REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NUMBERS 35 OF 2017

REPUBLIC.....REPUBLIC

VERSUS

JOSPHAT KARANJA AND ELIJAH NYANGWARA…RESPONDENTS

(Being an Appeal against decision the Honourable Samuel Wahome chief magistrate (CM) in Molo criminal Case No.2366 of 2014 Republic v** Josphat Karanja and Elija Nyangwara delivered on 30th March 2017**)

JUDGMENT

1. The Appellants were jointly charged with four counts of **robbery with violence** and two alternative charges of **handling stolen property**. Each count has an alternative charge of handling stolen property. Particulars of each count and its alternative are as per copy of the charge sheet attached.

2. The appellants denied all the 4 counts and alternative. The case proceeded for hearing and the trial magistrate in his determination found that the main charges were not proved to the required standard. He convicted each accused to the alternative charges and sentenced each to 4 years imprisonment.

3. The state being aggrieved by the decision of the trial magistrate, filed this appeal on the following grounds:-

i. That the learned magistrate erred in facts and law in finding that the prosecution had failed to prove all the four counts of robbery with violence against either of the accused persons and thereby acquitting both of them on benefit of doubt;

ii. That the learned magistrate rightly found as follows*:*

a) That the robbery took place in broad daylight at daytime at about 1.30p.m.

b) That the accused persons were arrested a few hours after the robbery.

c) That he had no doubt that the accused persons were the robbers who attacked the victims since it was day time; and

d) That the accused persons were arrested on the same day, a few hours after the robbery and subsequently identification parade conducted and were positively identified by the said 2 identifying witnesses.

That despite the above compelling circumstances the learned magistrate erred in facts and law in being dissatisfied with 2 identifying witnesses herein;

iii. That the court failed to appreciate and consider the proximity between the accused persons and the 2 identifying witnesses and the length of time spent with them during the ordeal, as such the learned magistrate erred in fact and law in being dissatisfied with the said 2 identifying witnesses herein.

iv. That considering the above stated circumstances the learned magistrate erred in law and fact in finding that the 2 identifying witnesses had not given any description of the robbers who had attacked them; and

v. That the learned magistrate erred in fact and law in failing to appreciate that the prosecution had proved its case to the required standard to sustain a conviction on the main charge of robbery with violence.

4. That the trial magistrate erred in fact and law by finding that the prosecution had failed to prove all the 4 counts of robbery with violence

against the appellants thereby acquitting the on befit of doubt.

5. The stated agreed with the trial court in finding:-

i. that the robbery took place in broad daylight at 1.30pm

ii. that the appellants were arrested a few hours after the robbery

iii. that there is no doubt that appellants were robbers who attacked the victims since it was daytime

iv. that the identification parade was conducted the same day and the 2 appellants were positively identified by the 2 identifying witness

6. That despite the compelling circumstances, the trial magistrate erred in fact and law by being dissatisfied with the two identifying witnesses; that the trial magistrate failed to appreciate the proximity between the accused persons and the 2 identifying witnesses and the length of time spent with them during the ordeal

7. State argued that the trial magistrate erred in fact and law by finding that the witnesses had not given any description of any robbers who had attacked them.

8. The state prayed for setting aside of the main charges of robbery with violence and this court to find that the evidence adduced in the trial was sufficient to link the appellants to the main charges of robbery with violence and convict them accordingly.

9. In response, the appellants filed written submissions on 9th July 2019. The 1st appellant **Josphat Karanja** submitted that they were both acquitted on ground of benefit of doubt. He quoted PW4 as stating on page 48 of the proceedings that he did not recognize the 3 men, further on page 48 policeman asked if could see robbers; *"I said I could*…and during examination he said PW4 said….*I said I saw a suspect...I identified them by description…I did not give description to police*."

10. The 1st appellant submitted that PW1 said he was attacked by 3 men who had covered their faces with black masks; and that he contradicted his evidence by saying the 3 man had not covered their faces; further that PW4 said he did not recognize the three men and he could not recall what they were wearing; he added that PW1 and PW4 said they were suddenly attacked and were therefore in a state of shock and did not have time to observe the robbers and be able to note any peculiar features regarding their appearance

11. 1st appellant confirmed that PW1, PW4 and PW7 attended identification parade conducted by **CIP Stephen Kibor** and identified the appellants at the parade. He however submitted that the issue of identification should be put to test set in the case of **Kisuma No.376 of 2014 Ajode Vs Republic** where the court held as follows:-

> **"…..in cases where the attackers are known to the complainant, it is mandatory for the complainant to mention their names and any other description to the relevant authorities at the earliest opportunity in order to discourage complainant from manufacturing evidence against innocent people,"**

12. He submitted that Pw1 and Pw4 never gave any description thus vitiate their abilities to have positively identified the appellants and cited **Nku CA No.63 of 1990 Robbert Gitau Vs Republic** where the court of appeal held as follows:-

> **"..that the evidence of identification should be with great care especially when it is known that conditions favoring the correct identification were difficult."**

13. He submitted that the witness who testified having identified them might easily mistake because of shock.

14. On identification parade, he submitted that the form show the member of parade were more than 10 contrary to parade rules.

