



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

(CORAM: A.K. NDUNG'U J.)

CRIMINAL APPEAL NO. 25 OF 2020

SAMUEL OMONDI MUGA.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal from the conviction and sentence by Hon. D.K. Matutu (PM) delivered on 6th September 2019 in Kilgoris Criminal Case No. 558 of 2018)

JUDGEMENT

1. The appellant, **SAMUEL OMONDI MUGA**, was convicted and sentenced to serve 15 years' imprisonment for the offence of robbery with violence contrary to **Section 295** as read with **Section 296 (2)** of the **Penal Code**. The particulars of the offence were that on the 20th day of July 2018 at Napoli village in Transmara West Sub-County within Narok County, jointly with others not before court, he robbed Gilbert Kibet Too a motor cycle registration no. KMEB 206 P Make Boxer valued at Kshs. 91,000/= and at, immediately before or immediately after the time of such robbery wounded the said Gilbert Kibet Too.
2. Since this is a first appeal, it is incumbent upon this court to re-evaluate the evidence presented at trial and draw its own independent conclusions. This court must however remain cognizant of the fact that it does not have the benefit of hearing and seeing the witnesses as the trial court did.
3. The complainant, Gilbert Kibet Too, (PW1) testified that on the said date at around noon he was at Soit doing *bodaboda* business using motorcycle registration no. KMEB 266B Boxer when he got a customer who asked him to take him to Sitoka to buy charcoal. PW1 took his passenger around to run his errands as he had said that they would return to Soit together.
4. PW1 testified that the distance between Soit to Sitoka was more than 10 kilometers and took 1½ hours. He stated that he had been with the customer for about 2 hours and saw his face during the time they were together. He had also noticed that the appellant had a wound on the leg as he had alighted and folded his trouser when they got stuck on the way.
5. He recalled that after sometime together, his customer hit him on the head several times with a stick and left him unconscious. PW1 did not see the motorcycle from that day. He remained on the spot and found himself at Lolgorian hospital two days later. He recorded his statement with the police and was later called in for an identification parade. Nine people were paraded and he picked the appellant as his assailant.
6. John Odongo Ododa (PW2) testified that he lived at Napoli-Nyakwari forest where he used to burn charcoal. He recalled that he returned home at about 5:00pm on the day in question and his son informed him that his customer Omondi "Oria" had come to ask for him. PW2 stated that Omondi had left a note saying that he had gone to see one Okatch and would come back. The following morning, they heard screams from Maasai women. They rushed outside and found PW1 who could not talk.
7. 14 days later, about 20 people came asking for his house. PW1 was among them. PW2 testified that he was asked to help them trace Omondi/Oria. They went to Okatch to look for him and found him talking on the phone about the motorcycle, asking the caller to travel fast with the motorcycle. The appellant ran away on seeing them and was tracked on phone. PW2 testified that he had known the appellant for 16 years as they had lived together in town. He denied having a grudge with the appellant over his wife.
8. David Kipyegon Sang (PW3) testified that PW1 was his employee. He had given him his *bodaboda* registration no. KMEB 206P Boxer 100. He recalled that PW1 was to bring him some money but his phone went off. He received a call from a neighbor informing him that PW1

had been attacked and was at Lolgorian Hospital. PW3 testified that when he saw PW1 at the hospital, he could not talk.

9. Later on, they took the AP to where PW1 had been attacked. They went to the hut of PW2 and PW1 described the man who had attacked him to PW2. They traced the appellant with the help of PW2. PW3 recalled that on the day they traced him, the appellant did not see them approaching. He was on phone talking in dholuo. He asked them to let him give out the phone and went past his house and ran away. PW3 testified that they had no money for logistics for police and were not able to recover the motorcycle.

10. Benard Lekima (PW 4) of Lolgorian Sub-County Hospital stated that he had examined PW1 when he was brought to the hospital on 4th August 2018. PW1 had five cuts on the skull which he stitched and referred him to Kilgoris. According to PW4, a blunt object had been used to injure PW1. He testified that he had filled and signed the P3 form which he produced as Exh. 1.

11. PC Fred Nyasinora (PW 5) of Lolgorian police station recalled that while on duty on 20th July 2018, he received a call from one Maasai reporting that he had spotted a rider who had been beaten up and left half dead. He went with his colleague to the scene and found the *bodaboda* rider in full gear. PW5 took him to Lolgorian Sub-County Hospital and later traced his relatives.

12. He informed the area chief of the incident and with the help of PW2 and other *bodaboda* members, the appellant was found, arrested and taken to Lolgorian police station. PW5 stated that an identification parade had been conducted upon which the appellant had been charged with robbery with violence.

