REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL CASE NO. 68 OF 2018

MOSES MUCHERU MAINA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the conviction and sentence in the Chief Magistrates' court at

Kibera in Kibera criminal case number 907 of 2017, delivered by the Hon. Juma (SPM) on 23.1.2018)

JUDGMENT

The appellant, MOSES MUCHERU MAINA was initially charged before the Chief Magistrates court in Kibera with 2 counts. The first count was of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code. That on 27th day of March, 2017 at Congo Area in Kawangware, jointly with another not before court, while armed with offensive weapon, namely a timber, robbed Grace Muthoni's pub of cash Ksh.34,000 and assorted drinks valued at Ksh.2,000 all valued at Ksh.36,000 and immediately before the time of such robbery used actual violence to the security guard Eliud Njenga.

He faced a 2nd count of assault causing actual bodily harm contrary to section 251 of the penal code. This charge related to the same date, time and the complainant, one Eliud Njenga. Upon his plea of Not guilty, the case against the appellant proceeded to full trial. He was eventually convicted and sentenced on both counts. For count I, he was sentenced to suffer death while on count II, he was sentenced to serve an imprisonment term of 1 year. This was on 23.1.2018. In his submissions, the appellant clarified that upon his application for resentencing, his sentence of death was reduced to a fixed term of 15 years' imprisonment. This court was however not furnished with the said order of resentencing nor the proceedings reflecting the same.

In the memorandum of Appeal filed by the Appellant on 19.4.2018, the appellant has listed several grounds mainly;

1. That the learned trial magistrate erred in law and fact in convicting him based on the evidence of visual identification which was not free from error or mistake.

2. That he was convicted on contradictory and inconsistent evidence.

3. That crucial witnesses did not testify.

4. That the charge sheet on which he was tried and convicted was defective.

5. That his own defence was not considered.

During the hearing of the appeal on 12.6.2020, the appellant did not argue the grounds as filed. He limited his submissions only to a few. First, that he was not properly identified at the scene since the incident allegedly took place at night. Second, he denied having assaulted the witness Eliud Njenga. He pleaded that his sentence of 15 years be reduced and that the period he served in custody be considered in this sentence.

The prosecution opposed this appeal. That the elements of robbery with violence were properly proved before the trial court i.e that he was in company of at least one other, was armed and used actual violence on the complainant. On identification, it was submitted that the security lights were on making it easy the appellant and the other still at large to be properly identified. And that the complainant was in fact injured as confirmed by the doctor (PW1).

And as to the presence of the appellant at the scene, the discovery of his driving licence at the scene proved it. Counsel asked that this appeal be dismissed.

The appellant made in short further reply. Simply that the court had dismissed his explanation about the driving licence. He otherwise confirmed that he and the 1st complaint Grace Muthoni knew each other well for about 10 years and that his resentencing was on 18.12.2018, and that the 15 years' imprisonment meted out was to run from 23.1.2018.

I have considered the submissions from both the appellant and the Respondent (state) sides. This court sits on this matter as a first appeal. In the case of David Njuguna Kariuki versus Republic (2010)eKLR, the court of Appeal reasserted the jurisdiction of the 1st appellant court, thus;

> "*The duty of the 1st appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself came to its own conclusions"*

And in Nelson versus Republic (1970)EA 599, while giving guidance on the scope of revision of sentence that an appellate court may entertain,

> "*The appellate court will ordinarily not interfere with the discretion exercised by a trial judge unless it is evident that the judge has acted upon some wrong principles or overlook some material factors. To this, we would add a third criteria, namely, that the sentence is manifestly excessive in view of the circumstances of the case."*

As an appellant court therefore the jurisdiction of this court is to analyze and evaluate the evidence and finding of the trial court to determine whether the correct decision was arrived at. The appellant herein has summarized his appeal basically on 2 issues, his identification at the scene and whether the complainant number 2 was assaulted as claimed.

On the first issue of identification, a number of salient factors are not in dispute since the same are agreed on by both sides. It is not in dispute that the appellant and both PW2 and PW3 knew each other well and for a long time before this incident on 27.3.2017. There is also no dispute as to the fact that the appellant and other not before the court, had been seen by both PW2 and PW3 at the pub owned by PW2 drinking till late, even remaining locked inside after closing hours. It is then PW3 who opened for them to go home upon finishing their drinks. It is further admitted by the appellant, that his expired drivers licence was later recovered inside the counter at the bar. The same licence was produced at the trial as an exhibit. (Exh.2).

During the trial, it was the evidence of PW2 Eliud Njenga Nganga that he had been woken up by a bang only to identify the appellant and one Kevo as the persons who had gained entry into the bar where he had been sleeping. That the lights were on and he was able to see and recognize the appellant and the other man well. This was at about 2:00am on the same night. The 2 had been those he had seen off as the last customers at the bar at about 11:30pm.

