REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CORAM: A.K NDUNG'U J

CRIMINAL APPEAL NO. 4 OF 2018

SAMUEL NDUATI WANJIKU.....1ST APPELLANT

JULIUS MAINA MBUGUA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. A. Mwangi–SRM dated

6th February, 2018 at the Senior Principal Magistrate's Court at Kigumo in Criminal Case No. 432 of 2017)

JUDGEMENT

1. Samuel Nduati Wanjiku and Julius Maina Mbugua (appellants) were charged with **Robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of which were that on the 7th day of April 2017 at about 2210 hours in Bush Baibe bar at Kahariro Trading Centre in Kigumo Sub-county within Murang'a County, jointly robbed Margaret Wangui of a mobile phone, make Techno V8+ valued at Ksh. 8,000 and cash Ksh. 12,450 and at or immediately before or immediately after the time of such robbery, threatened to use actual violence on the said Margaret Wangui.

2. In a judgement dated 6.2.2018, the appellants were convicted of the offence and sentenced to death, in the words of the trial court ***"I sentence the two accused to the prescribed sentence i.e, death penalty".***

3. Aggrieved by conviction and sentence, the appellants lodged this appeal and relied on the following grounds as seen in the petition of appeal;

1. **That we pleaded not guilty to the charge.**

2. **That the learned trial magistrate erred both in law and facts by failing to recognize that there was a second witness in the first report by the name John Iraki who never availed himself to testify hence creating doubt in the whole witness report by the first witness.**

3. **That the trial magistrate erred in law and facts by failing to note that PW 1 surrendered the phone to a police officer at a shopping centre (Kahariro) contradicting evidence testimony that the phone was given to the same police officer at another unspecified place.**

4. **That the trial magistrate erred in both law and facts when she ignored the fact that the complainer claimed to have been robbed by two people she did not recognize.**

5. **That the trial magistrate erred in both law and facts when he denied us the right to defend ourselves and call upon our defense witnesses.**

6. **That the trial magistrate erred in both law and facts by ignoring the report that was presented before him from the sub chief and the owner of the club which was the scene of crime.**

7. **That we felt denied justice because during the entire period of our case proceedings were all in our favour but the harsh judgement was so unfair to us.**

4. The 1st appellant filed some supplementary ground of appeal on the 1.9.2020. These grounds are;

> **1. That the learned trial magistrate erred in both law and fact by believing the evidence of PW 1 and PW 2 which was fabricated hence case not proved to the standard required by law.**
>
> **2. That the learned trial magistrate erred in both law and fact when he failed to summon the area senior assistant chief whose letter stated to the contrary as provided by the provisions of Section 150 CPC.**
>
> **3. That the learned trial magistrate erred in both law and fact by convicting me without hearing from the people who arrested me before handing me over to the police who were essential witnesses.**
>
> **4. That the learned trial magistrate erred in both law and facts when he failed to summon the owner of Bush Baby bar to come and establish the allegations by PW 1.**
>
> **5. That the trial magistrate erred in both law and fact by placing the burden of proof on my defence.**

5. The 2nd appellant filed amended grounds of appeal which are;

> **1. That the learned trial magistrate erred in law and fact by convicting the appellant while misapprehending the evidence on record and consequently failing to analyze the whole case.**
>
> **2. That the learned trial magistrate erred in law and fact by convicting the appellant whereas the prosecution case was riddled with doubts and inconsistencies which went to the root of the whole case.**
>
> **3. That the learned trial magistrate erred in law and fact by failing to appreciate that the prosecution failed to avail the key and essential witnesses who were the only eye witnesses while misapplying Section 143 of the Evidence Act.**
>
> **4. That the learned trial magistrate erred in law and fact by convicting the appellant while the prosecution case was poorly investigated.**
>
> **5. That the learned trial magistrate erred in law and fact by shifting the burden of proof to the appellants while dismissing their defence as a mere sham.**

6. The appeal was canvassed by way of written submissions filed by each of the appellants. The 2nd appellant's submissions were filed complete with legal authorities and are quite elaborate and well articulated. Mr. Waweru for the DPP made oral submissions in response.

