REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

CRIMINAL APPEAL NO 21 0F 2019

EKIRU EKENO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in CRIMINAL case NO 78 OF 2019 delivered by HON. I. M.WEKESA (SRM) dated on 29th May 2019 in KAKUMA Law Court).

JUDGEMENT.

1. The Appellant was tried of the offence of Robbery with violence contrary to section 296(2) of the Panel Code, found guilty ,convicted and sentence to suffer death, by the Senior Resident Magistrate KAKUMA.

2. Being aggrieved by the said determination, he filed this appeal and raised the following grounds of appeal:

a) His constitutional rights to free and fair trial as stipulated in Article 50(2) (c) of the constitution were violated.

b) The prosecution case was full of hearsay and no exhibits were produced to prove the case.

3. when the appeal came up for hearing before me the Appellant , who was not represented filed an amended grounds of appeal and written submissions , which he relied upon ,while Mr. . Mongare the learned prosecutor, opposed the appeal by way of oral submissions.

SUBMISSIONS.

4. It was submitted by the appellant, that the stolen items were not produced in court as exhibits; neither was the probable weapons used to harm the complainant produced. It was contended that the injuries allegedly sustained by the the complainant were not proved. It was submitted further that vital and essential prosecution witnesses were not called to testify and on the authority of **BUKENYA VS UGANDA (1972) EA 49** an adverse inference should have been made against the prosecution case.

5. It was submitted that the prosecution evidence was not corroborated, as the evidence of PW2 the Doctor did not corroborate that of PW1 the victim and PW3 who was allegedly with him. He contended that he should have been charged with the offence of affray as he fought with the complainant over the proceeds of sale of goats.

6. On behalf of the prosecution it was submitted that the appellant was given sufficient time to prepare for his defense and therefore his constitutional rights were not violated. It was contended that the appellant was properly identified by the complainant .and it was not mandatory to produce exhibits. It was further submitted that the prosecution case was based on direct evidence and not hearsay.

7. This being a first appeal ,the court is under a legal obligation to reevaluate the evidence tender before the trial court to come to its own conclusion ,while giving an allowance to the fact that un like the trial court ,it did not have the advantage of seeing and hearing witnesses. See **OKENO vs. R (1972) EA**

8. The prosecution case against the appellant was that on the 15/3/2019 at 6.00 pm **PW1 EROT EMEYAN** was together with PW3 when the appellant approached them and indicated that he had some goats which he wanted to sell .PW3 showed interest and the appellant agreed to take him to where they were using the complainant motor cycle. They went to the place where they got two goats, on their way back, they ran out of fuel and the appellant refused to pay the agreed fare and abandoned him. He later on returned and attacked him with stones and fist and attempted to gouge out his eye, in the commotion the appellant stole his money cash ksh. 3000 and nokia mobile phone valued at Ksh 2500, before he was rescued by bodaboda riders who were passing by. The following day the appellant was arrested and the complainant identified him at the police station.

9. It was his further evidence that he had known the appellant before then as a boda boda rider and that on the night of the attack there was clear moon light. In cross examination he stated that there was no dispute on the sale of the goats between the appellant and PW3. He denied fighting with the appellant. **Pw3 SIMON NATAPAR**, corroborated this evidence and stated that he bought the appellant's goats and the complainant dropped him at his home as he proceeded with the appellant. PW1 was later on taken to his home where he told him what the appellant had done to him. When he went to the accused home, he threatened to beat him up, he then called the police who arrested him. In cross examination, he stated that it did not take long from the time the complainant dropped him at his home and when he returned back.

10. **PW 2 Dr. ISAAC KOSGEI** a Clinical Officer at Kakuma Mission Hospital examined the complainant and produced P3 Form where he classified the injuries sustained by PW1 as harm and the weapon used to assault him as a blunt object. **PW4 P.C MAURICE SHIKOLI** received the report from PW1 on 15/3/2019. He recorded statements and issued PW1 with P3 Form. On 16/3/219 he found the appellant at the police station having been arrested.

