REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL APPEAL NO. 31 OF 2019

EZEKIAH OMURENDE MUNYENYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence delivered by the Hon L. Kassan

(Senior Principal Magistrate) in Mavoko Senior Principal Magistrate Court

Criminal Case No. 529 of 2015 delivered on 12/03/2019)

JUDGEMENT

1. The Appellant herein **Ezekiel Omurende Munyenya** had been charged with an offence of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code wherein he was convicted and sentenced to serve Ten (10) years imprisonment by Hon. L. Kassan vide a judgement dated 12/03/2019.

2. Being aggrieved by the said conviction and sentence the Appellant raised the following grounds of appeal namely:

> ***(i) That the learned trial magistrate erred in both law and fact by convicting the appellant on evidence which did not meet the minimum threshold as required by law namely proof beyond reasonable doubt.***
>
> ***(ii) That the learned trial magistrate failed to observe and appreciate that there existed a weak link connecting the appellant with the alleged offence.***
>
> ***(iii) That the learned trial magistrate did not adequately consider the appellant's defence.***
>
> ***(iv) That the learned trial magistrate rejected the appellant's defence without sound reasons contrary to section 168(1) of the Criminal Procedure Code.***
>
> ***(v) That there were yawning gaps and inconsistencies that marred the prosecution's case.***

3. This being the first appellate court, my duty is well spelt out namely to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See **Okeno –Vs- Republic [1972] EA 32.**

4. The particulars of the offence as disclosed in the charge sheet is that on the 28th day of June, 2015 at Mlolongo Township Athi River Sub-County in Machakos County the accused **Ezekiah Omurende Munyenya** jointly with others not before the court, while armed with offensive weapons namely stones robbed Denis Mwaka Kivuva of his motor bike registration No. KMDL 262 R make Skygo, cash 18,000/= mobile phone make Huawei and Sahara shoes all valued at Kshs. 125,000/= and at the time of such robbery with violence used actual violence to the said **Denis Mwaka Kivuva.**

5. **Denis Mwaka (PW.1)** testified that he was at the bus stage with his motor cycle waiting for passengers on 30/06/2015 when a certain customer approached him and requested him to ferry him to Phase III near a certain pastor's place. On arrival the customer was joined by

two other persons who viciously attacked and robbed him of the bike and his valuables. During a police identification parade he was able to identify the appellant herein as the person who had hit him. On cross–examination, he maintained that he saw the appellant by the use of security lights at the gate and was able to mark his face quite well.

6. **Justus Mulinge (PW.2)** stated that on 30/06/2015, he got a call from a strange number enquiring if he knew the complainant. It was through that call that he managed to rush to the scene where he found the complainant who is his son already injured. He rushed him to hospital for treatment. He also produced the ownership documents for the stolen motor cycle. He also confirmed that a mobile phone probably belonging to the robbers was recovered from the scene and which was handed over to the police. On cross- examination, he confirmed that there had been security lights at the gate belonging to a certain pastor who had alerted him of the incident.

7. **Samuel Agonga (PW.3)** stated that he was a pastor and that on the material date he was at his house when his dog barked forcing him to approach his gate and with the help of security lights saw three people emerge from a nearby bush and then suddenly heard noise like someone was being attacked. On venturing out of the gate he saw a man who was bleeding and had been tied. He then contacted the victim's father who came to the scene. He also stated that a certain mobile phone was recovered at the scene and which was handed to the police and was later produced as exhibit 4. On cross – examination, he confirmed that he was unable to identify the faces of the three persons.

8. **Wilfred Musembi (PW.4) a** clinical officer testified that he examined the complainant and confirmed the injuries and assessed their degree to be harm. He produced the P.3 form and treatment notes as exhibits 1(a) & (b).

9. **No. 235426 IP Richard Yego (PW.5)** testified that he had conducted the police identification parade wherein the Appellant was positively identified by the complainant. He confirmed that the Appellant had no objection with the exercise and duly signed the parade form which he produced as exhibit 3. On cross– examination he stated that he had carried out the identification parade in accordance with the rules and as far as he was concerned the same was above board.

