REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEALS NO. 69 & 70 OF 2019 (CONSOLIDATED)

LEONARD KIPROP MAIYO..................................1ST APPELLANT

JOSEPH ODUORY...2ND APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(from the original conviction and sentence by Cheruto C. Kipkorir, SRM in Mumias SPMC Criminal Case No.433 of 2018 delivered on 6/6/2019)

JUDGMENT

1. The two appellants were convicted of the offence of robbery with violence and each sentenced to 30 years imprisonment. They were aggrieved by the conviction and the sentence and filed two separate appeals that were consolidated for purposes of hearing and determination. The grounds of appeal raised by the 1st appellant were:-

> *1. That the learned trial magistrate grossly erred in law and facts in basing his conviction and sentence without considering that the charge was incurably defective contrary to section 214(1) of CPC and 134 of CPC.*
>
> *2. That the learned trial magistrate grossly erred in law and facts or she misdirected herself in law by presiding over a trial; that did not meet the threshold of a fair hearing as set under Article 50(2) of the constitution.*
>
> *3. That the learned trial magistrate grossly erred in law and facts by basing his conviction and sentence on discredited, doubtful, contradictive, inconsistent and malicious evidence which was not watertight enough to justify and uphold a safe conviction.*
>
> *4. That the learned trial magistrate grossly misdirected herself in law by convicting the appellant probably because she failed to co-operate with the police.*
>
> *5. That the learned trial magistrate grossly erred in law and facts by erroneously convicting the appellant without giving his defence due consideration but instead shifted the burden of proof to the appellant.*
>
> *6. That the learned trial magistrate grossly erred in law and facts in handing him a harsh and excessive sentence without considering that as a first offender, the intended effect of the sentence can be achieved with a less severe punishment or sentence.*

2. The grounds of appeal for the 2nd appellant were that:

> *1. That the learned trial magistrate grossly erred in law and facts in convicting him without considering that he was not accorded a fair trial contrary to article 50(2) of the constitution.*
>
> *2. That the learned trial magistrate grossly erred in law and fact by basing his conviction and sentence on an incurable detection charge.*
>
> *3. That the trial court erred in believing and admitting the photographic evidence which was not done pursuant to section 78 of the evidence act Cap 80 laws of Kenya.*
>
> *4. That the learned trial magistrate grossly erred in law by placing reliance on flimsy fabricated, discredited, malicious and doubtful evidence of prosecution which was not safe in law.*

5. That the learned trial magistrate erred in law and facts by believing the evidence of PW1 without inquiring into need for corroboration

6. That the trial court did not observe and consider that this was a systematic plan and implemented strategy to implicate him with the crime.

7. That the trial court erroneously believed and accepted the prosecution evidence regarding identification parade without considering that the same was inconsistent with the law under section 46 (6)(iv) of the "Force Standing Orders".

8. That the burden of proof was shifted against the appellant and defence not given due consideration.

3. The grounds of appeal were expounded by the written submissions of the appellants. The state did not make any submissions in the case.

4. The particulars of the charge against the appellant and his colleagues were that on the 20th day of April, 2016 at Manyulia village, Mudeku sub-location in Khwisero District within Kakamega County, jointly with others not before court, while armed with a knife and screw driver, robbed Jairus Maina Mulluka a mobile phone make Samsung valued Ksh. 10,000/= and cash Ksh. 1,700/= all valued at Ksh. 11,700/= and at the time of such robbery with violence wounded the said Jairus Maina Mulluka (herein referred to as the complainant).

Case for Prosecution -

5. The case for prosecution was that the complainant is a resident of Manyulia village in Vihiga County. He was at the material time aged 83 years. That on the material day he was at his home at 9 a.m. in the company of his wife PW2 when two people went to his home while driving a motor vehicle. One of them who was driving the motor vehicle introduced himself as Philip and told the complainant and his wife that they wanted to talk to the complainant's son called Barrack. They told him that Barrack was in Nairobi. After some talk Philip told the complainant that they wanted to withdraw money from an Mpesa agent. He asked the complainant to accompany them to the local market for him to show them where the Mpesa shop was. The complainant agreed. He entered into their vehicle. It is the colleague of Philip who got on the steering wheel that time. They went to the local market. On arrival, the driver turned the vehicle round. They drove back on the route to the complainant's home but they did not stop at the gate of the complainant. They stopped about 70 meters ahead. Another person entered into the vehicle. They told the complainant that Barrack had their money and that they wanted Kshs. 1 million. They started to beat him while threatening him with a knife. They blind folded him. They took his mobile phone and cash Kshs.1700/=. The driver ran away. At some place, the vehicle stalled. The people started to push it.

