REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL 229 OF 2011

(ARISING FROM JUDGMENT IN BGM CMCCRC NO 2151 OF 2008)

STEPHEN BARASA……APPELLANT

VRS

REPUBLIC...……...RESPONDENT

JUDGMENT

1. This appeal is against sentence. The significant grounds as contained in the petition of appeal dated 15/11/2011 are No. 2 and 4 which read as follows:

    1. ……
    2. *That the sentence imposed is rather harsh on my side.*
    3. ……
    4. *That I tray for leniency.*

2. The Appellant prays for leniency and that he is allowed to serve sentence under Community Service Order (CSO).

3. From his written submissions, it appears the Appellant gave notice of amendment of the petition of appeal. The submissions are, however, undated and do not also bear a court rubber stamp. Nonetheless, they are in the file and the prosecution confirmed they had been served with a copy thereof. I shall consider the submissions.

[4] From the written submissions, the Appellant argues that he was a victim of circumstances and mistaken identity. He further argued that he was convicted on evidence that was based on suspicions, speculation, conjecture, flimsy, uncorroborated and lacked probative value.

5. He further argued that the crime for which he was convicted is alleged to have taken place at 1.30 pm and it was dark. To him PW3 confirmed the time and the condition of darkness when he said that he only saw somebody running away but could not recognize him. The lack of proper vision identification, according to the Appellant, leads to a miscarriage of justice. To him PW1 and PW2 were mistaken as to the identity of the person who committed the offence. Failure by the trial court to warn itself before convicting of the danger of the possibility of the witness making a mistake was a miscarriage of justice. He relies on the case of R V Turnbull [1976] 3 A 11 ER549 at 552- judgement of lord Widgery, CJ.

6. The Appellant argue that the Nokia mobile phone found at the scene was not dusted for finger prints nor specific documents produced to show exactly where they were recovered. The prosecution did not also prove that the recovered mobile phone and SIM-card was the property of the Appellant. The only

account given of the phone is that PW6's number was traced to the Nokia phone allegedly belonging to the Appellant.

7. The Appellant discounts the evidence by PW6 as a lie and unreliable. He also questions why his "wife" was never invited to testify on the alleged telephone conversation with the Appellant.

8. The Appellant says that none of the witnesses to wit PW4, PW6 or Titus positively identified him or linked him with the offence or the handset allegedly recovered from the scene of crime.

9. He argues that he was never found in possession of any item. See **Mwangi v Republic (1974) E.A 08.**

10. Moreover, according to the Appellant, PW2 and PW7 lied to court but the trial magistrate overlooked all these facts thus arriving at a wrong decision. The Appellant did not attend an identification parade and so he wonders how he was identified by PW2.

11. The Appellant claimed an alibi which the trial magistrate dismissed casually. The magistrate did not evaluate his defence. Instead the magistrate shifted the burden of proof to the Appellant. The trial magistrate did not give the Appellant the benefit of doubt which she found existed in respect of identification.

12. The Appellant argues that the police circulated his photograph in Kenya, and Uganda without permission of the Attorney–General as required by Section78 of the Evidence Act.

13. The P3 form produced was also offending Article 256(b) of the Constitution which provides that a P3 Form should be furnished within 24 hours. It was filed after 2 months. PW 4 did not also treat PW1 but only signed the P3 Form. The victim was treated by another doctor and PW4 used the treatment notes to fill in the P3 Form.

14. There was also contradiction as to the place of arrest of the Appellant. PW7 claims it was Tororo Cement Company whereas PW5 claims it was Himo Cement store.

15. The Appellant has also argued that there was no weapon that was sufficiently disclosed in the charge sheet as required under section 134 and 137 of the CPC. The charge sheet did not talk of panga yet the panga was part of the exhibit. The omission was a serious error that makes the charge sheet totally defective.

16. He concludes by saying that the prosecution failed to prove its case and so the appeal should succeed.

PROSECUTION OPPOSSES THE APPEAL

17. Mr. Kibelion for the Republic opposed the appeal. He submitted that the appeal lacks merit. The Appellant was charged with Attempted Robbery Contrary to Section 297 of the Penal Code. The evidence adduced squarely placed the Appellant to the crime scene. There was proper investigation done and PW1 identified the Appellant as the person who attacked him. PW2 also positively identified the Appellant as the person who had requested PW2 to drop him to a destination he had identified he was going to. PW2 refused to ferry him after which the Appellant approached PW1. PW1 accepted to ferry the Appellant to his destination. PW1 and PW2 are both motor cyclists and ride motor cycles to carry passenger who had hired them.