13. The identification parade was conducted by Chief Inspector Mwangangi OCS Lolgorian (PW6) on 6th August 2018. He testified that PW1 was not within the station when the appellant was put in custody. They placed the appellant between the 7th and 8th members of the parade with similar height and brought in PW1. PW1 asked the members of the parade to raise their trousers. The appellant had a scar on the leg. PW6 testified that PW1 took some time with the appellant and identified him as the assailant. The appellant indicated that he was not satisfied with the parade.

14. On consideration of the prosecution's case, the trial court found that it had established a *prima facie* case against the appellant and put him on his defence. The appellant testified that on 3rd August 2018, the chief had come looking for him and he thought he had come to pay off a debt he owed him. He instead took him to Lolgorian police station where he was placed in a cell. The appellant testified that he was given a form and the officer had kicked him and ordered him to sign the form. The appellant testified that he did not know the reason for his arrest and denied participating in the identification parade.

15. The appellant has challenged the trial court's finding that he was guilty of the offence. In his petition of appeal, he argued that he had not been supplied with the documents that would shed light on the prosecution's case. He also stated that he was not satisfied with the manner in which the identification parade had been conducted because the complainant saw him before the parade was conducted.

16. In his written submissions, the appellant added that the prosecution had not proved ownership of the motor cycle and had also failed to avail hospital records. He also complained that the sentence meted on him was harsh and excessive.

17. Mr. Otieno, learned counsel for the State opposed the appeal. He submitted that the appellant had been identified by the complainant as the person who was his passenger on the motorcycle. He had sufficient time to look at the appellant and was able to pick him out in the identification parade as the person who hit him and robbed him. The description he gave to PW2 and the police is what led to the appellant's arrest. Counsel argued that the ingredients of the offence had been established and the appellant was properly convicted and sentenced to serve 15 years' imprisonment.

ANALYSIS AND DETERMINATION

18. The first issue raised by the appellant concerned his constitutional right to be informed of the evidence the prosecution intended to rely on in advance. The appellant argued that he was not supplied with the required documents that would shed light on the evidence which the prosecution intended to rely on.

19. The record shows that the appellant indicated that he had not been supplied with witness statements as PW1 was testifying. The trial court stood down the witness and directed the prosecution to supply him with the statements. The appellant did not bring up the issue of the lack of witness statements again after that.

20. The record shows that the appellant did an extensive and detailed cross examination of witnesses. He also gave a detailed defence. Throughout the proceedings after PW 1 was initially stood down, he never raised any complaint on lack of witness statements or access to the evidence the prosecution intended to rely on. Neither does the record show any other handicap that the appellant faced at trial that would prejudice him. The ground of appeal based on this subject is not supported by the record and must fail.

21. The second limb of the appeal relates to the quality of the evidence led by the prosecution. The appellant argues that the prosecution did not prove the case against him beyond reasonable doubt.

22. In the case of ***Juma Mohamed Ganzi & 2 others v Republic Criminal Appeal No. 275 of 2002 [2005] eKLR*** the Court of Appeal set out the ingredients of the offence of robbery with violence to be that:

“(i) The offender is armed with any dangerous or offensive weapon or instrument; or

(ii) The offender is in the company with one or more other person or persons; or

(iii) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person.”

23. The prosecution’s case was heavily dependent on the identification of the appellant as PW1’s assailant. Prior to the incident, PW1 did not know the appellant. He testified that he was going about his *bodaboda* business when the appellant who was his passenger turned on him and robbed him of his motorcycle.

24. The appellant argued, in his petition of appeal, that the identification parade was improperly conducted as the complainant saw him before the parade was conducted. In his written submissions he went back to the position he had taken in his defence that the identification parade was never conducted.

25. On the identification of strangers, the Court of Appeal in *Simiyu & Another –vs- Republic [2005]1 KLR 192* held:

In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who give the description and purport to identify the accused, and then by the person or persons to whom the description was given.

The omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attacker’s identity.

26. PW1 testified that he spent more than two hours with the appellant before he attacked him. He narrated to the trial court how he had picked the appellant from Soit at noon and ferried him on his motorcycle to Sitoka about 10 kilometers away to a forest to buy charcoal. They spent time going from the house of one friend of the appellant to the other. PW1 also recalled that the appellant had a wound on the leg which he saw when the appellant lifted his trouser. PW1 testified that he saw the appellant hit him with a stick on the head several times until he lost consciousness.

27. Later on, PW1 led a group of people including PW3 and PW5 back to the scene where he was attacked. They were able to trace the house of PW2 who confirmed that he had been trading in charcoal at the time. PW2 also testified that he was informed that the appellant had gone looking for him on the day PW1 was attacked but he was not home. Before that, PW2 had known the appellant for 16 years.

