REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 115 0F 2018

DAVID MWETERI Alias NDAU……..…….....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT

1. The **Appellant** was charged with 3 counts of robbery with violence contrary to Section 296 (2) of the Penal Code CAP 63 of the Laws of Kenya.

2. The Appellant was tried and at the end convicted on the 3 counts and sentenced to suffer death in respect to count 1 with sentences in the other counts being kept in abeyance.

3. The Appellant was aggrieved by the said conviction and sentence thus provoking the instant Appeal via Petition of Appeal filed in court on 23rd August 2018. The Appellant who is unrepresented subsequently filed what he called amended supplementary grounds of appeal which is undated raising the following grounds of appeal;

> **a) THAT the Learned Magistrate erred in matters of law and fact by failing to note that the circumstances at the scene of crime did not warrant a positive identification/recognition for the illumination used when the incident took place hence it was not possible for anyone to indentify a person at that particular hour.**
>
> **b) THAT the Learned Trial Magistrate erred in matters of law and fact in failing to note that the exhibit adduced before court was not found in possession of the appellant.**
>
> **c) THAT the Learned Trial Magistrate erred in matters of law and fact by failing to note that the evidence adduced before court lacked merit and was not sufficient to sustain a secure conviction.**
>
> **d) THAT the Learned Trial Magistrate erred in matters of law and fact by failing to note that the appellant was not given a chance to take plea on charges preferred against him. On 24.8.2015 plea taken before Maroro PM and appellant pleaded not guilty.**
>
> **e) THAT the Learned Trial Magistrate erred in matters of law and fact by not noting that the witness testimonies were contradicting inconsistent and uncollaborating.**
>
> **f) THAT the prosecution did not prove its case beyond reasonable doubt that it was the Appellant who got involved in the said offence.**

4. The Appellant *inter alia* submitted that he was not given a chance to take plea according to Article 50 (2) (b) of the Constitution of Kenya 2010 and that his rights to a fair trial were violated since the certified copy of the proceedings did not indicate that the Appellant was given a chance to refute the offence or plead to the charges. 24.8.2015 from Lower Court records shows plea was taken.

5. With regard to identification, the Appellant submitted that that the evidence adduced by PW1 and 2 was not enough to convict him since the light in the house was not enough to identify anybody because on the particular hour, there was no light apart from the light that the alleged persons used as torch as said by the complainant.

6. Finally with regard to exhibits, the Appellant submitted that no exhibit was found in his possession since all the witnesses told the court that the same was found in the fence which clearly showed that the Appellant was not found with anything belonging to any of the complainants.

7. On the other hand it was submitted for the State that the prosecution had proved its case against the accused beyond any reasonable doubt.

8. Being a first appellate court, it is duty of court to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis and drawn my own conclusions. I am alive to the fact that I neither saw nor heard any of the witnesses and so cannot comment on their demeanor. I am guided on the duties of a first appellate court by the Court of Appeal decision of In the case of ***KIILU & ANOTHER – V- REPUBLIC [2005]1 KLR 174*** the Court of Appeal stated thus;

> ***i. An Appellant on a first appeal 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.***
>
> ***ii. 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; only then can it decide whether the Magistrate's findings should 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.***

9. **PW1 Lucy Mware** one of the complainant's in this case testified that on the night of 20th August 2015, she was asleep with her children when she heard a commotion at around 11PM. That, the intruders broke the door with a brick and hit her on the head and right hand with a metal bar and that she saw 3 of the criminals' one of whom was dressed in a stripped white and black shirt. That, the thugs then demanded for money and she directed them to the cupboard in the sitting room where they took Kshs 5,000 and that they also entered the kiosk which was articulated in the main house and took cereals and the day's sales of Kshs 3,000/=.

10. It was her further evidence that later on assorted items which had been stolen from her kiosk were recovered at the Appellant's home. It was her further evidence that the appellant was someone he did not know well prior to the attack but he used to come to her shop and that he was the one who wore the striped shirt. She further testified that the robbers had torches which were shining and she could see the appellant quite well. Her evidence towards this respect was never challenged in cross examination.

11. **PW2 Janerose Karenya Muchai** the other complainant in this case testified that on 21st August 2015, she was in her house when a gang of 4 people broke into her house with a stone and hit her with a stick on the head while demanding money which she did not have. That, they continued beating her and she gave them Kshs 5,000/= which was in her skirt and they said that the money was not enough and they whipped her buttocks with sticks and poured water on her and inserted fingers in her anus searching for money. It was her further evidence that the thugs terrorized her for about an hour and that she was able to recognize one of them **(the Appellant)** a resident of the neighbouring village (Athanja) and that they shared a polling station. She further testified that she was able to identify the accused as he had placed his shinning torch between his chin and chest as he counted the money and that her cell phone was recovered from the home of the appellant. Again her evidence towards this respect was never challenged even in cross examination.

