REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 58 OF 2018

JUMAA MWAPONDA MRENJE......................APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Being an appeal from the original conviction and sentence in the Principal Magistrate

Court at Kwale Criminal Case No. 188 of 2012 by Hon. E.K. Usui (PM) dated 7th March 2013)

Coram: Hon Justice R. Nyakundi

Appellant in Person

Mr. Muthomi for the Respondent

JUDGMENT

The Appellant was charged with robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were that on 11th August 2010 at Kiteje area, Ngombeni location, Kwale County within Coast region while armed with dangerous weapons namely panga robbed Salim Jabali Mwanidma cash Ksh. 4,500/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence against the said Salim Jabali Mwandinya.

At the end of the trial, the Appellant was convicted and sentenced to death. Aggrieved by the sentence and the conviction of the trial court, the Appellant lodged an appeal on the following amended grounds:

1) ***That the learned trial Magistrate erred in law and fact by finding to find that the charge sheet which I was adduced before court and of which the court relied upon too convict me the Appellant was fatally defective.***

2) ***That the learned trial Magistrate erred in law and fact by failing to find that they key witnesses who were adversely mentioned in the prosecution case were never called to testify.***

3) ***That the learned trial court Magistrate erred in law and fact by failing to find that the Appellant's constitutional rights were greatly violated during the trial of the case.***

4) ***That the learned trial Magistrate erred in law and fact by failing to find that the prosecution case was marred by massive contradictions, discrepancies and invariances.***

5) ***That the learned trial court Magistrate erred in law and fact by failing to find that the requirements of section 211 were not complied with.***

Background

PW1 Salim Mwandinya Jabali, the victim the owner of a hotel told the court that on 10th August 2010 at around 10:00am he left the hotel to go and buy fish when he met with the Appellant, a whom he knew for 6 years as he always borrowed food for his children and further that

PW1had lived in the Appellant's house for a few months. That, the Appellant offered to escort him and they took a matatu and alighted at Mwembe Tayari when the Appellant asked him to escort him to a fundi's place at Likoni which PW1 agreed to.

That they arrived at a place called Kona Mbaya where the Appellant had tea and mandazi. When the Appellant had finished, PW1 started complaining as it was getting late but the Appellant reassured him that they were almost there. That they arrived at house where they met a man. The Appellant and the other man got into the house but PW1 was told to wait outside. That after a while the two men emerged from the house but by this time it was already 5:00pm. That the Appellant and the other man led him to the sea where the other man went into the sea.

PW1 stated that the Appellant took hold of his hand and tried to pull him into the water. PW1 hit the Appellant's hand and took off into the forest. He heard the Appellant chasing after him but he could not see the path as it was late at night. PW1 told the court that he hid in the bushes and it was about 2:00am. That he leaned on a tree and slept. That at around 4:30 the Appellant found him and attacked him with a panga and cut him at the waist, right shoulder and right hand. PW1 stated that he was bleeding profusely and collapsed as he was in and out consciousness. That after half an hour he stood up by which time the Appellant had left. That he came across a house where a man helped him and rushed him to Coast General Hospital where he was admitted for one month.

The complainant told the court that the Appellant had evaded arrest for a long time. That in February 2012, he saw the Appellant walking past him, that with the assistance of members of the public he arrested the Appellant and took him to the DO's office.

PW2 Anderson Juma Baya, worked with the complainant at the hotel. He told the court that on 10th August 2010 at 10:00am the Appellant came to the hotel and left together with PW1 to go buy fish but PW1 did not return. That the following morning at 9:00am PW4 called him to go to Coast General Hospital as there was an emergency. That when he arrived at the hospital he saw PW1 who was badly injured and could not speak.

PW3 corporal Moses Leveluk was an AP at Makindani DO Office. He stated that on 7th February 2012 the complainant went to the DO's office claiming he had been attacked and that the suspect had been on the run for a year. PW3 stated that he escorted them to Changamwe Police Station by taxi where he confirmed that a report had been made. He left them at the police station.

PW4 Stephen Thomas Munga was the complainant's older brother. He stated that on 11th August 2010 at 6:00am he received a call from a strange number who informed him that PW1 had been attacked and was at Coast General Hospital. At the hospital he found PW1 who was severely injured. The complainant informed him that he had been with the Appellant at Kiteje where the Appellant attacked him.

PW5 PC Jonah Limo from Diani Police Station was the investigating officer. He stated that a report had been made on 11th August 20018 and that on a later date the complainant took him to the scene of the crime at Likoni. He told the court that the Appellant had been underground and was arrested by APs at Changamwe and was taken to Diani Police Station.

