REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO. 60 of 2018

(Appeal Originating from Nyahururu CM's Court Cr.No.1345 of 2014 by Hon. A.P. Ndege – S.R.M.)

JOSEPH GICHERU MWANGI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

J U D G M E N T

Joseph Gicheru Mwangi alias Githombothi, the appellant was convicted for the offence of Robbery with Violence contrary to ***Section 296 (2) of the Penal Code*** by ***Hon. A.P. Ndege S.R.M.*** on 14/06/2016.

The particulars of the charge are that on 12/03/2014 at Tumaini Village in Nyandarua County, being armed with dangerous weapons, namely pangas and axes, jointly with others not before the court, robbed ***Beatrice Watima Maina*** of Kshs.12,000/-, two mobile phones, make Nokia, two pairs of ladies shoes, two jackets, two suits all with Kshs.20,000/- and at the time of the said robbery, threatened to use actual violence on the said ***Beatrice Watima.***

The appellant was charged together with ***Sammy Njuguna Muniu*** who was acquitted of the charge, while the appellant was convicted and sentenced to death.

The appellant is dissatisfied with the whole judgment of the trial court and filed an undated petition of an appeal and amended petition of appeal on 25/02/2020. The grounds of appeal are as follows;

1. ***That the court erred by finding that the appellant was properly identified;***

2. ***That the trial court failed to analyze and evaluate the evidence tendered in the trial court;***

3. ***That the conduct of the identification parade did not comply with the law;***

4. ***That the evidence of the witnesses was contradictory.***

Based on the above grounds and written submissions, the appellant prays that the court do quash the conviction, set aside the sentence and set him at liberty.

The appeal was opposed by ***Ms. Rugut***, learned Counsel for the State.

This being a first appeal, it is the duty of this court to examine all the evidence tendered before the trial court afresh, analyze it and arrive at its own conclusions. However, the court has to bear in mind that it did not have the opportunity to see or hear the witnesses testify. The court is guided by the decision of the court of appeal in ***Okeno vs Republic (1973) EA 32*** where the court said;

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya v R [1957] EA 336) 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 (Shantilal M Ruwala v 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 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, see Peters v Sunday Post [1958] EA 424."***

The prosecution called a total of seven witnesses. The complainant ***Beatrice Maina (PW1)*** was in her house on 12/02/2014 about 11.00pm when she suddenly saw people inside. The people put on the electric lights and she was able to identify one, the appellant, who was armed with an axe and panga. The robbers demanded for one million shillings which she denied having and a sword was put to her neck. She had Kshs.12,000/- in the house. They searched the house and found it, took it, clothes, jackets, female shoes, 2 pangas, 3 swords, a black Nokia phone. They then left and locked the door from outside and a servant opened for her. She reported to the chief. On 03/12/2014 she was attacked by thugs again who stole a Nokia mobile phone and another phone from her daughter and Kshs.300/-.

On 06/04/2014, CID officers from Nyahururu called her to Nyahururu and was shown a Nokia Phone, but different from what the police had in court. She could not get the receipts of the phone as the thugs interfered with them; that she was called on an identification parade on 04/04/2014 where she identified the appellant. She said she knew his facial appearance. She was not injured during the robbery. PW1 said that the phone in court was stolen during the second robbery.

Rebecca Wanjiru Maina (PW2) recalled 12/02/2014, about 11.00pm when two thugs arrived at their door when she was closing the door, pushed it and entered, went to PW1's room demanded money and threatened to cut her; that the robbers had a panga and a small axe. She gave them Kshs.1,500/-, a Nokia Phone and one assaulted her on her hand with the small axe and raped her. She did not identify the person as they never put on the lights in her room. On leaving, the robbers locked the door from outside but their servant opened for them. They latter realized that the robbers had also stolen a DVD, two pangas, clothes. She was taken for treatment next day. Thugs attacked them again on 12/03/2014, they stole Kshs.300/- from her and again she did not identify any of them.

Priscilla Njeri (PW3) a daughter of PW1 recalled 12/03/2014 when about 1.00pm when people broke into their house. She was in her room when they entered and demanded for money. They stole her Kshs.2,000/-, Nokia Phone worth Kshs.2,500/- and a DVD. She was not able to see any of the robbers but one slapped her.

Peter Nginyo (PW4) a clinical officer at Ol Kalou District Hospital produced a P3 form for ***Rebecca Wangeci*** who was allegedly raped on 12/03/2014. He found cut wounds on both hands, a fracture to the second finger on the left hand. He also found lacerations to her genitalia 5 o'clock mark and some spermatozoa which was evidence of penetration.

