REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.176 OF 2017

DENNIS NGAU BONIFACE.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. E. Boke SPM

delivered on 18th October 2017 in Kibera CM CR. Case No. 1208 of 2017)

JUDGMENT

The Appellant, Dennis Ngau Boniface, was charged with the offence of robbery with violence contrary to Section 295 as read with Section 296(1) of the Penal Code. The particulars of the offence were that on 9th May 2017 at Kibera Laini Saba within Nairobi County, the Appellant, jointly with others not before court, threatened to shoot and thereafter robbed Ann Warema Kimani of her property being a bag containing an Itel phone worth Ksh.3,000/-, two rings worth Ksh.5,000/-, identity card, Co-operative Bank ATM card, Ksh.5,000/- in coins and one Ksh.1,000/- note. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged and sentenced to death. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial court for failing to properly analyze the entire evidence on record in arriving at its decision. He opined that his conviction was based on a defective charge sheet. He was aggrieved that the trial court failed to warn itself of the dangers of relying on the evidence of identification to convict him. He asserted that his conviction was based on the evidence of identification which was not watertight since an identification parade was not conducted. He took issue with the fact that the trial magistrate failed to acknowledge that the evidence by the prosecution was full of contradictions. The Appellant faulted the trial court for failing to properly evaluate his *alibi* defence in arriving at its decision. He was of the view that the trial court improperly shifted the burden of proof to the defence. He was aggrieved that the trial court failed to put into consideration the fact that he was a minor when the offence was committed. He opined that the sentence meted by the trial court was harsh and excessive in the circumstances. In the premises therefore, the Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to court written submissions in support of his appeal. He urged the court to allow his appeal. This court also heard oral submission made by Mr. Nandwa for the Appellant and Ms. Kimaru for the State. Mr. Nandwa was of the view that the prosecution failed to establish its case against the Appellant to the required standard of proof beyond any reasonable doubt. He stated the prosecution case was inconsistent with regard to the Appellant's arrest and items allegedly recovered from the Appellant at the time of his arrest. He submitted that the Appellant's identification by PW1 and PW2 was not credible. He asserted that PW2 stated that she raised alarm during the robbery but no one came to her rescue. Counsel for the Appellant averred that the evidence of identification was not watertight. The police failed to conduct an identification parade when the Appellant was arrested.

Counsel for the Appellant further submitted that the complainant produced into evidence a receipt to establish ownership of the mobile phone that was stolen from her. The said receipt, however, did not indicate her name as the purchaser but contained the name of one Stephen Kimani. The prosecution did not inform the court who the said Stephen Kimani was. He averred that reasonable doubt was raised on whether the complainant owned the recovered mobile phone. He submitted that the Appellant was convicted on the basis of a defective charge sheet. He was charged under the wrong section of the law which caused the Appellant miscarriage of justice. He averred that the Appellant was a minor at the time the offence is alleged to have been committed. He stated that the trial court ought to have taken the fact into consideration, as well as the period the Appellant spent in remand custody, when it sentenced him. In the premises, Counsel for the Appellant urged this court to allow the Appellant's appeal.

Ms. Kimaru for the State opposed the appeal. She submitted that PW1 narrated to court how three men came to her place of business. The Appellant was one of the men who took her handbag. They threatened to shoot her if she did not remain silent. The robbery occurred in broad daylight. Learned State Counsel averred that PW2 who was at the scene, corroborated PW1's testimony. She opined that there was no need for an identification parade to be mounted since PW1 recognized the Appellant. She stated that he was a regular customer. Ms. Kimaru further averred that ingredients of the offence of robbery with violence were established by the prosecution to the required standard of the law. The complainant was robbed by more than one person. The assailants also threatened to shoot the victim if she resisted the robbery.

