REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

H.C.CR.APPEAL NO. E002 OF 2020

GEOFREY HAGGAR SAMUEL ALIAS MICAH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence delivered on 31st January 2020

by Hon.B.S. Khapoya (pm) in Cr. Case no 38 of 2019 Taveta Principal Magistrate's court)

JUDGMENT

1. The appellant (accused two) jointly with one Zacharia Ngwatu Jonah (accused one) were arraigned before Taveta Principal Magistrate's court charged with the offence of ***Robbery contrary to Section 296(1) of the Penal Code. The particulars were that on 222nd day of December 2018, around 09.00 hrs at Taveta township in Taveta Sub-county within Taita Taveta, jointly robbed Christine Zena Mbamba of Kshs 90,000, one mobile phone make infinix valued at 20,000, one mobile phone Huwawei valued at kshs 15,000 and immediately before the time of such robbery threaned to use actual violence to the said Christine Zena Mbamba.***

2. Having pleaded not guilty, trial commenced with the prosecution calling three witnesses. Upon conclusion of the case, the learned magistrate found the two accused persons guilty, convicted and sentenced them on 31st January 2020 each to serve 14 years imprisonment.

3. Dissatisfied with both the conviction and sentence, the appellant/accused two filed this appeal citing the following grounds;

a) The learned trial magistrate erred in law and fact by finding that there existed proper identification of the appellant a fact which was erroneous and not based on any law.

b) That the trial court charged and convicted the appellant based on a defective charge sheet.

c) That the trial court denied the appellant the right to affair trial envisioned under article 50 of the constitution.

d) That the offence however defective was not proved to the required degree.

e) That no description was reported to the police as first initial report which was the first day of the prosecution.

f) That the evidence was contradicted and poor investigations.

g) That the evidence was full of inconsistencies and having many discrepancies between reports made to the police station and evidence available before court.

h) Unfounded source of arrest and mistaken identity.

i) Lack of exhibit

j) No physical identification was done

k) No evidence to convict the appellant

l) No recognition was found by the trial court

4. Both parties agreed to file written submissions to dispose of the appeal. However, only the appellant filed his submissions in person on 7th June 2021. M/sMukangu appearing for the state urged that they were not opposed to the appeal on grounds that there was no proper identification of the appellant. Consequently, the appellant argued his appeal as hereunder.

5. The appellant submitted that PW1 the complainant Christine Zena Mbamba did not know him before. He contended that, there was no proof that she did recognize nor identify him during the robbery. It was his submission that the complainant was couched by the police who told him what to record and therefore should be disregarded. That pw1 did not give any features or descriptions of the appellant or even his co-accused.

6. To buttress the point that he was not positively identified, he relied on the holding in the case of **Hassan Abdalla Mohamed v Republic [2017]eKLR** where the court held that;

> **"Visual identification in criminal cases can cause a miscarriage of justice and should properly be tested."**

7. He further referred the court to the holding in the case of **Wamunga v Republic (1989)KLR 4242 at 426** where the learned judge stated that;

> **"Where the only evidence against a dependent is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."**

8. It was further submitted that the court did not caution itself on the dangers of relying on the evidence of pw1 alone to convict. In this regard, reliance was placed in the case of **Charles Maitanyi vs Republic (1986) KLR 198 and Karanja and others vs Republic (2004) e KLR 140.** Still on the issue of poor investigation, the appellant submitted that if the M-pesa transacting phone was stolen, which phone did the complainant use to transact M-pesa business of kshs 8000 at 1200hrs as per the M-pesa transaction sheet produced in court by the prosecution yet the robbery took place at 09.00hrs.

9. The appellant submitted that the charge sheet was defective as he was charged with Robbery 296(1) of the Penal Code whereas in court evidence was led to prove the offence of Robbery with Violence contrary to Section 296(2) of the Penal code. That he was convicted on evidence without any proper description of the assailants being given to the police by the complainant.

