REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei – J

CRIMINAL APPEAL NO. 1 OF 2018

JOSEPH MUTUA MWANTHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence passed by Hon C.A. Ocharo, Chief Magistrate while sitting at Machakos Law Courts in Criminal Case 1096 of 2015 vide judgement delivered on 29.12.2017)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPH MUTUA MWANTHI.....ACCUSED

JUDGEMENT

1. This is an appeal that was lodged herein on **9.1.2018** by the Appellant, **JOSEPH MUTUA MWANTHI**, against the conviction and sentence imposed by the Hon. **C.A. Ocharo**, in Machakos Chief Magistrate's **Criminal Case 1096 of 2015**. The Appellant had been charged before the lower court with the offence of Robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. It was alleged that the appellant on the 12th day of July, 2015 at Ngamba Sub-location, Miu Location in Mwala Sub-county within Machakos County jointly with others not before court and while armed with a dangerous weapon namely a stone robbed a rider **Stephen Sila Mutunga** of Motorcycle Registration KMDC 846F make Skygo valued at Kshs 80,000/- and immediately before or immediately after the said robbery used actual violence to the said **Stephen Sila Mutunga**.

2. The Appellant, having denied the allegations against him before the lower court, was taken through the trial process and a Judgment was subsequently rendered by the trial magistrate on 29.12.2017**.** The Appellant was found guilty of the offence of robbery with violence and was convicted thereof and sentenced to serve 15 years' imprisonment in respect of the main count on. Being aggrieved by his conviction and sentence, the Appellant preferred this appeal that challenged the decision of the trial court on the following grounds:

a) The prosecution case against the appellant was not proved beyond any reasonable doubt;

b) His defence was dismissed contrary to Section 169 of the Criminal Procedure Code.

c) That the appellant was not properly identified.

d) That the prosecution evidence was marred with contradictions and inconsistencies that went to the root of the prosecution case.

e) The charge sheet was defective.

f) Crucial witnesses did not testify.

g) The trial court erred in relying on the doctrine of recent possession.

h) That the sentence be reduced.

3. Accordingly, the Appellant prayed that appeal succeed in its entirety, the conviction be quashed and sentence set aside.

4. In his written submissions, the appellant submitted that the charge sheet did not conform with the evidence adduced by the prosecution. According to the appellant, the charge sheet indicated the value of the motorcycle as Kshs 80,000/- whereas during trial it came out that the motorcycle was purchased at Kshs 75,000/-. In placing reliance on the case of **Juma v R (2003) eKLR** and **Jason Akumu Yongo v R (1983) eKLR** the appellant urged the court to hold that the charge sheet was defective. The appellant submitted that the court relied on computer printouts that were not supported with any certificate from the maker. It was his argument that he was not identified. He pointed out to court that whereas the victim in the charge sheet was indicated as Stephen Sila Mutunga, Pw1 was not the named victim as he was Stephen Sila Muthoka. The appellant submitted that there was no evidence of recovery of stolen items and that there was no inventory that was prepared in relation to the alleged stolen motorcycle. The appellant challenged the lack of an identification parade.

5. The appeal was opposed by the State. Counsel submitted that the prosecution proved its case to the required standard and in placing reliance on the case of **David Muchiri Gakuya v R (2015) eKLR** submitted that the evidence of Pw1 was to the effect that he was attacked by the appellant who disguised himself as a customer and that he saw the appellant driving away his motorcycle. It was submitted that the doctrine of recent possession could be relied upon where possession has been positively proved. Counsel relied on the case of **David Mugo Kimunge v R (2015) eKLR**. On the issue of whether the charge sheet was defective, reliance was placed on Section 134 of the Criminal Procedure Code and the case of **Sigilani v R (2004) 2 KLR** and it was submitted that the statement of offence and the particulars on record were stated in an unambiguous manner and as such the appellant was not prejudiced. Further, that the appellant's contention could be cured under Section 382 of the Criminal Procedure Code and that the same could not found a ground to render the trial a nullity.

6. On the issue of crucial witnesses, counsel placed reliance on Section 143 of the Evidence Act and the case of **Bukenya & Others v Uganda (1972) EA 549** and submitted that this ground lacked merit. Counsel urged the court to dismiss the appeal and uphold the conviction and sentence of the trial court as the trial prosecutor proved his case beyond reasonable doubt.