18. PW1 gave a complete account of what transpired. PW1 and PW2 saw the Appellant alight from a motor vehicle before he approached and asked them to ferry him to another destination. PW1 and PW2 also saw the Appellant carrying a box but did not know the contents of the box.

19. According to PW1, before arrival to the destination where the Appellant had said he was going, the

Appellant opened the box he was carrying and removed from therein a panga which he used to cut PW1. He cut him on the head. Luckily he was wearing a helmet which met the initial cuts and broke. The Appellant then continued to inflict more cuts on PW1's head. PW1 sustained serious injuries.

20. At the scene, the police recovered several items. PW3 stated that a panga, a box, and a mobile phone were recovered at the scene. The police took away these items for investigations.

21. The Appellant fled and was only traced when PW6 whose cell phone number was found in the list of contacts and incoming and outgoing calls, in the Appellant's cell phone found at the scene. Through the communications between the two cell phones, the police were able to locate PW6 who then gave assistance to the police in locating the Appellant in Uganda.

22. All exhibits including the panga, broken helmet and the cell phone recovered at the scene of crime were produced in court by PW7; the investigating officer.

23. According to Mr. Kibelion, the prosecution evidence was unshaken. Accordingly the conviction is a safe one.

24. A weapon was used to commit the offence under section 297(2) of the Penal Code. The weapon was also produced in court as an exhibit. On prove of the offence under section 297(2) the penalty is death sentence. The evidence adduced by the prosecution prays for enhancement of sentence to death sentence.

EVIDENCE ADDUCED

25. The prosecution called 7 witnesses. PW1 testified that at the material time he used to own a motorcycle which he was riding himself. His motor bike was Registration No KBD 733E. He was at a junction at Amukura, when a passenger alighted from a matatu which had arrived from Bungoma. The passenger requested for *boda-boda* services from PW1; to be ferried to Kotur centre. They agreed on the fare at Kshs 100 and the passenger boarded the bike. The passenger was the Appellant. At a place called Spark Trust near Kotur, PW1 slowed down due to the potholes on the road. Suddenly the Appellant alighted and attacked him with a panga. He hit him 3 times on the head and his helmet broke. He lost control of the motor bike and PW1 fell down. The Appellant cut him on the right hand and also cut him four times on his left hand. He also cut him on the face. PW1 then screamed for help and good Samaritans responded.

26. Meanwhile, the Appellant took the bike belonging to PW1 but was unable to start it as PW1 had thrown the keys into the nearby grass and the members of public had already thronged the scene.

27. PW1 was treated for the injuries at Alupe and Busia hospitals.

28. PW1 also identified the box, the panga that the accused used, sachets and black polythene paper bags. The incident took place at about 7.15 pm. PW1 had marked the physical appearance of the Appellant. He, however, did not know the Appellant before the incident of 20.9.2008.

29. PW1 was cross examined by the Appellant and he told the trial court that it was not too dark when the offence was committed. He also reiterated that he was able to recognize the Appellant at the police station since he had seen him when he boarded his bike. He also confirmed that the Appellant was carrying a box whose content he did not know.

PW1 was recalled later and identified a photograph of his helmet that had been broken during the attack by the Appellant.

30. PW3 who is also a motorcyclist (boda-boda) told the trial court, that, on the material day, at about 7 pm he was at Kocholia Market, Kotur. He was with PW1. PW2 narrated the events of the particular time when the Appellant boarded PW1's bike. Later he was informed by a friend that PW1 had been attacked by the Appellant. He rushed to the scene and found PW1 being taken to hospital with injuries to his head.

He thereafter identified the Appellant after his arrest. He recognized him as he had seen him when he boarded PW1's bike. He also identified him at the dock.

31. PW2 also confirmed what PW1 told the court that the Appellant was carrying a carton box when he boarded PW1's bike. At the scene he also saw a black polythene paper and PW1's helmet that had been broken. He, however, did not see a panga or phone at the scene.

32. PW2 confirmed in re-examination that he recorded in his statement that he was with PW1 when the Appellant boarded PW2's bike.

33. PW3 testified that he responded to a call of distress from PW1 whom he found lying in a pool of blood. PW1 informed him that his pillion passenger had cut him with a panga. He saw the assailant run away. He saw a phone and a motor cycle at the scene. He also observed that PW1 had cuts on his head and hand. He did not, however, mark the appearance of the assailant.

