REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 20 0F 2020

SYLVESTER KIMUYU WAMBUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

{Being an appeal against the judgement of Hon. G. Omodho SRM- dated and

delivered on the 9th day of May, 2019 and sentence passed on the 25th day of

June, 2019 in the original Chief Magistrate's Court Criminal Case No. 678 of 2016}

JUDGMENT

The appellant was charged with two counts: **Count I: - Robbery with Violence contrary to Section 296(2) of the Penal Code.** The Particulars of the offence were that on 28th December, 2015 at Ngararia Centre of Gatanga District within Muranga County jointly with others not before court the appellant robbed John Kamau Kabue of safari boots brown in color, mobile phone make Nokia C3 and its charger, one pair of spectacles of black lenses and brown frame all valued at Kenya Shillings 56,000/= and cash money Kenya Shillings 5,000/= and at the time of robbery wounded the said John Kamau Kabue.

On count II, the appellant was charged with assault causing actual bodily harm contrary to Section 251 of the Penal Code. The particulars of the offence were that on 28th day of December, 2015 at Ngararia centre of Gatanga District within Muranga County the appellant jointly with others not before court assaulted John Kamau Kabue, thereby occasioning him actual bodily harm.

After a full trial the appellant was convicted on both counts and sentenced to life imprisonment on Count I and to six months' imprisonment on Count II. Being dissatisfied with the conviction for the offence of robbery with violence, the appellant preferred this appeal. The grounds are: -

> **"1. THAT, the learned trial magistrate erred in law and facts in his failure to observe that the elements that constitute Robbery with Violence were not conclusively proved as required by the law.**
>
> **2. THAT, the learned trial magistrate erred in law and facts when he failed to see that the evidence adduced was marred with contradictions and was uncorroborated.**
>
> **3. THAT, the learned trial magistrate erred in law and facts when he solely relied on the prosecution evidence that did not meet the required threshold i.e. Proof beyond reasonable doubt.**
>
> **4. THAT, the learned trial magistrate erred in law and facts when he refuted my defence without giving clear points of determination.**
>
> **5. THAT, since I cannot recall all what transpired during the trial I will adduce such other grounds at the hearing of this appeal."**

The appellant canvassed the appeal through written submissions. He submitted that he was not supplied with the OB; that there was no compliance with Section 200 of the Criminal Procedure Code hence the trial was a nullity; that he was not accorded an opportunity to access the submissions filed by his Counsel before judgment in contravention of Section 213 and 310 of the Criminal Procedure Code hence rendering the case against him untenable and further that he was not properly identified as the incident occurred between 9.00pm and 10.00pm at night a condition that would render positive identification difficult. The appellant also contended that the trial court did not give good reasons on why it rejected his alibi defence. He submitted that the evidence adduced fell short of the standard required in a trial of this magnitude and was incapable of sustaining a conviction. He urged this court to allow the appeal, quash the conviction, set aside the sentence

and set him at liberty.

Ms. Muthoni, Learned Counsel for the prosecution opposed the appeal. It was her submission that the elements constituting the offence of robbery with violence were proved beyond reasonable doubt. She submitted that the complainant testified that while on his way home at around 10.00pm he was attacked by people who roughed him up and stole his mobile phone, spectacles and shoes all valued at Kenya Shillings 56,000/= and Kenya Shillings 5,000/= which was in his pocket. Miss Muthoni submitted that it is clear from the evidence of PW2 and PW3 that the attackers were three though not armed; that the complainant suffered injuries as per the evidence of PW1, (the clinical officer); that the complainant had a swelling on the left eye and had bled from the nose and had tenderness on his chest.

On identification, Counsel submitted that it was by way of recognition. She contended that the complainant knew the attackers; that it was his evidence that he had known the appellant since 1993 and their homes were half a kilometer apart. She submitted that PW3 corroborated the complainant's evidence as he testified that he saw the complainant and the assailants and gave their names. Additionally, that the area was well lit by electricity even though it was at night. Counsel further submitted that this evidence was not rebutted as the appellant acknowledged knowing the complainant and also stated that there was no grudge between them. Ms. Muthoni urged this court to uphold the conviction and sentence and dismiss the appeal.

I have carefully considered the grounds of appeal, submissions by both parties and authorities cited. The appellant has only challenged the conviction and sentence for the offence of robbery with violence and the following issues arise for determination: -

1. Whether the elements of the offence of robbery with violence were proved beyond reasonable doubt.

2. Whether the provisions of Section 200 of the Criminal Procedure Code were complied with.

3. Whether the trial Magistrate erred in proceeding on the written submissions of the Advocate for the Appellant.

As a first appellate court my duty was succinctly stated in the case of ***Okeno v Republic [1972] EA 32*** that this court must re-consider the evidence before the trial court, evaluate it itself and draw its own conclusion though it should always bear in mind that it neither saw nor heard the witnesses and should make due allowance in that respect.