7. I have given careful consideration to the appeal and taken into account the written submissions made herein. I am mindful that, in a first appeal such as this, the court is under obligation to reconsider the evidence adduced before the lower court and come to its own conclusions thereon. In **Okeno v Republic [1972] EA 32,** the Court of Appeal for East Africa expressed this principle thus:

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...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 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..."***

8. The prosecution called a total of four witnesses before the lower court in support of their case. **PW1, Stephen Sila Muthoka** testified that he is a boda boda operator and that on the material day the appellant approached him on the pretext of being a customer and he lay ambush on him while he was on his way to pick up the appellant. He testified that with the help of motorcycle headlights he was able to see the appellant who was in the company of persons who threw a stone at the motorbike he was riding and that he fled for safety leaving the motorbike in the hands of the attackers and that the appellant was conveniently able to ride off with it. He testified that he reported the matter to the police station and that the police were able to locate the motor cycle in Makindu a day later.

9. The prosecution sought to substitute the charges with the instant charge and the appellant was given opportunity to plead to the new charges that he denied. On cross examination, Pw1 testified that he was able to identify the appellant from the clothes he was wearing, having interacted with him earlier in the day.

10. Pw2, **Pc Francis Korir** formerly of Muthetheni Patrol base told the court that on the material day he received a report from a motorcycle rider of a stolen motorcycle. He testified that the motorcycle was tracked down at Makindu when someone attempted to sell the same at a throwaway price of Kshs 25,000/-. He testified that the motorcycle rider was confirmed as Stephen Sila and that the attacker was reported as wearing a pink T-shirt hence the appellant was arrested while wearing the same pink T-shirt on the following day after the theft. He testified that the logbook of the motorcycle was in the name of Makindu Motors however who had sold the same to Patrick Musyoki Mutunga. On cross examination, he testified that the appellant was arrested as he attempted to sell the stolen motorcycle.

11. **Pw3**, **APC Patrick Musyoki Mutunga** told the court that on 12.7.2017, he received a call from his brother, Stephen Sila that the subject motor cycle had been stolen from him by a person purporting to be a customer who laid ambush on him as he went to pick him up. He testified that he had purchased the motorcycle from Makindu Motors at Kshs 75,000/- and tendered the sale agreement and the log book in court.

12. **Pw4, Pc Samson Mailu** told court that he received information that a motorbike was being sold at Kshs 25,000/- at Makindu area. He told the court that he posed as a customer and was able to arrest the appellant and later discover that the motorbike was reported as stolen at Muthetheni area. That was the close of the prosecution case. Thereafter the court found that a prima facie case had been established against the appellant and who was put on his defence.

13. In his defence, the Appellant gave sworn evidence to the effect that he was working at Makindu with China Roads and was arrested at 3.30 pm when he was outside a hotel. He denied commission of the offence.

14. The trial court found that the appellant was unable to explain why he was found in the possession of a stolen motorcycle. The court dismissed the appellant's defence and found that the ingredients of the charge had been proven and found the appellant guilty as charged. It

was this decision that prompted the instant appeal

15. From the foregoing summary of the evidence adduced before the lower court, the pertinent questions to pose in this appeal as grounded in the Appellant's grounds of appeal are:

> **[a]** ***Whether sufficient evidence was adduced before the lower court to prove the ingredients of the offence of robbery with violence to the requisite standard;***
>
> ***[b] Whether the trial court went into error in failing to consider the appellant's defence.***
>
> ***[c]Whether there were procedural infractions in the trial regarding the propriety of the charge sheet, the propriety of the judgement and whether the same could vitiate the trial.***
>
> ***[d] whether this court can review the sentence downwards.***

16. Having looked at the provisions of section 295 as read with section 296(2) of the Penal code, it can be elicited that in a case of robbery with violence, the prosecution must prove beyond reasonable doubt that:

> (i) There was theft of property;
>
> (ii) There was violence involved;
>
> (iii) There was a threat to use a deadly weapon or actual use
>
> of it; and
>
> (iv) The accused took part in the robbery.

17. I shall address myself to the elements of the offence in performing the duty of the 1st appellate court. As to whether there was theft of property, there is evidence of Pw3 that his motorcycle was reported missing by Pw1 on account of a robbery against Pw1 that was reported to have occurred on 12.7.2015. I have not seen an inventory of the lost item and this raised doubt as to whether the items were recovered. However, the evidence of Pw1, Pw3 as well as the exhibits that were tendered by the arresting officer who testified as Pw4 prove the element of asportation of property from one location to another. In these circumstances, I find as a fact that the prosecution has proved beyond reasonable doubt that theft was committed on 12.7.2015 to the prejudice of PW1 and Pw3.

