REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL CASE NO. 642 OF 2010

(Appeal from the judgment of Mary Murage [Senior Principal Magistrate, Limuru)

JOHN MWANGI WACHIRA.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

The appellant was convicted of the offence of **robbery** with **violence** contrary to **Section 296(2)** of the **Penal Code** and sentenced to suffer death as authorized by the law. Being dissatisfied with the judgment of the trial court, he appealed relying on several grounds: that his constitutional rights under **Section 72(3)(b)** of the repealed **Constitution** were violated; that the trial court relied on circumstantial evidence which was unreliable; that some important witnesses were not called to testify; that the burden of proof was shifted to the appellant causing a miscarriage of justice; that his alibi defence was rejected by the court; and that the decision of the court was against the weight of the evidence on record.

The facts are that on the 7th March 2009 around 11.00 p.m., the complainant PW1 was walking home after meeting a friend when he heard people calling his name. He was immediately attacked by three men. PW1 shouted for help as he was robbed him of his cash Kshs.2800/=, his identity card, ATM card and mobile phone. Members of public who heard screams came to the scene and found PW1 holding the appellant who was one of the attackers. The other two assailants ran away from the scene before members of public arrived. The appellant was taken to the police station where he gave names of the other two suspects. Subsequently, the three suspects were charged jointly with the offence of robbery with violence. The appellant was convicted while his two co-accused were acquitted.

The State opposed the appeal. It was the State counsel's submission Ms. Mwaniki that the appellant was held by the complainant during the incident until members of public arrived at the scene. He was then taken to Lari Police station. In the circumstances, the complainant never lost sight of the appellant and there was no possibility of mistaken identity. According to the State, the defence was considered and the sentence was lawful.

Ms. Ngonde for the appellant submitted that the appellant was incarcerated in police custody for over 14 days thus violating his constitutional rights. She further argued that the conviction was unsafe for it was based on circumstantial evidence. The counsel submitted that the death sentence imposed was unconstitutional relying on the **Court of Appeal case (Mombasa) Cr. Appeal no.18 of 2008 Ngotho Mutiso vs. Republic**.

In the case of **Odhiambo vs. Republic Cr. Appeal no. 280 of 2004 [2005] 1 KLR**, the Court of Appeal explained the duties of the first appeal court when it said:

"On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour."

It is therefore our duty to analyze all the evidence, re-evaluate it and come to our own conclusions. In this case as the first appellant court.

PW1 testified that he was attacked around 11.00 p.m. and it was dark. As he struggled with the three attackers during the robbery, PW1 held the appellant and did not release him until people who heard him call for help came to his rescue. The appellant was escorted to Lari Police station where he was interrogated and subsequently charged with the offence. One of the people who rushed to the scene was the watchman of the neighbouring premises (PW2) situated about 20 metres away. PW2 told the court that he found the complainant holding the appellant and said that the appellant was one of those people who had robbed him. PW2 assisted the complainant to take the appellant to the police station. PW4 was the owner of Mutenja Bar where PW1 had gone earlier to meet a friend before he was attacked. PW3 was a customer of the said bar was attracted by PW1's call for help. PW4 was also in the bar with PW3 and he too went to the scene. PW2, PW3 and PW4 found PW1 holding the appellant who was a suspect in the robbery. They helped to escort the appellant to the police station. The witnesses accompanied PW1 and the police to the scene where a metal bar was recovered. PW1 had been hurt on the right had and right ankle joint. The P3 Form was produced by PW5 who testified that a blunt object was used to inflict the injury. PW6 the investigating officer produced the metal bar in evidence which he said he recovered at the scene.

The appellant's defence was an alibi. He denied the offence and said that he was leaving his place of work at around 10.30 p.m. when he met a crowd. He got scared and ran away. He was chased and arrested, taken to where PW1 was. PW1 said that the appellant was one of the men who attacked him. He said he was arrested on 7th March 2009 and charged in court on 25th March 2009.

The prosecution's evidence was that the accused did not leave the scene until members of public arrived and assisted the complainant to escort him to the police station. PW1's evidence was corroborated by the evidence of PW2, PW3 and PW4 who heard him scream and rushed to the scene immediately. The three witnesses were in neighbouring plots and were able to come immediately. PW2 said he was on duty as a watchman in a plot situated about 20 metres from the scene. When PW1 screamed, people came to his rescue immediately after forcing the two accomplices of the appellant to take off leaving the appellant struggling to free himself from the grip of the complainant. The appellant was not lucky for PW1 got reinforcement to apprehend the him immediately.

The alibi defence of the appellant was not plausible. He said that he was arrested when walking home from his place of work at around 10.30 p.m. He did not explain why he ran away from the crowd he said found on the road if he was innocent as he wanted the court to believe. We find the evidence of the prosecution witnesses on the arrest of appellant is credible. None of these witnesses knew the accused before the incident. The four key witnesses did not know each other. The common factor between PW2, PW3 and PW4 was that they heard someone scream and rushed to the scene just to find PW1 struggling with the appellant. There is therefore no possibility of anyone framing up the case against the appellant.

Although the appellant was not found with any of the complainant's stolen items, there is great probability that his two accomplices took the items as they ran away. An identification parade would not have served any useful purpose for the key witnesses are the ones who arrested the appellant and handed him over to the police.

The trial magistrate considered the defence of the appellant in her judgment. She did not believe him that he was arrested as he ran away from a crowd he found gathered on the road. We agree with the magistrate that the defence was not plausible weighed against the overwhelming evidence of the prosecution. There is nothing on record that supports the appellant's allegation that the burden of proof was shifted to him. We find the allegation baseless.