7. This being the first appellate court, I am alive to the duty to re-evaluate the evidence afresh with a view to arriving at my own independent conclusions all the while alive to the fact that the trial court had the advantage of seeing the witnesses and observing their demeanour and this court should give allowance to that. This is in line with the holding in **Okeno –vs- Republic (1972) EA 32** , where the court stated;

> ***"The first appellate court must itself weigh conflicting evidence and draw its own conclusion (Shantilala M. Ruwala v. Republic [1957] E.A 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusions. It must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses (see Peters –vs- Sunday Post (1958) E.A 424."***

8. From the petition and the respective grounds of appeal filed, I filter the issues for determination to be;

> **1. Whether the conviction was based on sound evidence.**
>
> **2**. **Whether failure to call some of the witnesses was fatal to the prosecution's case.**
>
> **3. Whether the court shifted the burden of proof.**

9. To answer these questions one way or the other, an understanding of the evidence at trial is crucial. The eye witness account to the incident is narrated by PW 1 who said she was at Saba Saba bar where she worked. The two appellants who she had served earlier in the day came back at 10.10 p.m. The two engaged her over a claim of change arising from sale of cigarettes and condoms to them. PW 1 answered that she was not engaged in the sale of the two products. It is then that the 1st accused entered the counter and started lecturing (sic). The 1st accused was joined by the 2nd appellant in the counter. They threw PW 1 out of the counter. The 1st appellant entered (sic) the cashbox and the 2nd appellant took PW 1's phone. They took away Sh. 12,450.

10. The appellants ran off. PW 1 sought help from one Muturi. They gave chase and the appellants dropped the phone. Muturi picked the phone. It was PW 1's evidence that she was able to see the appellants as they took long in the bar and there was candle light. She had served them earlier in the day. She added that patrons in the bar took off when the appellants became violent. One John was left behind and the appellants attempted to push him out.

11. It is PW 1's evidence that the two were arrested by members of the public who responded.

12. PW 2 testified that he was called by PW 1 and he gave chase after the two appellants. They dropped a phone. The appellants were arrested by members of the public at the lower part of their (appellants') aunt's home. PW 2 on cross examination stated he had been at the subject bar during the day and the 1st appellant had bought him liquor which he (PW 2) took with the 2nd appellant, a brother to the 1st appellant.

13. PW3 testified that he was informed of a robbery report by Corporal Bwire. One Muturi informed them that the robbers had dropped a phone as they ran away. Members of the public arrested the suspects and beat them. PW 1 and Corporal Bwire rescued the suspects and took them to the Patrol base. On his part Corporal Bwire stated he was the investigating officer in this matter. He received a phone from PW 2 and he was told it had been dropped by the appellants. Muturi directed them to where the robbers had run to. Some members of the public went ahead and arrested the suspects. The public beat them.

14. Both appellants denied the offence. The 1st appellant testified that he had come from Nairobi with money to build a house. He had told the 2nd appellant (his brother) to wait for him. They entered a bar. At the bar, the 1st appellant bought beer for PW 2 and others. The 1st appellant hid his Sh. 26,000 in his socks and they left for home only to be accosted by PW 2 and police officers and accused of robbery.

15. The 2nd appellant testified that the 1st appellant came home with an intention to build a house. The hardware where they were to buy materials was not opened. They went to a bar. They drank and left for home only for police officers in company of Muturi (PW 2) to accost them when they were near their home.

16. It is clear from the evidence on record that the only eye witness account was that of PW 1. There is confirmation both by the prosecution witnesses and the appellants that they were at the bar in question on the material day. Indeed the appellants had bought PW 2 liquor at the said bar. In view of the time spent with the appellants at the bar PW 1 could not have had difficulties identifying the appellants.

17. The sequence of events from the time of the alleged entry to the counter, the pushing out of PW 1 from the counter and the taking of money and the phone, the chase and eventual arrest by members of the public and the handing over of the suspects to the police and whom juxtaposed with the appellants narration of the events of the day raises serious gaps in the evidence that were not explained.

18. There was without doubt, the need to call evidence to corroborate the evidence of PW 1 and this would have come from John who was said to be in the bar and at least one of the members of the public who arrested the appellants to explain the circumstances of the arrest and in the process displace the defence evidence tendered. The explanation that John was going abroad as the reason for the failure to call him as a witness is not sufficient. It is not explained when and after how long he left if at all and there is no explanation why any of the members of the public were not called as witnesses.

19. This would have been important for the prosecution, in my view, stemming from the fact that PW 2's evidence required a cautious reception. This was a person who was drinking with the appellants earlier in the day and he coincidentally and in a market centre where there were other people was the only person from whom help was sought to assist PW 1 after the robbery. His evidence would have been given more credence by the calling of at least one member of the public among those who arrested the appellants and who could have shed light on the matter.

