REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 116 OF 2018

KISILU MUSA OMAR...APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(An appeal from the original conviction and sentence delivered by Hon. L.T. Lewa, Senior Resident Magistrate, in Shanzu Senior Principal Magistrate's Court Criminal Case No. 549 of 2017)

JUDGMENT

1. The appellant herein was convicted for the offence of robbery with violence contrary to Section 295 as read with 296 of the Penal Code. He was sentenced to death. The particulars of the charge were that on the 23rd day of April, 2017 at Mtopanga catholic Church area in Kisauni Sub-county within Mombasa County jointly with others not before court being armed with dangerous namely panga and knives robed JUSTUS HARUN WANGA off his cash Kshs. 700/= and a mobile phone make Alcatel valued Kshs. 2000/= all valued Kshs. 2700/= and the time of such robbery used actual violence to the said JUSTUS HARUN WANGA.

2. On 5th November, 2018 he filed a petition and grounds of appeal raising the following issues-

(i) That the Learned trial magistrate erred in law and fact by relying on a charge sheet as drafted as aginist6 him without considering the same not to have been properly drafted rendering it defective;

(ii) That the medical evidence adduced before the court failed to prove the case beyond reasonable doubt;

(iii) That the prosecution case was governed by massive contradictions and discrepancies; and

(iv) That his defence statement was not considered.

3. In his written submissions filed on 10th March, the appellant submitted that the charge was defective, null and void because the exact or the approximate time the incident took place was not indicated. The appellant submitted that there was contradiction in the evidence of prosecution witnesses in that PW1 testified that the appellant and another were arrested by members of public whereas PW2 and PW4 stated that they were arrested by police officers from Nyali police station.

4. The appellant also submitted that the Trial Magistrate failed to warn herself of the dangers of relying on the evidence of PW1 whom he said he knew the appellant before the incident while the evidence of the said witness showed otherwise. He relied on the case of **Wamunga v Republic** (1989) KLR 424.

5. The appellant claimed that his defence was not considered.

6. The appellant also raised issues of violation of his rights as to the period of time he was held in custody for 5 days before being charged, that he was not supplied with witness statements in advance and that the Trial Court failed to consider his age. It is worth noting that the above issues were not included in the grounds of appeal raised by the appellant.

7. The duration of time he was held in custody before being charged is a matter that falls in the purview of the Constitutional Court. The issue of him not being granted statements well the case begun and the age factor were issues which ought to have raised with the Trial Court. If he feels that his rights were contravened, he has the right to file a Constitutional Petition.

8. The issue that he has submitted on about some witnesses not being called by the prosecution did not form part of his grounds of appeal.

9. In written submissions field on 17th June, 2020 by Mr. Muthomi on behalf of the Director of Public Prosecutions, he submitted that the charge was not fatally defective as it complied with the provisions of Section 134 of the Criminal Procedure Code. He cited decisions in **BND v Republic** [2017] eKLR, where the court stated that an accused should be charged with an offence known in law and the offence charged should be clear and unambiguous. Mr. Muthomi also cited decisions in **Joseph Njuguna Mwaura and 2 Others v Republic** [2013]eKLR, **Joseph Onyango Oduor v Republic** [2010] eKLR on provisions upon which a charge of robbery with violence should be brought.

10. On the issue of the contradiction submitted on by the appellant, Mr. Muthomi was of the view that there were no material contradictions to vitiate the conviction and sentence meted on the appellant.

11. He submitted that the evidence of how the aplenty and his co-accused were arrested cannot amount to an inconsistency or contradiction as the witnesses clearly outlined what their role was. He relied on the decision in **Erick Onyango Odeng' v Republic** [2014] eKLR to assert that minor discrepancies and inconsistencies cannot be regarded as material to the extent of weakening the probative value of the evidence tendered by the prosecution in support of their case.