18. As to whether or not there was violence, Pw1 testified that he was pelted with stones. There is no evidence of injuries sustained but there is evidence that Pw1 was distressed and scampered for safety. It is my considered opinion that there were acts of the appellant upon Pw1 that amounted to violence within the meaning of section 295 of the Penal Code and I see no reason to disbelieve Pw1's evidence. Though he is a single witness, I am satisfied that he was telling the truth. I find that the second ingredient of the offence has been proved beyond reasonable doubt.

19. This leads me to the issue of whether or not there was use of an offensive weapon or a threat to use it. A deadly weapon is defined in section 89 (4) of the Penal Code as means any article made or adapted for use for causing injury to the person, or intended by the person having it in his possession or under his control for such use. From the prosecution evidence, it is not clear that there was use of an offensive weapon. Despite the fact that there was no weapon presented in evidence, I wish to observe that there are exhibits which are not recoverable since the evidence giving a description of the weapon that the assailant was armed with, the nature of damage that was occasioned at the scene is enough and sufficient proof that the assailant was armed. From the prosecution evidence, there is no proof of injury occasioned on the appellant. In this regard, I find that this ingredient of the offence has not been proved beyond reasonable doubt.

20. As to whether the appellant took part in the robbery, the whole issue hinges on the question of identification made by Pw1 as well as the circumstantial evidence.

21. I will start with direct identification evidence as contained in the testimony of Pw1. Pw1 saw the appellant on the material night as he was posing as a customer at 7 pm and got a second look at him when he ambushed him and took off with his motorcycle. His evidence brings into focus the issue of visual identification. In determining the correctness of visual identification, I have taken into account the following factors:

> *(i)* ***The length of time the appellant was under observation;***
>
> ***(ii) The distance between Pw1 and the appellant;***
>
> ***(iii) The lighting conditions at the time; and***
>
> ***(iv) The familiarity of Pw1 with the appellant.***

22. **In Donald Atemia Sipendi v R (2019) eKLR** Justice Mativo observed that in evaluating the accuracy of identification testimony, the court should also consider such factors as:

a) What were the lighting conditions under which the witness made his/her observation?

b) What was the distance between the witness and the perpetrator?

c) Did the witness have an unobstructed view of the perpetrator?

d) Did the witness have an opportunity to see and remember the facial features, body size, hair, skin, color, and clothing of the perpetrator?

e) For what period of time did the witness actually observe the perpetrator?

f) During that time, in what direction were the witness and the perpetrator facing, and where was the witness's attention directed?

g) Did the witness have a particular reason to look at and remember the perpetrator?

h) Did the perpetrator have distinctive features that a witness would be likely to notice and remember?

i) Did the witness have an opportunity to give a description of the perpetrator? If so, to what extent did it match or not match the accused, as the court finds the accused's appearance to have been on the day in question?

j) What was the mental, physical, and emotional state of the witness before, during, and after the observation?

k) To what extent, if any, did that condition affect the witness's ability to observe and accurately remember the perpetrator?

23. As regards the length of time the appellant was under observation, the same was more than a fleeting glance. He saw the appellant twice that night and by the time persons were exchanging numbers they were pretty close hence it can be said that this is enough time for Pw1 to have noticed his attacker. As for the distance between them, they were close enough when they were exchanging numbers. As for the source of light at the time, the act occurred while the head lights of the motorcycle were on. As to the familiarity of Pw1 with the appellant, there was nothing. The appellant told the court nothing that was of assistance to controvert the evidence of the prosecution witnesses. He merely denied committing the offence. However, in my view, there was identification made under favourable conditions. I am of the view that Pw1 had no doubt in the identity of the appellant as the person who robbed him. The appellant's defence did not shake the evidence of the prosecution.

24. The appellant had assailed the court on failure to conduct an identification parade. However, in my view the parade is independent corroborative evidence. The identification having been conducted in favourable circumstances, in my view an identification parade would serve no useful purpose.

25. The appellant in his evidence had not raised any defence and assailed the trial magistrate for dismissing his defence. He only told the court that he did not commit the offence. This did not at all cast any doubt on the prosecution case and hence the trial court properly rejected his defence. In any case he had been found in possession of the recently stolen motor cycle while attempting to sell it.

26. In the instant case, if for arguments sake I were to consider the defence of alibi, I find that the same would not absolve the appellant of culpability. The prosecution adduced evidence proving that the appellant was the perpetrator of the unlawful actions. In this case, the prosecution largely rests on the accounts of Pw1 to Pw4 that placed the appellant at the scene of the crime. I have examined closely the identification evidence of Pw1 and the circumstantial evidence of Pw2 to Pw4 and found it to be free from the possibility of mistake or error and therefore I reject any imputation of a defence of alibi. I am satisfied that there was cogent and consistent evidence which put the appellant at the scene of crime.