34. On cross examination he confirmed that the phone that he saw at the scene was taken by the police.

[35] PW4 was the clinical officer in charge of Kocholia District hospital. He filled in the P3 Form for PW1 on 18.11.2008. PW1 had informed PW4 that he had been attacked by his pillion passenger who inflicted on him cuts on the head, both upper and lower limbs. PW4 was admitted as patient No 930808 on 20.9.2008 and discharged on 26.9.2008. In preparing the P3 Form, PW4 examined the patient and relied on treatment chits prepared by a colleague of his who had treated PW1. The findings in the P3 Form were:

a) Two cut wounds on the head

b) A big cut wound on the upper limbs

c) A fracture of the lunar sula of the right hand

d) The injuries caused impairment of the fingers

e) The weapon used to inflict the injuries was a sharp object.

[36] PW5 a police officer rushed to the scene in company of other officers and found a crowd gathered there. There were other officers from Kotur Patrol Base. At the scene he recovered; motor cycle KBD 733E; a khaki jacket; a broken helmet; a black polythene paper; a carton box; and a mobile phone make Nokia.

He, together with the other officers passed by Kocholia Hospital to see PW1 whom they found receiving treatment. PW1 then narrated to them about the incident in line with the evidence he gave in court. As part of his investigations, PW5 scrolled the phone contacts, incoming and outgoing calls. He found a number for Rehema and Titus. He called Rehema who told him she knew the Appellant as he was her neighbour. He also called Titus and interrogated him. Titus identified the Appellant as his customer. They learned that the Appellant worked in Uganda, initial information showed Tororo Cement Company but they conformed he was working at Hima Cement Store. On visiting Hima Cement Store, they found he had been sacked a week before the visit. They, however, received important document which had the picture of the Appellant.

[37] He was not the arresting officer though as he left on transfer for Port Kilindini Police Station before he had arrested the Appellant. PW7 took over the investigations. PW5 and PW7 produced photographs; one for the motor cycle; and the other for the broken helmet as exhibit IV and 4, respectively. He also produced Nokia Phone 1650 with Uganda SIM card, a panga, a black polythene paper bag, a carton box, letter from the chief and a receipt by KRA.

[38] PW6 was Rehema whose phone number was among those found in the Nokia hand-set recovered from the scene. She explained how her number was saved by the Appellant in his phone so that he could be calling that number in order to reach his wife. Her wife could also call him using the phone of PW6.

[39] The Appellant testified that he was a transporter with Tororo Cement Company and that his phone was taken from him when he was arrested on 28.10.2008 by the police. It was not recovered at the crime scene. He denied the charges.

The offence: Attempted Robbery with violence

[40] The Appellant was charged with Attempted Robbery with violence contrary to section 297(1) of the Penal Code. The section provides that:

> ***297.*** *(1) Any person who assaults any person with intent to steal anything, and, at or immediately before or immediately after the time of the assault, uses or threatens to use actual violence to any person or property in order to obtain the thing intended to be stolen, or to prevent or overcome resistance to its being stolen, is guilty of a felony and is liable to imprisonment for seven years.*

Nature of the offence

[41] Attempts offences are known as inchoate offences and are complete by themselves. In these offences, it is immaterial that the substantive illegal design or plan was not accomplished. In this case, evidence was led that the motor cycle was not eventually stolen as the assailant was interrupted by members of the public from stealing it. The other things the court will have to consider are; 1) whether the major elements of the offence of Attempted Robbery with violence have been proved; and 2) whether the person who committed the offence was the Appellant.

Elements of crime

[42] The elements of the crime of Attempted Robbery with violence as discerned from the section are in these words;

a) .... *assaults any person with intent to steal anything*; and

b) ....*at or immediately before or immediately after the time of the assault, uses or threatens to use actual violence to any person or property in order to obtain the thing intended to be stolen, or to prevent or overcome resistance to its being stolen....*

[43] There was evidence that PW1 was assaulted and violence was indeed used on him during the commission of the crime. His evidence and that of other witnesses showed this. PW4 was the medical clinician who produced a P3 Form which confirmed actual bodily harm was inflicted upon PW1. The weapon that was used to inflict the injuries was produced. The big question is whether the Appellant is the person who assaulted PW1 with the intent of stealing motor cycle KBD 733E, and at or immediately before or immediately after the time of the assault, used actual violence to PW1 in order to obtain the said motor cycle KBD 733E, or to prevent or overcome resistance to its being stolen.

The matter of identification

[44] The Appellant has put forth a ground that he is a victim of circumstances and mistaken identity. He has argued that the trial magistrate erred in placing preponderant weight on the evidence of PW1 and PW2 on identification by recognition without being satisfied that the evidence was reliable and free from the possibility of these witnesses being mistaken about the identity of the Appellant. According to him, the time of the commission of the offence was 7.15-7.30 pm. It was dark and possibility of being mistaken was real. PW3 could not even identify the assailant.