PW5 Dr. Kennedy Cheptum Sang was the clinical officer who filled the P3 form. He told the court that the complainant was brought in for examination on 8th September 2010 and he observed that the complainant had a deep cut wound on the right abdominal side which was stitched in layer. He also had a deep cut between the right index and middle finger which was also stitched in layers. The probable type of weapon was a sharp object and he classified the degree as maim He prepared the P3 which he produced in court as P. Exhibit1.

At the close of the prosecution case, the Appellant was placed on his defence and gave an unsworn statement. He stated that on 5th February 2012 at around 6:00pm the complainant approached him and arrested him claiming that he had injured him. He was taken to the police station where he was arrested. The Appellant informed the court that he knew the complainant as he was his tenant and the he had caught him with his wife in the shamba.

DW2 Asha Jumaa was the Appellant's wife. She told the court that the complainant was once his tenant and that he was sleeping with he co-wife and they had differed with the Appellant.

Submissions

<u>Appellant's written submissions</u>

On appeal, the Appellant relied on his written submissions filed on the 22nd May 2020. The Appellant submitted that the charge sheet was defective since the report made at the police station was that of assault and not robbery with violence. He also submitted that the prosecution failed to call the good Samaritan who had rushed the complainant to hospital. Further, he submitted that the case was a fabrication as it did not make sense that he could be hiding for two years yet he had a family to feed and that he did not rent a house.

The Appellant submitted that the prosecution case had contradictions. He stated that the OB report 36/11/8/2010 referred to assault while OB No. 39/9/2/2012 referred to robbery with violence. He also submitted that the prosecutor stated that the incident took place on 10th August 2010 while the charge sheet indicated 11th August 2010. The Appellant urged that the case was driven by malice and that the court had shifted the burden of proof. He relied on the case of **Augustino Njorogie Vs Rep Cr. App. No. 99 of 1998 at Nairobi.**

On sentence, the Appellant submitted that that the Supreme Court in **Francis Muruatetu & Another vs Rep (2017) eKLR** pronounced that the mandatory death sentence was unconstitutional. He urged the court to consider his mitigation that he was a first time offender with a young family and that the complainant was having an illicit love affair with his wife and set aside the death sentence. He cited the case of **Andrea Nahashon Mwakisha vs republi. Pet No. 104 of 2018** in support of his submission.

He also submitted section 211 of the CPC was not explained to him prejudicing him.

Respondent's submissions

The Respondent relied on its written submissions dated and filed on 13th July 2020 in opposition of the appeal. The Respondent submitted that the charge sheet was proper drafted as the particulars of the offence were clearly stipulated to enable the Appellant to prepare his defence and that he was never prejudiced. Reliance was placed on **BND vs Republic [2017] eKLR; Joseph Njuguna Mwaura & 2 Others vs republic [2013] eKLR** and **Joseph Onyango Owour & Cliff Ochieng Oduor vs R [2010].**

Further, the Respondent submitted that the fact that there were two reports made did not amount to a contradiction as the first report was made by PW4 while the complainant was still in hospital while the second report was made when the Appellant was arrested. The Respondent relied on **Erick Onyango Odeng v Republic [2014] eKLR** and **Peter Ngure Mwangi vs Republic [2014] eKLR.** It was also submitted that the prosecution was not required to call a number of witnesses to prove its case.

On sentence, the Respondent submitted that death sentences were not unconstitutional but that mandatory sentences deprived courts their legitimate discretion not to impose death sentences. However, in deserving cases death sentences can be meted. The Respondent urged that the Appellant had viciously attacked the complainant and left him to die and that the death sentence was merited. It was submitted that if the court in its discretion decided to mete out a difference sentence that it imposes a 40 year imprisonment. The Respondent cited **Francis Karioko Muruateu & Another vs Republic Petition 15 of 2015** and **High Court of Kenya at Mombasa Criminal Appeal No. 163 of 2016 Kurera Chilo Kuto v Republic.**

The Respondent submitted that the Appellant was in the company of other people when he attacked PW1 as stated in evidence on record and the fact that an identification parade was carried out to identify the other assailant. Additionally, it was submitted that PW1 was wounded as established by the medical evidence.

On sentence, the Respondent cited the decision of the court in **Criminal Appeal No. 51 of 2016; Anthony Mutua Nzuki v Republic [2018] eKLR** where the court set out principles to consider during a sentence re-hearing.