Samuel Kariuki Thiong'o (PW5) a businessman at Ol Kalou testified that on 15/03/2014 while in his shop, a person called Githombothi went to the shop in company of another called Kane; that Githombothi had a phone; that the said Githombothi pleaded that he leaves the phone as security for goods worth Kshs.285/- and that he would come back for it next day but he did not return for it. On 05/03/2014, police found PW5 with the phone and he was arrested and charged. When released on bond, he went in search of Githombothi, traced both Kane and Githombothi. He identified the pone as PMFI 1.

PW6 Cpl Steven Ekirapa, OCS Gigiri Police Station recalled that on 25/05/2014, he was requested to conduct an identification parade in respect of Joseph Gicheru; that the victim identified the appellant although the appellant raised objection that the victim had seen him earlier.

Cpl Paul Omondi (PW7) of CID Nyahururu recalled 20/03/2014 when the case was assigned to him to investigate following a robbery report from Beatrice Watima; that Beatrice was again attacked on 12/03/2014; that 2 Nokia phones were stolen from her and on 05/04/2014 he tracked the phone – serial No. 357259105/084589/1 which had been used by the complainant on No. 0725120902. He found it with Thiong'o PW5 who was charged but traced the owner of the phone; that he organized for an Identification parade where the appellant was identified and he was charged.

When called upon to defend himself, the appellant in his unsworn statement recalled the date of his arrest, that is 26/05/2014. He had slept early and went to the police station next day to look for his landlord at the police station; He met two officers and a journalist, a vehicle came there, stopped where he was and a prisoner came out, passed by him, came back and the prisoner pointed at him alleging he looked like the one. He was taken to his house for investigation, i.e. search was done but nothing was found. He was later arrested and was identified on a parade after doing the parade three times; He protested but was charged.

In his submissions, the appellant argued that PW1 never gave a description of the appellant before purporting to identify him on the identification parade; that PW1 did not indicate in his first report that she was able to identify anybody. He relied on the case of ***Githinji vs Republic (1970) EA 231,*** in which the court said that a parade is valueless if the witness has seen the suspect before the parade is held. The appellant submitted that the parade was held in breach of the Police Standing Orders ***Section 46 (6) (IV) (n).***

The appellant also argued that there were discrepancies in the dates of the attack.

As regards the recovery of the phone with PW5, he claimed to have been left with it on 15/03/2014 yet it was allegedly stolen on 12/03/2014, which is contradictory; that the investigating officer admitted that the phone was never found with the appellant and it was not established who 'Githombothi' is and there is no evidence to prove that he sold the phone to PW5.

In opposing the appeal, ***Ms. Rugut*** submitted that PW1 was able to identify the appellant because there were lights in her room, and later on the parade.

Counsel also submitted that the appellant was found in recent possession of a phone stolen during the robbery; that the recovery of the phone corroborated PW1's evidence as to the appellant's identity; that PW5 knew the appellant and led to his arrest and he did not explain how he came to be in possession of the phone.

Whether the offence of robbery with violence was planned:

The appellant faced a charge of Robbery with Violence contrary to ***Section 296 (2) of the Penal Code.*** To prove the said offence, the prosecution has a duty to establish beyond reasonable doubt the following ingredients;

1. That the attackers were in company with one or more persons; or

2. That the attackers were armed with dangerous or offensive weapons; or

3. That immediately before or after the said robbery the attackers threatened to use or used violence on the complainant.

See ***Oluoch vs Republic (1985) KLR*** the offence of Robbery with Violence is proved even when only one of the above elements is proved. Sometimes all the three elements may exist.

PW1 told the court that two people entered her room, were armed with a panga and an axe. PW2 who was closing the door when the robbers attacked confirmed that they were armed. Although no violence was visited on PW1, PW2 was raped and seriously injured on her hands. She was seen by a Clinical Officer (PW4) and a P3 form produced in evidence to that effect. PW1, 2 and 3 lost phones, money. All the three elements that constitute an offence of Robbery of Violence exist. The court is satisfied that an offence of Robbery with Violence was committed.

Whether the appellant was properly identified:

The robbery took place in the deep of the night about 11.00pm, PW1 and 2 denied seeing the robbers. PW1 is the only identifying witness. The law is that a fact can be proved by the testimony of a single witness ***(Section 143 of the Evidence Act)*** unless a particular statute requires otherwise. However, being the identification evidence of one witness under unfavorable conditions, the court has to take the greatest care and warn itself of the dangers of relying on such evidence as there is possibility of mistake. There is a host of case law to the effect that the court has to exercise great caution in receiving such evidence to ensure that the conditions favoured correct identification. This was considered in the decision of ***Abdalla Bin Wendo & Another vs Republic (1953) 20 EAC 166*** where the court held that, ***"Subject to well known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but the rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favoring a correct identification were difficult."***

The above case was cited with approval in ***Roria vs Republic (1967) EA 583***

In ***Cleophas Wamauga vs Republic (1989) KLR 426,*** the Court of Appeal said; ***"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 are favorable and free from possibility of error before it can safely make a basis of conviction."***

Factors that the court considers in interrogating whether visual identification was positive were stated in ***Republic vs Turnbull & Another (1976) 3 A4 ER 1549.*** The factors include, how long the witness observed the accused, the distance between them, the amount of light; if there was any obstruction between them, etc.