This issue of lighting was taken up by the appellant at length during cross examination of PW2 who strenuously maintained that the security lights were on and so he was able to identify the appellant and the other man. The witness went ahead to describe the actions of the appellant and the man who was with him as they carried out the robbery. Worth noting also is the fact that immediately it was daylight, PW2 readily named the appellant and Kevo as those who had attacked him in the night both to his employer PW2 and the police. He did not hesitate as to the identity of the appellant and Kevo as the ones who had attacked and robbed him.

Despite the cross examination by the appellant, the evidence of PW2 that he was able to identify the appellant well during the incident remained intact. This court is therefore convinced that the finding of the lower court that there was sufficient light enough for PW3 to identify the appellant was proper. And the accuracy of this finding is buttressed by the fact that the driving licence of the appellant was later recovered inside the counter where the theft of the money had taken place.

The appellant gave a defence regarding the recovery of his drivers licence at the counter, that he had given it out to PW2, the owner of the bar for safe custody. When he raised this defence with the witness, she denied the explanation. On my part, I also no convincing reason as to why the appellant would have decided to hand over his driving licence to PW2 to keep. He would have kept it himself. He is a matatu driver and by the nature of his work, he would be expected to carry with him his licence at all times, not to keep it away. Yes, it is agreed that the licence had expired. But it still belonged to him. He must have only failed to have it renewed, but had otherwise carried it with him. This court takes judicial notice that expired drivers' licence are not disposed of or kept away. They are instead renewed for continued use. I therefore do not find any merit in the explanation that appellant gave as to why his licence was found at the scene of this crime. I accordingly agree with the finding of the trial magistrate that the licence must have dropped off the appellant at the scene during the robbery.

On the second count that the appellant faced before the lower court, PW3, Eliud Njenga Ng'ang'a gave a detailed testimony on who the appellant and his accomplice attacked him with pieces of wood. He had been taken to hospital, the following morning. He also obtained a medical examination report (P3 form) which was filled and produced in court as exhibit (exhibit 1) by PW1, Dr. Zephania Kamau. This to me is substantive proof that the said witness (PW3) was in fact assaulted during the robbery incident. The denial of the appellant on this issue is therefore unconvincing and lacking in any merit. I dismiss it.

This notes that the conviction herein was based on the evidence of a single identifying witness (PW3). The trial magistrate, following the directions laid down in Matianyi versus Republic (1986)KLR 198 and Wamunge versus Republic (1989)KLR 424, rightly so, duly warned itself of the appurtenant dangers.

On whether the offence of robbery with violence was properly proved as required by the law, this court is guided by the perimeters set in Oluoch versus Republic (1985)KLR 549, that;

> "*Robbery with violence is committed in any of the following circumstances;*

(a) The offender is armed with any dangerous or offensive weapon or instrument or

(b) The offender is in company of one or more person or persons; or

(c) At or immediately before or immediately after the time of robbery, the offender wounds, beats, strikes or uses other personal violence to any person."

And also the authority in Daniel Muthoni versus Republic (2013)eKLR that proof of any of the 3 elements of the offence of robbery with violence would be enough to sustain a conviction under section 296(2) of the Penal Code.

In the case of the appellant, all the 3 elements were proved. The 2 attackers were armed, they were 2 in number and lastly, they used actual violence on PW3. To that extent therefore, the conviction by the lower court for the offence of robbery with violence was proper. The appeal of the appellant on conviction of counts I and II therefore lack merit and fails.

Lastly on the issue of sentence, it is clear from the proceedings that the trial court on 23.1.2018 sentenced the appellant to death on count I. It has now been deponed to and further submitted by the appellant that upon his application, the trial court on 18.12.2018 resentenced him to 15 years' imprisonment. No records of these proceedings were availed to this court. In passing this order of resentencing, the trial court must have taken into account the mitigation of the appellant including the period he served in custody pending determination of his case. Without the advantages of the said proceedings and giving the appellant the benefit of doubt that he has already been resentenced to serve 15 years' imprisonment, I am convinced that taking into account all the circumstances of this case, I am convinced that the said term of 15 years' imprisonment (on count I) is reasonable.

The appeal filed herein by the appellant Moses Mucheru Maina on 19.4.2018 is hereby dismissed. The appellant to serve 15 years' imprisonment on count I. The same to run from the date of first sentence of 23.1.2018. since count II (sentence of 1 year) has been spent, I make no orders regarding the same. Right of appeal 14 days.

D. O. OGEMBO

JUDGE

10.7.2020

Court:

Judgment read out via Zoom in presence of the appellant and Mr. Mutuma for the state.

D. O. OGEMBO

JUDGE

10.7.2020