15. Second appellant submitted that Pw1 never said he was able to see and note facial features or physical description of the robbers. He said Pw1 that he saw three men who had black masks then went further to say he saw them remove masks; that despite Pw1 saying the men had not covered their faces; he never gave their physical descriptions.

16. Second appellant submitted that had Pw1 noted any features of the assailant, he would have reported to the police.in respective to pw4, he submitted that despite him responding to the affirmative that he identified the 3 robbers, he did not identify them because he never described them to the police

17. He cited the case of **Tekeball and others Vs Republic volio 1952 (no proper citation)** where the court held that the first report to a person in authority is important to determine subsequent statement whether made up. And in **Juma Ngondia vs Republic Nbi CA Case No.136 of 1983** where the court of appeal held as follows:-

18. It is now established requirement of law that a witness should be asked a description of the suspects to ascertain and confirm identification

19. He submitted that Pw4 should have been asked what they expect to see of the suspect in order to identify him as compared to their first report to the police; that the witnesses never told the parade officer what the suspects they were looking for in the parade looked like.

20. Second appellant further submitted that the parade was irregular. He further submitted that the witnesses who identified phones never produced any document to prove ownership

21. In respect of the vehicle, he testified that none of them testified that the vehicle was near the scene of robbery; that no first report was produced to show that the impounded motor vehicle was as a result of the accident.

22. In oral submissions, **Mr. Limo** for the state restated grounds of appeal. He submitted that from evidence adduced, PW1 was asked to lie down and later asked to produce money paid by students and at the time of producing the money, PW1 was able to see the 1st respondent who was ordering him to produce money.

23. He further submitted that PW1 and PW2 participated in identification parade and positively identified the appellants, and that the trial magistrate erred in finding that the two witnesses did give description of the persons they identified. He argued that the evidence adduced was sufficient to link the appellants to the robbery and urged court to set aside the trial magistrates determination on the main count.

24. In oral response, 1st respondent, he submitted that the parade was properly done. He added at the time they were arrested he met the witnesses at Molo police station and DCIO showed to the suspects. Further that parade officer said there were 9 parade members yet he went further to say 1st appellant stood between member 10 and 11. He added that he never understood when went on in a parade that was conducted at 2 am.

25. Second respondent submitted that PW1 said the attackers were hooded and if that were the case, it would have been difficult for him to identify faces of the Person. He added in OB money recorded as received is 37,500 while the charge show kshs 35,000 and 5 mobile phones were produced in court yet 4 were recorded in OB.

26. 2nd respondent testified that the officers who located him using his cell phone testified that the tracking system indicated that he was in Salgaa and while there they got indication that he was in Nakuru Rhonda and he was found in his vehicle on the road towards Molo. He questioned how they found him on his way to Molo is the tracking system showed he was in Nakuru Rhonda. He added that PW5, the police driver towed his vehicle testified his phone was not found on him. He added that the police fail to avail in court the driver of the vehicle which hit second appellant's vehicle and argued that police feared he would have watered down their evidence.

27. Further, that PW1 said kshs 150,000 was stolen from him but he never said that a mobile phone was stolen from him; further that Pw4 said he identified the two of them in one parade. That he stood between 9 and 10 and 1st Respondent between 10 and 11 and wondered where other members of parade came from yet parade form indicate 8 members.

28. He said he is the owner of motor vehicle KBX 879D and that he gave the logbook to the police and that KRA confirmed he is the owner. He said people involved in the robbery were riding motor cycle, which were not produced in court. He said police are holding his vehicle for no reason and prayed for its release.

29. He concluded that they were satisfied with the decision of the court on both the main charge and alternative charges.

