REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 73 OF 2014

ABDUL MOHAMMED ABDUL……..….APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

(*Being an appeal from the original conviction and sentence in criminal case number 620 of 2011 in the Chief Magistrate's Court at Webuye – S. N. Abuya (PM) on 7/7/2014*)

JUDGMENT

1. Abdul Mohammed Abdul the Appellant herein was charged together with five (5) others in 11 counts of robbery with violence contrary to **section 296(2)** of the **Penal Code** and on one count of assault causing actual bodily harm contrary to **section 251** of the **Penal Code**. At the close of the trial, the Appellant alone was found guilty on all 12 counts and sentenced to suffer death as by law required in count I. The sentences in the other counts were left in abeyance pending the outcome of any appeal in count I.

2. The Appellant subsequently filed the present appeal based on eight (8) grounds in which he argued that: the proceedings were a nullity since his rights were violated; the prosecution evidence was contradictory and could not sustain a conviction; the learned trial magistrate failed to analyze the evidence on record and lastly that the sentence imposed was harsh and excessive.

3. The learned state counsel Mrs. Njeru opposed the appeal and asserted that the evidence was sufficient and the charge was proved beyond reasonable doubt. She urged the court to dismiss the appeal and uphold both the conviction and sentence.

4. This being the first appeal, I have perused the lower court record and re-evaluated the evidence tendered at the trial to make my own findings and draw my own conclusion as to whether the evidence was sufficient to form a basis for the Appellant's conviction. I took care in my re-evaluation of the fact that I did not have the advantage that the trial court had of seeing and hearing the witnesses as they testified and gave due allowance therefor.

5. On the first ground, the Appellant complained that he was in police custody for more than 24 hours before he was arraigned in court and this was in violation of **Article 49** of the **Constitution**. He urged the court to declare that his rights had been violated and that the resultant proceedings were therefore a nullity. In rebuttal, Mrs. Njeru submitted that the Appellant ought to have raised this issue in the lower court so that the Investigating Officer and the arresting officers could be taken to task.

6. The consolidated charge sheet on the record shows that the Appellant and his co-accused persons were arrested on 13th May, 2011. The charge sheet also contains a date apprehension report to court which is indicated as 30th May, 2011 and a date to court which is shown as 9th June, 2011.

7. From the proceedings on the record, it is shown that the Appellant and his co-accused persons were before the court on 9th June, 2011 during which time he took plea upon consolidation of the charges. The Appellant had previously been separately charged with another in Criminal Case No. 710 of 2011 which case was consolidated with Criminal Case No. 620 of 2011 from which the present appeal arose.

8. There is on record a charge sheet for the original Criminal Case No. 620 of 2011 which shows that the three (3) accused persons therein were arrested on 2nd May, 2011. They were arraigned in court to take plea the next day, being the 3rd of May, 2011. 9th June, 2011 is therefore the date on which the Appellant and his co-accused persons were arraigned in court to take plea on the consolidated charges and not the day on which they were first arraigned in court.

9. Unfortunately, the original charge sheet in Criminal Case No. 710 of 2011 is not on the record and the court cannot therefore confirm from it the date on which the Appellant first took plea before the charges were consolidated. There is nothing on the record to show that this issue came up during trial as it would have been properly addressed and put to rest by the Investigating Officer and the arresting officers. In the absence of contrary evidence as to the date of the arrest and arraignment of the Appellant, this court cannot make a finding that he was

arraigned outside the stipulated 24 hour period.

10. Be that as it may, there are remedies available to accused persons who are taken to court later than the period provided for, as observed in the case of **Julius Kamau Mbugua vs. Republic Criminal Appeal No. 50 of 2008**. The Court of Appeal, in the foregoing case, while deliberating on **section 72(6)** of the former constitution which is the current **Article 49** in the 2010 Constitution, rendered itself thus:

> **"Moreover, it was not shown that the alleged unlawful detention had any link or effect on the trial process itself or that it caused trial related prejudice to the appellant which affected the validity of the trial. The alleged unlawful detention does not exonerate the appellant from the serious crime he is alleged to have committed. The breach could logically give rise to a civil remedy – money compensation as stipulated in section 72(6). That is the appropriate remedy which the appellant should have sought in a different form."**

11. This position was reaffirmed by the Court of Appeal in its recent decision in **Evans Wamalwa Simiyu vs. Republic Criminal Appeal 118 of 2013 [2016] eKLR,** where the appellate court cited the case of **Julius Kamau Mbugua vs. Republic [2010] eKLR**. The court stated *inter alia* that, where an Appellant is not produced in court within twenty-four hours, it would not automatically result in his acquittal. Instead, the Appellant would be at liberty to seek remedy, in damages, for the violation of his constitutional rights. In the premise therefore, there is no basis for me to find that this issue was fatal to the prosecution's case.