28. PW1 had interacted with the appellant for a long time during the day when the conditions for identification were ideal. He described the appellant’s appearance to PW2 who was well acquainted with him. Based on that description, the appellant was traced, arrested and an identification parade conducted to confirm his identity as the perpetrator.

29. Even if I were to accept the appellant’s rather implausible claim that no identification parade was conducted, the evidence I have outlined above would lead me to the finding that the appellant was positively identified by PW1.

30. This position is informed by the decision of the Court of Appeal in *Mehtab Ahmedali Hussein Shah v Republic Criminal Appeal No. 85 of 2019 [2020] eKLR* where court held:

“It is also not in dispute that no identification parade was conducted to identify him, instead, the appellant claimed that when George was called to the police station at Karuri, he saw the appellant through a window, and was also shown a photograph of him and that this enabled George to identify him. Though this may have been prejudicial to the appellant, it cannot be overlooked that the prevailing conditions for visual identification were favourable. **The incident took place in broad daylight, and George was with the appellant for a reasonable period before he was robbed** and dumped in the coffee plantation. He saw him when he came out of the hospital and during the drive to Ruaka which gave him ample time to see and identify the appellant. George recalled that he was of Indian appearance. **The failure to hold an identification parade did not negate George’s ability to identify the appellant**, and, as was the High Court, we too are satisfied that George identified him as one of the robbers. **[Emphasis added]**

31. However, the testimonies of PW1, PW5 and PW6 proved that an identification parade was conducted. PW6 testified that 8 members of the public of similar height as the appellant had been assembled and the appellant placed between the 7th and 8th members of the parade. He stated that PW1 was not within the station and was only called in afterwards to identify his assailant. PW1 asked the members of the parade to raise their trousers and he was able to pick out the appellant who had a scar on his leg.

32. According to the identification parade report, the appellant had expressed his willingness to participate in the parade. He also chose a third party named Peres Atieno to be present when the parade took place. The identification parade was conducted by PW6 who was not the investigating officer. There were 8 people in the parade of similar height as the appellant, whose names were listed in the report. The appellant claimed that PW1 had seen him before the parade but there was no evidence that PW1 was present when the parade was assembled. PW6 was categorical that PW1 was not in the station before the parade. Overall, the parade was conducted in compliance with the Force Standing Orders.

33. In addition to positively identifying the appellant as PW1’s assailant, the prosecution witnesses also confirmed that PW1 was gravely injured on the material day. PW2 and PW5 testified that they had seen PW1 at the scene where he had been beaten up and left for dead by the appellant. PW3 also testified that he had gone to see PW1 at Lolgorian hospital when he heard of what had befallen him. PW4 produced a P3 form he had prepared after examining PW1 and confirmed that PW1 sustained severe injuries on the head which had been inflicted by a blunt object. Contrary to the appellant’s assertion, I find that there was adequate evidence to prove that PW1 sustained severe head injuries.

34. As to the ownership of the motorcycle, I find that although no log book or documents of ownership were produced to prove that it

belonged to PW3, the chain of evidence led by the prosecution established that the appellant stole the motorcycle from PW1. PW2 and PW5 testified that when they found PW1 at the scene he was clad in motorcycle gear. PW3 also testified that he had employed PW1 to operate his motorcycle registration number KMEB 206 PBoxer. PW1 did not find his motorcycle after he had been beaten up by the appellant whom he positively identified. Before his arrest, the appellant was heard on phone talking to someone about a motorcycle and asking the person on the other end to travel fast with the motorcycle.

35. While it would have been prudent for PW3 to produce proof of ownership of the motorcycle, his failure to do so did not vitiate the fact PW1 lost the motorcycle immediately after being beaten up by the appellant. The appellant did not explain what had happened to the motorcycle. I therefore find as the trial court did, that the prosecution proved that the appellant robbed PW1 of the motorcycle as charged.

36. Lastly, the appellant argued that the sentence imposed by the trial court was harsh and excessive. The Penal Code prescribes a death sentence for the offence of robbery with violence. The trial court imposed a sentence of 15 years. It took into account the appellant's mitigation and recent jurisprudence on minimum mandatory sentences in exercising its discretion on sentence. It has not been shown that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle in imposing the sentence. Consequently, I find no reason to interfere with the sentence meted upon the appellant by the trial court.

37. The appeal is therefore found to be lacking in merit and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT KISII THIS 13TH DAY OF APRIL, 2021

A. K. NDUNG'U

JUDGE