6. Meanwhile Emmanuel Wandera PW3 was driving his vehicle along Inyanga-Dudi road. He was overtaken by a vehicle that was going at high speed. Ahead he found the vehicle having stalled off the main road. One of the occupants of the vehicle borrowed a rope from him to help them pull the vehicle. He did not have it. One of the occupants left to buy a rope. They helped the driver to push the vehicle. As they did so he saw 3 people on the back seat of the vehicle. One of them was the complainant herein. The complainant started to shout. PW3 went back to his vehicle. He called the area assistant chief PW4 and informed him of the incident. He gave him the registration number of the vehicle. Some young people helped the driver to push the vehicle. The vehicle drove away.

7. On receiving the report the Assistant Chief PW4 called the Officer in Charge Dudi Police Patrol Base Cpl. Machango, PW10 and informed him. PW10 was at the time manning a road block on Busia-Kisumu road. PW4 gave the registration number of the vehicle to PW10. PW10 and his colleagues laid an ambush. The vehicle arrived at the road block and they stopped it at gun point. Two people came out of the vehicle and ran away. They arrested the driver of the vehicle, the 1st appellant. They found the complainant at the back seat. The complainant told them that he had been hijacked by the people. They searched the 1st appellant and found him with the complainant's identity card and pension card in the pocket. They found a knife and a screw driver at the back seat. They escorted the vehicle, the appellant and the complainant to Dudi police post. P.C. Oginga, PW9 of Butere CID office received the report. He went and picked the people together with the vehicle.

8. On the 8/7/2016 P.C. Oginga received a report from the Flying Squad Officers, Eldoret that some suspects had been arrested. He went to Eldoret and picked two people among them the 2nd appellant. He took them to Butere police station. C.I. Janet Itiang PW8 conducted an identification parade on the people. The 2nd appellant was picked by the complainant at the identification parade.

9. The complainant was treated at Butere Sub-County Hospital. He was examined by Dr. Daniel Nashole PW7 who completed his P3 form. He found him with injuries. He classified the degree of injury as harm.

10. It was discovered that the motor vehicle involved in the robbery had been hired by the 1st appellant from a car hire company whose directors were Victor Mugodo PW5 and Philemon Kosgei PW6. The appellants and a third person were charged with the offence. The appellants were convicted. The other one was acquitted. During the hearing the motor vehicle was produced as exhibit. The doctor PW7 produced the P3 form as exhibits, PEx4. The parade officer PW8 produced the parade form for the 2nd appellant as exhibit, PEx.10(b). Cpl. Erick Machongo, PW10 produced the knife and screw driver as exhibits, PEx.14 and 15 respectively.

Appellants' Defences -

11. When placed to his defence the 1st appellant stated in a sworn statement that he was working at Eldoret. That a friend called him and told him that he wanted to hire a motor vehicle. They went to a motor vehicle hire company. Rop sent him money over Mpesa to pay for the motor vehicle on his behalf. That he gave out his identity card and driving licence. Photocopies of the documents were made. He paid the money via Mpesa. They were given the vehicle. Rop then asked him to drive him to Kakamega. He offered to pay him Kshs. 3000/=. He agreed. They passed by Kapsabet road. At Mosoriot they picked a person whom he came to learn is called Kemboi. They went upto

Butere. They were joined by a person who was being called Mwalimu. They spent the night at Sabatia market. On the following day Mwalimu picked them. They drove away. He was the one driving. They left Rop and Kemboi on the way. He and Mwalimu went to a certain home. Mwalimu spoke to the residents in Luhya language. He did not understand the language as he is a Nandi. Mwalimu talked to the old man of the home. The wife to the old man was making a phone call. After about 10 minutes they went back to their vehicle. The old man joined them in the vehicle. He sat at the back seat. The old man told him that they go to the local trading centre. They left the compound. On getting to the centre Mwalimu held the old man and ordered him (the 1st appellant) to drive off. He drove off. They picked Rop and Kemboi on the way. At a certain place the vehicle got stuck. Mwalimu asked for help from the area residents. A pick-up vehicle came along but it did not help them. Mwalimu went away to buy a rope but he did not come back. They managed to pull out the vehicle. He continued driving. On the way he stopped and started to quarrel Rop. Armed policemen then appeared. Rop and Kemboi fled away. He was left with the old man. The old man told the police that he (the appellant) and his colleagues wanted to kill him. He denied that he was part of the plot. He said that he never knew his co-accused.