12. The Prosecution Counsel pointed out that the Trial Magistrate evaluated the defence of the appellant and his co-accused and gave reasons why he found that the same was not clear and did not persuade the court. He further stated that the said Trial Magistrate went into great length to demonstrate the reason he believed the appellant's co-accused's defence and acquitted him and found the appellant culpable, convicted and sentenced him. It was submitted that the appellant's defence was properly evaluated and rejected thus the Learned Magistrate did not err as he found out that the case by the prosecution was proved.

13. On the issue of the sentence, Mr. Muthomi submitted that the appellant did not injure or inflict injuries on the victim. He urged this court to substitute the death sentence with 10 years imprisonment.

14. In the lower court case, the victim of the offence was Justus Aron Wanga, a boda boda rider. His evidence was that he had seen the appellant whom he knew by face (sic) but he did not know his name. He knew the appellant as a notorious thief. His evidence was that on 23rd April, 2017 at 1:00a.m. while at his usual place of work, he got a lady passenger, she requested to be dropped at a place where there was a wedding . PW1 indicated that he had taken several people to the venue and he therefore took her to the place. His evidence was that on reaching the venue, the passenger alighted and as she was rummaging through her pursue for money, the appellant's co-accused attempted to rob her of her phone but PW1 tried to protect her from the boys who then turned their anger against him and the girl ran away. His evidence was that as he resisted being bullied, the appellant took out a knife and threatened to harm him. He stated that on seeing the knife he submitted to them that they stole his Alcatel phone and slashed the tyre of his motor cycle. They then ran away.

15. PW1 said that the appellant and his co-accused were in a group of around 30 people but only 2 of them attacked him.

16. PW1 stated that they reported to Kiembeni police station and was told to go back on 24th April, 2017and that he should continue investigating. He stated that on going back to the said police station he was referred to Nyali police station as the case was not for Kiembeni jurisdiction.

17. PW1 stated that on 27th April, 2017 he reported to Nyali polices station and he was given a motor vehicle to go and apprehend the boys because he had known where they lived and 4 people were arrested. He asserted that he especially knew the appellant who was the one who harassed him with knife and verbally. He was also out to harm him.

18. PW2 was No. 106327, Philip Ngali (PC) attached to Nyali police station. His evidence was that on 27th April, 2017 at 3:30p.m. while on patrol in Mishomoroni area heading to Vikwatani, PW1 stopped them and explained that he had been involved in a robbery incident and he had reported the incident at their police stat ion. He showed PW2 the house of the attackers where they found the appellant, Kisilu popularly known as Tyson and his co- accused. They arrested them and took them to the police station after PW1 identified him.

19. PW4 was No. 69412 PC Thomas Nyamwemya who was attached to Nyali police station, at CID department. He indicated that he went through the OB on the 28th April, 2018 and found this case minuted to him. He indicated that two suspects had been remanded. The Appellant was one of them. He reiterated what PW1 informed the court about how he was attacked by the appellant and another and robbed of his alcatel phone and Kshs. 700/= on 23rd April 2017 at 1:00a.m. He indicated that in the process he was threatened with a machete and knife and his motor cycle tyres slashed. He dragged his motor cycle home and reported about the incident to Kiembeni police station. PW4 explained that the appellant reported the case there first because the incident happened at the border of Kiembeni and Nyali. That PW1 was told to inform the officers if he saw his assailants as he knew them and where they lived.

20. PW4 further stated that on 27th April, 2017 the complainant saw a patrol vehicle from Nyali police station which he stopped, reported the incident and showed them where the incident occurred. That the police noted that the said area was within their jurisdiction. They were shown the OB and directed them to the home of the appellant and his co- accused who were arrested.

21. The appellant gave sworn defence and stated that he used to live in Maweni, Kongowea where he worked as a hawker. He indicated that he did not know of anything that happened on 23rd April, 2017.

22. He further indicated that on 27th April, 2017 he was on the road in Kongowea where he was stopped by police officers who asked his name and he responded. That he was interrogated on issues he did not know or was conversant with. That he was arrested and taken to the cells up to 2nd May, 2017 when he was arraigned in court for charges he did not know anything about. He said the charges were trumped up and denied the same.