The court record shows that the appellant was arrested in the night of 7th and 8th of March 2009 and the plea taken on 25th March 2009. The proceedings of 24th March 2009 show that the accused was arraigned in court on that day but the plea deferred to 25th March 2009. The accused was received at Lari Police station around midnight of the 7th and 8th March 2009. From 8th to 23rd is total of 15 days in police custody. The repealed **Constitution Section 72(3)(b)** allowed 14 days remand period pending investigations for capital offences. The police over remanded the appellant for one (1) day. The appellant raised the matter in his defence but it appears that the issue was not dealt with in the judgment. The magistrate ought to have dealt with the matter as required by the law. It was the duty of the magistrate to seek explanation for the delay in arraigning the appellant in court. At this stage, it is not possible to examine the issue since the delay was not explained by the prosecution.

The accused relied on the case of **Albanus Mutua vs. Republic Nairobi H.C. Criminal Appeal no.120 of 2004** where the accused was released upon the charges being declared a nullity due to extra-judicial incarceration. This authority and that of **Ann Njogu & 5 others vs. Republic** were overruled by the recent Court of Appeal decision of **Julius Kamau Mbugua vs. Republic** Criminal Appeal no. 50 of 2008 where it was held that extra-judicial incarceration has no relation to the criminal trial process and that each of the process must be dealt with separately.

The law provided in **Section 72(6)** of the repealed **Constitution** for a remedy of compensation to the aggrieved persons through the civil process. The act of extra-judicial incarceration does not therefore affect the criminal process. The trial process had to go on to conclusion and so shall this appeal. Relying on the case of **Julius Kamau Mbugua** (supra) we find that the issue does not affect this appeal. The appellant is at liberty to sue the State for compensation.

The complainant testified that the offence occurred at 11.00 p.m. which evidence was corroborated by the witnesses who came to the scene. The investigating officer PW6 said that on 7th March 2009 at around 10.00 a.m., his boss informed him that he should take up investigations in this case. He was told that the offence taken place around mid-night the previous night. The date on the morning which followed ought to have been 8th March 2009 not 7th March 2009 as PW6 said. The error of the date by one witness is not material since PW1 and the three key witnesses were clear that the date of the offence was 7th March 2009. The charge sheet is also very clear that the offence occurred on 7th March 2013. The error by the investigating officer does not materially affect the prosecution's case in our opinion.

The appellant said that PW6 gave the wrong names of the suspect. He referred to them as Karis and Muthama instead of Peter Kamau Waithaka and Robert Kamau Gichuki. The two accomplices of the appellant were acquitted. The appellant who was arrested at the scene was convicted on the strength of the evidence of the four key witnesses. The co-accused were acquitted because the only evidence against them was that of an accomplice. The confusion of names of the accomplices by PW6 does not affect this appeal.

The magistrate did not base her findings on the recovered metal bar which but on the evidence of the witness and the circumstances of the appellant's arrest. We agree with the appellant that a metal bar recovered at the scene after the appellant was handed over to the police raises doubt as to whether it is the appellant who had the weapon. Furthermore, the recovery of the iron bar or otherwise had no bearing in the judgment.

The appellant's case of being arrested at the scene by the very person he was attacking must be treated differently from that of a single identifying witness where the suspect attacks a complainant and disappears to be arrested later. There was therefore no need for the magistrate to warn herself of the danger of relying on the evidence of PW1 as a single identifying witness as submitted by the appellant.

The issue of the appellant being convicted on circumstantial evidence does not arise. The evidence of PW1 was direct evidence on how he was attacked and how he got hold of the appellant and did not lose sight of him. The evidence was corroborated by PW2, PW3 and PW4 who heard the screams and found the appellant under arrest.

The ingredients of the offence under **Section 296(2)** and **Section 295 Penal Code** is threefold:

a) that the accused was in the company of one or more other persons; or

b) that he/she was armed with a dangerous any weapon or instrument; or

c. ***that the accused used violence on the complainant or wounds or strikes immediately before, or at the time of the robbery or after the robbery.***

The prosecution have a duty to prove that any one of the three ingredients has been established. It was held in the case of **Johanah Ndungu vs. Republic Criminal Appeal no.116 of 1995** that once it has been established that one of the above circumstances existed, the court has no alternative but to convict.

The appellant was arrested at the scene and the evidence of arrest was well corroborated. He was in the company of two other people when he attacked the complainant. PW1 was injured during the attack as confirmed by PW5 who examined him at Tigoni Hospital. He had injuries on the right hand and on right ankle joint.

The appellant argued that the death sentence imposed is unlawful. He relied on the Court of Appeal case of **Ngotho Mutiso vs. Republic Criminal Appeal no.18 of 2008** where it was held that under the Constitution, the court has discretion to impose any other sentence in addition to death for capital offences. This decision was recently over turned by the Court of Appeal of five bench in the case of **Joseph Njuguna Mwaura & 2 Others Criminal Appeal no.5 of 2008** where the following exposition was made:

> ***"In our view, to say that there are other alternative sentences to the mandatory imposition or application of the death sentence is a pedantic and preposterous interpretation of the spirit and the letter of the Penal Code and the Constitution of Kenya, 2010. If the people of Kenya intended in their wisdom, and their collective will to outlaw the death sentence, then nothing could have been easier to do."***

The court held that the death sentence provided by the law is lawful and is not unconstitutional. This decision settles this ground of appeal.

It is our finding that the trial court reached a correct finding in this case and imposed a lawful sentence which is in accordance with constitutional principles.

We therefore uphold the conviction and the sentence.

The appeal is hereby dismissed.

F. N. MUCHEMI **G. ODUNGA**

JUDGE **JUDGE**

Judgment delivered in open court in the presence of the appellant on this **11th** day of **December 2013**.

F. N. MUCHEMI

JUDGE