REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 68 OF 2019

CHAMA SAID ALIAS ADAM SAID MANZELE ..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being An Appeal From The Judgment of The Learned Chief Magistrate Hon. D. W. Nyambu delivered on The 11th Day of April, 2019, In Kwale Criminal Case Number 752 of 2018).

Coram: Hon. Justice R. Nyakundi

Appellant in person

Theresa Mwangeka for the state

JUDGMENT

The appellant was charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code and in the alternative handling stolen goods contrary to Section 322 (2) of the Penal Code. Thereafter, after a full trial, the appellant was convicted and sentenced to twenty (20) years imprisonment.

Being aggrieved with both conviction and sentence, appellant preferred an appeal to this Court; grounded on the following concerns, namely:

(1). That the Learned Trial Magistrate erred in Law and fact by failing to appreciate that identification evidence tendered in Court by PW1 and PW2 was not sufficient to warrant a conviction.

(2). That the Learned Trial Magistrate erred in Law and fact in basing the conviction and sentence on dock identification.

(3). That the Learned trial Magistrate erred in Law and fact by failing to note that the alleged confession of PW4 would not be admissible unless it is made in the manner contemplated under Section 25 (A) of the Evidence Act.

(4). That the Learned trial Magistrate erred in Law and fact that this was a one off incident and it is unlikely that one could identify the mobile phone and subsequently remember it.

(5). That the Learned trial Magistrate erred in Law and fact by failing to find that several key witness who recovered the alleged motorcycle were never called to testify in the trial Court.

(6). That the Learned trial Magistrate erred in Law and fact to find that my arrest had no connection with the offence.

(7). That the Learned trial Magistrate erred in Law and fact by finding that the doctrine of receive possession was applicable in the circumstances of the case.

(8). That the Learned trial Magistrate erred in Law and fact in summarily dismissing the defence.

(9). In addition that the Learned trial Magistrate erred in Law and fact in sentencing him to twenty (20) years imprisonment a sentence which was excessive to the nature of the offence.

In his appeal the appellant side submitted that evidence by the prosecution witnesses on identification was shaky and inconsistent to place him at the scene of the robbery. The appellant in his submissions attacked the veracity and consistency of the prosecution witnesses (PW3) and (PW8) which was heavily weighed by the Learned trial Magistrate to make a findings on identification.

On the identification factor, the appellant cited the principles in the cases of **Peter Sangura v R CR Appeal No. 324 of 2004, Karumba & 2 others v R {2001} KLR, Fredrick Ajode v R {2004} 2 KLR 81.**

According, to the appellant there was no legal reason for the trial Magistrate to accept identification evidence which was flawed. With regard to the evidence of (PW4) on the alleged confession statement, the appellant submitted that would have been excluded for being in breach of Section 25 (A) and 32 (1) of the Evidence Act.

The appellant also raised the issue to do with the evidence on recent possession which he described as wholly unreliable and unsatisfactory to prove existence of any facts to implicate him with the offence. The appellant contented that the evidence can be facilitated in relation to its admissibility as set out in the case of **Charles Launamba v R CR Appeal No. 8 of 1984, Arum v R {2006} 2 EA**. Based on that submissions appellant argued that the charge of robbery was never proved beyond reasonable doubt to warrant a conviction and subsequent sentence of twenty (20) years imprisonment.

The Respondent Submissions

Mr. Mwangi, the Learned Prosecution Counsel nevertheless in his written submissions contends that the critical ingredients forming the offence of robbery with violence as stated in Section 296 (2) of the Penal Code was proved beyond reasonable doubt.

According, to **Mr. Mwangi**, the primary evidence against the appellant at that trial was based on identification and not on the trial of recent possession. Further, **Mr. Mwangi** submitted that the alleged confession never formed part of the strand of evidence relied upon by the prosecution to proof the elements of the offence in which the Learned trial Magistrate made her findings on guilty and conviction.