1. <u>Whether the elements of the offence of robbery with violence were proved beyond reasonable doubt.</u>

Section 296(2) of the Penal Code which creates the offence of robbery with violence states: -

> **"(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."**

The prosecution must first prove theft as it is a central element of the offence. The other elements of the offence were elaborated by the Court of Appeal in the case of ***Ganzi & Another v Republic [2005] eKLR*** to be: -

> **"1. The offender is armed with any dangerous or offensive weapon or instrument, or**
>
> **2. If he is in the company with one or more other persons, or**
>
> **3. If at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person."**

Proof of any one of the above ingredients therefore is enough to prove the offence ***(see also Oluoch v Republic (1985) KLR 549).***

The evidence of the complainant (PW2) is that on 28th December, 2015 at around 10.00pm he was walking home from Ngararia market when he met the appellant and two other persons namely Mwenga and Mulei who assaulted him, stole his mobile phone Nokia C3, spectacles, shoes and Kenya shillings 5,000/= which he had in his possession. This was corroborated by the evidence of PW3 who confirmed that he went to aid the complainant from the assailants upon hearing his screams and found him being attacked by three persons. He testified that the complainant was in a trench and that the attackers fled on seeing him. He also confirmed that the scene was well lit. The element of theft was therefore proved beyond reasonable doubt.

The evidence of PW1 shed light as to the injuries sustained by the complaint during the robbery. Upon medical examination, it was found that the complainant had a swelling on left eye, had bled from his nose and had tenderness on his chest. PW3 also testified that when he rescued the complaint he was bleeding from the face and his shirt had blood. This evidence conclusively proves that the attackers used violence against the complainant. There was also cogent evidence by PW2 and PW3 that the appellant was in the company of other persons at the time of the commission of the alleged robbery. Although the attackers were not armed I find that the elements of the offence of robbery with violence as stated in **Section 296 (2) of the Penal Code** were satisfied and proved beyond reasonable doubt. This is because there was a theft, the appellant was in company with two other persons and during the robbery they used actual violence against the complainant.

In regard to identification, PW2 testified that he recognized the three assailants as he knew them well even by their names. PW3 testified that after hearing the complainant (PW2) scream and after running to where PW2 was, he saw the complainant being beaten by the appellant, Mwenga and Mulei. PW2 and PW3 also testified that although it was at night, the scene of the robbery was well lit by street lights and security lights from a nearby pub. Corporal Mathew Njue (Pw4) confirmed that in his first report to the police the complainant disclosed that

he knew the person(s) who attacked him and that it was he that led police officers to arrest the appellant.

In his defence, the appellant confirmed that he was well known to the complainant. In the case **Anjononi and others Vs. Republic 91976-1980) KLR 1566** it was held that: -

> ***"……When it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other."***

I find that the appellant was positively identified as the perpetrator of the offence.

2. <u>Whether the provisions of Section 200 of the Criminal Procedure Code were complied with.</u>

On this issue, the appellant contended that the trial magistrate proceeded with his case without observing Section 200 of the Criminal Procedure Code. He relied on the case of **Abdi Adan Mohamed v Republic (2017) eKLR** where it was held that: -

> ***"As much as it is practically possible it is highly desirable that the trial magistrate or judge must hear the case to conclusion and ultimately render judgments. It is important for the final arbiter to be in a position to weigh the evidence taken together with his or her observation of the demeanor of witnesses……..in other words section 200 as emphasized in Ndegwa case will be resorted sparingly and only in cases where the exigencies of the case dictates. Even where the trial magistrate has been transferred arrangements ought to be made for him or her to return to the former station to complete the trial, unless in cases where only a few witnesses had testified. In such a case the succeeding magistrate may continue with the trial from the stage it had reached. The provision can also be used where the evidence already recorded is more or less formal or largely uncontroverted……."***

From the proceedings of the lower court it is noted that the court complied with **Section 200 of the Criminal Procedure Code** on 21st November 2017 and in response Mr. Ngala, Advocate for the appellant confirmed that they desired the matter to proceed from where it had stopped but wished that the complainant (PW2) be recalled. This was done. I therefore find it to be untrue that the matter proceeded with total disregard to **Section 200 of the Criminal Procedure Code** as the appellant wants this court to believe.

3. <u>Whether the trial Magistrate erred in proceeding on the written submissions of the Advocate for the Appellant.</u>

On the issue that the appellant did not consent to the written submissions hence the provisions of **Section 213 and 310 of the Criminal Procedure Code** were flouted, the Court of Appeal in the case of ***Fredman James Musinga Vs. Republic (2020) eKLR*** stated that: -

> ***"It is clear from the record that at no point has it been shown that the proceedings were conducted in the absence of the appellant and/or his advocate. The appellant has also not set out before this court any error, omission or inconsistencies that he is disputing in the said written submission which he may have wanted to point out to this court.***
>
> ***Our finding on this issue is that the appellant was well represented by the counsel who requested to file written submissions on his behalf, in open court and in his presence. It is thus our consideration view that this was not fatal to his case and he was therefore not prejudiced at all."***

I am satisfied that the appellant in the instant appeal was not in any way prejudiced by his Advocate filing written submissions on his behalf. I also find that the appellant and his Advocate were both present at all times during the proceedings in the lower court. It is thus my view that the trial court in relying on the written submissions by the Advocate for the appellant did not amount to a violation of the appellant's right to a fair trial and was not fatal to the case and the appellant was not prejudiced in any way.

I have considered the alibi mounted by the appellant and it is my finding that the same could not hold in the face of the cogent and watertight evidence adduced by the prosecution.

The appellant did not contest the sentence imposed by the trial court and the same is therefore upheld and the appeal is dismissed in its entirety. It is so ordered.

Signed and dated this 28th day of October 2020.

E. N. MAINA

JUDGE

Judgement dated and delivered Electronically via Microsoft Teams on this 9th day of November 2020.

MARY KASANGO

JUDGE