27. The appellant had challenged the charge sheet for being defective. Section 134 of the Criminal Procedure Code provides as follows:-

> **"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."**

28. According to the appellant, the defectiveness was that there was variance in the value of the motorbike that was indicated in the charge sheet as against the evidence tendered in court and also in the names of the victim. I am unable to agree with the appellant that the charge sheet was defective because when I look at the charge sheet i find that it set out the elements of the offence; the evidence on record was substantively in tandem with what was indicated in the charge sheet and as a result the court was able to make a finding that the appellant had a case to answer. The appellant was present during trial, heard all the evidence against him and cross examined them at length and thus in my view there was no defect in the charge sheet as to go to the merits of the case or as to vitiate the trial.

29. As regards the issue of electronic evidence, I am unable to see how the court relied on the same. It was the police who used the same so as to try to locate the appellant and therefore I find no merit in this ground raised by the appellant.

30. With regard to sentence, section 296(2) provides for a death sentence. However, I shall address the issue of sentence in view of my finding that proof of the element of use of or threat of use of violence was lacking in the prosecution case. I shall have recourse to section 179 of the Criminal Procedure Code. According to section 179 of *The Criminal Procedure Codet*, when a person is charged with an offence and facts are proved which reduce it to a minor cognate offence, he or she may be convicted of the minor offence although he or she was not

charged with it (see **Paipai Aribu v. Uganda [1964] 1 EA 524 and Republic v. Cheya and another [1973] 1 EA 500**). The minor offence sought to be entered must belong to the same category with the major offence. The considerations of what constitutes a minor and cognate offence were set out in **Ali Mohamed Hassani Mpanda v. Republic [1963] 1 EA 294**, where the appellant was charged together with others with obstructing police officers in the due execution of their duty contrary to s. 243 (b) of *The Penal Code*. The magistrate found the appellant not guilty of the offence charged but convicted him of the minor offence of assault occasioning actual bodily harm, contrary to s.241 of *The Penal Code*. On appeal it was considered whether the magistrate had power to substitute a conviction of the lesser offence and whether that offence must be cognate with the major offence charged. The High Court of Tanganyika held that;

> "***s. 181 of The Criminal Procedure Code (similar to section 179 of The Criminal Procedure Code) can only be applied where the minor offence is arrived at by a process of subtraction from the major charge, and where the circumstance embodied in the major charge necessarily and according to the definition of the offence imputed by that charge constitute the minor offence also, and further where the major charge gave the accused notice of all the circumstances going to constitute the minor offence of which the accused is to be convicted***."

31. Section 179 of the Criminal Procedure Code envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offence and may then, in its discretion, convict of that offence. In the instant case, the only distinction between the offence of robbery with violence c/s 295 as read with section 296(2) of *The Penal Code* and robbery c/s 295 as read with Section 296(1) of *The Penal Code*, is that the former requires proof of being armed with a dangerous weapon whereas the latter does not. Therefore by a process of subtraction, the offence of robbery c/s 295 as read with section 296(1) of *The Penal Code* is minor and cognate to that of robbery with violence c/s c/s 295 as read with section 296(2) of *The Penal Code,* and a person charged with the latter offence and facts are proved which reduce it to the former, he or she may be convicted of the minor offence although he or she was not charged with it. The circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by that charge constitute the minor offence also. The charge under section 295 as read with section 296(2) of *The Penal Code* gave the appellant notice of all the circumstances going to constitute the offence under section c/s 295 as read with section 296(1) for which I so convict.

32. I have discounted the offence of robbery with violence c/s 295 as read with section 296(2) of *The Penal Code,* only because of absence of a medical report to aid in classifying the weapon that was used and had the trial magistrate properly directed herself, she would have come to the same conclusion. Hence the trial court ought to have convicted the appellant under section 295 as read with section 296(1) of the Penal Code. Under section 296(1) thereof the appellant ought to have been sentenced to 14 years imprisonment. There is thus need to interfere with the conviction and sentence.

33. In the result the appeal partly succeeds the conviction is hereby quashed and the sentence set aside and is substituted with a conviction for the offence of robbery contrary to section 295 as read with section 296(1) of the Penal Code and sentenced to serve **14 years imprisonment** from the date of arrest namely 13.07.2015.

Orders accordingly.

Dated and delivered at **Machakos** this **12th** day of **May, 2020.**

D. K. Kemei

Judge