REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 8 OF 2019

ABDALLA SAID MBOGA .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the judgment of Hon. D. Nyambu, Chief Magistrate, delivered on 17th July 2018 in

Kwale Chief Magistrate's Court Criminal Case No. 710 of 2016).

J U D G M E N T

1. The Appellant Abdalla Said Mboga was convicted in Kwale Chief Magistrate Court CR. Case No. 710 of 2016 for the offence of robbery with violence and sentence to suffer death as provided under Section 296(2) of the penal code.

2. The particulars of the charge of robbery were that the appellant Abdalla Saidi Mboga on the 11th day of July 2016 at Msambweni Development Farm area of Gazi Location in Kwale County within Coast Region robed Hamadi Juma Tsuma of motorcycle Registration No. KMDT 849T make Haojin Red in colour valued at Kshs.94,000/= and at, immediately before or immediately after the time of such robbery wounded the said Hamadi Juma Tsuma by stabbing him with a knife.

3. In the alternative the appellant was charged with the offence of handling stolen goods contrary to Section 323(2) of the penal code. Particulars were that the appellant on the 11th day of July 2016 at around 4.30pm at dumpsite area of Kimondo location Kwale County within Coast Region otherwise than in the course of Stealing dishonestly received and/or retained a motor cycle Reg. No. KMDT 849W make Haojin red in colour knowing or having reason to believe it to be stolen property.

4. The appellant was aggrieved by the conviction and sentence and he preferred the appeal herein on the following grounds of appeal filed on 4th February 2018:-

> **i. That the learned trial Magistrate, erred inlaw and fact by finding him guilty and sentencing the appellant without considering the 1st Report made to the police which does not indicate his name.**
>
> **ii. That the learned trial Magistrate erred in law and fact by finding the conviction and sentence without considering that proper identification at the scene of crime was not done.**
>
> **iii. That the trial Magistrate erred in-law and fact by finding Appellants conviction and sentence without considering that the prosecution case was governed by massive contradictions and discrepancies.**
>
> **iv. That the learned trial Magistrate erred in-law & fact by finding appellants conviction & sentence without considering his defence evidence.**

5. By a Notice of Motion filed on 25th May 2021 the appellant with leave of the court granted on 12th October 2020 filed amended grounds of appeal as follows:-

> **i. That the learned trial Magistrate erred inlaw & facts in basing conviction & sentence on dock identification on evidence tendered by PW 1.**
>
> **ii. That the learned trial Magistrate erred in law & fact by failing to find that identification evidence was not sufficient to**

warrant a conviction.

iii. That the learned trial Magistrate erred in law & facts by failing to find that, the type of clothes he had not been given in evidence and were not brought to court by prosecution as evidence.

iv. That the learned trial Magistrate erred in law & facts by failing to find that no DNA or examination was done on the alleged clothes and found with blood stain to connect him with alleged crime.

v. That the learned trial Magistrate erred in law & fact by failing to find that the appellant was arrested with nothing to connect him with nothing to connect him with the matter in question.

vi. That the learned trial Magistrate erred in law & facts in basing conviction on the uncorroborated prosecution evidence.

vii. That the learned trial Magistrate erred and facts by summarily rejecting his defence.

viii. That the learned trial Magistrate erred in law and facts by failing to find that the death, sentence was declared unconstitutional by the supreme court.

ix. That the learned trial Magistrate erred inlaw and facts by failing to consider the period spent in remand custody prior to conviction and sentence as provided under Section 333(2) of the criminal procedure code.

6. The appellant prayed that the appeal be allowed, conviction quashed & sentence set aside.

7. Brief facts of the case are that the appellant hired PW 1 a boda boda rider to take him to Kitaruni and while on the way the passenger turned on him, produced a knife and stabbed him. That he jumped off the motorcycle and the 'passenger' escaped on it. The complainant got a lift in a matatu and returned to where the appellant found him at the boda boda stage and explained to his fellow boda boda riders who pursued the robber and found him with the motor cycle on the same day.

8. That the appellant hit a hole while trying to escape and fell and left the motor cycle and ran away. That when appellant was arrested he raised alarm claiming PW 2, PW 6 & PW 7 were thieves and they were attacked and PW 7 assaulted as his friends ran away. That appellant ran into a house and locked himself. That the thief PW 4 came and rescued PW 7 and he was taken to Kinondo Hospital. He said it is appellant who took complainants motorcycle. PW 4 got appellant from a house and as he was bleeding he assisted him to go to hospital. He said appellant had blood stained clothes.

