REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO. 55 OF 2020

STEPHEN KAMAU WAITHERA..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. STEPHEN KAMAU WAITHERA is the appellant herein. He has filed this Appeal against conviction and sentence before the Chief Magistrate Court Gatundu. In that court he was convicted of the offence of robbery with violence contrary to Section 296(2) of the **Penal Code**. On conviction the appellant was sentenced to serve 30 years imprisonment.

2. The prosecution's case was that the complainant, **Perpetua Mugure** (hereinafter Mugure) was operating a bar, known as **Mambo Yote Bar** at Mukurwein Gatundu North. Mugure also serves the customers at that said bar. On the material day 14th December 2018 Mugure closed the bar at 10:30 p.m. On closing the bar **Henry Mburu** (PW2) (hereinafter Mburu) assisted Mugure to carry alcohol from the bar to Mugure's house. Mugure's house was said to be behind the bar. Mugure said that while at her house she heard noise of a motor vehicle. She heard people calling her by name. Mugure recognized one of those men as her customer. Mugure on informing the two men that she had closed the bar she was reluctant to sell them alcohol. The men insisted and Mugure sold them on bottle of beer called balozi. They drunk the beer outside seated on chairs. Mugure refused to take alcohol with them but agreed to sit with them. She sat in between the two men. Mugure after sitting with the men for 30 to 40 minutes lost consciousness and fell down.

3. Mburu was present, together with another man called **Muya**, when the two men arrived and requested Mugure sells to them alcohol. Mburu sat in the same vicinity with Mugure and the two men for a period of 30 minutes. Mburu said Mugure fell down and he noted Mugure was unconscious. Mburu noticed the appellants then ran to where the motor cycle was parked and the appellant return armed with a panga. Mburu saw the appellant confront **Nzambi Kamau** (hereafter Nzambi) Mugure's visitor with a panga. Mburu also saw the appellant open the bar.

4. Nzambi stated that she was a longtime friend of Mugure. She had, on the night in question; visited Mugure. She was cooking in Mugure's house. At 11.30 p.m. she saw two men one was armed with a knife while another was armed with a panga. Nzambi stated that the appellant had a panga and on lifting it up Nzambi surrendered and lay down and the men took things from the house. Nzambi was categorical that the appellant was the one with the panga. Pointing at the appellant at the dock Nzambi said:

> **"I looked at him (appellant) well … He talked to me."**

5. Mugure in her evidence set out the items of property that she lost which included X Tigi phone. She was able to give the police the phone's **International Mobile Equipment Identity** (IMEI) Number. This number was on the box that came with the phone when she purchased it.

6. On 23rd December 2018 **P.c. Victor Sharuli** and **P.c. Gilbert Langat** went to a house in Igegania area, Kirai Gatundu, where they had information that the appellant, who was a suspect in the robbery at Mugure's house was to be found. On entering that house, the two police officers found the appellant, who was in the company of a female. The appellant had in his possession the phone. That phone was later identified by Mugure as her phone she stated that it was stolen during the robbery.

7. At the close of the prosecution's case the appellant gave an unsworn statement in his defence.

8. In his defence the appellant stated that when he was arrested a friend had earlier on visited him and left him charging a phone. That he and his friend were arrested but his friend was released because he/she gave a bribe of Kshs.50,000 to the police.

9. The trial Magistrate in the court's judgment stated that Mugure identified the appellant as her customer and gave the police the appellant's details. The trial court also found that Mugure's evidence was corroborated by Nzambi who was able to identify the appellant as the man with the panga. The trial court also found that although the light, at the scene, was poor the appellant was identified by the prosecution's witnesses. The trial court also made a finding that the doctrine of recent possession was well met in this case because the appellant was found with the phone of Mugure nine days after the robbery.

