



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 120 OF 2012

(An Appeal arising out of the conviction and sentence of Hon. G.W. NGENYE-MACHARIA (MRS.) (PM) delivered on 30th April 2012 in Nairobi Criminal Case No.890 of 2011)

JEREMIAH MWITA RANGEAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant Jeremiah Mwita Range 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 the 21st day of April 2011, along Uhuru Highway in Nairobi within Nairobi County, the Appellant with another jointly robbed Thomas Kyalo Nguo of cash ksh.3,200/-, and at the time of such robbery used personal violence and wounded the said Thomas Kyalo Nguo. 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 faulted the trial court for violating his rights under **Article 50(2)** of the **Constitution**, **Section 150** of the **Criminal Procedure Code** and **Section 146** of the **Evidence Act**. He took issue with the trial magistrate's finding that the evidence of identification was proved to the required standard of proof beyond any reasonable doubt. He was aggrieved that the trial court acted upon inconsistent and contradictory evidence adduced by the prosecution. He complained that the trial magistrate did not consider his defence. He took issue with the sentence meted out by the trial court and asserted that the same was unconstitutional. 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 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 narrated to the court in detail how the Appellant and his accomplice assaulted and robbed him. He lost his teeth during the incident. His story was corroborated by PW2. PW2 witnessed the robbery. The medical evidence adduced by the prosecution indicated that PW1's injuries were serious. Learned State Counsel asserted that the Appellant was positively identified. The identification was by recognition. In the premises therefore, she urged this court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows: PW1, Thomas Kyalo Nguo, is the complainant herein. He stated that he worked as a handcart pusher. He transported groceries from Wakulima Wholesale Market to customers in different estates within Nairobi. On the material day of 21st April 2011, he left the said market at about 10.30a.m. He was going to South B Estate to deliver groceries. When he got to Uhuru Highway, he saw the Appellant and his accomplice seated on a bench along the highway, near the golf course. The two men approached him and demanded he surrender all the money he had. They held his hands together and ransacked his pockets. They beat him up. They stole Ksh.3,200/- that he had in his pockets. Passersby started crowding the scene to watch what was going on. The Appellant and his accomplice ran away and escaped with his money.

PW1 later reported the robbery at Parliament Police Station. He was referred to hospital for treatment of his injuries. PW1 stated that he knew the Appellant. He had seen him on numerous occasions along Uhuru Highway. The Appellant and his accomplice occasionally assisted handcart pushers in case they had a heavy load. The Appellant had assisted him in pushing his handcart, prior to the fateful day. On 27th June 2011, PW1 saw the Appellant and his accomplice seated at their usual spot along Uhuru Highway. He rushed to Parliament Police Station. He reported that he had seen the persons who had earlier robbed him. Accompanied by four police officers, they went to where the Appellant was. He was arrested alongside four other men. Back at the station, PW1 identified the Appellant and his accomplice as his assailants.

PW2, John Katiku Ndolo stated that he worked as a cleaner at Uhuru Highway Motors along Uhuru Highway. On the material day, he was at work. He overheard people quarrelling about ten (10) meters away. He saw three men; the Appellant, his accomplice and PW1. There was a handcart filled with groceries. A fight ensued between them. The two men beat up PW1. They then escaped into the railway golf club field. PW1 ran to where PW2 was. He was bleeding. Two of his teeth fell off. He said that the two men had robbed him of Ksh.3,200/-. PW1 requested PW2 to watch over his handcart. PW1 went to report the matter at the police station. PW2 stated that he had seen the Appellant and his accomplice along Uhuru Highway on numerous occasions. After a few days, police officers came and arrested the Appellant among others.

PW3, Corporal Lenny Ekidol was one of the police officers who arrested the Appellant. Together with his colleagues, they accompanied PW1 to Uhuru Highway where he identified the Appellant and his accomplice. They arrested the Appellant among other suspects. PW4, Corporal Alice King'oo was the investigating officer of the case. She interrogated the complainant. He narrated to her how the Appellant and another man had assaulted and robbed him on the material day. He identified the two assailants. They were arrested. She proceeded to charge them with the offence herein. Dr. Zephaniah Kamau, PW5 examined the complainant on 6th May 2011. This was 15 days after he claimed to have been attacked. He had a scar on his head, thumb, upper and lower right arm. He classified the injuries as harm. Two of his teeth had fallen off. He produced the complainant's P3 form in evidence. The same indicated that the Appellant's injuries were about two weeks old.

When the Appellant was put to his defence, he testified that on the material day he left home and alighted at Railways stage. He was headed to Langata to visit a friend. On his way, a police officer arrested him and took him to the police station. He was not informed of the reason for his arrest. He denied the charge brought against him.

This being a first appeal, it is the duty of this court to re-evaluate and reconsider the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the decision of the trial court. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot make any comments regarding the demeanour of the said witnesses and therefore give due regard in that respect (*See Njoroge vs Republic [1987] KLR 19*). In the present appeal, the issue for determination is whether the prosecution proved its case on the charges brought against the Appellant 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 to secure the conviction of the Appellant. This was a case of identification by recognition. PW1 stated that he had seen the Appellant on numerous occasions along Uhuru Highway. The Appellant had, prior to the robbery, helped him push his handcart on several occasions. This was for a fee. PW1 saw the Appellant at the same spot on Uhuru Highway days after the robbery. He identified him and made a report to the police. PW2 corroborated PW1's testimony. He witnessed the robbery on the material day. He knew the Appellant prior to the occurrence of the robbery. He stated that he had seen the Appellant on Uhuru Highway for four months prior to the robbery incident. He had also seen PW1 on numerous occasions carrying luggage on his handcart on Uhuru highway.

PW2 narrated how he saw the Appellant and his accomplice attack PW1 on the fateful day. His testimony was consistent with that of PW1. The Appellant was therefore not a stranger to the complainant and PW2. In addition, the robbery took place in broad daylight, at about 10.00 a.m. The complainant and PW2 were therefore able to identify the Appellant and his accomplice. This court is of the view that circumstances favouring positive identification were present in this case. The Appellant was positively identified and placed on the scene of crime.

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] KLR 549*). In the present appeal, the particulars of the charge are very clear. The Appellant was in the company of Geoffrey Muthoka (deceased) who was charged and convicted alongside the Appellant in the trial court. The evidence of PW1 and PW2 established the use of personal violence occasioned on PW1 by the Appellant and his accomplice. The medical evidence adduced corroborated PW1's claims that he sustained injuries during the robbery on the material day. **The defence put forward by the Appellant does not dent the otherwise strong evidence adduced by the prosecution connecting him with the offence.** 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 submitted that he was not provided with witnesses' statements. Hence, his right to a fair trial was contravened. From the trial court's record, the Appellant requested for witnesses' statements on 19th October 2011. The trial court gave an order for the same to be provided. When the trial case came up for hearing on 19th December 2011, the Appellant requested for an adjournment to enable him prepare for the trial. He did not inform the court that he did not have witnesses' statements. The matter came up for hearing on 22nd February 2012. The Appellant again did not intimate to the trial court that he did not have witnesses' statements or that he was not ready to proceed with the trial. The trial court had previously made an order for the said statements to be provided. Since the Appellant failed to inform the trial court that the statements were not given to him, this court cannot be sure that the same were not provided. There is also no indication that the trial court proceeded with the hearing of the witnesses after the Appellant intimated that he did not have witnesses' statements. Therefore, his right to a fair trial was not violated as alleged in his petition of appeal. He either received the witness statements or failed to fulfill his minimal obligation to inform the court that he did not have the statements, if at all.

The Appellant further contends that he applied for PW1 to be recalled for further cross-examination, but the same was not done. From the trial court's record, the said application was made by the Appellant on 19th October 2011. The trial court gave an order for PW1 to be recalled for further cross-examination by the Appellant. However, there is no indication from the trial court's record whether PW1 was actually recalled. This court cannot speculate with regards to the same. However, this is not a case where the Appellant was denied a chance to cross-examine witnesses. The Appellant fully participated in the trial and cross-examined witnesses. This court notes that the Appellant did not give any reasons why he wanted to recall PW1. He only stated that he wanted to recall PW1 for further cross-examination. The application was not grounded on any reasons or justifiable facts or on any desire to clarify any issues. It is the opinion of this court that the Appellant failed to demonstrate how he was prejudiced by failure to recall the said witness. Even though the trial court committed an error in the trial by failing to record whether the witness was recalled, by virtue of **Section 382** of the Criminal Procedure Code, this court cannot reverse or alter the Appellant's conviction on account of such error unless it had occasioned a failure of justice. This court is of the view that the same did not occasion any miscarriage of justice. The upshot of the above reasons is that the Appellant's appeal on conviction lacks merit

and is hereby dismissed.

With regards to sentence, 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 Appellant robbed the complainant and injured him in the process. The Appellant and his accomplice assaulted the complainant to the extent that he lost his teeth. The evidence adduced by the prosecution showed that actual violence was used. In the premises, this court sets aside the death sentence meted by the trial court. The same is substituted by an order of this court sentencing the Appellant to serve ten (10) years imprisonment with effect from the date of this judgment. The court has taken into account the period that the Appellant was in custody during trial and the period he has been in prison since his conviction. It is so ordered.

DATED AT NAIROBI THIS 13TH DAY OF MARCH 2019

L. KIMARU

JUDGE