[45] I accept the proposition by the Appellants that where the only evidence against an accused is that of

identification, the trial Court is enjoined to examine such evidence carefully and to be satisfied that circumstances of identification were favourable and free from the possibility of error before it can return a conviction. See generally **Maitanyi –vs- Republic [1986] KLR 198** and **Wamunga –vs- Republic [1989] KLR 424.** See also the case of ABDALA BIN WENDO V R (1953) 20 EACA 166 AT 168 where the Court of Appeal for Eastern Africa laid down the rule on this subject and had been adopted by the Court of Appeal with approval. The position of the law is that nothing in law that prohibits the court from convicting on evidence of identification by a single witness, except great care and caution must be exercised to find if there is evidence, circumstantial or otherwise, which would sanctify the confidence of the court to convict on such evidence. The court must look at all the circumstances of the case so that it is satisfied that there will be no danger of convicting on the basis of that evidence by a single witness. The case of CA AT NYERI CRA NO 56 & 57 OF 2004 JOHN WACHIRA WANDIA & ANOTHER V R [2010] eKLR offers further light about the circumstances of the present case. The identification was at about 7 pm but PW1 & PW2 said it was not very dark as not to recognize a person particularly one whom they had interacted with in negotiations for hire of bodaboda services. Such evidence of identification at such time of the evening must be tested with the greatest care using the guidelines in ***Republic v. Turnbull*** [1976] 3 All ER 549 and must be absolutely watertight to justify a conviction. See ***Nzaro v. Republic*** [1991] KAR 212 and ***Kiarie v. Republic*** [1984] KLR 739.

[46] The trial court evaluated and exhaustively scrutinised the evidence of identification and did in fact made a specific finding that the circumstances were favourable for positive identification at the time PW1 was negotiating with the Appellant on the hire services. There was no identification parade done because the Appellant refused to submit to identification parade. His identification was, however, not mere dock identification. The trial court was careful in analysing the evidence on identification by recognition. It observed that PW1 had ample opportunity to know the physical appearance of the Appellant when they were negotiating on fare. The court warned itself about the danger of relying on the evidence of a single witness on identification. The evidence of PW1 that his pillion passenger is the one who attacked him was uncontroverted. The trial court observed the demeanour of PW1 and concluded...*PW1 appeared quite honest and truthful.* The Appellate court did not see the witness and so it cannot doubt that observation by the trial court unless the opposite is glaringly noticeable from the recorded evidence. The evidence of PW2 then becomes useful because he also saw the person who boarded the motor bike that PW1 rode and he was also present when the Appellant and PW1 were negotiating on the transport service sought. Yet another evidence which is useful here is the one that connects the Appellant with the scene of crime; Nokia phone 1650. The phone belonged to the Appellant and he admitted this except he testified in his defence that the said phone was taken from him when he was arrested but was not recovered from the scene. The evidence by the prosecution especially PW3 and PW5 clearly shows that the phone was recovered from the scene. It is from that phone that PW5 was able to contact Rehema and Titus who gave further information about the Appellant and where he works. These things happened long before he had been arrested. That evidence placed the Appellant back to the scene and circumstantially gives credence to the identification of the Appellant by PW2 as the pillion passenger carried at the material time by PW1.

[46] With all the above direct and circumstantial evidence, my analysis leads the court to the inescapable conclusion that the Appellant was properly identified by PW1 as the person who assaulted him and attempted to rob him of motor cycle KBD 733E. The Appellant was the pillion passenger he ferried on 20.9.2008. PW2 had also seen the pillion passenger whom PW1 had ferried and identified the Appellant as that pillion passenger. The evidence of PW3 and PW5 also connects the Appellant to the crime scene and leaves no doubt he is the one who committed the crime herein. The evidence of identification was sufficiently interrogated. And taken alone, would be a basis for a safe conviction. It is not, therefore, in order for the Appellant to suggest that any doubt existed for which he should have been the beneficiary. None existed and the trial court was clear on that. The trial court was, therefore, correct in its assessment of the evidence and that the prosecution proved its case against the Appellant beyond any reasonable doubt.

[47] For the reasons above, I uphold the conviction and sentence as meted out by the trial magistrate. The appeal is dismissed.

Dated, and Signed at Bungoma this 18th day of October 2013

F. GIKONYO

JUDGE

Read, signed and delivered in open court at Bungoma this 23rd day of October 2013

H.A.OMONDI

JUDGE