10. **No.73681 PC. Ezekiel Juma (PW.6)** was the investigating officer. He had stated that he received a mobile phone that had been recovered from the scene of crime. He had the phone analyzed which revealed several calls made to the number 0731233739 on the sim cards. Upon investigations he established the owner of the mobile phone as one Jackson Mutunga and that the Appellant herein had called the said number through his cell phone number 07873965416. The call data also captured one Dickson Obwori and which data he produced as exhibits 6(a) & (b). On cross-examination, he stated that he misplaced the Appellant's mobile phone through which he had contacted him prior to his arrest. He confirmed that the incident took place on 30/06/2015 and that the Appellant led the police in a futile chase for other suspects. He stated that he had the Appellant compelled to participate in a police identification parade where he was positively identified by the complainant. He denied shielding other suspects from prosecution. He also confirmed that accused's confession was not recorded. He also confirmed that the complainant had indicated that the appellant was not one of the two who came to attack him.

11. The Appellant was later found to have a case to answer and was subsequently placed on his own defence. He tendered a sworn testimony. He stated that he was arrested on 21/07/2015 while heading to his place of work. He denied ever being linked to the alleged robbery and further denied being the owner of phone number 07873965416 since he had his own cell phone line and further denied being linked to one Jackson Mutunga and that his mobile phone was seized by the investigating officer who did not even produce it as an exhibit as he misplaced it. On cross – examination he castigated the investigating officer for linking him to the offence upon being misled by one Dickson Mbuvi who was not called to testify. He maintained that he was forced into the parade identification and that the complainant had already been brought to the police cells by the investigating officer prior to the parade. He maintained that he had been forced to sign the parade form. He denied ever escorting police officers to Mukuru Kwa Njenga slums in search of other suspects and the stolen motor cycle.

12. Parties agreed to canvass the appeal by way of written submissions.

13. The appellant submitted that the evidence did not establish that he was in any way linked to the alleged crime. It was also submitted that there was no positive identification of the appellant since the alleged attack took place in a nearby bush at night and hence there was no time for the complainant to register the attackers faces. Reliance was placed in the case of **Republic –vs- Turnbull & Others [1976] 3 ALLER 549.** It was further submitted that the alleged items recovered from the appellant were his personal items and did not belong to the complainant. Finally, it was submitted that the charge levelled against the appellant was duplex and hence infringed the appellant's rights to a fair trial under the Constitution.

14. Mr. Machogu for the Respondent raised three issues for determination namely; whether the prosecution's case was proved beyond reasonable doubt; whether the charge sheet was duplex and fatally defective; whether the appellant's defence was considered by the court. On the first issue, it was submitted that all the ingredients of the charge under section 296(2) of the Penal Code were established and that the complainant positively identified the appellant during a police identification parade. On the second issue, it was submitted that even though the charge sheet indicated section 295 and 296(2) of the Penal code the appellant was not prejudiced in any way since he was able to plead to a charge of robbery with violence contrary to section 296(2) of the Penal Code and that the particulars were unambiguous and that in any case any defects were cured by section 382 of the Criminal Procedure Code. On the third issue, it was submitted that the trial court duly considered the appellant's defence but dismissed it and found that the prosecution's evidence placed him at the scene of crime.

15. I have considered the grounds of appeal, submissions thereon and evidence adduced before the trial court. I find the issues for determination are as follows:

(i) Whether the charge sheet was defective;

(ii) Whether the appellant's identification was proper;

(iii) Whether the prosecution's case had been proved to the required standard of proof.

16. As regards the first issue, the appellant submitted that he was supposed to be charged only under section 296(2) of the Penal Code and that the inclusion of section 295 of the same Act made the charge to be defective and which has infringed his rights to fair trial under the Constitution. A good charge is spelt out under section 134 of the Criminal Procedure Code as follows:

> "***Every charge of 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."***

The above provisions was expounded in the case of **Sigilani –vs- Republic [2004] 2KLR 480** where it held:

> "***The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence."***

I have perused the trial courts proceedings and note that the charge was read over to the appellant in Kiswahili language which was his language of choice. The elements outlined in the particulars of the offence and which were read to the appellant constituted to those of the offence of robbery with violence. Looking at the particulars of the offence it is clear that the same were not ambiguous in any way since the appellant duly pleaded to the charge and went ahead to cross – examine all the witnesses and finally tendered his defence. I do not see any prejudice that he suffered as a result and that if any such prejudice cropped up then the same was curable under section 382 of the Criminal Procedure Code. In this regard, I am persuaded by the decision of the Court of Appeal in the case of **Paul Katana Njuguna –Vs- Republic [2016] eKLR** where it held that as an offence of robbery with violence includes the elements of the offence of robbery, if the particulars of the charge sheet show the elements of the offence of robbery which are proved, then this is a defect that is not fatal and can be cured by the court under section 382 of the Criminal Procedure Code. The trial court record shows that the appellant fully cross-examined the witnesses and did not raise any complaint throughout the trial and went on to tender his defence. I am satisfied that there was no issue of confusion in the mind of the appellant as to the charge framed and the evidence presented against him. I have no doubt in my mind that he faced a charge of robbery with violence proper under section 296(2) of the Penal Code as the evidence tendered pointed to such a charge and not section 295 of the said Act and therefore I find that he was not prejudiced in any way. In any event if any such prejudice sufficed then same was cured by section 382 of the Criminal Procedure Code which provides as follows:

> "***Subject to the provisions herein before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge proclamation, order, judgement or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice; provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."***

17. As regards the second issue, the appellant has submitted that his identification by the complainant was not free from error in that the alleged incident took place at night and away from the alleged pastor's gate. He placed reliance in the case of **Republic –vs- Turnbull & others [1976] 3 ALLER 549.** He also took issue with the manner in which the police identification parade was conducted in that the rest of the parade members had worn suits unlike himself thereby seriously exposing him to be the odd one out. He also took issue with the conduct of the investigating officer who exposed him to the complainant earlier before the parade exercise. On the part of the prosecution it was submitted that there was positive identification of the appellant.

On the issue of identification, the Court of Appeal's decision in the case of **Mwaura –vs- Republic [1987] KLR 645** is relevant. The said court held as follows:

> "***In cases of visual identification by one or more witnesses, a reference to the circumstances usually require a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light."***

Again the Court of Appeal in **Anjononi and Others –vs- Republic [1976- 1980] KLR 1566** held that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of stranger because it depends upon some personal knowledge of the assailant in some form or other.

It is noted that the incident took place past 8p.m on the material date and hence the evidence of identification at such times should be tested with great care and should be absolutely watertight in order to justify a conviction. In the cited case of **Republic –vs- Turnball & Others [1976] 3 ALLER 549** Lord Widgery CJ laid down the circumstances necessary for consideration whenever an issue of identification of perpetrator is in question namely:

> ***(a) How long did the witness have the accused under observations?***
>
> ***(b) What was the sufficiency of lighting?***
>
> ***(c) Was the observation impeded in any way as for example by passing traffic of group of people?***
>
> ***(d) Had the witness seen the accused before and if so, how often?***
>
> ***(e) Were there any special features about the accused?***

(f) How much time elapsed between the original observation and the subsequent identification to the police by the complainant when first seen and the actual appearance?

Again in the case of **Maitanyi –vs- Republic [1986] eKLR** the Court of Appeal stated that in determining the quality of identification of using light at night, it is at least essential to ascertain the nature of the light available, what sort of light available, what sort of light, its size and position from the suspect and the witnesses.

The complainant herein stated that he was at the boda boda stage when a certain customer approached him around 8 p.m. at night to ferry him to Phase III area where he was to visit a certain pastor in the neighbourhood and on arrival two other persons joined in and assaulted him and then robbed him of his motor cycle, mobile phone, shoes and cash. He stated that there were security lights at the pastor's gate and managed to see the appellant's face for around one minute. On being cross- examined, he admitted that he did not indicate in his police statement the issue of having identified the appellant. He also admitted that the attack took place at a nearby bush which was dark and that he was unable to see or identify any of the three attackers. Samuel Agonga (PW.2) a pastor and who lived near the scene stated that he and his son came out of his gate and found the complainant inside a nearby bush having been injured. Both the complainant and the pastor (PW.2) confirmed that the security lights did not extend to the nearby bush. If indeed this was what had obtained, then it is highly likely that the identification of the appellant by the complainant under those circumstances cannot be said to have been free from the possibility of error. In any case the complainant maintained that he had not known the appellant before. The evidence of the investigating officer (PW.6) revealed that he was trying to reach the appellant who was a stranger by way of tracking the mobile phone records but however it turned out that none of those mobile numbers belonged to the appellant and further the appellants mobile phone as well as the sim cards despite being recovered by the said investigating officer were not produced as evidence. The last port of call regarding the identification of the appellant was the police identification parade. The appellant has taken issue with the said exercise and maintained that the parade members all wore suits unlike him and further that the investigating officer had earlier brought the complainant to the police cells for the purposes of identifying him. The police standing orders provides for the procedures for conducting identification parades and which include the following:

(i) The accused has the right to have an Advocate or friend at the parade;

(ii) The witness should not be allowed to see the suspect before the parade and that the suspects on the parade should be strangers to the witness;

(iii) Witnesses should be shown the parade separately and should not discuss the parade among themselves.