30. **ANALYSIS AND DETERMINATION**

This being the first appellate court, I am required to re-evaluate evidence adduced before the trial court and arrive at an independent determination. This I do bearing in mind the fact that, unlike the trial court, I never got opportunity to take evidence first hand and observe the demeanour of witnesses. For this I give due allowance. The principles that relate to first appeal are set out in the case of of ***OKENO VS REPUBLIC [1972] EA 32*** where the court stated as follows:-

> **"The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [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 findings and conclusions; 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"**

31. In view of the above, I have perused and considered evidence on record and submissions by parties herein. The issue that comes out clearly which require determination is whether the appellants were positively identified. On perusal of the court record, I have seen two identification parade form marked as **Exhibit 9** in respect of 1st Respondent and **Exhibit 10** in respect of 2ndrespondent. Both forms show members of parade were 8. It indicate the suspect was between 7 and 8 and for second witness between 10 and 11 and that both witnesses identified the suspect. I believe after adding one for identification by first witness the member became 9 and there must have been an error in recording of between 10 and 11 as recorded clearly show the number of members and names.

32. **Exhibit 10** show that the suspect stood between member 9 and 10 for 1st witness and between 7 and 8 for 2nd witness and both witnesses identified the suspect positively. Comments indicate that the suspect was satisfied with the parade.

33. PW1 in his testimony said he saw the person who ordered him to give money and that it was PW1. He said 1st respondent asked him to stand up and show him where the money was. He added that he would argue. He said he showed kshs.500 notes he had counted to kshs.90,000 then he asked him to show more money. He said 1st respondent asked him where the other teachers were collecting money and he told them it is at the head teacher's office. He said instead they went to the bursar's office and that he saw them remove the hats they had worn.

34. In his testimony, PW1 said the three men had black masks but they had not covered their faces. He said he was called for two identification parade and he identified the two people who robbed him. Of the parade, the members were of similar height. In cross-examination PW1 said the respondents had not covered their faces when they attacked him but they had only covered their hair. He said the two kept telling him to get up and lie down; that the incident took about seven minutes and that they talked severally.

35. From evidence on record and finding in the lower court judgment, there is no doubt that the incident occurred during the day in broad daylight. The respondents despite agreeing on determination in respect to alternative charges of handling stolen properties, which were identified by the witness, availed by police in identification parade, agree with the trial magistrate finding to the effect that the identification was doubtful.

36. Respondents argue that the witnesses were in shock and that witnesses said they wore masks. However, from PW1's evidence above, the respondents had not covered their faces. He further said he was not in shock and that the respondents took about 7 minutes with him and that they engaged him severally while asking him to show them money; in the ordeal, he was asked twice to lie down and get up.

37. PW4 confirmed that the three people who attacked them had not covered their faces and when 1st respondent asked him to lie down he held his hat and he saw 1st respondent for a period of 5 minutes when he lay down.

38. PW4 further confirmed that there were 9 people on the parade. He confirmed that he had been sent to the scene of accident involving 2nd respondents vehicle and another and while towing the vehicle to police station, a saloon vehicle followed them and ordered him to put the vehicle aside and they were looking for 1st and 2nd respondent whom they arrested in the 2nd respondent's vehicle. He said upon search 5 to 6 phones were recovered.

39. In my view, there is no doubt in the witnesses' identification. Failure to give description of faces do not cast doubt on identification especially in view of the fact that the suspects were arrested shortly after the incident and parade carried the following day when the witnesses' memory were still fresh. Recovery of items stolen from the witness in the cause of the robbery further corroborates evidence of identification.

40. From the foregoing, I find that that the trial magistrate erred in failing to convict the respondents with the main charges of robbery. I proceed to set aside conviction on the two alternate counts and jointly convict 1st appellant and 2nd appellant for the two counts of robbery count 1 and count 2.

41. In so far as sentence is concerned I note that the offence of robbery attract mandatory death sentence. I am however guided by the decision in **Muruatetu** case by the Supreme Court, which held that discretion of court in sentencing should not be taken away. It did not outlaw death sentence but held that court should have discretion to impose any other sentence depending on the circumstances of the case.

42. From the foregoing considering mitigation on record and presentence report from probation officer.

43. **FINAL ORDERS**

1. **Appeal on conviction and sentence allowed.**

2. **Conviction by trial court on the two alternative charges set aside.**

3. **1st and 2nd Appellants are jointly convicted of the two counts of robbery with violence count 1 and 2.**

4. **Presentence report to be filed by probation officer within 2 weeks.**

Judgment dated, signed and delivered at Nakuru this 20th day of February, 2020

RACHEL NGETICH

JUDGE

In the presence of:

Schola Jeniffer – Court Assistant

Appellant 1 – present

Appellant 2 - absent

Rita counsel the for State