IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 154 OF 2012

SIMON NDUNGU KINUTHIA……..……..…..APPELLANT

VERSUS

REPUBLIC…….……RESPONDENT

JUDGMENT

Simon Ndungu Kinuthia appeals against the decision of Hon. H. M. Nyaga, Senior Principal Magistrate, at Molo wherein he had been charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. In the alternative, he faced a charge of handling stolen property contrary to **Section 322(2)** of the **Penal Code**. In count II he was charged with the offence of assault contrary to **Section 251** of the **Penal Code**. After a full trial, the court convicted the appellant of the offence of attempted robbery with violence contrary to **Section 297(2)** of the **Penal Code** and handed him a sentence of 7 years imprisonment. Being dissatisfied with both the conviction and sentence, the appellant has preferred this appeal relying on grounds contained in his amended petition of appeal filed in court on 3/7/2013 and the written submissions. The grounds relied upon are as follows:-

1. **That the charge sheet was defective;**
2. **That the appellant's constitutional rights under Section 50(2)(p) of the Constitution were infringed;**
3. **That the prosecution case was full of contradictions and inconsistencies;**
4. **That PW5 was not qualified to produce the medical report;**
5. **That the trial court failed to consider the appellant's defence which offends Section 169(1) of the Criminal Procedure Code.**

As a result the appellant prays that the appeal be allowed, the conviction be quashed, sentence set aside and the court do set him at liberty.

The learned State Counsel, Mr. Marete opposed the appeal. He submitted that the appellant was seen by PW1 and another enter his compound, where they stole a pair of slippers and shoes; that he was armed with a metal bar with which he hit the complainant severally. PW1 held onto the appellant at the scene; that PW1's evidence was corroborated by PW2 and PW3 who helped arrest the appellant; that the complainant was treated by PW5 who classified injuries as harm. Counsel also submitted that the trial court did consider the defence and although he found him guilty of the offence of attempted robbery with violence under **Section 297(2)** of the **Penal Code**, there was sufficient evidence to found a conviction under **Section 296(2)** of the **Penal Code**. Counsel urged this court to find and convict the appellant under **Section 296(2)** of the **Penal Code**.

At the opening of the trial, the Learned State Counsel warned the appellant that he will be urging the court to enhance the sentence. The appellant was warned of the state's intention to enhance the sentence but he insisted on proceeding with his appeal.

This being the 1st appeal, it behoves this court to re-evaluate the evidence afresh and arrive at its own independent findings and conclusions but always bearing in mind that this court did not have an opportunity to see the witnesses to evaluate their demeanour.

The case before the trial court was that on 6/6/2011, about 11.20 a.m., the complainant, Samuel Kamanjara Macharia, was walking back to his house at Kenyatta Phase I, Molo when he noticed two men standing near his house. He got suspicious of them, pretended to be passing, saw them enter his compound, and he followed. He found that they had picked a pair of slippers and one shoe belonging to his grand child, a paper bag and that the appellant had a metal bar and a pair of pliers. He got hold of the appellant. The two people hit him severally so that he could release the appellant but he did not and instead shouted for help. His watch was also stolen.

PW2, Joseph Nthiga Mugambi and PW3, Yabesh Ogega who are neighbours to PW1 responded, went to PW1's rescue and helped arrest the appellant. Both of them identified the items that were recovered at the scene.

PW5, Machaira Mwangi, a Clinical Officer at Molo Hospital, examined PW1 on the same day and found that he had tenderness to the back of the head, nasal bridge (swollen) tenderness to abdomen, tenderness to left ankle and knee joint, a swollen wrist and assessed the degree of injury as harm. PW4, PC George Kamau recovered a pair of slippers, metal rod, a shoe and pliers (PEx.2-6).

When called upon to enter his defence, the appellant said that on 4/6/2011, he went to Kenyatta Estate water point, where he met a man who alleged he was a thief. The woman with him started to scream, a crowd gathered and beat him and that the police rescued him and complainant alleged the appellant had robbed him.

In his further submissions, the appellant contended that there was contradictory evidence as to where the offence was committed. In his defence the appellant did admit that he was arrested at Kenyatta Estate two. PW1, PW2 and PW3 told the court that the robbery occurred at Kenyatta Phase I in Molo. Although PW4 said that he was sent to Kenyatta Phase 2, we find that the three witnesses PW1 – PW3 knew better than PW4 where PW1 residence is and there is no denial that the appellant was arrested at Kenyatta Estate in Molo.

The offence was committed in broad daylight at about 11.20 a.m. PW1's evidence was corroborated by PW2 and PW3 who testified that the appellant never left the scene but that PW1 got hold of him and never let go. In our view, there is absolutely no reason why PW1, a stranger to the appellant could have framed him with such a seirous offence. The trial court believed the testimony of PW1, PW2 and PW3 and we have no reason to doubt it.

PW1 testified that he was beaten by both the appellant and his companion in a bid to free himself. PW1 got injured on the wrist and was seen by PW5, Macharia Mwangi, a Clinical Officer at Molo Hospital. It is the appellant's contention that the said officer was not qualified to examine PW1 and fill a P3 form. The injuries sustained by the complainant were classified as harm. The medical evidence was produced pursuant to **Section 77** of the **Evidence Act**. The section reads as follows:-

> **"77. (1) In criminal proceedings any document purporting to be report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.**
>
> **(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when**

he signed it.