Analysis and determination

This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyse it and come to its own conclusions. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanour of the witnesses and the Appellant during the trial and can therefore only rely on the evidence that is on record. See **Okeno v R (1972) EA 32, Eric Onyango Odeng' v R [2014] eKLR.**

I have considered the grounds of appeal, the respective submissions, and the record and the issue for determination is whether the charge sheet was defective, whether section 211 of the CPC was complied with, whether the prosecution proved its case and whether the sentence was excessive.

The offence of robbery with violence is found in Section 296 (2) of the Penal Code which states that:

> ***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 ingredients of robbery with violence were set out in the case of **Oluoch –Vs- Republic [1985] KLR 549** where the Court of Appeal held that:

> ***"Robbery with Violence is committed in any of the following circumstances***:
>
> ***a) The offender is armed with any dangerous and offensive weapon or instrument or***
>
> ***b) The offender is in company with one or more other person or persons or***
>
> ***c) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person"***

The same principles were used by the Court of Appeal in the case of **Daniel Muthoni M'arimi v Republic [2013] eKLR** where it further stated that proof of any of the three 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 present case, PW1 narrated to the court how the Appellant had attacked him with a panga cutting him in several places causing him to bleed profusely and losing consciousness for about 30minutes. That when PW1 regained consciousness the Appellant was nowhere to be seen and that the Ksh. 4,500/- he had to purchase fish was missing.

PW5 adduced the medical evidence of the injuries suffered by PW1. He produced the P3 (P. Exh1) which indicated that PW1 had suffered deep cuts to his waist and right hand that required stitching and came to the conclusion that the cuts were inflicted by a sharp object.

From the evidence before court there is no doubt that PW1 was maliciously attacked requiring him to be admitted for a month. The medical evidence that a sharp object caused the wounds corroborated PW1's evidence that his attacker was armed. Also, it was the evidence of PW1 that after the attack he discovered that the Ksh. 4,500/- he had carried for purposes of purchasing fish was missing.

I am satisfied that the ingredients of robbery with violence had been met even though the money was never recovered. The question that remains to be answered is whether the Appellant was positively identified.

The importance of identification of an accused in a case of robbery with violence was indicated by the Court of Appeal in the case of **Suleiman Kamau Nyambura v Republic [2015] eKLR** where it stated that: -

"In addition, and what is crucial in a criminal trial is also the requirement to prove in addition to there being one of the set out ingredient of robbery with violence is the need to positively identify the assailant/s in question."

Identification by recognition is found to be more assuring than identification by a stranger as was held by the Court of Appeal in the case of **Reuben, Taabu Anjononi & 2 Others v Republic [1980] eKLR** where it held that: -

> ***"The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya vs. Republic (unreported)."***

In **Francis Muchiri Joseph – V- Republic [2014] eKLR** the Court of Appeal held that:

"In LESARAU – v-R, 1988 KLR 783, this court emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name…."

In the current case, the Appellant met PW1's at his restaurant and offered to accompany him to buy fish a fact that was corroborated by PW2, the complainant's co-worker. That from throughout the day PW1 was in the company of the Appellant until about 7:45pm when the Appellant was chasing him through the night. At no time did PW1 lose track of the Appellant so as to create an impression that someone other than the Appellant was the one who chased and attacked him.

Moreover, PW1 was well acquainted with the Appellant having lived as his tenant for a few months a fact that was substantiated by the Appellant and DW2, the Appellant's wife. Further, PW4 informed the court that when he visited PW1 in hospital, PW1 told him that the Appellant attacked him. From the evidence it is clear that this could not be a case of mistaken identity and find that the Appellant was positively identified.

On compliance with section 211 of the CPC, it states: -

> **1. At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any)**

Various decisions of the courts have explained the import of the above section. The Court of Appeal in **Martin Makhakha v Republic [2019] eKLR** explained that: -

"19. The rights under section 211 of the CPC are crucial rights of an accused person in a trial that are meant to ensure fair trial. When they have been explained to an accused, he responds by electing to proceed as he wishes. His response ought to be taken down and ought to appear on the court record. The accused is then called upon to proceed in the way he has elected."

In **DO v Republic [2020] eKLR** the Court of Appeal differently constituted stated that: -

> "As regards the appellant's contention that he was not informed of his rights under Sec. 211 of the CPC, we find that nothing much turns on this. The record shows that the appellant made a sworn statement and although the record does not state that the appellant was informed of the 3 options in defending himself, he clearly opted to make a sworn statement of defence."