10. The appellant contended that the evidence of the prosecution witnesses was full of contradictions and conviction based on poor investigation. He asserted that pw1 did not mention in her initial report that the appellant who was the second accused did not have hands. Regarding his alibi defence, he opined that he was not at the scene of robbery and therefore had no duty to prove where he was.

11. This is a first appeal. As a first appellate court, I am duty bound to re-evaluate, re-assess and determine afresh the evidence tendered before the lower court before arriving at an independent determination without losing sight of the fact that the trial court had the advantage of seeing and listening to the witnesses to be able to assess their demeanour . **See Okeno and ano vs Republic(1972)EA 32**

12. Briefly, PW1 the complainant herein testified that on 22nd December 2018 at 00.9hrs, she was in her Mpesa Agent business opposite Taveta G.K Prisons along Taveta-Voi Road when two men armed with a pistol walked in and demanded for all the money she had. That she told them she did not have any money and at this point one of them drew a pistol and pointed at her as the other walked to the counter where she had kept the money. She identified accused 1 as the person who had a firearm and that he also had worn a mask and a helmet.

13. That it was Accused 1 who opened the door for accused 2 who when at the counter shouted "ni mjeuri,ana pesa". She stated that it was at this point that accused 1 threatened her with death as he took off his mask and asked her twice whether she knew him. That out of fear, she put the money on the counter and saw accused 2 push the same away using his elbows. She told the court that she could not understand why accused 2 could not pick up the money using his hands.

14. She further stated that accused 1 collected the money and took her mobile phones infinix note 4 and Huawei. After picking the money and the phones they walked out and boarded a motorcycle that was parked outside there and sped off. It was her testimony that Accused 1 was armed with a firearm and wearing a black jacket. That immediately the two left, she raised alarm and with the help from members of public tried to pursue the two suspects who rode towards Njoro Area. Unfortunately, they lost track of them hence proceeded to report the incident at Taveta Police Station.

15. That on 14th January 2019, while leaving her home being driven on a motor cycle, she met with two men also riding a motor cycle. It was then that her eyes met with those of accused 1 and the appellant whom she immediately identified as the persons who had robbed her. She then directed her rider to turn back home as the two followed them to their gate. Upon getting home, she raised alarm and with the help of the members of the public they pursued the accused persons to a nearby murram quarry where they were apprehended and later taken to Taveta Police Station.

16. She gave an elaborate outline of her work routine of banking her money and how she used to operate her business. She identified to the court her book sheet which showed the deposits, withdrawals and unregistered entries. She also identified to the court a SMEP withdrawal receipt for the amount of Kshs 80,000/= a withdrawal she made on 21st December 2018 at about 1245hrs (super-agent transaction slip). She also identified to court her Mpesa statement for the period 21st to 22nd December 2018 which she asserted matched her handbook.

17. PW2 No.66883 Sgt Benson Lwangu the investigating officer having taken over from Cpl.Gitahi informed the court that on 22nd December,2018 at around 0924hrs they received the complainant's report that two robbers had raided her at her Mpesa shop opposite Taveta Prison and robbed her Kshs 90,000/=, two mobile phones make Infinix and Huawei. He reiterated the testimony of pw1. He simply produced the exhibits being Mpesa transactions record sheet.

18. PW3 No.261495 P.C Anthony Kagwamba based at Taveta Police Station testified that on 14th January, 2019 he was at the station when members of public escorted in two men accused of robbing off the complainant herein. He disclosed that the two had been beaten and that he visited the Mpesa Shop where the robbery had occurred. His role was to assist P.C Gitahi who was the lead investigator. He also assisted take accused persons' finger prints.

19. In his defence, the appellant denied committing the offence as alleged. He told the court that on 14th January 2019 he was being driven home on a motor cycle from town when they collided with another motor cycle at a place known as Russia. He further stated that as a result of the accident, the riders fought and some woman screamed calling out for help. In response to the alarm, People came out and the screaming woman claimed that accused 1 resembled the person who had robbed her. That the facts do not show any weapon used and that none of the people who assisted the complainant arrest them was called to testify.