12. In cross-examination the 1st appellant said that Rop and Kemboi said that the old man's son had their money. That he did not tell the people who were helping them to pull out the vehicle about the incident because he was afraid that they could be attacked.

13. The 2nd appellant stated in unsworn statement that he was running a furniture workshop at Eldoret town. That in May 2016 he was arrested over a complaint by a customer. He was charged over the complaint at Eldoret Law Courts. He was then brought to Butere. An identification parade was organized. He was then taken to court and charged over things he did not know.

Submissions -

14. Both appellants submitted that they were not supplied with copies of witness statements during the hearing to enable them prepare for their defence as required by Article 50 (2)(i) of the Constitution of Kenya. That their right to fair trial was therefore infringed.

15. The appellants further submitted that it was not possible for the complainant to identify them as he was in panic after being assaulted. That the fact that the 1st appellant did not attempt to run away showed that he was not a participant to the robbery.

16. The 2nd appellant submitted that it was not safe to rely on the identification parade as the basis of his conviction. That the trial magistrate relied on the evidence that he was wearing a brown jacket that was found in the vehicle yet he was not found in the vehicle. That the jacket was not in the inventory that was prepared of the things that were recovered in the vehicle. That the trial magistrate held that he was one of the people who was at the complainant's home yet the complainant stated that he entered into the vehicle after the vehicle had gone for a distance of about 70 meters from his home.

17. The 2nd appellant further submitted that the sentence imposed of 30 years was harsh. That the trial court did not consider the time spent in custody awaiting trial. That the court did not also consider that he was a first offender.

Analysis and Determination -

18. This being a first appeal, the duty of the court is to analyse and re-evaluate afresh the evidence adduced at the lower court and draw its own conclusions while bearing in mind that the trial court had the advantage of hearing and seeing the witnesses testify – See **Okeno –Vs- Republic (1972) EA 32.**

19. The appellants in their grounds of appeal contended that the charge on which they were convicted was defective. The appellants were charged with robbery with violence contrary to section 296(2) of the penal code. The particulars of the charge were as set out above.

20. The manner in which charges are supposed to be framed is provided under Section 134 of the Criminal Procedure Code that states that:-

> ***"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 is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged".***

21. The charge in the appellants' case complied with the said provision. The statement of the charge and particulars were stated. The offence with which the appellants were facing was disclosed in the charge. The appellants have not stated what was defective about the charge. It is my considered view that there was no defect in the charge.

22. Article 50 (2) of the constitution provides that:

> ***"Every accused person has the right to a fair hearing that includes right to:***
>
> ***(i) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence."***

The appellants allege that they were not supplied with copies of witness statements during the trial.

23. The 1st appellant was arraigned in court on the 26/4/2016. When his case came up for hearing on 24/5/2016 he sought to be supplied with copies of witness statements. The state counsel reported that the appellant had not been supplied with the same because the complainant had not recovered. They undertook to supply the same to the appellant. His case and that of the other two accused was consolidated on 24/8/2016 when they took plea a fresh. The state counsel then told the court that the 2nd and 3rd accused were to be supplied with witness

statements. He sought for adjournment. On 17/10/2016, the court made an order for the 2nd and 3rd accused (appellants) in the case to be supplied with witness statements. On 29/11/2016 the state counsel reported that the accused persons had been served with copies of charge sheet, P3 form and witness statements. All the accused confirmed that they had been supplied with the same. The 2nd appellant thereupon applied for adjournment to enable him prepare for his defence in view of the documents that had thereupon been supplied to him. The application was granted. On 14/12/2016 the prosecution counsel told the court that the 2nd and 3rd accused had requested to be issued with the investigation diary which they had been issued with. The two confirmed to have been supplied with the same.

24. The 1st appellant was at the time represented by a counsel, **Mr. Melly**. Mr. Melly was in court on 14/12/2016 when the hearing started. He did not complain that he was not supplied with any of the documents. It is clear from the aforesaid that the appellants were supplied with witness statements and other documents that were in possession of the prosecution before the case started. Their allegation that they were not supplied by the same is not borne by the court record. This ground of appeal therefore does not stand.

25. The 1st appellant admits that he was one of those two persons who went to the home of the complainant. He admits that he was arrested in the vehicle that was used to rob the complainant. He admitted that he was the driver of the motor vehicle when they went to the home of the complainant and when the vehicle was intercepted by the police. His identification is therefore not in issue. The question is whether the 2nd appellant was identified as being among the people who robbed the complainant.

