REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R. MWONGO, J.

CRIMINAL APPEAL NO. 46 0F 2019

JULIUS NJUGUNA KINYANJUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the judgment of Hon K Bidali CM delivered on 12th November, 2019 in Naivasha CMCR No 729 of 2016)

JUDGMENT

Background

1. The appellant was charged together with one Robert Muniu Gichogu and others not before the court, with robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code. The charge sheet contained nine (9) counts of robbery with violence.

2. In particular, however, the appellant was convicted in respect of Count 7. The charge there was that on 12th March 2016, the appellant jointly with Robert Gichogu and others not before the court, and the two being armed with rifles and knives, robbed Gabriel Mbuthia of Kshs 2,000/-. At the time of the robbery, the two accused used actual violence on Gabriel Mbuthia.

3. Following his conviction, the appellant was sentenced to life imprisonment.

4. Dissatisfied with the judgment, the appellant appealed against conviction and sentence. Being self-represented, the grounds of his appeal are best presented in his own words, as follows:

> ***1) My lords upon receipt and perusal of the original trial courts records and its judgement dated 28/11/2019 [cm] in a case of robbery with violence contrary to section 296(2) of the penal code; where the appellant was sentenced to suffer death; do humbly beg leave to amend the earlier lodged grounds form part of my appeal proceedings;***
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> ***2) That the learned trial magistrate erred in law by convicting and sentencing the appellant on a defective charge sheet under section 295 as read with section 296(2) of the penal code; the charge therefore was duplicitous the appellant should have been charged under section 296(2) of the penal code.***
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> ***3) That, the learned trial magistrate erred in law and in fact by convicting the appellant in reliance of evidence identification by pw4 but failed to note that, pw4 did not state to have identified anyone.***
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> ***4) That, the learned trial magistrate erred in law and facts by introducing his own theories not supported by evidence.***
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> ***5) That, the learned trial magistrate erred in law in misconstruing the circumstances of the arrest of the appellant in connecting him with the purported robbery which by the evidence adduced the appellant had no knowledge of the same.***
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> ***6) That, the learned trial magistrate erred in law by convicting the appellant but failed to critically analyse the appellant's defence.***

5. Parties filed written submissions, and highlights were orally made on 24th September, 2020. At the outset, Ms Maingi for the DPP, took the position that she would concede the appeal. She highlighted her concession submissions in the following words:

"The appeal by Julius is conceded. The Appellant was charged with Robbery with Violence whereby he was convicted. They were charged jointly but he was convicted on Count 7 for robbing Gabriel Mbuthia and he was sentenced to death.

He raises the issue of identification. Upon perusal of the Lower Court record and the judgment I noted Appellant was not identified. In page 24 – 25 of the Record [is] the testimony of PW4 (Gabriel Mbuthia) the complainant in Count 7. In his testimony he said he did not see faces of robbers. He was not cross-examined by either of the Accused persons. This is the count on which he was convicted.

The Trial Magistrate relied on PW5's evidence in respect of Count 6 in which he Appellant was acquitted. I noted that PW5 did dock identification where he said the person he saw resembled the Appellant and the appellant was acquitted in this count so the judgment was not clear in terms of identification and how he was connected to the offence. Therefore I concede that this identification was not water tight as he was not identified by the complainant. Furthermore no identification parade was done in favour of the 1st Appellant and for those reasons I concede. The conviction was unsafe for improper identification."

6. The duty of this court as the first appellate court is ***"to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court."*** (**Okeno v R 1972 EA**). I must then satisfy myself that the evidence meets the standards for proof beyond reasonable doubt in respect of the offence(s) with which the accused is charged.

7. I have carefully perused the record. The complainant in Count 7, Gabriel Mbuthia, testified as PW4. He said he went to work at 7.00am on the material day at *Mele Electricals shop* where he worked. At 8.30pm as he was closing the shop, two men entered hurriedly. One unzipped his jacket and removed a rifle. He pointed the rifle at Gabriel and ordered him to lie down. One of the robbers then entered the counter and removed some cash, about 2,000/-, and left with it. His testimony in chief included the following:

"We had a fluorescent tube electricity light in the shop. It was well lit. there were normal bulbs at the back.

…….

I did not see the faces of the robbers clearly. I was shaken."

Despite the good lighting Mbuthia did not see the accused. In addition, he was not cross examined by any of the defendants, presumably in light of his benign evidence.