In the instant case, all that PW1 said was that she saw the appellant using electric lights as they robbed her, held a sword at her threatening to injure her and that they ransacked her room. The prosecution did not lead any evidence on the amount of light in the room and the time that PW1 had the robbers under observation. PW1 did not know the appellant before. PW1 did not describe any of the robbers nor did she tell the police that she was able to identify any one of the robbers.

Before I conclude the issue of identification, I must consider the identification parade that was conducted by PW6, IP Steven Ekirapa. The conduct of an identification parade is governed by the Police Standing Orders the National Police Service Act. The purpose of an identification parade was discussed in ***Samuel Kilonzo Musau vs Republic (2014) eKLR,*** as follows;

"the purpose of an identification parade is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify, and for a proper record to be made of that event to remove possible later confusion."

The procedure to follow in the conduct of parades was described in the case of ***R.V. Mwango s/o Manaa (1936) 3 EACA & Ssentale vs Uganda (1968) EALR 365.*** PW6's evidence was merely that PW1 identified the appellant on the parade. One of the appellant's right under ***para. 6 (iv) (a) of the Force Standing Orders*** is that he must be informed that if he requires the presence of a friend or solicitor to be present at the parade, he should do so. PW6 did not say whether he informed the appellant of this right but merely said the appellant had no witness. Another requirement for a fair parade under ***para. 6 (iv) (k)*** is that the witness must be informed that the suspect may or may not be on the parade. There is no evidence that PW1 was informed of that caution. It means that PW1 must have gone to the parade with the knowledge that the suspect must be on the parade.

PW6 told the court that the appellant complained that the witness had seen him before the parade. PW6 never told the court where the witness was waiting before the parade. PW6 merely replied ***"Due care was taken to make sure that the suspect did not come into contact with the witness."*** That reply was not sufficient. In light of the appellants' objection, he should have explained where PW1 was kept as opposed to the appellant and how the complainant moved to the parade. In my considered view, the conduct of the parade did not accord with ***Section 46 of Force Standing Orders the National Police Service Act*** as required and I therefore conclude that the identification of the appellant by PW1 if at all, is in doubt. This is a serious charge and the evidence in support though must be candid and credible and leave no room for doubt.

The appellant was arrested on suspicion that he sold to PW5 a phone stolen during the robbery. PW5 told the court that one 'Githombothi' and Kane took to him the phone on 15/03/2014. PW1 was robbed twice on 02/03/2014 and 12/03/2014. PW5 claimed to have given the appellant goods worth Kshs.258/- and waited in vain for the said Githombothi to come for the phone and that on 05/03/2014 police tracked the phone to him following which he was arrested. PW7 said that in fact he traced the phone to PW5 on 05/04/2014 not 05/03/2014. PW5 led to the arrest of the appellant from his place of work. It means that PW1 knew the appellant quite well.

The question however is whether the phone that was recovered belonged to PW1. PW1 merely told the court that the phone that was recovered and which was shown to her was stolen from her during the 2nd attack. PW1 did not positively identify the said phone, she merely said it was a Nokia. She did not tell the court the IMEI number or Serial Number nor did she disclose her mobile number which had been used in the said phone. To this court's amazement, PW7 said he recovered the Nokia phone which had been registered on phone No. 0725120902 and serial no. 35725105/08589/1. This court has no idea where PW7 obtained the phone number or the serial number from or whose number it is. There was no document or evidence from Safaricom to confirm that the number that was used in the phone was PW1's. The trial court erred in finding that the phone had been proved to be PW1's phone and the one that it is what was stolen during the second robbery.

I find the identification by PW1 to be questionable and not full proof. I also find that there was no proof that the recovered phone was the complainant's so that possession would link the appellant to the robbery.

In the end, I find that the charge of Robbery with Violence was not proved against the appellant beyond any reasonable doubt. The appeal is meritorious, and is allowed. The conviction is quashed and sentence set aside. The appellant is set at liberty forthwith unless otherwise lawfully held.

Dated, Signed and Delivered at *NYAHURURU* this *12th* day of *May,* 2020.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Mwangangi – State Counsel

Soi – Court Assistant

Appellant present