in his evidence said that he saw somebody being chased. PW2 said he could not identify the appellant and that he was not sure if he was the one who was arrested at the scene.

On his part, the learned state counsel **Mr. Schijenje** submitted that the appellant was properly identified and that factors favouring identification were favourable. He further submitted that the appellant was arrested at the scene where the offence was committed and a hammer and a claw bar were recovered from him. He further submitted that the complainant was injured in the course of the robbery and this was proved by the P3 form that was produced by **PW4 Dr. Emmanuel Loiposha.** He told the court that the defence of alibi raised by the appellant in the lower court was considered and it was found to be wanting. The fact that the appellant was arrested at the scene with weapons took away his defence of alibi.

In his written submissions the appellant submits that the identification was not safe and that the same was not free from possibility of errors. According to him the circumstances obtaining at the time the offence took place were not favourable for proper identification in that it was dark, the complainant was in pain, having been injured by his attackers and on being hit, he fell down. He further submitted that the complainant did not give any description of his attackers to the police when he made his report. He also took issue with the evidence of PW1 *(complainant)* and that of PW2 with what happened at the scene and further stated that his defence of alibi was not considered by the trial court.

This being the first appellate court we are duty bound to carefully examine and analyze the evidence adduced before the trial court and come to an independent decision bearing in mind that this court neither saw nor heard any of the witnesses testify and therefore did not have the benefit of observing their demeanour. From the foregoing this court will re-evaluate the evidence adduced at the lower court and reach its own decision on issues of law and facts.

The brief facts of the case are that on the 21st January, 2012 the complainant PW1 was in Mumandu at 6.45p.m at the stage waiting for customers when two men came and hired him. He operated a motor cycle taxi the registration number of the motor cycle was KMCR 643X. In between the journey they ordered him to stop to which he obeyed and stopped and they hit the helmet that he was wearing. By this time they had alighted from the motor cycle and they used a hammer to hit his helmet. The motor cycle had fallen and one of the robbers was frisking him to rob him while the other was trying to start the motor cycle. He held one of the robbers in a bid to help himself while screaming for help as the other robber took off with the motor cycle. He had been injured on the head and he was bleeding. People from the nearby homes responded to his screams and also his cousin James who was also a boda boda operator and they helped him to arrest one of the robbers whom the complainant identified as the appellant herein. Members of public appeared and they telephoned the area chief called **Douglas Mutua Mutavi** who testified as PW5. The Appellant had a claw hammer which the complainant and the members of public recovered from him and it was produced as an exhibit during the trial.

PW2 (James Musyoka Mulinge) was also a motor cycle taxi operator at the time. On 21st January,

2012 he was in Mumandu market when he received a telephone call from the complainant who told him to go to Kwa Kilonzo stage. He rushed there and at a distance of 50 meters he saw two people running. He stopped and parked his motor cycle and it is at that point that the complainant told him that he had been robbed off his motor cycle and that the appellant was a suspect. They raised alarm, people came to the scene but he did not see the appellant clearly as he was concentrating on the complainant who had been injured. They gave chase for about 30 meters before they arrested the appellant and he was carrying a weapon like a hammer which they took from the appellant. He escorted the complainant to the police and later to hospital at Machakos Level 5 and he later recorded his statement with the police.

PW5 was the chief of Lumbwa. He told the court how on the 21st January, 2012 while at Mumandu market within his jurisdiction he saw motor cycles moving at high speed towards Machakos. He stopped them and on making enquiries the rider told him that one of their colleagues had been robbed of a motor cycle. He boarded one of the motorcycles and rode to the scene where he found a large crowd of people. He found the appellant being beaten by people and he intervened and cooled the situation. He called the OCS who sent police officers to the scene. He gathered information that the appellant and another had robbed off the complainant a motor cycle. He arrested the appellant and took him to Machakos police station.

PW6 (**Joshua Waema Mbaluka)** had employed the complainant as a motor cycle taxi rider for his motor cycle KMCR 643X. On 21st January, 2012 he received information that the complainant had been robbed off the motor cycle by people who hired him. He reported the theft at Machakos police station the following day and he gave details of ownership. He found that one of the suspects had been arrested and he was the one before the court. He was shown some weapons used in the attack.

PW4 (Emmanuel Loiposha) a medical doctor examined the complainant and found that he had a healing cut wound and stitches on the scalp with bruising on the lower lip. He filled the P3 form and produced it as an exhibit.

PW3 (P.C. John Chebii) attached to Machakos police station then, was assigned the case to investigate. The appellant had been arrested and he was in the cells. He had been arrested by the complainant and members of public. He called the complainant who narrated to him the events of 21st January, 2012 on how he was attacked and robbed off the motor cycle by two people who had hired him. He told him how the complainant held onto the appellant while the other ran away with the motor cycle. He identified the exhibits before court which he had got from AP officers attached to Mumandu, he had a P3 form filled and charged the appellant with the offence of robbery with violence.

We have carefully considered the submissions by both the appellant and the leaned state counsel. We have also considered the amended grounds of appeal relied upon by the appellant.