Determination

As this Court was constantly been reminded, it's my duty to analyze and evaluate the evidence on record afresh and after doing so, come to my own independent conclusions and inferences though bearing in mind that I have neither seen nor heard the witnesses and to make due allowance in this respect **(See the cases of Okeno v R {1972} EA 32, Pandya v R {1957} EA 336, Ruwalla v R {1957} EA 570).**

The questions raised on this appeal are:

> ***(a). Whether in view of the evidence adduced the trial Court was right to have convicted the appellant of the charge of robbery with violence duly proved beyond reasonable doubt.***
>
> ***(b). Whether the trial Court was right when it held that the appellant was positively identified by the witnesses at the scene.***

Issue No. 1

As the Law is settled in this area, to prove the offence of robbery with violence, the prosecution must prove three main ingredients namely:

> ***(a). The offender is armed with any offensive weapon or instrument***
>
> ***or***
>
> ***(b). The offender is in company with one or more other persons or***
>
> ***(c). At or immediately before and or immediately after the robbery the offender wounds, beats, strikes or use other personal violence to any other person.***

Also in the case of **Opoya v Uganda {1967} EA 752 and Moneni Ngumbao v R {2006} eKLR**:

> ***"The word robbed is a term of art and connotes not simply a theft but a theft preceded, accompanied or followed by the use of threat or use of actual violence to any person or property in order to obtain or retain stolen property."***

In the circumstances of this case as the record reflects, the Learned trial Magistrate findings and decision was based purely on identification evidence of the appellant presumably by the witness testimony of **(PW1 Simon Mwevu)** and that of **(PW3 Riziki Matano).** It is trite Law that on many occasions Courts have held in several other decisions that conviction based on identification or recognition must be watertight; to respectfully place the appellant at the scene of the robbery with violence. It is also pertinent to state that the operation of the rule on identification also gives credence to single identifying witness, whose evidence has to be tested with the greatest care. **(See Maitanyi v R {1986} KLR 198, Roria v R {1967} EA 583)**. If one is to test the evidence on identification with greatest care, this was the way the comparative precedent by the Court of Appeal in **England in R v Turnbull {1976} 3 ALL ER** said the enquiry to proceed before accepting such evidence as conclusive in that case **Lord Widgery C. J.** had this to say:

> ***"First, whether the case against an accused depends wholly or substantially on the correctness of one or more identifications of***

the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make reference to the possibility that a mistaken witness can be a convicting one and that a number of such witnesses can all be mistaken. Secondly, 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 the accused under observation? At what distance? In what light? Was the observation impeded in any way e.g. by passing traffic or a press of people? 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 original observations 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 the actual appearance."

The Learned trial Magistrate relying on the above principles at the back of her mind went on to observe as follows:

"All in all, I find that the prosecution has proved its case against the 1st accused/appellant herein beyond reasonable doubt. The circumstances leading to his arrest crippled with positive identification by (PW1) confirms that he was one of the robbers. I therefore convict him for 2 counts of robbery with violence contrary to Seciton 296 (2) of the Penal Code as charged. The 2nd accused person is acquitted under Section 215 of the Criminal Procedure Code in Count 1 and Count 2."

Turning them to the instant appeal, the question is whether the appellant has raised substantial issues worthy considerations to impeach the approach taken by the Learned trial Magistrate on identification evidence. The appellant queried that findings and improper inference drawn by the Learned trial Magistrate in sustaining the conviction and sentence for the offence of robbery.

In subjecting the entire evidence to afresh scrutiny, I take into account the settled principles in **Okeno v R & Ruwalla v R (supra)** on the duty of a first appellate Court to remember the task of weighing the evidence of the witnesses but not to lose sight of not having the advantage of not having seen or heard the witnesses being a preserve of the trial Court.

In this case also are the principles on identification as escaptulated in the above cited authorities which have also been consistently repeated in our Law reports as part of our jurisprudence. The problem before the trial Court as I see it stem from the analysis of the evidence given by **(PW1), (PW3)** and **(PW5) – Inspector Nyamutah –** the parade officer. The witness **(PW1)** and **(PW3).** Presented evidence that the robbery happened in the night on or about 8.00 – 8.30 p.m. in (PW3) evidence she was a passenger on board motorcycle registration Number KMDW 370F registered in the name of **(PW2 – Musa Chimera).**

at the time of the robbery, the aforesaid motorcycle was being driven by **(PW1 – Simon Mwevu)** as an agent and authorized servant to (PW2). According to **(PW1)** and **(PW3),** the attack by the robbers was spontaneous while driving through a feeder road towards **(PW3)** home from her business premises. It was in their evidence of **(PW1)** and **(PW3)** that within the same scene but at different locations, they were ordered to disembark from the motorcycle as the 'gang' robbed **(PW3)** of her cash and other personal properties like a mobile phone.

Apparently, the suspect motor vehicle was never driven away from the scene of the crime, as the robbers ordered **(PW3)** to disappear to her home without looking back. In reference to the surrounding circumstances, **(PW1)** seemed to have told the Court that with the strength of motorcycle lights he was able to positively identify the appellant and his co-accused though finally acquitted by the Court.

According to **(PW1),** besides that moment identification, the appellant was a person known to him prior to that material day.

During cross-examination, **(PW1)** confirmed to have identified the appellant at an identification parade as evidence to buttress the issue grounded on positive identification by the prosecution.

However, interestingly, there is no such corroboration from **(PW5 – Inspector – Myamutali)**, who conducted the identification parade. That (PW3) participated as a witness in which the accused **(suspects persons Omari Ramah and Chama Zaidi alias; Adam Said (appellant)** were to be identified. From the parade forms remarks made by **(PW5),** it was only **(PW3)** who managed to identify the two suspects and not **(PW1).** That identification by **(PW1)** bears the resemblance of mistaken identification.

It appears to me that the Learned trial Magistrate entirely relied upon the evidence of **(PW1)** to find the appellant guilty of the offence which was followed with a conviction and sentence. While it is altogether easy for the Court to point out that the evidence of **(PW1)** was of such probative value to identify the appellant. There is no examination of the evidence with the greatest care within the scope of **Roria v R {1967 EA 583, Abdalla Bin Wendo v R {1953} 20 EACA 166 & R v Turnbull (supra).** Thus throughout the trial and evidence admitted in support of the charge, one cannot say it was watertight and cogent to squarely place the appellant at the scene. This was an incident in which the complainants **(PW1)** and **(PW3)** were suddenly attacked by armed robbers. The underlying facts of the case demonstrate that there was no time **(PW1)** and **(PW3)** had to see, observe and identify the robbers. The circumstances were such that the robbers allegedly armed executed the offence accompanied with threats of violence which each of them was lying down on the ground.

I think, the Court should not lose sight of the fact that though one Omar – the co-accused to the appellant was also identified at the parade by **(PW3)** it would appear that the Learned trial Magistrate was not convinced with that identification. The co-accused was accordingly, acquitted of the two counts of robbery with violence, while on the other hand the Learned Magistrate concluded quite wrongly. That the same identification paraded afforded evidence in support of the charge against the appellant. But as it has surfaced from the record, this was a robbery which occurred on a feed or road. There was no source of light save that of motorcycle and moonlight. May; I say that it is my belief and indeed supported by the record of the trial Court that there is evidence of surrounding circumstances which on aggregate content from **(PW1)** and **(PW3)** does not sufficiently proof the prosecution beyond reasonable doubt. All those questions formulated by **Lord Widgery in R v Turnbull case (supra)** closely applied to the evidence by **(PW1)** and **(PW3)** certainly fails the threshold test of positive identification or recognition to hold the appellant responsible for the commission of the offence.

In my view the appellant never participated in the robbery and if he did so, both the evidence on identification and the doctrine on recent possession falls short of the standard of proof of beyond reasonable doubt propounded in the cases of **Woolmington v DPP {1935} AC 462 & Miller v Minister of Pensions {1947} 2 ALL ER 372.** Accordingly, the appeal must be allowed to this extent and that the Judgment of the lower Court is hereby set aside on both conviction and sentence.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9TH DAY OF FEBRUARY, 2021

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R. NYAKUNDI

JUDGE

In the presence of

1. Appellant
2. Alenga for the state