20. He argued that the Mpesa statement shows Pw1 worked up to 1200hrs yet she claimed her phone had been stolen. It was his testimony that the complainant did not explain to the court the balance of Kshs 10,000/= being money stolen less exhibited bank receipt. That there was no recorded evidence of him pushing the money aside and that his description was not contained in the complainant's first report. Lastly, he stated that the investigating officer did not implicate him in any way.

21. I have considered the record and grounds of appeal plus submissions by the appellant. Issues that emerge for determination are;

a) Whether the charge sheet was defective

b) Whether the evidence adduced was contradictory

c) Whether the appellant was properly identified

d) Whether the court properly relied on the evidence of a single witness to convict.

e) Whether the court properly dismissed appellant's alibi defence.

22. It was the appellant's submission that he was charged with the offence of robbery yet the evidence adduced leaned towards proving the offence of robbery with violence leading to a conviction on a defective charge sheet.

23. The parameters to gauge whether the charge sheet is defective were succinctly set out in the case of **B N D v Republic [2017] eKLR** where the court stated;

> **"The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence.**
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> **The answer from our decisional law is this: the test for whether a charge sheet is fatally defective is a substantive one: was the accused charged with an offence known to law and was it disclosed in a sufficiently accurate fashion to give the accused adequate notice of the charges facing him? If the answer is in the affirmative, it cannot be said in any way other than a contrived one that the charges were defective."**

24. Further, the court in the case of **S C N v Republic [2018] eKLR** quoted the Court of Appeal in **Peter Ngure Mwangi v Republic [2014] eKLR** which quoted the **Isaac Omambia case** with approval thus stating that:

> ***"A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archbold, Criminal Pleading, and Evidence and Practice (40th Edn), page 52 paragraph 53, this Court stated in YONGO v R, [198] eKLR that:***
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> ***"In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:***
>
> > ***(i) when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,***
> >
> > ***(ii) When for such reason it does not accord with the evidence given at the trial."***

25. From the trial court's record, the appellant was charged with simple robbery and not robbery with violence. Although it is evident from the evidence adduced that it was geared towards proving the offence of robbery with violence, this was to the appellant's advantage that he was charged of a lesser charge instead robbery with violence which carries a maximum death penalty.

26. A charge sheet does not become defective by virtue of preferring a lesser charge which if proven will attract a lesser penalty. The common denominator in the two offences is use of force only that in robbery with violence use of a dangerous weapon is an additional element. In this case force was used hence the charge of simple robbery was properly before the court.

27. Regarding the issue of contradictory evidence, the appellant stated that there was no agreement in evidence tendered by the prosecution. A case in point is the Mpesa transaction carried out at 1200hrs yet the phone used for mpesa business had been stolen. The complainant explained that the mpesa transactions after the phone was stolen were made by customers after she had closed the shop but had them reversed.

28. It is trite that, a court should weigh the nature and strength of the alleged contradictory evidence against the entire evidence tendered as a whole before dismissing a case. It is not every contradiction that calls for an acquittal. It will depend on the magnitude of the contradiction against delivery of substantive justice.

29. In the case of **Leonard Kipkemoi v Republic [2018] eKLR** the court quoted the case of **Erick Onyango Ondeng' vs Republic [2014]e KLR where it was held** stated that;

> ***"The primary duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honoured devise for testing the truth or correctness of evidence. Next is the first appellate court which by law, it is its bounden duty to re-consider, re-evaluate and analyse the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified. (See Okeno vs Republic (1972) EA 32)."***

30. **Similarly, in S C N v Republic (supra)** quoted in the case of **Jackson Mwanzia Musembi v Republic [2017] eKLR** the court relied on the case of Uganda Court of Appeal in **Twehangane Alfred v Uganda- Criminal Appeal No 139 of 2001, [2003] UGCA, 6**, where the court noted that it is not every contradiction that warrants rejection of evidence. It was held as follows:

> ***"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."***

31. In **Peter Ngure Mwangi vs Republic [supra]** the Court of Appeal, when dealing with the question of alleged inconsistencies in evidence, stated as follows;

> ***"We, therefore find that on the totality of the evidence before us, any difference there may have been in the evidence adduced by the prosecution consisted of minor discrepancies and inconsistencies. We find that these were not material and did not weaken the probative value of the evidence tendered by the prosecution in support of their case."***

32. Having considered the appellant's submissions and the evidence adduced at the lower court, I do not find any serious contradiction in the prosecution witnesses' evidence that would weaken the probative value of the evidence tendered by the prosecution regarding the occurrence of the robbery in question. Although no clear explanation was given regarding the Mpesa transaction at 1200hrs that alone cannot disqualify the fact that a robbery took place.

33. On recognition and identification, the appellant submitted that this is a framed up case against him. He contended that pw1 was coached by the police on what to say in court. According to the appellant, his arrest could have been a case of mistaken identity thus explaining the reason why the complainant did not give to the police during her initial report any description regarding the identity of the people who attacked her more particularly the appellant who has no hands.

34. The court in the case of **Leonard Kipkemoi v Republic (supra)**while dealing with the issue of recognition stated that**;**

> **"the factors to be considered with respect to recognition as set out in R vs Turnbull & Others (1976) 3 ALL ER 549 must always be borne in mind when a court is dealing with the question of identification. The court in that case stated as follows:**
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> ***"... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

35. From the evidence on record, it is evident that the complainant did not know the appellant before. That during the attack, the appellant had covered himself with a mask hence the face was not exposed at any one time. It is not in dispute that the complainant did not give any description of the people who attacked her. Obviously, she could not have missed to see that one of the attackers in particular the appellant had no hands.

36. In the case of **James Karani M'Ikombo vs Republic (2014) e KLR** the court of appeal expressed itself that dock identification is almost worthless and that failure of a witness to give a description of the assailant to the police raises a doubt as to whether the identification of the appellant was free from error and could form a basis for a conviction.

37. Although the trial court relied on the evidence of the complainant alone, he did not caution himself on the truthfulness of the complainant's evidence and the dangers of convicting based on the evidence of a single witness. See **Abdalla Bin Wendo vs Republic (1953) 20 EACA583**. In this case, there is no other evidence connecting the appellant with the commission of the offence besides the evidence of the complainant which does not meet the threshold of reliability without any other corroborating evidence.

38. As regards the question of conviction without due regard to the appellant's alibi defence, the appellant contended that he had no duty to prove his own alibi and that it was upon the prosecution to establish that it was not true. In his judgment the trial court in convicting the accused persons stated as follows;

> **"...DW2 alleges that she was with her son on the material date. Accused 1, her son did not tell court where he was or what he was doing. This testimony is obviously made up and false. Similarly accused 2 did not tender any evidence to rebut the prosecution's case as regards the date of the incident."**

39. The appellant having raised an alibi defence that he was not at the scene of the incident at the time the robbery was committed, had no duty to prove his alibi. See **Charles Anjare Mwamusi V. R CRA No. 226 of 2002** where the Court of Appeal stated;

> **"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to the charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable Kiarie V. Republic (1984) KLR 739 at page 745 paragraph 25."**

40. Having held that there was no sufficient proof that the appellant took part in the robbery and the alibi defence having not been challenged, it leaves me with one conclusion that, it is possible the appellant did not participate in the commission of the offence.

41. In view of the above holding, I am in agreement with the prosecution's sentiments that there was no proper identification of the appellant hence the possibility of mistaken identity. Accordingly, the appeal herein is allowed with orders that the conviction thereof is quashed and the sentence against the appellant set aside. The appellant shall be set free forth with unless otherwise lawfully held.

Right of appeal 14 days.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 15THDAY OF FEBRUARY 2022

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J.N. ONYIEGO

JUDGE