With regard to the Appellant's age, Learned State Counsel submitted that the Appellant, at the time of taking plea told the court that he was born on 4th May 1997. He was therefore 20 years old. She was of the view that the age assessment report was inaccurate. She averred that the contradictions in the prosecution's case were immaterial and that the evidence against the Appellant was cogent and credible. She therefore urged the court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows: PW1, Ann W. Kimani, is the complainant. She stated that she operated a shop at Kibera, where she leased video games. On the material day of 9th May 2017, she was at work together with her employee, Phyllis Njoki Ireri (PW2). At about 2.00 p.m., three men came to her shop. The Appellant was one of the said men. He stood at a corner inside the shop. The second man stood at the door and the third stood in the middle of the shop. The man who was standing in the middle was smoking a cigarette. PW1 asked him to smoke outside. He left the shop and put out his cigarette. When he came back inside shop, he asked the Appellant..*"ni huyu, ni huyu, ni hapa ni hapa?" (meaning "is she the one? Is this the place?")*. The Appellant signaled him to be quiet.

The Appellant then came to where she was and took her handbag. When PW1 asked why he was taking her bag, he threatened to shoot her if she did not remain silent. The three men then left the shop. PW1 shouted for help but no one came to her rescue. She stated that her handbag contained Ksh.4,000/- in coins, one Ksh.1,000/- note, her identity card, her phone make Itel, two rings and an ATM card. She called a police officer from Ngumo who advised her to close the shop and come back the next day. The following day, while she was on her way to the shop, PW2 called her and informed her that she had spotted one of the men who robbed them the previous day. She called the police who went to the shop and arrested the Appellant. PW1 met them at the police station. She identified the Appellant as one of the men who robbed her. She testified that she had seen the Appellant prior to the robbery as he was one of the men who came to play video games at her shop. She produced in evidence a receipt for purchase of the phone dated 10th April 2017.

PW2, Phylis N. Ireri, was employed by PW1 at her shop. She stated that on the material day at about 2.00 p.m., three men came to the shop. One stood at the door, another at a corner inside the shop and the third man in the middle of the shop. The man who was standing in the middle was smoking a cigarette. They asked him to smoke outside the shop. He left the shop and put out his cigarette. He then came back inside and asked the Appellant in Swahili if that was the place. The Appellant told him to be calm. He then walked to where PW1 was and took her handbag. When PW1 asked why he was taking her bag, he threatened to shoot her if she did not keep quiet. The three men then left the shop. They raised an alarm but no one came to their help.

The next day, the Appellant came to the shop. He peeped inside and then went outside to make a call. PW2 immediately called PW1 and informed her that one of the men who robbed them the previous day was at the shop. PW1 called police officers who came to the shop and arrested the Appellant. PW2 stated that on the day of the robbery, the Appellant had earlier that morning come to the shop and caused chaos before leaving.

PW3, Cpl. Joseph Kisang, and PW4, Sgt. Joseph Cheboi, were attached to Golf Course AP Post at Kibera. On 9th May 2017, they were on patrol duty in Kibera. PW1 called PW4 and informed him that three men had come to her shop and stolen her handbag. He instructed her to go to the police post and make a report of the same. The next day, PW1 called PW4 at about 2.30 p.m. She told him that one of the men who had robbed her had been spotted near her shop. PW3 and PW4 went to PW1's shop. They found PW2 who pointed out the Appellant. They arrested him and took him to the police post. He denied robbing the complainant. They recorded his statement and transferred him to Capitol Hill Police Station.

PW5, Kennedy Ochola, investigated the case. He was based at Capitol Hill Police Station. He was assigned the case on 11th May 2017. The Appellant was in custody. He interviewed the witnesses and the Appellant and recorded their statements. PW1 and PW2 told him that three men came to her shop and stole her handbag which contained money, a phone, her identity card, ATM card and two rings. They identified the Appellant as one of the men who robbed PW1. After his investigations, he proceeded to charge the Appellant with the present charge.

When the Appellant was put on his defence, he opted to give unsworn evidence. It was his testimony that on 10th May 2017, he left the house at about 1.00 p.m. He was going to play football. On his way, he met two police officers in civilian clothes. They stopped him and ordered him to raise his hands. They searched him before arresting him and taking him to the police station. He was not informed the reason for his arrest. He was later arraigned before the trial court.