11. When put on his defense, the appellant stated that on 13/3/2019 he was arrested by the police at a busaa den and locked up for five days before being charged in court with an offence he did not understand.

ANALYSIS AND DETERMINATION.

12. From the memorandum of appeal, submissions and the proceedings herein, I have identified the following issues for determination:

a) Was the appellants constitutional rights to free and fair trial violated

b) Was the appellant positively identified

c) Was the prosecution case proved beyond reasonable doubt?

13. On the issue of violation of the constitution rights of the appellant, save for the fact that the same was arrested on the 16 th and taken to court on the 19th, which was outside the 24 hours period within which he should have been presented to court, I am unable to find any other violation of the appellant constitutional right to free and fair trial. From the proceedings, I have noted that the appellant did not raise this issue at the trial so as to give the prosecution an opportunity to offer an explanation for the delay. There are also several authorities of the superior courts which confirms that the mere fact that the appellant was not taken to court within the constitutional timelines does not vitiate the validity of the trial, unless it is show to court that the accused was prejudiced by the said delay, see the case of **JULIUS KAMAU MBUGUA vs. R (2010)eKLR** where the Court of Appeal stated that where an appellant is not produced in court within twenty –four hours it would not lead to an automatic acquittal, but the appellant maybe at liberty to seek damages for the violation. I therefore find no merit on this ground.

14. On the identification of the appellant, it is clear that the same was known to both PW1 and PW3. They were together on the complainant's motor cycle when the appellant was going to show PW3 the goats which he purchased. He left him with the complainant only for the same to report back to him shortly of having been assaulted by the appellant. I am therefore satisfied that the appellant was properly identified by recognition, which was free from error.

15. On proof of the persecution case, the elements of the offence of robbery with violence which the prosecution had to prove beyond any reasonable doubt were clearly set out by the trial court on the authority of **OLUOCH VS REPUBLIC (1985) KLR549** as follows:

a) Stealing something

b) At or immediately before or after uses or threaten to use actual violence

c) Is armed with dangerous or offensive weapon

d) Is in the company of one or more persons.

16. Whereas the prosecution through, PW1 andPW2 proved that the complainant suffered bodily injuries, there was no proof that any item was stolen from the complainant. As submitted by the Appellant, there was no proof that the complainant owned a mobile phone or was in possession of the same at the material time and therefore the trial courts finding thereon was not supported by evidence on record. Further there is a gap in the persecution case on how the appellant was arrested since the arresting officer was not called to testify to corroborate the evidence of PW3. I therefore find and hold that the benefit of this doubt should have been given to the appellant which the trial court failed to so do thereby failing into error.

17. Having reevaluated the evidence tendered before the trial court and in particular that of PW1 andPW2 am satisfied that the prosecution proved the lesser offence of assault causing grievous harm, in exercise the powers confirmed upon this court by section 354(3) (iii) and 179(2) of the Criminal Procedure Code alter the finding of the lower court on robbery with violence and substitute the same with a finding and conviction on the lesser offence of causing grievous harm contrary to section 234 of the penal Code.

18. In the final analysis I allow the appeal on conviction and sentence, set aside the conviction on the offense of robbery with violence, quash the sentence of death and substitute the same with a conviction on the offense of causing grievous harm. Having taken the appellant mitigation and in the absence of presentencing report, having taken note of the injuries sustained by the complainant and the weapon used and the circumstance under which the offence was commuted, I hereby sentence the appellant to imprisonment for a term of four (4) years from the date of the judgment of the lower court that is to say 29/5/2019.

19. Both parties have right of appeal and it is ordered.

Dated signed and delivered at Lodwar through Skype this 12th Day of May, 2020

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Mwaura for the State

Appellant – present

Court Assistant: Maureen/Lotim