REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 15 OF 2019

KELVIN GALACHA OPIYO.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

(Being an appeal against both conviction and sentence from original CR. No. 246 of 2016

in the Chief Magistrate's Court at Malindi)

JUDGEMENT

The appellant, **Kelvin Galacha Opiyo**, was charged with the offence of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code. The prosecution alleged that on the 3rd of April, 2016, at around 0400hrs at Via Latten Residence in Malindi Township Area within Kilifi County, jointly with others not before Court, stole several items and immediately during commission of the offence, the appellant assaulted and injured the complainant on her nose with a metallic torch.

He was charged with an alternative charge of Handling Stolen goods contrary to section 322(1)(2) of the Penal Code. The prosecution alleged that on the aforementioned date, time and place, the accused in the course of stealing, dishonestly retained one solex padlock and female handbag valued at Kshs. 3000/= knowing or having reasons to believe they were stolen.

The appellant was convicted and sentenced to 20 years imprisonment of the offence of robbery with violence. Having been dissatisfied by both conviction and sentence, the appellant lodged the instant appeal on the following grounds:

(i) That the charge sheet was defective.

(ii) That the appellant was not positively identified as the perpetrator of the robbery with violence in question.

(iii) That the identification parade was not properly conducted.

(iv) That recent possession was not proved beyond reasonable doubt.

(v) That the case was poorly investigated.

(vi) That his defense was not considered.

I have contemplated the instant appeal within the bounce of **Okeno v R (1972) EA 32 at P. 36; Padya v R (1957) EA 336** and **Shantilal M. Ruwala v R (1957) EA 570).** I have considered the appellant's submissions in support of the aforementioned grounds of appeal and all the relevant material on record. The appeal against both conviction and sentence fails for the reasons to be discussed below.

The ingredients of the offence of robbery with violence are the evidence on the theft, the number of attackers, appellant being armed with a dangerous weapon and that violence was visited upon the complainant. As regards the said ingredients, section 296(2) provides as follows:

"296. Punishment of robbery

(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

(2) If the offender is armed with any dangerous or offensive weapon or is in company with one or more other person or persons, or if, at immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death"

The Appellant complained that he was not properly identified as the perpetrator of the alleged robbery. His argument is that the testimony presented by the prosecution was not free from the possibility of error. He therefore hold the view that he was mistakenly identified as the perpetrator of the robbery in question. The appellant further argued that the incident occurred at the wee hours hence the incident happened in darkness. Thus, in the appellant's view, the conditions which existed at the scene of crime were not favorable for a positive identification.

In view of the above argument advanced by the appellant, it is this court's view that he was properly identified as the perpetrator of the robbery with violence in question. It is clear from the evidence of record the appellant violently took away the complainant's property and ran away. He then chased after and caught immediately after the robbery, with items which belonged to the complainant. The complainant, identified the said items as the ones which had been stolen from her. No credible explanation was given by him as regards how the said goods had gotten into his possession. This is well supported or corroborated by cogent and consistent testimonies of the two security officers who were present at the scene of crime when the appellant was arrested. I find the same to be sufficient evidence to satisfy the threshold required in criminal law. I therefore find that the appellant was properly identified as the perpetrator of the offence in question.

On the ingredient of visiting violence upon the complainant, the evidence on record shows that the appellant visited violence upon the complainant immediately before he forcibly took away her personal property, a handbag. The evidence of PW1 depicts that the appellant assaulted the complainant by hitting her on the nose with a metallic torch. As a result of the attack, she sustained nose injuries.

On whether theft was proved, the complainant testified that she was attacked by a tall and slim male person whom she identified as the appellant. The complainant was robbed of her personal property worth 50,000/= Kenya Shillings. Some of these properties were recovered in the appellant's possession, and he failed to give a plausible explanation or defense on how the property ended up in his possession. In any event, the presumption of recent possession suffices in this case. Therefore there is no doubt whatsoever that theft was proved beyond reasonable doubt.

It must be noted that the ingredients of the offence of robbery set out in terms of section 296(2) of the Penal Code must be ready distinctively as opposed to conjunctively. Thus, whenever any of the aforementioned ingredients has been proved, the offence of robbery with violence has been proved. In this matter, the appellant stole from the appellant and used force of violence to retain the items he stole. There is also no doubt that he was properly identified. I therefore reject the appellant's arguments that the charge sheet was defective, that identification was not positive made and that there were massive contradictions in the prosecution's evidence. I therefore find the appellant to have been properly convicted by the Learned Trial Magistrate.

However, on sentencing, I have noted that the manner in which the offence was not quite aggravated hence 20 years imprisonment may be excessive in the circumstances. The sentence is hereby varied to a period of ten (10) years from the date of arrest.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 14TH DAY OF MAY 2020

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R. NYAKUNDI

JUDGE

In the presence of

1. Ms. Sombo for the state
2. The appellant