9. PW 8 Sergent Shukruit Ali Aden investigated the offence together with OCS Msambweni and PC Farida Evans and Munari Aden and later preferred charge of robbery with violence against the appellant.

10. The appeal herein was canvassed by way of written submissions. The appellants submissions filed on 25th May 2021 were to the effect that evidence of identification by PW 1 & PW 2 was not corroborated and the people who received the initial report were unreasonably left out in the prosecution case.

11. The appellants submitted that identification was not conducted properly as he found the complainant at the police station. He said no reason was given for failure to conduct proper identification parade as held in the case of Kazungu Kavulina and Another vs Republic KCA No. 3 of 2017. The appellant argued that it was un-procedural to expose him to the complainant without an identification parade.

12. Appellant further said that PW 1 said the clothes produced in court i.e. the 3 trouser short appeared different from the one the appellant was wearing during the time of the robbery and that the finding of the trial court was merely based on suspicion and the same must remain suspicion- Bwreinyi vs Uganda (1968) E.A C.A No. 123 – By Sir Udo Udoma.

13. The appellant further argued the blood stains on his clothes that made the court to conclude he was the robber was not examined to confirm if it was his blood on the Complainant's blood – see **Muiruri Njoroge & Another vs Republic CR. Appeal No. 115 of 1987**.

14. The appellant also argued that apart from evidence of investigation officer which contradicted that of the Chief – PW 4 there was no other evidence showing that appellant was found in possession of the stolen motorcycle and that despite seeing the appellant being escorted into the police station PW 1 was still unable to describe the kind of clothes he was wearing. The appellant urged the court to evaluate the matter and come up with an independent determination and dismiss the appeal.

15. He further submitted that the death sentence had been declared in the *Frances Kariako Muruatetu* petition as unconstitutional and that the court should find that the 6 years he had served in custody since his arrest was enough punishment for the crime committed.

16. The Respondent on the other hand submitted while relying on the holdings in **John Nduati Ngure vs Republic [2016] eKLR, Muiruri & others vs Republic [2002] eKLR**, **Abdullabin Wendo vs Republic [1953] 20 E.A.C.A 166**, **Roria vs Republic [1967] E.A. 583** and **Charles Mautamy vs Republic [1986] 2 KLR 76**, that the offence was committed at 3.00pm and the appellant was arrested shortly thereafter and taken to police station where complainant was found. That appellant's house was searched and a jungle short trouser which had blood stains was recovered. It was submitted that complainant had sufficient time to recognize the appellant as the one who committed the robbery as the offence was committed in broad daylight.

17. The Respondent further submitted that the evidence of PW 1 at page 10 line 9 to 10 that he saw appellant through the side mirror

removing a knife and cut him on the neck on the right side was corroborated by evidence of PW 2, PW 6 & PW 7 who saw the complainant bleed from the neck and PW 9 medical doctor produced P3 form which was dully filled on 11/7/2016 showing the complainant had a stab wound on the neck and arm. It was therefore submitted that the trial Magistrate properly evaluated the evidence on record and established the prosecution had proved its case beyond any doubt.

18. It was further submitted that the prosecution proved the ingredients of the offence of robbery with violent and that there was no need to conduct DNA examination as appellant was arrested shortly after the robbery and blood stained single short trouser which complainant described he was wearing was recovered in his house.

19. The Respondent also submitted that the trial Magistrate rightly evaluated the appellants defence and found it was an afterthought and his witness. DW 2 found not to be credible as he didn't even know the name of the appellant whom he alleged was his brother.

20. On unconstitutionality of the death sentence, it was submitted that a declaration was made every in respect of murder case and no other capital offences.

