



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.36 OF 2018**

*(An Appeal arising out of the conviction and sentence of Hon. S. Jalang'o- SRM delivered on 16<sup>th</sup> February 2018 in Makadara CMC. CR. Case No.1967 of 2013)*

**ASHMOND VISU OWINO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant Ashmona Visu Owino was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on 22<sup>nd</sup> December 2012 at Soweto Village in Nairobi East District within Nairobi area Province, the Appellant, jointly with others not before court, being armed with a dangerous weapon namely iron bar, robbed Timothy Namasaka of his mobile phone make Nokia and cash Kshs.2,000/-, all valued at ksh.6,500/- and immediately after the time of such robbery threatened to use actual violence to the said Timothy Namasaka. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged and sentenced to death. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He took issue with how the trial was conducted and asserted that the same violated his constitutional rights. He was aggrieved that his conviction was based on a defective charge sheet. He faulted the trial court for convicting him based on the evidence of identification which was not free from error. He was further aggrieved that the trial court relied on contradictory and inconsistent evidence adduced by the prosecution witnesses. He complained that the trial magistrate did not consider his defence. In the premises, the Appellant urged this court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to court written submissions in support of his appeal. He urged the court to allow his appeal. Ms. Sigei for the State opposed the appeal. She made oral submissions to the effect that the prosecution had established its case on the charge brought against the Appellant to the required standard of proof beyond any reasonable doubt. She submitted that PW1 left the house to go to the shop. On the way, he was accosted by the Appellant and his accomplices. The Appellant hit him on the head. He robbed PW1 of his mobile phone and ksh.2,500/-. PW1's son, PW2, witnessed the robbery. The Appellant and his accomplices took off when they saw a crowd gathering to witness the incident. She asserted that PW1 and PW2 properly identified the Appellant. The robbery occurred during the day. The Appellant was PW1's neighbour. He had known him since 2011. The identification was therefore watertight. She averred that medical evidence adduced proved that PW1 was injured. She was of the view that the defence adduced by the Appellant was a mere denial. The same did not explain the occurrences of the material day. She maintained that the trial court sentence was legal and proper in the circumstances. In the premises, she urged this court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows: The complainant left his house on the material day at about 2.00 p.m. He was going to a shop to buy airtime. He passed through a corridor. It was here that he was ambushed by the Appellant. The Appellant started dragging him. He asked the Appellant why he was dragging him. The Appellant suddenly hit him on his head with an object. Blood started oozing from his head. The Appellant then took his Nokia mobile phone and cash Ksh.2,500/-. The commotion attracted a crowd at the scene. Appellant ran off and escaped. The complainant stated that he knew the Appellant as well as his father. The Appellant lived in his neighborhood. The complainant informed the Appellant's father of what had transpired. He also reported the robbery at Soweto Police Station. He thereafter sought medical treatment.

PW2, the complainant's son witnessed the alleged robbery. His father, PW1, left the house to go to a shop. His mother needed additional items from the shop. She therefore asked him to follow his father and pass on the message. As he was catching up with him, he saw PW1 being pushed into a corridor. He saw one of the assailants hit PW1 on the head. PW1 fell on the ground. There were other young men on the corridor. On seeing him, the assailants took off in different directions. He was able to see and identify the Appellant. PW2 ran back to the house. He informed his mother of the incident. He stated that the Appellant's father lived in the neighborhood. He used to see the Appellant

at his father's house.

The investigating officer, PW3 informed the court that the Appellant was arrested on 3<sup>rd</sup> May 2013. The stolen items were, however, not recovered. The complainant was examined by PW4, Dr. Maundu on 14<sup>th</sup> January 2013. PW4 stated that the complainant had a cut wound on his scalp. The injury was approximately twenty- one (21) days old. The same had been inflicted by a sharp object.

When the Appellant was put to his defence, he testified that on the material day, he went to work as usual. He worked as garbage collector. He worked the whole day. He thereafter went home in the evening. On 2<sup>nd</sup> May 2013, he left work and went home at 8.00 p.m. Two police officers came to his house. He was arrested and taken to Soweto Police Station. He was thereafter charged with the present offence He denied having any knowledge of the robbery as narrated by the complainant.

This being a first appeal, this Court is mandated to re-evaluate the evidence afresh. The Court of Appeal in the case of Gabriel Kamau Njoroge –vs- Republic (1982 – 88) 1 KAR 1134 stated this on the duty of the 1<sup>st</sup> Appellate court;

*“It is the duty of the first Appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, but bearing in mind always that it has neither seen or heard the witnesses and make due allowance for this.”*

In the present appeal, the issue for determination is whether the prosecution established the charge of robbery with violence contrary to Section 296(2) of the Penal Code to the required standard of proof beyond any reasonable doubt.

It was evident from the facts of the case that the prosecution relied on direct evidence of identification by recognition to secure the conviction of the Appellant. This court has a duty to examine thoroughly the evidence on identification before confirming a conviction based on the same. In the case of Wamunga vs Republic [1989] eKLR 426 the Court of Appeal stated as hereunder:-

*“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.”*

In the present appeal, the alleged robbery took place at about 2.00 p.m. PW1 was accosted by the Appellant as he was going to a shop. He stated that he knew the Appellant. **The Appellant started dragging him towards a corridor. He asked the Appellant why he was dragging him. The Appellant suddenly hit him on his head with an object. Blood oozed from his head. He fell down and lost consciousness for a few minutes. When he woke up, he noticed that the Appellant had stolen his Nokia phone and cash Ksh.2,500/-.** PW1 was able to identify the Appellant since the incident occurred in broad daylight. When the Appellant started leading him to the corridor, he inquired from him what he was doing. He therefore had a chance to identify the Appellant as he conversed with him. He also knew the Appellant as well as his father prior to the alleged robbery. He referred to them by their names. He stated that he had known the Appellant since 2011, when he moved to their neighborhood. The Appellant was his neighbour. The Appellant lived with his father. The identification of the Appellant was therefore through recognition. It was not an identification of a total stranger.

In the case of Anjononi & others vs. R [1980] eKLR 59, the Court of Appeal provided thus:

*“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 personal knowledge of the assailant in some form or other.”*

PW2 corroborated PW1's evidence. He stated that he witnessed as the Appellant pushed his father to a corridor and hit him on the head. He thereafter proceeded to rob him. He stated that he recognized the Appellant. The Appellant's father was a neighbour. PW2 informed the court that he had seen the Appellant on numerous occasions at his father's house. The basis for the evidence of recognition was therefore clearly laid out by the prosecution. The Appellant was properly identified by PW1 and PW2.

The aggravated offence of robbery as described under **Section 296(2)** of the **Penal Code** may be complete with or without use of violence as long as there has been a theft and the offenders are either armed with offensive weapons or offenders are more than one. (See Oluoch v Republic [1985] eKLR 549). In the present appeal, the Appellant was in the company of others not before this court at the time the robbery was committed. The Appellant hit and injured PW1 on his head. Medical evidence adduced corroborated PW1's testimony. The elements of the offence of robbery with violence were therefore present in this case. **The Appellant in his defence stated that he was at work on the material day. He denied being involved in the alleged robbery.**

After weighing the explanation offered by the Appellant against the prosecution evidence, this court is of the view that the prosecution's evidence is truthful, credible and consistent as opposed to the highly improbable defence offered by the Appellant. From the above analysis of the evidence, this court is of the view that the prosecution has established its case on the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** to required standard of proof beyond any reasonable doubt.

The Appellant contended that his right to a fair trial was violated since the trial court failed to assign him legal representation. This court has perused the trial court's record. The trial suit was conducted fairly and in accordance with the set guidelines and procedures. No prejudice was occasioned to the Appellant with regards to how the trial was conducted. This court therefore finds no merit in this ground of appeal.

**The Appellant also submitted that the charge sheet in the trial court was fatally defective. He averred that the particulars of the offence indicated that the Appellant threatened to use actual violence against the complainant. However, evidence adduced by the**

**prosecution indicated that the complainant actually sustained injuries.** This court is of the opinion that this discrepancy is curable under **Section 382** of the **Criminal Procedure Code**. The evidence adduced established the offence of robbery with violence. In addition, the prosecution established that the Appellant was in the company of other accomplices when he attacked and robbed the Appellant.

From the above analysis of the evidence, this court is of the view that the prosecution established its case on the charge of **robbery with violence** contrary to **Section 296 (2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

The upshot of the above reasons is that the appeal lodged by the Appellant on conviction lacks merit and is hereby dismissed.

The Appellant was sentenced to death by the trial court. Following the recent decision of the Supreme Court in **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR**, this court has discretion to re-sentence the Appellant on the basis of severity of the offence. In the present appeal, the complainant sustained head injuries occasioned by the Appellant during the robbery. In the premises, this court sets aside the death sentence given by the trial court. The same is substituted with an order of this court sentencing the Appellant to serve ten (10) years imprisonment with effect from today's date. This court has taken into consideration the period that the Appellant was in lawful custody both before his conviction and after his conviction by the trial court. It is so ordered.

**DATED AT NAIROBI THIS 13<sup>TH</sup> DAY OF MARCH 2019**

**L. KIMARU**

**JUDGE**