8. So what evidence was there against the appellant to lead to his conviction?

9. The trial magistrate, summarized the evidence of PW5 Paul Gitahi Kahagi, who was also robbed on the same night whilst in *Umeme Hardware shop*. His complaint concerned Count 6. He said that at about 8,00pm on the material night three men – one with a leather jacket – entered his shop and started beating them up and stole two phones and Kshs 3,500/-. Testifying in respect of Count 6, he stated that he saw one of the robbers clearly. According to him, the person resembled the Appellant whose face was familiar as he had a mark on top of his left eyebrow. He identified the appellant in the dock as the person who had a mark above his eyebrow.

10. On the strength of PW5's evidence, the trial Magistrate analysed the evidence as follows:

"On cross examination, the witness (PW5) stated that he reported the incident to the police and that he remembered the 1st Accused face clearly

……

On re-examination he said……that he saw the robbers clearly since he faced them when they entered the shop and the incident lasted five minutes. He stated that the same mark he saw on the face of the 1st accused in court was the same one he saw during the time of the robbery"

11. The trial magistrate concluded:

"In Count 7 PW5 stated that he saw one of the robbers clearly. His face was familiar. He identified the 1st accused as one of the robbers citing that he had a mark on the forehead."

As already seen, it is clear that PW5 was the complainant in Count 6 in respect of the robbery at Umeme Electrical shop, for which no conviction was made. Count 7 concerned the robbery at Mele Electricals where PW5 was not present.

12. The trial magistrate then referred to the case of **Joseph Muchangi Nyaga & Another v R [2013] eKLR** in which the Court of Appeal stated the need for the trial court to carefully examine evidence on identification in difficult circumstances noting:

"Evidence of visual identification should always be approached with great care and caution (see Waithaka Chege – v- R {1979} KLR 271). Greater care should be exercised where the conditions for a favourable identification are poor. (Gikonyo Karume & Another – v – R {1900} KLR 23). Before a court can return a conviction based on identification of any accused person at

night and in difficult circumstances, such evidence must be water tight. (See Abdalla bin Wendo & Another – v- R, {195} 20 EACA 166; Wamunga – v- R, {1989} KLR 42; and Maitanyi – v- R, 1986 KLR 198). Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him subsequently."

13. The trial Magistrate also referred to a passage in **John Mwangi Kamau v Republic [2014] eKLR** where the Court of Appeal dealt with the significance of identification parades but also noted the following with regard to dock identification from the case of ***Gabriel Kamau Njoroge –vs- Republic (1982-1988) 1KAR 1134. There the Court had*** observed:-

"A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade."

In this case, the appellant did not go through an identification parade as he declined the one that had been arranged for him as shown in PExb 2. Nevertheless, I note from the exhibit of the failed parade that the complainants in Count 6 and 7 were not present.

14. The trial magistrate, applying the legal principles on identification, stated he was satisfied that:

"….PW5 was in a position to make a favourable identification"

Consequently, the trial magistrate concluded and determined:

"I find the two accused guilty as charged and convict the 1st accused in respect of count 7…."

Since the trial magistrate was satisfied with the evidence of PW5, Paul Gitagi Kihagi, the conviction should presumably have been in respect of Count 6, not 7, but this is not the state's argument.

15. It is clear to me as conceded by the state, however, that the alleged identification by PW5 of the appellant was in respect of Count 7 whilst PW5 was robbed in respect of Count 6 on the same night, was absolutely shaky. There was no connection established beyond reasonable doubt between the robbery in Count 6 and that in Count 7. That should have been done. In my view, there should have been further inquiry connecting the two robberies and not assume they were a series by the same persons on the same night.

16. Finally, the trial court ought to have taken proper heed of the danger of relying heavily on evidence of dock identification where a parade had not been successfully conducted, and corroborative evidence was not readily available.

Disposition

17. Ultimately, and for the above reasons, I find there was reasonable doubt as to the proper identification of the appellant in respect of the offence for which he was charged and had opportunity to defend himself against.

18. Accordingly, I agree with the DPP that the conviction of the Appellant was unsafe, and sufficiently doubtful to require the Appellant to be discharged. I therefore set aside the conviction and sentence of the Appellant. He is therefore to be set at liberty forthwith unless otherwise awfully held.

Administrative directions

19. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams video/tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

20. A printout of the parties' written consent, if any, to the delivery of this judgment shall be retained as part of the record of the Court.

21. Orders accordingly.

Dated and Delivered at Nairobi this 1st Day of October, 2020

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RICHARD MWONGO

JUDGE

Delivered by Videoconference in the presence of:

1. Julius Njuguna Kinyanjui, the Appellant

2. Ms Maingi, for the DPP

3. Court Clerk - Quinter Ogutu