10.The appellant raised seven grounds of appeal, which I will try to summarize as follows:

a. That the first report to the police did not identify the appellant.

b. The appellant was not identified in view of the unfavourable or difficult conditions.

c. The prosecution's case was insufficient, fabricated, speculative, conjecture, discredited, inconsistent and lacked probative value.

d. The trial magistrate analyzed cases in an unfair manner against the appellant.

e. The investigation was wanting and inept.

f. The trial court failed to take regard of material inconsistencies in the prosecution's case.

g. The trial court erred in consideration of defendant's defence contrary to Section 169 of the Criminal Procedure Code.

11. This is a first appellant court. The duty of this Court was discussed in the case **Paul Thiga Ngamenya –v- Republic (2018) eklr.**

"Similarly in **Kiilu & Another vs. Republic [2005]1 KLR 174,** the Court of Appeal stated thus:

1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.

12. Appellant by this appeal faults the prosecution's evidence on his identification or recognition.

13. Mugure by her evidence stated that one of the two men, who later carried out the robbery was known to her as customer. She was not led by prosecution to confirm whether the said customer was or was not the appellant. It is through the evidence of P.C. Langat that one understands that it was Mugure who informed him and his co-investigator that one of the robbers was the appellant. It is incorrect however for the appellant to submit that Mugure by her first report to the police stated that the robbers were unknown to her. This is because throughout the trial the issue of Mugure's first report to the police was not an issue.

14. It however needs to be noted that the identification of the appellant was by Nzambi and by Mburu. Both these two witnesses were categorical that it was the appellant who was wielding the panga during the robbery. Nzambi was confronted by the appellant at close range while she was inside Mugure's house. Nzambi during cross examination by the appellant responded thus:

"You are the one who threatened me with a panga ……. I identified you as you were the most active and leading the operation. You lifted the panga."

15. Nzambi also confirmed that she looked at the appellant very well as he commanded her not to impede the robbery.

16. Moreover Mburu was in the company of the two robbers for 30 minutes, one of whom he identified as the appellant. There was security lighting at the area where the robbers were consuming alcohol. Mburu also confirmed that it was the appellant who had the panga. Mburu witnessed the appellant fetching the panga from the motor cycle and he saw him confront Nzambi while she was cooking in Mugure's house.

17. It follows that the identification evidence of the appellant was by more than one witness and further there was the evidence of the recovery of the phone in his possession.

18. The finding of Mugure's phone in the appellant's possession fits very well with the doctrine of recent possession which was discussed by the Court of Appeal in the case **David Mugor Kimunge –v-s Republic (2015) eKLR** where the Court of Appeal discussed a case from the Supreme Court of Canada, the case **Republic v. Kowkyk (1988)2 SCR 59, as follows:**

"In the end, the majority of that Supreme court accepted the following summary of the doctrine: -

"Upon proof of the unexplained possession of recently stolen property, the trier of fact may –but not must-- draw an inference of guilt of theft or of offences incidental thereto. Where the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be for the trier of fact upon a consideration of all the circumstances to decide which, if either, inference should be drawn. In all recent possession cases the inference of guilt is permissive, not mandatory, and when an explanation is offered which might reasonably be true, even though the trier of fact is not satisfied of its truth, the doctrine will not apply."

19. The appellant throughout in his examination of the prosecution's witnesses did not suggest that the phone recovered from him had been left with him by an unnamed friend for charging. Notwithstanding that failure appellant in his unsworn statement, in his defence, alleged that the phone recovered from him by the police had been left with him for purpose of charging. That defence can best be termed as an afterthought. That defence is discounted when compared to the police evidence that they found the appellant operating the phone while seated on his sofa set.

20. It follows that the elements of recent possession discussed in the case **Isaac Ng'ang'a Kahiga alia Peter Ng'ang'a V Republic Criminal Appeal No. 272 of 2005 (UR)** were met in this case as follows:

i. The phone was positively identified by Mugure as hers and further IMEI number on the phone was same number in the container box in Mugure's possession.

ii. The phone was recently stolen from Mugure.

