REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 57 OF 2014

(From Original Conviction and Sentence in Kakamega Criminal Case

No. 1015 of 2016 of 13th May 2014

by P Achieng, Principal Magistrate)

WALTER DISMAS NAZ…….APPELLANT

VERSUS

REPUBLIC ……..RESPONDENT

JUDGEMENT

1. The appellant was convicted by P Achieng, Principal Magistrate, of robbery with violence contrary to Section 296(1) of the Penal Code, Cap 63, Laws of Kenya. He was found guilty on both counts, and accordingly sentenced to death. The particulars were that on 24th May 2013 at Ilesi within Kakamega County he had jointly with others not before the court robbed Shadrack Otieno of assorted goods, listed in the charge, and immediately after the time of the said robbery used actual violence to the complainant. He pleaded not guilty to the charges before the trial court, and the primary court conducted a full trial. The prosecution called four (4) witnesses who testified.

2. The complainant, Shadrack Otieno, a *boda boda* operator, testified as PW1. He explained how on 24th May 2013 three individuals approached him and hired him to take them to Ilesi. When they got there they attacked him and robbed him of money, phone and the motorcycle. He was slapped and knocked to the ground during the process, and the items grabbed from his person. He reported to the police on beat, and they caught up with one of his attackers, who he later identified in an identification parade. Benson Ilondanga testified as PW2. He was the person who had given the motorcycle to PW1. Inspector of Police Harrison Onyapindi testified as PW3. He was the police officer who conducted the identification parade during which PW1 identified the appellant. Police Constable John Mutemi testified as PW4. It was to him that the appellant was handed over by the administration police officers who had arrested him. He rearrested them and conducted the investigation into the matter. The appellant was put on his defence. He gave an unsworn statement. He denied that she had robbed PW1, saying that on the material day he was on his way home when administration police officers arrested him for no reason, he was subjected to an identification parade, after which he was arraigned in court.

3. The appellant was dissatisfied with the conviction and sentence and has appealed to this court and raised several grounds of appeal.

a) That the identification parade was prejudicial as it was conducted after he and PW1 had spent the night in the same police cell;

b) That the learned trial Magistrate had erred in convicting on the evidence of a single witness;

c) That the conviction was against the weight of the evidence and the arresting officer had not been called to testify ;

d) That the trial court had failed to take the appellant's defence into account; and

e) That the trial court rejected his sworn evidence yet the same was cogent and sufficient.

4. Being the first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of ***Okeno vs. Republic*** **(1972) EA 32** has consistently been cited on this issue. In its pertinent part, the decision is to the effect that:-

> *"An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own*

conclusions. 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 findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can 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."

5. Directions were taken on 28th June 2018. The appellant opted for written submissions, while the state chose to make oral submissions.

6. The appellant put in his written submissions. He raised three issues. The first was on fair trial issues. He submitted that the trial court did not ensure that he was afforded opportunity to prepare his case by having him given the prosecution evidence in advance. Secondly, he submits that the identification parade was unfair for he and PW1 had been put in the same cell prior to the parade being mounted. Finally, he pointed to contradictions in the evidence that he submitted was material.

7. The appeal was canvassed on 9th October, 2018, and the appellant relied on written submissions that he had placed before the court. Mr. Juma, Prosecution Counsel, addressed the court orally. He invited me to examine the record.

8. On the identification parade, it was the word of the appellant against that of PW1 and PW4. He alleged that he and PW1 had be put together in the same cell before he was subjected to parade where PW1 identified him. I note that PW1 gave sworn testimony, and was cross-examined, while the appellant opted for an unsworn statement and was therefore his testimony was not tested through cross-examination. The testimony of PW1 is therefore preferable to that of the appellant. Nothing turns, therefore, on his claim that the identification parade was not properly conducted. The material placed before me indicates that PW1 was with the police when they arrested the appellant while he was running away from the scene. Consequently there was no need for the police to have mounted the identification parade.

9. On the question of the court relying on the evidence of a single witness. It is correct that PW1 was the only eyewitness to the events the subject of the trial. However, the court can convict on the evidence of a single witness, as longer as it finds it cogent and believable, and adequately supported by other evidence. PW1 testified that he was attacked by the appellant amongst others. He said that he was the person that he negotiated with before the fateful motorcycle ride. The appellant was the person who held him as he was assaulted and robbed by the rest, and he was also the person that he and the administration police officers arrested while he was fleeing from the scene. That evidence is supported by the testimony of PW4, the officer who rearrested the appellant after he was handed over to him by the administration police officers who had arrested him. PW3 thereafter conducted an identification parade. Nothing turns on the said submission.

10. On whether the conviction was against the weight of the evidence, I have carefully gone through the record, and reiterate paragraph 9 of this ruling. I find that the material placed before the trial court was sufficient to sustain a conviction. The failure to call the administration police officers who arrested the appellant was not fatal.

11. On the court rejecting his sworn *alibi* defence, the record speaks for itself. The appellant did not give a sworn statement. He was not cross-examined. Not much weight can be given to his statement, taken against the sworn evidence of PW1.

12. The other issued raised was the fair trial issue that he had not been given the evidence of the state in advance. I have looked at the record and noted that the appellant raised the said issue on three occasions, and the court directed the prosecution to furnish him with witness statements and did not commence trial. The record does not have a confirmation as to whether the statements were in fact furnished, but on 19th September 2013 the appellant indicated to the court that he was ready to proceed which suggested that he had been given the evidence of the prosecution in advance and he was in a position then to mount his defence.

13. The contradictions and inconsistencies that the appellant has pointed at in his written submissions are, in my view, inconsequential. They do not go to the heart of the matter.

14. After considering all the issues raised I am not persuaded that the appellant has made a case for grant of the orders sought. I shall accordingly disallow the appeal herein, and I do hereby uphold the conviction of the appellant in Kakamega CMCCRC No. **1015 of 2016** of robbery with violence. However, regarding the sentence, I shall not confirm the sentence imposed in view of the recent decision to the Supreme Court on the death penalty. Accordingly I hereby substitute the death penalty with a sentence of thirty (30) years imprisonment effective from the date of conviction by the trial court.

PREPARED, DATED AND SIGNED AT KAKAMEGA THIS ……31st …. DAY OF ……January……., 2019

W. MUSYOKA

JUDGE

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS ……7th ……. DAY OF ……February…… 2019

J. NJAGI

JUDGE