(iv) The number of suspects in the parade should be 8 or 10 in the case of two suspects.

(v) All members in the parade should be of similar build, height, age and appearance, as well as of similar occupation, similarly dressed and of the same sex and race.

(vi) Witnesses should be told that the culprit may or may not be in the parade and that they should indicate whether they can make an identification.

(vii) The investigating officer of the case should not be in charge of the parade as the same might heighten suspicion of unfair conduct.

The identification parade exercise was conducted by Inspector Richard Yego (PW.5) who stated that he had carried out the same in accordance with the police force standing orders. The appellant in his sworn testimony maintained that he was placed among pot-bellied persons who wore suits unlike him and that the investigating officer had earlier brought the complainant to the police cells for the sole purpose of identifying him. The appellant further claimed that he was forced to sign the parade form. These assertions by the appellant appears not to have been seriously challenged by the prosecution and which thus created doubts about whether he had been properly identified as one of the robbers. The overzealousness of the investigating officer Ezekiel Juma (PW.6) throughout the investigations left a lot to be desired as it appeared that he was out to nail the appellant by hook or crook just because the appellant's alleged cell phone number had been found among calls made to a certain number retrieved from a mobile phone that had been discovered at the scene yet the appellant strongly denied ownership of such number. The investigating officer did not produce the relevant transcript expressly indicating that the number was registered in the name of the appellant. Again the complainant did not give a full description of how the suspects looked like at the time of lodging the report to the police. The complainant admitted that the incident took place at night and that the assailants had emerged from the dark and attacked him. He also added that the incident had taken him by surprise and which took a short time. Under those circumstances it is unlikely that he was able to capture the features of the suspects in his memory and hence the appellant's claim that the complainant had been aided by the investigating officer during the identification is not far from the truth. Suffice to add that the investigating officer had accompanied the appellant to Mukuru slums in search of the stolen motor cycle and that the complainant must have been roped in during the said search for purposes of identifying the stolen motor cycle. There is a high possibility that the identification of the appellant by the complainant was not positive and safe by any standards as the same cannot be said to have been free from error. I am guided by the Court of Appeal decision in **Criminal appeal No. 52 of 2000 at Mombasa Boniface Okeyo –Vs- Republic** where the court held as follows:

"..... we note also like PW.1, this witness (PW.3) did not give a description of the Appellant to the police at the time of the report. Under these circumstances, we are not satisfied that the identification of the Appellant by PW.3 was positive and safe. We note also that the identification parade was conducted some three weeks after the attack when the witness allegedly identified the Appellant."

I am satisfied that the conditions available at the time of the incident were not that favourable for a proper identification of the appellant by the complainant who confirmed that the incident took place under a minute and which raised doubt as to the observations regarding the physical features of the assailants. Hence the identification of the appellant was not free from error.

18. As regards the third issue, the prosecution was under a duty to establish the elements of the offence of robbery with violence contrary to section 296(2) of the Penal Code. The same provides as follows:

> ***"If the offender is armed with any dangerous or offensive weapons or instrument, or is in company with or more other persons, or is in company with one or more other persons, or if at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or use any other personal violence to any person, he shall be sentenced to death."***

Proof of any of the above ingredients of robbery with violence is enough to sustain a conviction of robbery with violence under Section 296(2) of the Penal Code. The complainant herein stated that he had ferried a customer to Phase III area near the resident of a certain pastor when the customer was joined by two others and who attacked him and then robbed him of the motor bike, mobile phone, cash and shoes. He was assisted to hospital for treatment. Apparently a mobile phone handset was abandoned by the robbers at the scene and which was picked up by the investigating officer (PW.6) who traced one of the calls as having been made by the appellant herein. The appellant vehemently denied that the said mobile number belonged to him as he had his own number. Indeed, the investigating officer seized several items from the appellant which included a mobile phone handset. However, the said investigating officer confirmed that the appellant's mobile handset and sim card had been misplaced and was thus not produced as an exhibit. It seems the investigating officer linked the appellant to the crime because of the mobile call data obtained from the recovered mobile phone at the scene of crime. This version seems to have convinced the learned trial magistrate to rely on circumstantial evidence to convict the appellant purely on the issue of his mobile phone number being among those in the call data. The learned magistrate in his judgement at pages 106 – 107 of the record of appeal stated as follows:

> ***"It goes without saying that the accused's mobile number was used in the recovered phone. Accused does not explain how his mobile call was in the call records of a stolen mobile phone but instead denies that the mobile number was his."***

The appellant in his defence evidence stated that the mobile number claimed by the prosecution was not his own number. Indeed, the investigating officer confirmed having sized a mobile phone handset from the appellant but however did not produce it as exhibit. Again no document was produced which proved that the mobile number in the call data belonged to the appellant. The investigating officer seemed to have relied on circumstantial evidence to link the appellant to the robbery incident using the call data. It is trite law that before a court can draw from circumstantial evidence the inference that the accused is guilty, it must also satisfy itself that there are no other co-existing circumstances which could weaken or destroy the inference of guilt (see **Sawe –vs- Republic [2003] KLR 364.** It is also settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests namely: the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else *(see* ***Teper –Vs- Republic [1952] ALLER 480*** *and* ***Musoke –Vs- Republic [1958]EA 715).***

Applying the above principles and going by the evidence of the complainant, investigating officer and the appellant, what emerges is that the appellant was not positively identified as having been at the scene but is suspected to be linked to the crime by reasons of the fact that one of the calls in the call data records produced is alleged to belong to him. However, the prosecution did not produce any document showing that the appellant was the registered subscriber of the alleged mobile phone number. Again the appellant's mobile phone handset and sim card that had been misplaced at the police station were not produced in evidence. Hence what remained is only suspicion yet suspicion alone however strong cannot sustain a conviction. Clearly the learned trial magistrate went into error when he ruled that the appellant's number was used in the recovered mobile phone and could not explain how his number ended up there. This is because it is not an offence for one's mobile number to be found in another's mobile phone. That fact alone does not per se imply that the appellant was one of the criminals since the owner of the recovered mobile phone was not arrested or traced so as to shed light on his association with the appellant. Indeed, the investigating officer stated in his evidence that the recovered mobile phone belonged to one Mutunga yet he did not arrest him or treat him as a prosecution witness. Further, the investigating officer had difficulty explaining as to why he was unable to call the persons who had allegedly given him the mobile number alleged to belong to the appellant as witnesses. A close scrutiny of the evidence of the investigating officer left no doubt that he was a man out to fix the appellant by all means as he deliberately left out the crucial witnesses. He also blundered when he lost the mobile handset and mobile number belonging to the appellant which could have shed some light regarding the appellant's participation in the alleged crime. The conduct of the investigating officer in leaving out the exhibits recovered from the appellant more particularly the mobile phone handset and sim card left a lot to be desired. It raises questions as to whether the said exhibits were deliberately disposed of or misplaced as their production herein as exhibits would have bolstered the appellant's defence assertion that the mobile number captured in the call data did not belong to him. The appellant in his defence gave out his mobile number and denied that the one in the call data did not belong to him. The prosecution did not manage to discredit the said assertion thereby raising doubt as to whether or not the mobile number in the call data really belonged to the appellant. Finally, there is some discrepancy regarding the correct date of the alleged robbery with violence incident. Whereas the charge sheet indicated the date as 28/06/2015 the complainant including the investigating officer and the rest of the witnesses stated that the incident took place on the 30/06/2015. This was a glaring irregularity and which went to the root of the case. It is trite that for an offence to be properly proved beyond the requisite standard of proof the evidence tendered should support the particulars of the charge. In the present scenario the evidence tendered regarding the date of the incident does not support the charge sheet since the evidence talks of a different date from the one in the particulars of the charge. I am satisfied therefore that the prosecution did not prove its case beyond the requisite standard of proof. Hence the conviction arrived at by the trial court was not safe in the circumstances and must be interfered with by this court as the prosecution's case had not met the requisite threshold of proof. There was clearly some doubt created in the prosecution's case and that such doubt ought to have been resolved in favour of the appellant.

19. As the issue of the conviction has been established in the appellant's favour, a determination on the issue of sentence now becomes moot.

20. In the result it is my finding that the appellant's appeal has merit. The same is allowed. The conviction is hereby quashed and the sentence set aside. The appellant is hereby ordered to be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

Dated and delivered at Machakos this 6th day of July, 2020.

D. K. Kemei

Judge