ANALYSIS AND DETERMINATION

23. The issue for determination are-

(i) If the charge was defective;

(ii) Whether the prosecution's case was marred with massive contractions;

(iii) If the prosecution proved its case beyond reasonable doubt; and

(iv) If the sentence imposed on the appellant can be regarded as being harsh or excessive.

If the charge was defective

24. The issue that the appellant challenged about the manner in which the charge was drafted was that there was no indication of the extract or approximate time of the incident. Section 137 of the Criminal Procedure provides for the manner in which a charge should be drafted. It states as follows:-

> ***"The following provisions shall apply to all charges and informations, and, notwithstanding any rule of law or practice, a charge or information shall, subject to this Code, not be open to objection in respect of its form or contents if it is framed in accordance with this Code-***
>
> > ***(a) (i) Mode in which offences are to be charged. – a count of a charge or information shall commence with a statement of the offence charged, called the statement of offence;***
> >
> > ***(ii) the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence ,and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence;***
> >
> > ***(iii) After the statement of the offence, particulars of the charge shall be set out in ordinary language, in which the use of technical terms shall not be necessary:***
> >
> > ***Provided that where any rule of law or any Act limits the particulars of an offence which are required to be given in a charge or information, nothing in hit paragraph shall require more particulars to be given than those so required;***
> >
> > ***(iv) The forms set out in the Second Schedule or forms conforming thereto as nearly as may be shall be used in cases to which they are applicable, and in other cases forms to the same effect or conforming of offence being varied according to the circumstances of each case;***
> >
> > ***(v) Where a charge or information contains more than one count, the counts shall be numbered consecutively;***

25. When addressing the issue of failure on the part of the prosecution to include the time the offence as committed in the case of **Moses Mathu Kimani v Republic**, Criminal Appeal No. 212 of 2004, the court held thus-

> ***"The particulars of the charge indicate the date of the offence. That date is sufficient particulars to enable the appellant to know when it is alleged he committed the offence had not been shown in the charge."***

26. The case of **Isaac Omambia v Republic** [1995] eKLR, the court considered the ingredients which need to be captured on a charge sheet and stated thus-

> ***"In this regard, it is pertinent to draw attention to the following provisions of Section 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge. Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the cause persons is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence."***

27. In this case, although the particulars of the charge did not disclose the time the offence was committed, it came out clearly through the evidence of PW1 that the offence occurred at 1:00a.m., in the night. The appellant failure to indicate how he was prejudiced by the said omissions.

28. In the case of **JNA v Republic** [2009] KLR 671 it was held that –

> ***"It was not in all cases in which a defect detected in the charge would render a conviction invalid. Section 382 of the CPC was meant to cure such an irregularity where prejudice to the appellant is not discernible."***

29. This court's finding that no miscarriage of justice was occasioned due to the no-disclosure of the time the offence occurred in the charge sheet. The said omission cannot render the charge fatally defective.

30. In the decision in **BND v Republic** [2017] eKLR, the court stated as follows in regard to the test to be followed in determining if a charge is defective -

> ***"The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear an unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence."***

Whether the prosecution's case was marred with massive contradictions.

31. The appellant pointed out a contradiction in the evidence of PW1 as to the source of arrest. He stated that PW1 said that the appellant was arrested by members of the public whereas PW2 and PW4 gave evidence that the appellant was arrested by the police from Nyali police station. It is apparent from the proceedings that the said contradiction exists. PW1 said that –

> *"On 27th April, 2017 I went to Nyali police station reported the incident and at around 4-5pm he was given a motor vehicle to go get them because I had known where they lived. When we arrived at their place, we saw a big group but members of the public managed to arrest 4 people. 3 boys and a girl aged 9 years. The girl later confessed and was released. However, because the other boys had known of their incident, they started threatening me and I had to move out of the place to Vikwatani where I now live."*