19. The Court of Appeal in ***David Mwingirwa v. Republic [2017] eKLR*** citing the case of ***Bukenya –vs- Uganda [1972] EA 549, at 550 to 551*** stated;

> ***"…. It is well established that the director (of public prosecution) has a discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. First, there is a duty on the director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the court itself has not merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case ….Thirdly, while the director is not required to call a superfluity of witnesses, if, he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses if called, would have been or would have tended to be adverse to the prosecution's case. If they had disappeared, the prosecution could easily have called evidence to show that reasonably exhaustive enquiries had been made to trace them without success…."***

21. The import of the decision in ***Bukenya v. Uganda (Supra)*** is that at all times the prosecution has the unfettered discretion to decide what evidence to call in support of their case. The court too, has the legal lee way to call or summon any witness whose evidence it considers essential to the just decision of the case. Ultimately, it behoves on the prosecution to ensure that the evidence called proves their case beyond reasonable doubt. That burden remains on the prosecution until such is discharged.

22. I have analysed the evidence herein. In the words of the court in ***Bukenya v. Uganda*** in the evidence called by the prosecution, that is, PW 1, PW 2, PW 3 and PW 4 was barely adequate. The circumstances of the alleged robbery as explained by PW 1 required corroboration from other direct evidence which was available from one John said to have been in the bar or from the person(s) said to have arrested the appellants as they ran away.

23. Owing to this inadequacy, this court is persuaded that the prosecution needed to do more to bolster their case to achieve the standard of beyond reasonable doubt required in law. They had ready evidence in the form of the presence of the mentioned John or the members of the public who arrested the appellants. The prosecution did not endevour to pursue this evidence. In the end the account of PW 1 on the events of the day and the account of PW 2, a person who was drinking with the appellants during the day are not corroborated and doubts linger as to the culpability of the appellants.

24. When doubts arise, the benefit of doubt must be given to the accused person. In ***Elizabeth Waithiegeni Gatimu v R [2015] eKLR*** the court stated;

> ***"To give the accused the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right."***

25. In her own evidence PW 1 stated that there were patrons in the bar who fled when the appellants became violent. She later in her evidence changes tune and states that only John was in the bar at the time. This is a material contradiction that begs belief. It also opens a gaping gap in the prosecution case. If there were patrons who ran away leaving behind a robbery taking place, how come they never sought help from the nearby bar that was said to be open or from other persons in the locality. Is it possible that they would just leave and go to their homes without qualms despite witnessing the incident of robbery, a serious matter and a crime? I do not think so.

26. I have considered the defence raised by the appellants at trial. Whereas the appellants bore no burden to prove their innocence, the defence put up is on the face of it and required proper interrogation by the trial court. My analysis of the evidence and the summation of the conclusions reached by the trial magistrate clearly demonstrate that the learned magistrate seems to have accepted the prosecution case wholesale without giving any or sufficient consideration to the appellants' defence. The trial court gave the defence short shrift and in a hasty peremptory conclusion stated;

> ***"The evidence given by the prosecution witnesses is corroborative and consistent. The allegations raised by the accused to tarnish the credibility of the witnesses are baseless and the same are dismissed."***

27. This was not the proper way to treat the defence. More so when the appellants raised a significant angle to the matter by exhibiting a letter purportedly written by one Charles W. Ngugi, Senior Assistant Chief Githembe Sublocation dated 27.7.2017 in which the assistant chief claimed that the allegations against the appellants were not truthful and that the complainant had on previous occasions made similar allegations. The court dismissed this letter as lacking in probative value. On my re evaluation of the defence evidence, I am satisfied this casual dismissal of that piece of evidence was unwarranted especially considering the fact that the prosecution evidence and especially that of PW 1 and PW 2 was shaky.

28. In the ***Bukenya Case (Supra)***, the holding was that ***"the court itself has not merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case…."*** Having been confronted by this piece of evidence, and for whatever it was worth, nothing would have been easier than for the court to summon the said Charles W. Ngugi to shed light on the letter and the contents. The task would have been made the more easier by the fact that the said Charles W. Ngugi having been said to be a local administrator, would have been easy to locate and summon.

29. In the final analysis, I am of the considered finding that the conviction of the appellants was not based on sound cogent evidence and was thus unsafe. The failure by the prosecution to call essential witnesses and the failure of the court to rise to the occasion and summon a necessary witness is fatal to the prosecution's case as the court would be entitled to draw an adverse inference thereon. It is further borne out of record that the court shifted the burden of proof on the appellants.

24. With the result that I find the appeal before this court has merit. The same is allowed. The conviction of the appellants is quashed and sentence set aside. The appellants are set at liberty unless otherwise lawfully held.

Dated, Signed and delivered at Murang'a this 11th day of November, 2020.

A.K NDUNG'U

JUDGE