21. The Respondents submitted that the appeal lacks merit and should be dismissed. The mandate of the 1st appellant court is set out in the case of Okeno vs Republic (1972) E.A. 32 as follows:-

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). 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 finding and conclusion; it must make its own findings and draw its own 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, see Peters vs. Sunday Post [1958] E.A 424."**

22. After considering the grounds of appeal, the record of the trial court and submissions by the appellant and respondent the issues that fall for determination are:-

> **i. Whether the appellant was properly identified Grounds 1, 2 & 3.**
>
> **ii. Whether it was necessary to conduct DNA on the clothes allegedly recovered from the appellant to establish if the blood stains on it came from him or the complainant – Grounds 3 & 4.**
>
> **iii. Whether the prosecution's case was proved beyond all reasonable doubt – grounds 5 & 6.**
>
> **iv. Whether the appellants defence was considered – Ground 7**
>
> **v. Whether death sentence was properly passed and whether it is unconstitutional.**
>
> **vi. Whether the trial court ought to have considered the period the appellant spent in remand custody as provided under Section 333(2) of the Criminal Procedure Code.**

23. To start with grounds 7 and 8 of the appeal, **Supreme Court of Kenya petition Nos. 15 & 16 of 2017 – Francis Karioko Muruatetu & Another vs Republic** held that mandatory death sentence in murder cases was unconstitutional as it robbed the trial court of its inherent jurisdiction to exercise discretion while passing sentence.

24. The said petitions didn't hold that the death sentence is unconstitutional. Furthermore the supreme court has now clarified that as much as the High Court can make a declaration as to constitutionality or otherwise of any law as contravening the constitution the same can only be done if placed before the court in a proper manner.

25. Directions in Supreme Court of Kenya petition Nos. 15 and 16 of 2015 delivered on 6th of July 2021 therefore precludes other capital offences from the application of the holding in Francis Karioko Muruatetu holding. It follows that where sentence is not quantified in terms of days months and years then the appellant cannot benefit from the provisions of Section 333(2) of the Criminal Procedure Code.

26. Whether the appellant was properly identified the offence took place in broad day light. The appellant was seen by the prosecution witnesses at the boda boda stage before he asked PW 1 to take him to the place where he attacked him and robbed him of the motorcycle. PW 2, PW 6 & PW 7 on learning and seeing that PW 1 had been injured and was bleeding mounted a search by going to where the attack and robbery took place and spotted the appellant on the complainant's motorbike when they cornered him he hit a hole and fell in a ditch but started raising alarm that PW 2, PW 6 & PW 7 were thieves as a result of which they were attacked by members of public. The Chief of the area came and rescued them as the appellant was hiding in a house and also had injuries.

27. The appellant cannot say he was not properly identified PW 2, PW 6 & PW 7 found him on the same day hardly 2 hours after the robbery riding the stolen motorcycle. When he arrived at the police station the complainant was already there and he was identified circumstances prevailing could not have allowed for identification parade as there is no identification the officers who took him to the station knew the Complainant was already there. Appellant having been identified by PW 2 at the boda boda stage and again having found appellant with Complainants motorcycle confirms to this court that appellant was properly identified.

28. PW 4 Ali Hamadi Regga found appellant hid given a house which was surrounded by woman and he was bleeding. This was after he had rescued. The description of what appellant was hearing, made PW 2, PW 6 & PW 7 to pursue him when there found him riding on the motorcycle that had just been stolen from the complainant- PW 1. Because of false alarm he made members of public attack and injure PW 7 who was rescued by PW 4 the Chief.

29. There clear evidence by PW 2, PW 6 & PW 7 corroborated evidence of PW 1 as to identify of the appellant and this court is of the view that there was no mistake committed and there was no need for DNA analysis on the ¾ short trouser recovered from him on arrest.

30. The appellant defence was considered by the trial Magistrate at page 12 and found to be an afterthought. In consideration of evidence of PW 1, PW 2, PW 6 & PW 7, I do agree that the evidence of prosecution as to what transpired outweighs the appellants defence. The witness the appellant brought to testify in his support was devoid of very many basic facts about the appellant in consideration that he said that he was his brother and on the other-hand the appellant said he was a good Samaritan and not his brother. DW 2 cannot be taken as a credible witness.

31. In conclusion, I do find that the appeal herein lacks merit and same is dismissed. Appellant has 14 days right of appeal.

32. Orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT /ONLINE THROUGH MS TEAMS, THIS 07TH DAY OF OCTOBER, 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ogwel – Court assistant

Mr. Mulamula for Respondent

Appellant – present in person

HON. LADY JUSTICE

A. ONG'INJO

JUDGE