Similarly, the Court of Appeal in Kossam Ukiru v Republic [2014] eKLR pronounced itself thus: -

> ***"15. The appellant also complained that the provisions of Section 211 of the Criminal Procedure code were not explained to him...***
>
> ***In our view, the appellant is hanging on straws. He was ably represented by counsel and unambiguously elected to give a sworn statement when the provisions of Section 211 were explained to him. After that statement, his counsel informed the trial court***

that that was the close of the appellant's case. We do not think that failure to record the exact words of Section 211 of the Criminal Procedure Code in any way prejudiced the appellant. There was, in our view, no failure of justice and the appellant's complaint in that regard lacks merit and we reject it."

Guided by the decision of the superior court I have looked at the record of the trial court which shows that when the Appellant was put on his defence on 12th November 2012, the trial Magistrate indicated: -

Court: Provisions of section 211 CPC read and explained to accused in Swahili

Accused – I will give unsworn testimony

It is clear that when put on his defence, the Appellant elected to give an unsworn statement. This is a clear indication that section 211 of the CPC was complied with and this ground fails.

The Appellant faulted the prosecution for failing to call the person who rescued and rushed the complainant to hospital. It is trite that there is no requirement that the prosecution should call any particular number of witnesses to prove its case. This is buttressed by Section 143 of the Evidence Act which provides that:

"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

In the case of **Keter V Republic [2007] 1 EA 135** the court held inter alia that:

"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."

Flowing from the above, the person who assisted PW1 and rushed him to hospital was not necessary to the determination of the case as he never witnessed the incident. For this reason, this ground fails.

On the charge sheet, the Appellant submitted that the same was defective as the report made to Diani Police Station was on assault while the was charged with robbery with violence.

Section 134 of the Criminal Procedure Code provides that: -

Every charge or 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 Court of Appeal in **Benard Ombuna v Republic [2019] eKLR** pronounced itself as thus: -

"In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence."

The Appellant's contention that the charge sheet differed from the report made to Diani Police Station does not hold water. Nothing precludes the police from framing charges as they deem fit. The police are not bound by the complaints as made as they carry out their own investigations and which may reveal further facts that inform the how they draft he charges. Additionally, the particulars of the offence were read out to the Appellant and he responded and proceeded to participate in the trial process. This ground fails.

On sentence, conviction for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code is one to be liable to suffer death. The Supreme Court in **Francis K. Muruatetu v R [2017] eKLR** held that the mandatory death penalty under Section 204 of the Penal Code was unconstitutional. By that principle the automatic imposition of the death penalty under Section 204 and Section 296 (2) of the Penal Code confirmed to such cases was left to trial Judges and Magistrates to exercise discretion over sentence to address the following question:

"Whether the offence in their view under Section 204 or Section 296 (2) of the Penal Code is eligible or ineligible for the death penalty or any other proportionate sentence."

I have taken into account some of the cases where convicts for robbery with violence were re-sentence after the **Muruatetu case**. In **Benjamin Kemboi Kipkone –Vs- Republic (2018) eKLR** where 3 robbers armed with an AK 47 rifle robbed the complainant of Ksh. 250,000/= and a mobile phone, **Chemitei J.** substituted the death sentence with 20 years imprisonment. In **Paul Ouma Otieno –Vs- Republic (2018) eKLR** where the accused being armed with an AK 47 rifle and a kitchen knife robbed the complainant of Ksh. 450,000/= and 3 mobile phones. **Majanja J.** substituted the death sentence with 20 years imprisonment. In **Wycliffe Wangugi Mafura –Vs- Republic Eldoret Criminal Appeal No. 22 of 2016 (2018)** the Court of Appeal imposed a sentence of 20 years imprisonment where the appellant was involved in robbing an Mpesa shop agent with the use of firearm.

In **Benson Ochieng & France Kibe –Vs- Republic (2018) eKLR, Joel Ngugi J.** re-sentenced the petitioners to 20 years imprisonment upon considering that the offence was aggravated by the use of multiple guns by an organized gang to commit armed robbery.

However, on sentencing, I have noted that the amount of money stolen was Ksh. 4,500 and he was armed with a panga. The manner in which the offence was not quite aggravated hence death sentence may be excessive in the circumstances. The sentence is hereby varied to a period of fifteen (15) years from the date of arrest.

Orders accordingly.

Judgment delivered, dated and signed at Malindi this 9th day of December, 2020.

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R. NYAKUNDI

JUDGE

In the presence of:

Hon. Justice J. Nyakundi

Mr. Mwangeka for the Respondent present

Appellant in person