



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL DIVISION
CRIMINAL APPEAL NUMBER 79 OF 2019

BETWEEN

MUHDHAR SAID JUMAAN.....APPELLANT

-VS-

REPUBLIC.....RESPONDENT

(Being an appeal against the judgment that was delivered on 23.05.2019 convicting the appellant

and the sentence passed by Hon. Francis Kyambia SPM on 4.07.2019

in Mombasa CMCR No. 2043 of 2015)

JUDGMENT

Introduction.

1. Muhdhar Said Jumaan was convicted for the offence of robbery with violence in Counts I & II of the charges preferred against him in Mombasa Chief Magistrate Court Criminal Case No. 2043 of 2015 and he was sentenced to serve 21 years' imprisonment in each count to run concurrently.

2. The appellant was aggrieved by the conviction and sentence and he lodged his petition of appeal dated 9th July, 2019 filed on 10th July, 2019 on the following grounds: -

1. That the learned Honourable Magistrate erred in both law and fact by convicting the appellant for the offence of robbery with violence despite the prosecution having failed to demonstrate motive/*mens rea* and *actus reus* vis-à-vis the charges.

2. That the learned Honourable Magistrate erred in both law and fact by convicting the appellant by finding that two firearms were robbed violently while the existence of the firearms and the case was never demonstrated beyond reasonable doubt.

3. That the learned Honourable Magistrate erred in both law and fact by convicting the appellant despite having ruled that the circumstances prevailing were not favorable/conducive for a positive identification and the prosecution having failed to draw a nexus between the appellant and the ingredients of the offence of robbery with violence.

4. That the learned Honourable Magistrate erred in both law and fact by convicting the appellant despite the prosecution's failure to link the appellant to the alleged murder weapons (firearms) and active or passive participation in the robbery with violence.

5. That the learned Honourable Magistrate erred in both law and fact by convicting the appellant despite having ruled that there was no earlier plan involving the appellant to commit robbery with violence and for that reason the prosecution's failure to demonstrate that the appellant shared common intention/plan and purpose with the assailants.

6. That the learned Honourable Magistrate erred in both law and fact by convicting the appellant despite his finding that the

appellant was not privy to the intentions, mechanizations and plans of those that had hired him to repair and drive the vehicle that they had for a fee and those others that forced themselves in the vehicle later.

7. That the learned Honourable Magistrate erred in both law and fact by shifting the burden of proof to the appellant and dismissing his well-articulated, corroborated and un-rebutted defence evidence in defending his innocence; as seconded by the pre-sentencing report.

8. That the learned Honourable Magistrate erred in both law and fact despite the prosecution's failure to prove their case to the required standard and reason we find the sentencing to have been unwarranted.

3. It was sought that the appeal be allowed, the conviction quashed and sentence set aside.

4. In the lower Court, the prosecution case was that KDF officers based in Ras Kamboni in Somalia on the 25th May, 2014, were on their way from Manda base in Lamu where they had gone to collect food supplies and on reaching Milimani Area in Lamu East district, their military truck got stuck in the mud as it had rained heavily. They were unable to push the truck out of the mud from 2.00pm to 7. 00 pm when they settled down to prepare food and thereafter divided themselves in three groups where some soldiers remained in the truck, and others took shelter in a nearby structure put up by KWS.

5. PW 9 Seargent Andrew Wambua Nzomo, Corporal George Mahulo and Private Vincent Imbenzi were enlisted to keep sentry. At around 10. 00 to 11.00 pm, the vehicle that was being driven by the appellant herein arrived from Hindi direction and PW 9 instructed Private Imbenzi and George Mahulo to stop the vehicle but it did not stop. However, the vehicle got stuck in the mud adjacent to their military truck when the officers ordered the occupants of the vehicle to alight, the two people in the passenger's seat alighted and stood in front of the vehicle and produced their identity cards, meanwhile, the driver of the vehicle was in communication with other persons who were at the back of the vehicle and he said he was going to get his identity card from the vehicle but he suddenly removed a firearm and started shooting at the KDF officers. Corporal George Mahulo and Private Vincent Imbenzi were consequently shot dead.

6. On sensing danger, PW 9 took cover and the other people in the vehicle started shooting at the KDF officers. The shootout continued up to 2.00 am and in the course of it the fuel tank for the assailant's motor vehicle was shot and the vehicle engulfed in flames. The registration plate of the vehicle was produced in Court as KAV 599E Toyota Land Cruiser. The following morning, Mohammed Mohu who is in charge of military intelligence in the area proceeded to the scene and met KDF soldiers including PW 9 who informed him of what had happened. Apart from the two KDF soldiers who were felled in the shootout, there was also one body of an unidentified person who PW 20 said was one of the occupants of the motor vehicle driven by the appellant.

7. From the dead body of the unidentified person were recovered a pistol holster, a prismatic compass and a digital wrist watch whereas from the scene, the identity card of the appellant, and the identity card of one Ahmed Omar were recovered together with 9 spent cartridges and one live ammunition, pistol serial number AN5550, Safaricom wallet containing Nokia phone and sim cards of Safaricom and Yu were also recovered. The scene of the attack was photographed and Corporal Harrison Mugiri PW 10 processed the films and prepared a report which were produced as exhibit 2 and 3.