21. The defence raised by the appellant that the phone belonged to his unnamed friend was in my view devoid of reasonableness and plausibility.

22. I do not find that the arrest and prosecution of the appellant was based on suspicion. The prosecution through the witnesses who testified before court proved beyond reasonable doubt that the appellant was identified by two of the prosecution's witnesses, Nzambi and Mburu, and further the phone stolen from Mugure, whose IMEI number was given to the police, was found in possession of the appellant and that possession by the appellant was not reasonably explained by the appellant. The prosecution's case cannot be discredited, nor can the trial court be said to have erred in convicting the appellant.

22. It follows that the appeal against conviction fails.

23. The appellant's appeal against sentence is on the ground that the trial court failed to take into account the time spent in custody while the trial proceeded and on the ground that the trial court's sentence was excessive in the circumstances of the offence

24. The trial court in sentencing treated the appellant as a first offender. It also noted that the appellant failed to offer mitigation before sentencing. It went on to consider the violent nature of the offence and the victim's assessment report. That report showed the victim suffered financial loss and physical and psychological trauma. The report also showed the victim feared for her life after she refused to withdraw her complaint, over this matter, at the police. The trial court on taking all those circumstances into account and considering the appellant was a young man of 30 years sentenced the appellant to 30 years imprisonment.

25. The trial court in passing that sentence failed to take into account the time appellant spent in custody pending the conclusion of his trial. Section 333(2) of the Criminal Procedure Code state:

"Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced except where otherwise provided in this code.

Provided that where the person sentenced under subsection (1) has prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

26. The trial court ought to have pronounced itself on the period the appellant spent in custody while sentencing him. This is what was stated in the case **Josiah Mutua Mutunga (2019) eKLR** thus:

27. I associate myself with the decision in **Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR** where the Court of Appeal held that:

"The second is the failure by the court to take into account in a meaningful way, the period that theappellants had spent in custody as required by *section 333(2)* of the Criminal Procedure Code. By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the

appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."

28. The appellant in seeking to appeal against his sentence did not provide any mitigating factors that could have been considered by the trial court. It will be recalled that he failed to present mitigation before the trial court. This Court is therefore hampered by that absence of mitigation in determining what was the appropriate sentence that the trial court should have ordered against the appellant, while considering the aspect of the objective of sentencing, that is, punishment, deterrence and public protection. The Supreme Court in the case, **Francis Kariko Muruatetu V Republic Petition No.15 of 2015** gave the following guidelines with regard to mitigation.

> **"[71] To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:**
>
> **(a) age of the offender;**
>
> **(b) being a first offender;**
>
> **(c) whether the offender pleaded guilty;**
>
> **(d) character and record of the offender;**
>
> **(e) commission of the offence in response to gender-based violence;**
>
> **(f) remorsefulness of the offender;**
>
> **(g) the possibility of reform and social re- adaptation of the offender;**
>
> **(h) any other factor that the Court considers relevant.**

29. The appellant having failed to mitigate the only information this Court has about him is that as at the date of his sentence, on 5th February 2020, he was age 30 years. That information is not sufficient to consider the guideline set by the Supreme Court in **Muruatetu case** (*supra*).

30. Bearing the above in mind I do find that there is no basis of interfering with the trial court's sentence other that the sentence should have been in compliance with Section 333(2) of Cap 75.

CONCLUSION

31. In the end the appeal against conviction and sentence fails and is dismissed. This Court however orders that the trial court's sentence shall take into account the period the appellant spent in custody while awaiting the conclusion of his trial.

SIGNED AND DELIVERED VIRTUALLY THIS 11TH DAY OF FEBRUARY 2021.

MARY KASANGO

JUDGE

11th February 2021

Before Justice Mary Kasango

C/A - Kevin

Appellant – Stephen Kamau Waithera - Present

For the Respondent (DPP) - Miss Kathambi

COURT

Ruling virtually delivered in their presence.

MARY KASANGO

JUDGE