This being a first appeal, it is the duty of this court to re-evaluate and reconsider the evidence adduced before the trial court before reaching its own independent determination, whether or not to uphold the decision of the said court. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and can therefore not make comment regarding the demeanour of the witnesses (See Okeno vs Republic [1972] EA 32). In the present appeal, the issue for determination by this court is whether the prosecution proved its case on the charges brought against the Appellant to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the evidence adduced before the trial magistrate's court. It has also considered the rival submission made by the parties to this appeal. This court will first address itself on the issue of the defective charge sheet. The Appellant submitted that the charge sheet as drafted was fatally defective as he was charged under the wrong section of the law. The charge sheet indicated that the Appellant was charged with the offence of **robbery with violence** contrary to **Section 295** as read with **Section 296(1)** of the **Penal Code**. These cited sections provide for the offence of robbery. The charge of robbery with violence however, is provided for under **Section 296(2)** of the **Penal Code.**

The test the court ought to apply in determining whether a charge sheet is fatally defective was set out by the Court of Appeal in **Obedi Kilonzo Kevevo v Republic [2015] eKLR.** The Court held thus:

> ***"The test applicable for an appellate court when determining firstly the existence of a defective charge, and secondly its effect on the Appellant's conviction is whether the conviction based on the alleged defective charge occasion miscarriage of justice resulting in great prejudice to the Appellant. In the case of JMA v Republic (2009) KLR 671, it was held inter alia that:***
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> ***"It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the CPC was meant to cure such an irregularity where prejudice to the Appellant is not discernable.""***

The test that the court shall apply is whether the charge sheet contains sufficient information which contained a specific statement of offence which gave the Appellant necessary information to enable the Appellant to mount a defence or challenge to the charge brought against him. In the present appeal, it was clear to this court that the defect noted by the Appellant was not fatal to the prosecution's case. The charge contained information which set out the offence that the Appellant was charged with and was required to plead to. It contained particulars of the charge that the Appellant was being called upon to answer to. The element of robbery in the company of others not before court was brought out in the particulars of the charge. The defect in the penal section of the charge sheet did not prejudice the Appellant. The same is curable under **Section 382** of the **Criminal Procedure Code.** It was clear to this court that the Appellant knew the charge that he was facing. He ably defended himself during the entire trial. The particulars set out in the charge clearly enabled him to defend himself. He was therefore well informed of the charges he faced. This court finds this ground of appeal to be without merit.

> **It was clear from the evidence adduced that the Appellant was convicted on the basis of direct evidence of identification by recognition. This court has a duty to thoroughly examine the evidence on identification before confirming a conviction based on the same. In the case of Wamunga vs Republic [1989] eKLR 426** the Court of Appeal stated as hereunder:-
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> ***"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."***

In the present appeal, PW1 and PW2 were the identifying witnesses. The robbery took place at about 2.00 p.m. It was the complainant's testimony that three men entered her shop. The Appellant was among the said men. The Appellant stood at a corner while inside the shop, the second man stood in the middle and the third man stood at the door. The man who was standing at the middle of the shop asked the Appellant in Swahili whether they were at the right place. The Appellant asked him to relax. He then went ahead and took the complainant's handbag which contained cash and other valuables. The three men then left the premises. PW2 who was inside the shop during the robbery corroborated the complainant's testimony. The complainant stated that she was able to positively identify the Appellant as he was her customer. He used to come to the shop to play video games.

This court is of the view that PW1 positively identified the Appellant. The conditions favouring positive identification were present in this case. The robbery occurred in broad daylight. From the evidence on record, the Appellant and his accomplice, who was standing in the middle of the shop had a conversation before proceeding to rob the complainant. She therefore had opportunity to observe the Appellant and positively identify him. In addition, the identification was by recognition as the complainant had seen the Appellant on previous occasions when he came to her shop to play video games. There was therefore no chance of mistaken identity.