8. The bodies of the two KDF officers were airlifted to Forces Memorial Hospital whereas that of the unidentified person was preserved at Mpeketoni Hospital Mortuary for post-mortem upon proper identification by the relatives. The appellant was arrested by Corporal Losiro of KWS on 26th May, 2014, after his footprints were trailed to where he was hiding under the bush and he was collected by KDF officers.

9. Evidence was given by PW 6 & 14, that on 26th May, 2014, more exhibits were collected from the scene of the attack that is;

I. Nokia mobile phone 1280,

II. Safaricom sim card S/No. 8925402965/002192841,

III. Safaricom sim card S/No. 8925402965/002456527,

IV. Sim card holder for mobile number 0706308492,

V. Sim card holder for mobile number 0706515148,

VI. Used Safaricom scratch card S/No. 070790085993796 for Kshs. 100/=

VII. Yu sim card S/No. 89254050001229497270 attached to sim card holder.

VIII. Burnt ashes of suspected food stuff and plastic were also recovered from Motor Vehicle Registration Number KAV 599E.

10. The recovered exhibits were forwarded to the Government chemist for analysis and forensic analysis respectively. Corporal Elisha Maru PW 20 who was the investigating officer, collected spent cartridges at the scene and forwarded them to chief inspector Alex Mwandwiru a ballistic expert and upon examination, he formed the opinion that the spent cartridges were fired from different AK 47 rifles.

11. The appellant was placed on his defence, and he gave a sworn statement and said that he did not steal or help Al shabab. He testified that on 22nd May, 2014, Said Maraba went to his garage at Kongo boys in Mombasa, and told him that there was a radiator he wanted him to repair. The said Said Maraba was known to him as his customer and was running a tour farm. He went to repair the motor vehicle in Watamu

area where it had been parked. He took the radiator to Mombasa where it was repaired and he went to fix it at 6.00pm. he thereafter slept at Musa's home in Watamu.

12. After the repair of the vehicle, Said Maraba persuaded him to accompany him to Lamu in case the vehicle broke down before reaching Lamu. He said that the vehicle was loaded with cooking oil and other food stuffs. They got stuck in mud at a place called Bango but managed to remove the vehicle and proceeded with the journey. The appellant said that he was the one who was driving and Musa was sitting in the Co-driver's seat. He said he left with Musa and Dongo. While they were removing the vehicle which was stuck in mud at Hindu, five persons came armed with guns and one of them was of Somali origin, they entered into the vehicle while threatening them so they did not stop them from entering into the vehicle.

13. They proceeded with the journey to Kiunga when they saw torches flashing a sign that they stop and the vehicle landed in a whole. He together with one Musa and a passenger that they had given a lift alighted and gave out their identity cards, when he was told to stand aside for the officers to search the vehicle, he heard gun shots and he escaped for fear of his life. The following day he started looking for the road but he did not find it and in the evening he climbed a tree to sleep.

14. That on 27th May, 2014, he found the road and when he reached a place called Bothei and decided to rest, several persons came armed with guns and arrested him and took him to a nearby school. A call was made and KDF officers came and tied his face and took him to places that he did not know while assaulting him and asking him for guns. He was then taken to Makonge police station on 3rd June, 2014 and placed in the cell. On 4th June, 2014, police officers took him to Hindi and arraigned him in Court. He said that he did not have a gun and he never owned a gun and he didn't know whether the people they carried were Al Shabab. He told the police that he knew where Musa and Said were staying.

15. On cross-examination, he stated that he was taking food stuffs to Hassan Noor in Kiunga. He stated that among the three people he was carrying, one was of Somali origin and one was armed with a gun but he did not know the make of the gun. He averred that he suffered a gunshot injury on the right leg on the thigh and that he did not know where the gun shots started from.

SUBMISSIONS.

16. The appeal was canvassed by way of written submissions. The appellant's Counsel consolidated the eight grounds into two broad grounds of appeal and submitted that the prosecution failed to prove their case beyond reasonable doubt because the evidence was inconsistent, insufficient and lacked corroboration. They relied on the case of **Oluoch v Republic** [1985] eKLR at page 549 which was cited in **David Barongo Gathej v Republic** [2006] eKLR to support the position that any one proven ingredient of the offence of robbery with violence establishes the offence of robbery with violence.

17. On ground 7 to 8, it was argued that the same was premised on the fact that the prosecution, did not rebut the appellant's defence and it was unwarranted for the trial Court to shift the burden of proof to the appellant. It was submitted that the duty of the appellate Court, is brought out in the case of **Okeno v Republic** and the Court was urged to take into account the date that the appellant was arrested. That the appellant was tortured and an order for investigation was made but by the end of the trial there was no report on the order.