12. On the second ground, the Appellant argued that the evidence tendered by the prosecution was contradictory and could not therefore sustain a conviction. He contended that there were discrepancies in the dates of arrest and the dates of presentation to court, the amounts of money taken from the robbery victims and the weapons used in the robbery. He contended further that the charge sheet listed various weapons namely guns, pangas and axes but only a gun was mentioned throughout the trial. He urged that the prosecution witnesses failed the credibility test and that the identification parade was not properly conducted.

13. Mrs. Njeru opposed the Appellant's arguments and submitted that the mention of different weapons was not fatal. That the error is a curable one since the gun mentioned in evidence was also listed in the charge sheet and it is the Appellant who was in possession of the gun as the leader of the gang. She urged that the Appellant was positively identified by the prosecution witnesses, namely PW1, PW2, PW7, PW8, PW9, PW10 and PW12 as one of the robbers and was singled out as the one who was armed with a pistol and who gave commands to the other robbers.

14. On the issue that the charge sheet mentioned various weapons while the prosecution only led evidence to show that the assailants used guns, I am satisfied that the discrepancy is one that is curable by the provisions of **section 382** of the **Criminal Procedure Code and** it did not occasion any miscarriage of justice against the Appellant. The record shows that the prosecution witnesses namely PW1, PW2, PW5 and PW6 led evidence to show that one of the assailants was wielding a gun during the robbery. Further, PW1 and PW2 pointed out the Appellant as the person who was wielding the said gun. Based on the foregoing, I find that there was no injustice occasioned upon the Appellant.

15. On identification, the Appellant contended that he was not properly identified by the prosecution witnesses. That the prosecution witnesses did not specify how favorable the circumstances were during the identification. Further that the identification parade was not conducted according to the required standards.

16. Mrs. Njeru opposed the Appellant's contention and submitted that the prosecution witnesses namely PW1, PW2, PW7, PW8, PW9, PW10 and PW12 had singled out the Appellant as the assailant who was armed with a pistol and who gave commands to the other two. She asserted that the robbery lasted for a considerable amount of time, during which there were lights in the hotel enabling the witnesses to see and identify the assailants.

17. I have re-examined the evidence of the prosecution witnesses afresh to ascertain whether or not there was the possibility of error in the identification of the Appellant. Pursuant to the concerns on the need to ensure that no person is convicted of an offence on the basis of untested evidence of visual identification by a witness, the Court of Appeal in the case of **Cleophas Otieno Wamunga vs. Republic [1989] KLR 424** set out certain guidelines as follows:

> **"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Widgery, C.J. in the well-known case of Republic vs. Turnbull [1976] 3 All ER 549 at page 552 where he said:**
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> ***"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.""***

In considering the evidence therefore, I was circumspect in view of the fact that errors of identification may occur even where witnesses are honest.

18. A scrutiny of the evidence on the record shows that the Appellant was identified as the assailant who was armed with a pistol, and who robbed and terrorized the Complainants. PW1 Eliud Sibweche gave a detailed account of the robbery in his testimony in which he stated as follows in examination in chief:

"*While I was coming from Hon. Eseli's room going to the bar, I met three people. They had put on jungle jackets for administration police. They had caps written Arsenal. They stopped me and asked why I was still selling. I told him that we had closed. They pushed me to the corridor. One had a pistol. He held me on the neck…There were sufficient lights at the corridors goings towards the rooms. There was sufficient light from security lights…when all that was happening there was sufficient lights. I was able to identify one of them positively who had a pistol. Later, we were called to the offices of the DCIO where an identification parade was conducted. I was able to identify the same person. I can be able to see him in Court (Accused 5 identified in the dock).*"

Upon cross-examination by the Appellant who was Accused 5 at the trial, PW1 stated as follows:

"*You are the one who held my neck. I saw you as you were ahead. You are the one who asked me if we were still selling. There was light everywhere. You had put on a jungle jacket for police…I can positively identify you as you were the one who came with three other people. You were the one who was leading.* "

19. The testimony of PW1 found support in the testimony of PW2 Joyce Nasambu Simiyu, who was a receptionist at Park Villa hotel where the alleged robbery took place. The relevant part of PW2's testimony in examination in chief in her own words is as follows:

"*At around 12.30 a.m, while I was resting at the reception, one of my workmates Mr. Eliud Wanyonyi Sibweche came and knocked the door. He called me by name and told me that there was a visitor who wanted to check in. He insisted that he was a V.I.P visitor. He wanted me to open quickly. I switched on the lights at the reception. When I looked outside through the window, I saw Eliud Wanyonyi Sibweche with one man wearing jungle uniform similar to those worn by Administration Police…During the night of the attack, I was able to identify the one who came with Eliud Sibweche. He is the same person who picked the key when I threw it on the ground, the same who opened the safe the same who tied our hands with ropes who requested me to give out the registration book, who told me to show him the room for V.I.P, who took my mobile phones at the door of Hon. Shitanda's room and the same who ordered me to lie under Hon. Shitanda's bed. I was able to identify him as there was enough light from the electricity. He was medium black with a protruding. I was able to see him as there was sufficient light from electricity. I can see him in court. (Accused 5 identified in the dock).*"

From PW2's testimony, it is evident that she spent ample time with the Appellant and during the whole period, there was sufficient light to enable her identify him and note his descriptive features which she later gave to the police.

20. The record further shows that the evidence of the other prosecution witnesses namely: PW5 Pius Simiyu Ndumba, PW7 Joseph Wanjala Satia, PW8 Robert Simiyu Wandeme, PW10 Godfrey Simiyu Kiluyi and PW12 Jotham Wafula Simiyu echoed what PW1 and PW2 had stated in their testimonies. They all testified that the Appellant was in the company of two people and they all donned jungle green jackets at the time of the robbery. In their respective accounts of the robbery, the witnesses asserted that they each identified the Appellant who was the leader of the group and who was armed with a gun as there was adequate lighting. That it was the Appellant who took command of the others and led the robbery during which time he terrorized the robbery victims.

21. The prosecution therefore led evidence to show that there was sufficient electric lighting throughout the hotel premises where the robbery took place. The evidence of PW1, PW2, PW8, PW9, PW10, PW11 and PW12 demonstrated that there were electric lights in the hotel reception area, on the corridors leading up to the hotel rooms, inside the hotel rooms and outside in the parking lot. They also stated that in addition, the place was also sufficiently lit by security lights.

22. Taking into account the nature of the lighting available, the conditions prevailing at the time of the robbery and the period of time which the prosecution witnesses spent with the assailants during the robbery, I find that the prosecution witnesses had ample time to see and identify the attackers who were in close proximity to them.

23. I note that some of the prosecution witnesses namely PW2, PW8, PW10 and PW12 were even able to mark the features of the Appellant whom they positively identified as one of the assailants. The Appellant was unknown to the witnesses prior to the incident but was positively identified by the witnesses at the scene and in the dock as they testified.

24. On the Appellant's complaint that the identification parade did not comply with the set standards, the evidence on the identification parade can be found in the testimony of PW1, PW2 and PW14, the Investigating Officer. PW14 testified that he summoned PW1 and PW2 to the identification parade from which they both identified the Appellant herein. He however stated that he is not the officer who conducted the identification parade but that he merely interviewed the prosecution witnesses and recorded their statements.

25. There is however no evidence on how the identification parade was actually conducted. The record shows that when the matter came up for hearing on 16th July 2013, the Prosecutor sought an adjournment to enable him call the Officer who conducted the identification parade. The Officer however never testified and therefore did not produce the parade forms. The result is that there is only the evidence of PW1 and PW2 who attended the parade and the Appellant's allegations that the parade was non-compliant with the prescribed legal standards.

26. The evidence on the record does not ascertain how the identification parade was conducted, or if it complied fully with the set legal standards. Be that as it may, I note that in the instant case, the Appellant wasproperly and positively identified as the assailant by the prosecution witnesses at the scene of the robbery. I therefore find that the evidence of the prosecution witnesses was sufficient as to the identification of the Appellant, even without the evidence of the identification parade.

27. On the third ground, the Appellant complained that the learned trial magistrate failed to analyze the evidence on record and further that he analyzed extraneous factors such as the doctrine of recent possession. The record however reflects that the learned trial magistrate analyzed the evidence of each of the prosecution witnesses and that of each of the defendants. He weighed the evidence tendered by the prosecution together with that of all the defendants and found that on the offence of robbery with violence contrary to **section 296(2)** of the

Penal Code, the prosecution had only proved the case to the required standard against the Appellant herein. His co-accused persons were acquitted on these charges of robbery with violence and convicted on the alternative count of neglect to prevent a felony contrary to **section 292** of the **Penal Code**. The Appellant's argument that the trial court failed to analyze the evidence on record is therefore baseless and misguided.

28. Besides the evidence of identification, the trial magistrate also employed the doctrine of recent possession to convict the Appellant. In considering the doctrine of recent possession, the trial court referred to the case of **Maina & 3 others vs. Republic [1986] KLR** where the Court of Appeal held *inter alia* that, where it is proved that premises have been broken into and certain property stolen therefrom, and shortly afterwards a person is found in possession of that property, that is evidence from which it can be inferred that the person is the housebreaker or shop breaker.

29. The basis on which the trial court employed the doctrine of recent possession in convicting the Appellant was his being found in possession of a mobile phone make Nokia C1-01 belonging to one of the victims of the robbery soon after the robbery. An inventory prepared on the date of the recovery and which was also signed by the Appellant was produced in evidence as P-exhibit No. 6. In the circumstances therefore, it is evident that the doctrine of recent possession was applicable to this case and was properly applied by the learned trial magistrate.

30. Lastly, the Appellant complained that the sentence imposed upon him was harsh and excessive and further that he was wrongly referred to as Accused 4 in the judgment instead of Accused 5.

31. Upon conviction under **section 296(2)** of the **Penal Code**, the Appellant was sentenced to suffer death which is the sentence prescribed under the section upon conviction. It is noteworthy that sentence is a matter of discretion of the court, and a court on appeal will not normally interfere with the sentence imposed by the trial court unless it is shown that the court took into account an irrelevant factor, or failed to take into account a relevant factor, or applied a wrong principle of law. See - **Shaddrack Kipkoech Kogo vs. Republic Criminal Appeal No. 253 of 2003** (unreported). In the present case, the sentence meted against the Appellant was legal as provided by law. I therefore find that the sentence imposed was proper and not harsh and excessive as alleged by the Appellant, in view of the fact that he terrorized the victims and injured PW1 which injury was classified in the P3 form as harm.

32. On the issue that the Appellant was referred to as Accused 4 in the judgment of the trial court, I find that this is not fatal to his case. The record demonstrates that there were initially five (5) accused persons before the trial court but Accused 4 escaped and was never found or rearrested. The trial therefore proceeded with four (4) accused persons which saw the Appellant who was Accused 5 often referred to as Accused 4. From the proceedings, it is evident that the Appellant was sometimes referred to as Accused 4 as shown during his cross-examination of PW4 on 14th May, 2012, in the proceedings of 4th October, 2012 when the Appellant opposed an adjournment sought by the prosecution and on 26th October, 2012 during the cross-examination of PW11 and PW12.

33. I note further, that whereas the learned trial magistrate in his judgment referred to the Appellant as the 4th Accused, he went further to state the Appellant's name thus: "*As regards the fourth accused ABDUL MOHAMMED ABDUL…* " before convicting him on the charges leveled against him. I therefore find that reference to the Appellant as Accused 4 did not occasion him any injustice.

34. Having subjected the entire proceedings to a fresh scrutiny, and considered the Appellant's grounds of appeal, I find that the trial court directing itself to the evidence before it and the law applicable reached the correct conclusion. In the premise, the appeal is found to be unmeritorious and is dismissed. Both the conviction and sentence are found to have been properly founded on the evidence and are left to stand.

It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF DECEMBER 2018.

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L. A. ACHODE

HIGH COURT JUDGE

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUNGOMA THIS 17TH DAY OF JANUARY 2019.

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S. N. RIECHI

HIGH COURT JUDGE