PW2, who was present when the robbery took place, also identified the Appellant as being part of the gang that robbed the complainant. PW2 corroborated the details of the robbery as narrated by the complainant. She told the court that when the three men came in, the Appellant stood at a corner inside the shop. PW2 further testified that the following day after the robbery, the Appellant went back to the shop. He peeped inside and then went out to make a phone call. PW2 immediately called the complainant and informed her that one of the boys who had robbed her was at the shop. The complainant called PW4 who was a police officer.

PW4, in the company of his colleague (PW3) proceeded to the complainant's shop. PW2 pointed out the Appellant. They arrested him and took him to the police station. PW2's identification was also by recognition as she had previously seen the Appellant at the shop. There was therefore no need for an identification parade to be conducted since the evidence of identification was by recognition. PW2 pointed out the Appellant to the police officers who thereafter arrested him. The Appellant was identified by both the complainant and PW2.

Conditions favouring positive identification were present in this case. As stated earlier in this judgment, the robbery occurred in broad daylight. The Appellant was in close proximity to the two prosecution witnesses. PW1 and PW2 had a chance to observe the Appellant before the Appellant and his accomplices robbed PW1. PW1 and PW2's identification of the Appellant was by recognition. This court is of the opinion that the evidence of identification was credible. The Appellant in his defence stated that he lived in Kibera. He stated that he was arrested on 10th May 2017 while on his way to play football. He was not informed the reason for his arrest. His defence is however displaced by that of PW3 and PW4 who told the court that they arrested the Appellant at the complainant's place of business. No evidence was adduced to show the existence of any prior grudge between the two prosecution witnesses and the Appellant for them to frame him with the present charge.

Although the Appellant denied being part of the gang that robbed the complainant, from this court's re-evaluation of the evidence adduced, it was clear to this court that the prosecution established to the required standard of proof beyond any reasonable doubt that indeed the Appellant was positively identified as being a member of the gang that robbed the complainant. The evidence of identification that was adduced by the two prosecution witnesses, especially PW1 and PW2 was watertight. That evidence was of recognition rather than mere identification of a stranger. The Appellant was known to the said witnesses prior to the robbery incident. The Appellant frequented the complainant's shop to play video games prior to the robbery incident. The contradictions pointed out by the Appellant were immaterial and minor and did not dent the cogent and strong evidence adduced to the effect that a robbery occurred and that the Appellant was positively identified as one of the robbers who robbed the complainant's valuables.

In the premises therefore, this court holds that the prosecution was able to establish, to the required standard of proof beyond any reasonable doubt, the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The ingredients of the charge of **robbery with violence** were established. The Appellant was in company of others when he robbed the complainant of her handbag which contained cash, phone and other valuables. The Appellant's appeal against conviction therefore lacked merit and is hereby dismissed.

The Appellant was sentenced to death by the trial court. Following the recent decision by the Supreme Court in **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR**, this court has discretion to re-sentence the Appellant on the basis of severity of the offence, now that the mandatory death sentence has been declared unconstitutional. The Appellant claimed that he was a minor at the time the offence was committed. The Appellant during plea taking told the court that he was 17 years and was born on 4th May 1997. However, if he was born in 1997, that meant he was 20 years old at the time of taking plea. Prior to sentence, the trial court ordered for an age assessment to be done. The age assessment report which was dated 24th October 2017 (6 months after the robbery was said to have occurred) indicated that the Appellant was aged between 18 and 20 years. This court is therefore of the opinion that the Appellant was an adult at the time the offence was committed.

This court has considered the Appellant's mitigation. He is a first offender. It has also taken into account that the Appellant had been in lawful custody for a period of approximately three (3) years since his arraignment before the trial court. In the premises, this court sets aside the death sentence meted by the trial court. The same is substituted by an order of this court sentencing the Appellant to serve three (3) years imprisonment with effect from the date of this judgment. It is so ordered.

DATED AT NAIROBI THIS 6TH DAY OF MAY 2020

L. KIMARU

JUDGE