26. The complainant and his wife did not know the 2nd appellant before the date of the robbery. Before the court can convict on evidence of identification by a stranger, it has to examine the evidence with great care so as not to convict on evidence of mistaken identity. This was sanctitly stated by the Court of Appeal in **Cleophas Otieno Wamunga –V- Repubic** (1989) eKLR where it was held that:

> ***"……Evidence of visual identification in a criminal case can bring about miscarriage of justice and it is of vital importance that such evidence be examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special needs for caution before convicting the defendant in reliance on the correctness of the identification……."***

27. The wife to the complainant PW2 stated that the 2nd appellant was one of the two people who went to her home. That the 2nd appellant is the one who talked to her. That later on she identified him in an identification parade.

28. The complainant himself in his evidence-in-chief stated that the 2nd appellant entered into the vehicle later on after he had been hijacked. When cross-examined by the 1st appellant he stated that it was the 1st appellant and the 2nd accused (who was acquitted) who had entered into his house. On cross-examination by the 2nd appellant he stated that the 2nd appellant was one of the two people who went to his home. Is it then the 2nd appellant or the one who was acquitted who accompanied the 1st appellant to the home of the complainant?

29. The complainant stated in his evidence that he does not see properly. That he could not remember who among the three people who were before court introduced himself as Philip. That he could not remember properly as to who did what during the robbery. That he could not remember who blindfolded him. He admitted that he did not give the description of the people to the police.

30. The trial magistrate did not carefully consider all the above issues. Neither did she consider the contradictions between the evidence of complainant and his wife as to whether the 2nd appellant was one of the people who went to his home. It was clear from the evidence of the complainant that he could not identify the people if he thereafter saw them. His identification of the 2nd appellant in the identification parade therefore cannot have been reliable. Though his wife claimed to have identified the 2nd appellant in an identification parade, there was no such evidence from the parade officer. There was thereby not sufficient evidence that the 2nd appellant was among the people who robbed the complainant. The 2nd appellant was entitled to an acquittal.

31. There was overwhelming evidence against the 1st appellant that he was in the gang that robbed the complainant of money and mobile phone. The gang was armed with a knife when they robbed him. They injured him in the course of the robbery. There cannot have been any truth in the 1st appellant's defence that he was an innocent driver who had been hired to drive the vehicle. There is no time that he raised alarm when he saw his colleagues robbing the complainant. Even when the pick-up driver PW4 came along he did not raise any alarm. He was therefore part of the gang. His appeal on conviction is without merit and is thereby dismissed.

32. The appeal against the 2nd appellant is upheld. His conviction is quashed and the sentence meted out on him set aside. He is set at liberty forthwith unless lawfully held.

Sentence on 1st appellant -

33. The 1st appellant was sentenced to 30 years imprisonment. He urgues that the sentence was harsh and excessive.

34. Section 333 (2) of the Criminal Procedure Code requires a sentencing court to consider the time spent in custody awaiting trial when considering the most appropriate sentence in a case.

35. The 1st appellant was on bond during the hearing of the case. He mitigated at the lower court that he was aged 35 years. That he had a wife and children of tender age.

36. Sentencing is a discretion of the trial court. I have considered some other comparative sentences imposed by courts in recent years in

cases of robbery with violence. In **Juma Anthony Kakai –Vs- Republic (2018) eKLR** where the appellant had been sentenced to death for the offence of robbery with violence in a case where a gang had stolen money and household goods from the victim, the Court of Appeal substituted the sentence with 20 years imprisonment. In **Isaac Kimanzi Musee & 2 Others –Vs- Republic (2019) eKLR** where the appellants had been sentenced to death by the trial court, the High Court re-sentenced them to 20 years imprisonment.

37. The 1st appellant robbed an old man. Though they injured him the injuries were not serious. The value of the stolen property was not much. Duly putting in mind the sentences in the comparative authorities cited above, I am of the considered view that the sentence of 30 years was excessive. The sentence of 30 years is thereby set aside and substituted with one of 20 years imprisonment, the same commencing from the date of sentence by the trial court.

Delivered, dated and signed at Kakamega this 14th day of May, 2020.

J. N. NJAGI

JUDGE

In the presence of:

Mutua for State/Respondent

Appellants – present through video link to Kakamega G.K. Prison

Court Assistant - Polycap

14 days right of appeal.