(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof. ”

It does not define who a medical practitioner is. In our view, for purposes of **Section 77** of the **Evidence Act**, a Clinical Officer was qualified to examine the complainant. This is a common practice in our hospitals for Clinical Officers perform the bulk of the work due to shortage of doctors. In a recent decision **CRA 360/2012, Daniel Lucas Kivuva v R** (Embu) the Court of Appeal upheld the decision of the High Court where the post mortem on the deceased had been conducted by a Clinical Officer. In the case of **Lochuch Nchacha & Loroto Eloto v Rep. CRA 229/2011,** Wendoh and Emukule J held that the fact that a Clinical Officer conducted a post mortem did not offend **Section 77** of the **Evidence Act** because it was not a murder trial but all that the post mortem needed to prove was that violence was visited on the deceased. Similarly, in this matter, all the court wants to prove is that violence was inflicted on the complainant. There is no evidence that the defence has been prejudiced in any way.

Whether the evidence supported the charge: An offence of robbery with violence is committed:-

i. **If the offender while armed with any dangerous or offensive weapon or instrument uses or threatens to use violence against any person or property at or immediately before or after time of the act of stealing; or**
ii. **If the offender commits the robbery while in company of one or more other person or persons; or**
iii. **If the offence immediately before or after the time of the robbery wounds, beats, strikes or uses any other violence to any person.**

The Court of Appeal in **Mneni Ngumbao Mangi v Rep 141/2005**, considered what constitutes an offence of robbery with violence when it said:-

> **“As already stated, there are three ingredients, any of which is sufficient to constitute the offence of robbery with violence under Section 296(2) of the Penal Code. If the offender is armed with any dangerous or offensive weapon or instrument, that would be sufficient to constitute an offence. Secondly, if one is in company with more than one or more other person or persons, that would be evidence of the offence too. And lastly, if at or immediately before or immediately after the time of the robbery he wounds, beats, strikes or uses any other violence to any person, that would be yet another set to constitute the offence.”**

In the instant case, the appellant was with one other person who managed to escape; the two were armed with a metal rod at the time of the robbery and they did inflict actual violence on the complainant. The complainant lost a wrist watch in the process while the other items were recovered. We are satisfied beyond any doubt that an offence of robbery with violence was proved. The prosecution only needed to prove existence of one of the ingredients. The trial court found that the appellant had taken some items from the complainant’s compound but had not left with them, contrary to what the complainant clearly stated that his wrist watch was stolen. Besides, the evidence disclosed that all the three ingredients under **Section 296(2)** existed. In our view, the trial court erred when it found the appellant guilty of a lesser offence of attempted robbery with violence.

The appellant complained that the evidence did not support the charge because whereas PW1, PW2 and PW3 talked of a pliers having been recovered, it was not mentioned in the charge sheet. PW1 told the court that he found the appellant with the pair of pliers. PW1’s evidence was corroborated by PW2 and PW3 who came to the scene to rescue PW1. PW4 who re-arrested the appellant found the pliers at the scene and took it into his possession as an exhibit. Even though the pliers was not mentioned in the charge which we believe was the omission by the police officer who drafted the charge sheet, other items are mentioned and in our view, that omission does not weaken the prosecution evidence nor does it prejudice the defence case.

The appellant alleges that his defence was not considered. We have considered the appellant's defence, we find that the defence was a bare denial, in which he said that he was just a passerby when PW1 alleged that he had stolen from him. The magistrate did consider the said defence and did not believe him. We have no reason to find otherwise.

The appellant also complained that the trial court violated his constitutional rights guaranteed under **Article 50(2)(p)** of the **Constitution**. **Article 50(2)(p)** reads as follows:-

> **"50 (1)….**
>
> 2. **Every accused person has the right to a fair trial which includes the right –**
>   a. **– (0);**
>
> **(p) to the benefit from the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing."**

The appellant's submission was that since he was found guilty under **Section 297** of the **Penal Code** and the law has changed, he should have been awarded the least sentence possible. **Section 297(2)** of the Penal Code provides for a death sentence if the person found guilty was armed with a dangerous weapon or was in company of another/others or immediately before or after the offence, used violence on the victim. So far the law has not been changed. However, the trial court was guided by the Court of Appe\ al decision CRA 277/07, **Evanson Gichana v Republic** where the court held that **Section 297(2)** of the **Penal Code** on sentence for attempted robbery with violence be read with **Section 389** of the **Penal Code. Section 389** of the **Penal Code** reads as follows:-

> **"389. Any person who attempts to commit a felony or a misdemeanour is guilty of an offence and is liable, if no other punishment is provided, to one-half of such punishment as may be provided for the offence attempted, but so that if that offence is one punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years. "**

The appellant was only sentenced to a period of 7 years imprisonment. In our view, the court was very lenient on him.

Be that as it may, this court having arrived at a different finding that the appellant did actually commit an offence of robbery with violence, we dismiss his appeal, quash the conviction on the offence of attempted robbery with violence, and set aside both conviction and sentence. Instead we find the appellant guilty of the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** and convict him accordingly. We therefore dismiss the appeal on conviction.

The law prescribes a death sentence upon conviction under **Section 296(2)** of the **Penal Code**. In light of the recent Court of Appeal decision in **Joseph Njuguna Mwaura v R** 5/08, we also dismiss the appeal on sentence. We hereby sentence the appellant to suffer death.

These shall be orders accordingly.

DATED and DELIVERED this 8th day of April, 2014.

R.P.V. WENDOH

JUDGE

A. MABEYA

JUDGE

PRESENT:

In person for the appellant

Mr. Chirchir for the State

Kennedy/Court Assistant