32. When it came to the evidence of PW2 he stated thus –

> ***" … I was in Mishomoroni heading to Vikwatani. We were on patrol. The complainant stopped us and explained to us that he was involved in a robbery incident (the victim) and that he reported the matter at our police station and that he urged us to assist. The complainant showed us the house and told us he knew (sic) his attackers. So we proceeded to the identified house with PC Mungai and fortunately we found both the accused person Kisilu was there aka Tyson (popularly known as Tyson) and his co-accused, so we arrested them and took them to the police station after the complainant identified them." According to the complainants, the accused he identified during the attack was the 1st accused person popularly known as Tyson. However, when we arrested them the accused persons were together. The house we found the two was a mud house and they were only two of them. There was no one on sight and/or around."***

33. According to PW1, Members of the public arrested the appellant and his co-accused but according to PW2, he and a fellow police officer by the name of PC Mungai arrested the appellant herein. My understanding of PW4's evince is that he was not present when the appellant was arrested. His evidence is mostly recorded in the form of reported speech as he was reporting what the victim PW1 had told him.

34. It is discernible from the evidence of PW1 that he was accompanied by police officers from Nyali police station when the appellant was arrested. It is this court's view that the contradiction brought out by the appellant does not vitiate the fact that he was arrested at the place and the date stated by PW1 and PW2. The only issue is whether the actual arrest was done by PW2 or by members of the public, in my view the contradiction would not render the prosecution's case null and void.

If the prosecution proved its case beyond reasonable doubt.

35. The appellant w snot a stranger to PW1. He had been seeing him the estate and knew him as a notorious thief. He did not know his name. PW1 stated that he was robed of his phone and cash Kshs. Catholic Church at 1:000a.m. but the place of attack was well lit with street lights. The case of **Wamunga v Republic** applies. Was threatened with a knife by the appellant who slashed the tyres of his motor cycle. PW1 pushed it home. It is apparent at the time of the robbery the appellant was armed with a dangerous weapon, namely, a knife. The appellant was in the company of another at the time he robbed PW1 of his phone. He also used violence by slashing PW1's motorcycle. It is my finding that the ingredients of the provisions of Section 295 of the Penal Code were satisfied. The appellant in his submissions claimed that the lady who was aboard PW1's motor cycle was not called as a witness. The said lady was a fare paying passenger and the evidence by PW1 did not indicate that he knew her before then.

If the sentence imposed on the appellant can be regarded as being harsh or excessive.

36. The appellant was sentenced to death on 26th October, 2018. Mr. Muthomi urged this court to substitute the said sentence with 10 years imprisonment, and cited the case of **Francis Karioko Muruatetu and Another v Republic** [2017] eKLR. PW1 did not hold back the views and the distaste he had about men who wait for others to work hard and then steal from them.

37. PW1 was working at 1:00a.m. at night trying to eke a living when the appellant and another attacked him with the sole aim of eating from the sweat of others. The appellant was armed with a knife and threatened PW1 with it. When PW1 saw that he risked being harmed with the knife he submitted to the demands of the appellant. The appellant was according to PW1 a notorious thief who had moved from Milango Saba to Manomi area. They would waylay motorcycle riders who had passengers and steal from them. Such a person is not deserving of a lenient sentence like the 10 years proposed by Mr. Muthomi. The appellant needs to be locked away for a long duration of time so that motorcycle riders and their passengers can enjoy peaceful lives of not worrying about being robbed at any time.

38. The appellant was not a child when he was arrested and charged. An age assessment report dated 3rd August, 2017 showed that he was 22 years old. He was arrested on 27th April, 2017. He was therefore an adult at the time he was arrested.

39. Taking into account the circumstances of the case, I substitute the death sentence with 25 years imprisonment. The sentence will run from the 2nd of May, 2014 when the appellant was arraigned in court, in line with the provisions of Section 333(2) of the Criminal Procedure Code. The appeal is hereby allowed to the extent stated in this Judgment.

DELIVERED, DATED and SIGNED at MOMBASA on this 4th day of December, 2020.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms. Odhiang for the accused

Mr. Muthomi for the DPP

Accused present

Mr. Oliver Musundi - Court Assistant.