On the issue of identification the court finds that the appellant was positively identified as one of the robbers who attacked and robbed the complainant. He told the court that he held one of the robbers in a bid to help himself while screaming for help while the other one took off with the motor cycle. He struggled with him for five minutes before members of the public came to rescue him. He told the court that the claw hammer was recovered from the appellant. The members of the public including PW3 went to the scene and found the complainant who was holding the appellant. The issue of the identification does not arise in this case as the appellant was arrested at the scene and taken to the police station. It was not necessary for the complainant to give any description of the appellant to the police because there was no lapse of time between when the offence was committed and the arrest, after all he was arrested at the scene.

On grounds 2, 3 and 5 of the appeal this court finds that evidence adduced before the trial court was sufficient. The witnesses were able to prove that the complainant was robbed, and at the time of the said robbery he was injured by his attackers who were armed with a hammer and one of those who robbed him was the appellant before the court. The prosecution proved the case beyond any reasonable doubt. There may have been some minor discrepancies in the evidence of PW1 and PW2 which in our view were not material as to affect the finding that was reached by the trial court. In this we have been guided by the

case of ***Joseph Maina Mwangi vs Republic (Criminal Appeal No. 73 of 1993*** where the court held;

> ***"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of Section 382 of the Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and the sentence"***

On ground number 4, the appellant faulted the trial court for failing to consider his alibi defence and for failing to give reasons why he disregarded his defence. On page 7 of the judgment, the trial magistrate considered the defence of alibi raised by the appellant and made a finding that the same lacked truthfulness and was not backed by any evidence. The trial magistrate noted that the appellant did not offer any proof that he resided in Nairobi at that time and no material particulars were presented to court in this regard. He observed that it was highly improbable that members of public attacked and arrested him while he peacefully carried his luggage home, in absence of any adverse information against him. This court fully agrees with the trial court in that regard and find that the appellant's defence did not hold water and could not stand.

On ground 7 of the appeal, the appellant alleges that his constitutional rights under **Article 50(2) (c) (j)** of the **Constitution** were flouted and violated. **Section 50(2)** provides as follows; Every accused person has the right to a fair trial, which includes the right to

> ***(c) "to have adequate time and facilities to prepare the defence.***
>
> ***(j) to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence."***

This court notes that, on 9th February, 2012 when the matter came up for hearing, the trial court made an order that the accused person be supplied with copies of witness statements and other exhibits in the case at his costs. On 2nd March, 2012, the appellant is again on record as having requested for witness statements and the trial magistrate made another order that he be supplied with supporting documents at own cost. The court went further and informed him of his right to be represented.

On 19th March, 2012, the appellant prayed for statements and the prosecutor applied for an order to facilitate the issuance of the same. The court made an order that he be supplied with a charge sheet and statements to prepare for his defence.

On the 17th August, 2012, the appellant reminded the trial court that he had requested for a P3 form and other documents plus the first report. The magistrate noted *"orders accordingly"*.

From what we can gather from the court file, the appellant severally requested for copies of witness statements but what is not clear from the record is whether the same were supplied to him or not. It is very clear from the record that the matter came up for hearing on several occasions when it was adjourned by the prosecution and on 3rd August, 2012 the appellant expressed his frustrations at the pace of the trial and he told the court that he was suffering in remand and that the matter was dragging.

On the 17th September, 2012 the appellant was at it again. When the matter failed to proceed that day he told the court that he was suffering because he was still in custody prompting the court to make an order for the *"last adjournment"*.

What is not clear from the record is whether the appellant was finally supplied with the witness statements after making several requests. In view of the many requests that he had made, the trial magistrate ought to have ensured that he was supplied with the statements before the trial could commence and by failing to do so, he erred.

In our humble view, and we are cautious in stating so, the appellant may have proceeded with the trial

without the witness statements and the P3 due to the frustrations that he had expressed which had been caused by the delay in the trial. We shall give him the benefit of doubt. He has a constitutional right to have adequate time and facilities to prepare a defence and to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence. This is an absolute right guaranteed in the Constitution.

In the result, we do not think that the appellant was given a full and fair hearing. This we think is a fundamental breach which goes to the root of the appellant's conviction. It is not the sort of irregularity which is curable under **Section 382** of the **Criminal Procedure Code.** That being our view in the matter we cannot but allow this appeal, quash the appellant's conviction and set aside the sentence of death.

The court very strongly considers to order a retrial in this matter. In doing so, we are guided by the case of ***Njeru vs Republic (1980) KLR 108***. Whether to order a retrial or not largely depends on whether the trial of the appellant was illegal or defective. In certain rare cases however, circumstances may exist which would militate against ordering a retrial notwithstanding that the trial was unsatisfactory.

In such an event an appellate court would normally order the release of the appellant. In our case, the offence the appellant was charged with is serious in nature. The trial magistrate conducted the trial well except for the failure to ensure that the appellant was supplied with witness statements. We do not think that this is a fit case for the immediate release of the appellant. Clearly the appellant's constitutional rights to a fair trial were breached.

Consequently we order that the appellant shall be produced at the earliest possible time, before the trial court for fresh hearing dates to be fixed and the matter be heard a fresh according to the law.

Those are our orders.

Dated and **Delivered** at **Machakos** this 16th day of September, 2015

LUCY NJUGUNA **P.NYAMWEYA**

JUDGE **JUDGE**