18. It was further submitted that the arresting officers and the investigating officer breached the appellant's right before arraigning him in Court. That from the evidence of KWS officers, the appellant was arrested on 27th May, 2014 and later handed over to KDF officers. That it was a misrepresentation of facts to claim that KDF officers arrested the appellant. Counsel argued he was kept in illegal custody of KDF until he was handed over to police on 3rd June, 2014 and that is why the charge sheet claims that the appellant was arrested on 3rd June, 2014, to cover up the illegality that preceded arraignment in Court.

19. As a result of the illegality, the trial Magistrate at page 176 to 177 dismissed the ability of the witnesses especially KDF officers to have identified the assailants. It was submitted that the appellant did not record a statement under inquiry and it was wrong for the trial Magistrate to allude that the appellant told the investigating officer that he did not know the intention of the people he had carried. That the Investigating Officer did not comply with Article 49 of the Constitution of Kenya, 2010 and therefore his evidence was inadmissible.

20. On the ingredients of the offence of robbery with violence, the appellant's Counsel argued that the 1st and the 3rd ingredients were in applicable and the appellant was convicted based on the 2nd ingredient that he was in company of one or more persons. It was submitted that the appellant gave a sworn statement and explained how he found himself in that situation and the probation report confirmed that he was a seasoned mechanic and his defence was that he was hired to repair the subject motor vehicle and drive it to Kiunga. It was the appellants case that the said defence was never shaken.

21. In response to the respondent's submissions that the evidence was circumstantial, it was argued that they did not meet the threshold of circumstantial evidence. The appellant's position was that the strangers who forced themselves into the subject motor vehicle were not known to him and that they did not have a common intention, therefore, they could not have pursued an unlawful object or used unlawful means to obtain a lawful object. That had the appellant been convicted in Count III, that conviction would have supported the claims for unlawful means. It was also argued that if the appellant had a common intention with those who hired him he could have escaped but he was arrested two days later sleeping under a tree with gunshot wounds.

22. The respondent's submissions were that they are facts which have not been disputed and the Court was urged to find that there was common intention which has been proved. That the act of shooting and robbing KDF officers renders the appellant culpable. It was contended that the appellant's defence was a mere denial because from the onset, he was with the owner of the motor vehicle and he had the opportunity to remove himself from the transaction but he did not. It was argued that if he did not know the five people he alleges to have forced themselves into their vehicle, he ought to have alerted KDF officers that he was in company of dangerous and suspicious persons. The appellant made it possible for Private Imbenzi to be shot when he ducked.

23. It was submitted that the threshold for circumstantial evidence was met and sentence for 21 years properly meted out following consideration of evidence on record as well as mitigation. The respondent's urged the Court to uphold the conviction and sentence.

Analysis and determination

24. This being a 1st appeal, the duty of this Court is well settled in **Kiilu & Another vs. Republic [2005]1 KLR 174**, where 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.”

25. I have considered the trial Court's records, as well as the grounds of appeal and submissions and the issue that arises for determination by this Court is whether there was sufficient evidence whether direct or circumstantial to warrant the conviction of the appellant for the offence of robbery with violence.

26. The appellant admitted that while on their way to Kiunga, they arrived at Bango and as it was raining and the state of the road was bad, they got stuck in the mud. That while removing the vehicle from the mud, five persons came armed with guns and one of them was of Somali origin. That the five people entered their vehicle and they proceeded with their journey to Kiunga. Allegations of forceful entry by bandits/gunmen into the appellant's vehicle lacks corroboration

27. He confirms that they were stopped by police officers wearing KDF uniform but from the evidence of PW 9, they refused to stop and it is only that they were stuck in the same mud that the vehicle came to a stop. In the words of the appellant the vehicle landed in a hole and he has not explained why it landed in a hole if it is not true that he had refused to stop.

28. When the vehicle got stuck in the mud, the appellant, Musa and one of the passengers they had picked alighted and identified themselves. The appellant knew he was carrying dangerous people in his vehicle and while giving out his identity card to the KDF officers who had stopped them he had the opportunity to alert them of the danger that they were exposing themselves to.

29. The appellant failed to signal the KDF officers and as a result, the five gunmen in his vehicle opened fire on the KDF officers and shot two of them fatally. Having aided the five gunmen by transporting them at night on an obviously dangerous route and having failed to alert PW 9 and the deceased officers of the imminent danger, this Court finds that he was an accomplice to the violence against the officers and the robbery of their firearms and uniform.

30. The only inference that can be made from those circumstances i.e. that the persons carried by the appellant were armed and were travelling on a dangerous road at night, is that the appellant was properly found guilty of the offence of robbery with violence the prosecution having established all the necessary ingredients forming the said offence. Appeal on conviction is disallowed. The appellant to serve sentence meted out by the trial Court.

It is so ordered.

Right of appeal 14 days.

DATED, SIGNED AND DELIVERED THROUGH MICROSOFT TEAMS AT MOMBASA THIS 08TH DAY OF JULY, 2021.

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:

Court Assistant: Ogwel

Appellant:

Respondent Counsel:

Appellant's Counsel: