REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.64 OF 2016

(An Appeal arising out of the conviction and sentence of Hon. A. Onginjo - CM delivered on 11th March 2016 in Kibera CM. CR. Case No.2695 of 2014)

JULIUS MUNYINYI KAMAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Julius Munyinyi Kamau 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 18th June 2014 at Ongata Rongai Township within Kajiado County, the Appellant jointly, with another not before court, being armed with dangerous weapon namely a knife, robbed Samson Mbori Mbedha of one silver ring valued at Ksh.800/- and two silver chains all valued at Ksh.7,500/- both items valued at Ksh.8,300/- and at or immediately before or immediately after the time of such robbery threatened to injure the said Samson Mbori. 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 his conviction stating that the prosecution's evidence was insufficient to sustain a conviction. He asserted that the evidence of identification adduced by the prosecution was not watertight. He faulted the trial court for relying on the doctrine of recent possession yet the stolen items were not recovered in his possession. He was of the view that the prosecution's case was not proved to the required standard of proof beyond any reasonable doubt. He was aggrieved that the trial court failed to consider his alibi defence in arriving at its decision. In the premises therefore, he urged the court to allow the appeal.

By consent of the parties, the appeal was disposed of by way of written submission. Both parties filed their written submission. During the hearing of the appeal, counsel for the Appellant submitted that the Appellant's conviction was based on a charge sheet that was bad in law for duplicity. She averred that the Appellant was charged with **robbery with violence** contrary to **Section 295** as **read with Section 296(2)** of the **Penal Code.** She asserted that the two sections created two different offences, which was prejudicial to the Appellant. She was of the opinion that one of the members of public who apprehended the Appellant ought to have been availed in court to adduce evidence with regard to the arrest of the Appellant. Failure to do so weakened the prosecution's case. She therefore urged this court to allow the Appellant's appeal.

Ms. Kimiri for the State opposed the appeal. She stated that the defect in the charge sheet was not fatal. It was her submission that the particulars of the offence as well as the evidence tendered matched the charge of robbery with violence. The Appellant was not prejudiced by the defect. It was her view that the same was curable under **Section 382 of the Criminal Procedure Code.** She submitted that the Appellant's identification was safe. He was apprehended at the scene of crime immediately after the robbery occurred. Learned State Counsel stated that the prosecution witnesses were credible and consistent. She argued that the fact that PW2 was the complainant's brother did not automatically disqualify his evidence. It was her submission that the prosecution was not required to call a certain number of witnesses to prove a fact. Those called were sufficient to establish the prosecution's case. She was of the view that the prosecution established the Appellant's guilt on the charge preferred against him to the required standard of proof beyond any reasonable doubt. In the premises, she urged the court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows: On 18th June 2014 the complainant was on his way home. It was about 8.45 p.m. As he was approaching Quarry at Friends' Corner, he met two young men. The Appellant was one of the men. The complainant greeted them as he walked past them. They suddenly attacked him from behind. The Appellant took his ring. His accomplice snatched a chain from his neck. He had a phone in his pocket. The two men were struggling to take the phone from his pocket. Luckily his brother (PW2) was also on his way home. When he got to the scene of robbery, he saw the Appellant and his accomplice in a scuffle with his brother. When the Appellant's accomplice saw PW2 approaching, he produced a knife. PW2 raised an alarm. He pleaded with his brother to cooperate with the

robbers. Members of the public started approaching the area to find out what the commotion was all about. The complainant with the help of the members of the public managed to apprehend the Appellant. They took him to the police station. His accomplice made good his escape. The complainant sustained a bite mark as well as injuries on his neck and legs as a result of the robbery. His stolen ring was recovered from the Appellant.

When the Appellant was put to his defence, he testified that on the material day, he was on his way home. He saw a person holding a flashlight. The said person appeared to be searching for something. When he approached him, the said person raised alarm. He accused him of being a thief. Members of the public responded to the alarm. They arrested him and took him to the police station. At the police station, a ring was produced. He was accused of stealing the ring. He denied taking part in the robbery.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make comment regarding the demeanour of the witnesses (See **Okeno vs Republic [1972] EA 32).** 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,** against the Appellant 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, the immediate arrest of the Appellant and the recovery of the stolen item to secure the conviction of the Appellant. As regard evidence of identification, PW1 and PW2 testified that they were able to positively identify the Appellant during the night of the robbery. PW2 stated that the scene of the robbery was well lit due to presence of street lights. He was therefore able to identify the robbers. He saw three men in a scuffle. When he came closer he noticed that one of them was his younger brother. There was therefore sufficient light at the scene of the robbery for PW2 to make a positive identification. PW1 stated that he greeted the Appellant and his accomplice before they proceeded to attack him. He therefore had a chance to see his assailants before the attack.

PW1 stated that when the members of the public started approaching the scene, the Appellant and his accomplice tried to escape. He managed to get hold of the Appellant. The Appellant bit him on his arm when he apprehended him, in a bid to try and make good his escape. His efforts to escape were however frustrated. From this evidence, the Appellant was apprehended at the scene of crime. He was arrested immediately after the robbery incident. PW2 corroborated this evidence. He saw the Appellant and his accomplice in a struggle with PW1 as they tried to rob him. When he noticed that the Appellant's accomplice had a knife, he pleaded with his brother to cooperate with the robbers as he feared for his brother's life. He also witnessed the Appellant's arrest at the scene of the robbery. PW1 and PW2 did not lose sight of the Appellant until his apprehension. The Appellant was apprehended by the complainant. The evidence from the prosecution witnesses was consistent and corroborative. This court is of the view that circumstances favouring a positive identification were present in this case. The Appellant was positively identified and placed on the scene of crime.

Two silver chains and a ring were stolen from the complainant. The stolen ring was recovered in the Appellant's possession. PW1 stated that when they apprehended the Appellant, he was pressured by members of the public to surrender the items he had stolen from the complainant. He finally surrendered the complainant's ring. The ring was in the Appellant's pocket. PW2 corroborated this testimony. In the case of **Arum -Vs – Republic [2006] 2 EA 10**, the Court stated as follows:

> ***"Before a court can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. There must be positive proof; first that the property was found with the suspect; second that the property is positively identified as the property of the complainant; thirdly that the property was recently stolen from the complainant."***

In the present appeal, it is evident that all these three ingredients were proved. **PW1 and PW2** confirmed that they recovered the ring from the Appellant. The complainant positively identified the ring as one of the items that was robbed from him. **PW2 confirmed that the recovered ring belonged to the complainant. It therefore follows that the doctrine of recent possession applies in this case. There was no doubt that the Appellant was found in possession of the ring belonging to the complainant after he was arrested immediately after the robbery occurred.**

In the present appeal, the ingredients of the offence of robbery with violence were established by the prosecution. The Appellant was in the company of an accomplice not before this court at the time the robbery was committed. The Appellant's accomplice was armed with a knife which is a dangerous and offensive weapon. PW4's evidence established that personal violence was occasioned on the complainant by the Appellant. PW4 examined the complainant on 20th June 2016. He stated that the complainant had scratch marks on the right side of his neck. He had bite marks on his left hand. His left knee was bruised. He also sustained injuries on his lower left leg. PW4 classified the said injuries sustained by the complainant as harm. He stated that the injuries were one day old. This medical evidence corroborated the complainant's evidence.

The Appellant submitted that the charge sheet was bad in law for duplicity since he was charged with robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. In **Cherere s/o Gukuli vs R. [1955] 622 EACA**, the Court of Appeal observed the following on the effect of a charge which is found to be duplex:

> ***"The test still remains as to whether or not a failure of justice has occurred. In our opinion, the result of the application of this test must depend to some extent upon the circumstances of the case and the nature of the duplicity".***

In the present appeal, the Appellant was not prejudiced by the defect in the charge sheet since he was aware of the case he had to meet. The particulars of the offence supported the charge of robbery with violence. The trial court's record indicates that the Appellant was not confused when the charge and the particulars thereof were read to him. He fully cross-examined the prosecution witnesses. He did not raise any complainant before the trial court with regard to the same. In the premises, this court holds that no miscarriage of justice was occasioned on the Appellant. The charge sheet was not fatally defective.

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 Appellant's defence did not rebut the overwhelming prosecution evidence. The upshot of the above reasons is that the appeal lodged by the Appellant lacks merit and is hereby dismissed. His conviction by the trial court is hereby upheld.

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 injuries occasioned by the Appellant during the robbery. The same were classified as harm. The court has taken into account the circumstances that the robbery took place. The death sentence is not called for in such circumstances. In the premises therefore, this court sets aside the death sentence meted by the trial court. The same is substituted with an order of this court sentencing the Appellant to serve five (5) 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 2ND DAY OF APRIL 2019

L. KIMARU

JUDGE