12. PW3 who was robbed in a similar fashion like PW1 and 2 however testified that she could not identify any of the attackers as she was a visitor in the area.

13. The Learned Trial Magistrate who had the opportunity of seeing the witnesses testify remarked inter alia as follows in his judgment;

> ***"The prosecution lined up 3 eye witnesses; the complainants who gave a firsthand account of the events the subject of the instant proceedings. The testimonies of the said eye witnesses were fairly consistent and articulated well with that of other prosecution witnesses the common thread running through being a gang of 3-4 thugs, amongst them, the accused who hailed from the neigbouring village, breaking into the complainants homes and terrorizing them before robbing the women of various amounts of cash and assorted goods. Out of the 3 eyewitnesses 2 of them, the 1st and 2nd complainant positively identified the accused at the crime scene as one of their tormentors. Although the incident is stated to have occurred at night evidence forthcoming was that the medium of light that aided the said witness in indentifying the accused was torchlight being flashed around by his accomplices. The accused was in close proximity of the said witnesses within the confines of a room in a house and the transaction took a considerable duration of time. The 1st complainant and the 2nd complainant testified having previously known the accused as having occasionally visited the former's shop as a customer and a resident of the neighbouring village having shared a polling station with the latter. The court finds that in view of the foregoing circumstances the factors attendant to the identification of the accused by the said witnesses leave no room for a likelihood of error, more so the event having been one of identification by way of recognition. The recovery of items stolen from the 1st complainants kiosk within the homestead of the accused further corroborates the oral testimonies of the 1st complainant and the 2nd complainant of the accused involvement in the 3 robberies the subject hereof."……." "Being the trial court this court had the benefit of evaluating the demeanor of witnesses and those by the prosecution impressed as candid and forthright……."*** No one could have said it better than the Leaned Trial Magistrate.

14. As alluded to earlier PW1 and 2 were able to positively indentify the Appellant as one of the gang members who attacked them that night. PW1 was candid enough when she stated that she did not know the appellant very well. She however stated he used to come to her shop to shop. She further testified that the attackers had torches which were shinning and she could see the Appellant quite well. She was even able to describe how the Appellant was dressed on that material night and her evidence towards this respect remained uncontroverted. PW2 on the other hand stated that she was able to identify the Appellant as he had placed his shinning torch between his chin and chest as he counted money that he had robbed her. She further stated the Appellant was a resident of neighbouring village (Athanja) and that they shared a polling station. She further testified that the attackers engaged her for about 1 hour and her evidence towards this respect similarly remained uncontroverted.

15. There is therefore no doubt that the Appellant was positively indentified by PW1 and 2 who were known to him prior to this incident.

16. In the case **R –vs- Turnbull & Others (1976) 3 ALL ER 549 it was stated thus**

"... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?.... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

17. The Court of Appeal in **Douglas Muthanwa Ntoribi vs Republic (2014) eKLR** in upholding the evidence of recognition at night held as follows

"On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified:-

> ***"I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant."The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error..."***

18. From the circumstances of this case I am satisfied that the Appellant was positively identified by PW1 and 2 and the conditions at the time were conducive for a positive identification/recognition free from the possibility of any error. In any event this was a case of positive recognition as opposed to identification and I reject the Appellant's submission that he was not positively identified.

19. With regard to non recovery of exhibits, PW1 testified that assorted items namely; bunch of ball pens, cereals including rice, 2 packets of maize meal, 4 packets of wheat flour, 3 packets of oil, 2 bar soaps, a packet of cigarette, polythene papers, 2 packets of salt, 7 bathing soap, 11 sachets of detergent and 10 kilograms of beans which had been stolen from her *kiosk* were recovered from the Appellants home. PW2 similarly testified that a cell phone which had been stolen from her was recovered from the Appellant's home. The evidence of these two witnesses remained unchallged throughout the trial. The contention by the Appellant that no exhibit was recovered from his home was therefore not truthful. In any event even if it was to be accepted that no exhibit was recovered from the Appellant's home, the same would not have been fatal to the prosecution's case, being that there is evidence the appellant was recognized as one of the robbers.

20. The Court of Appeal in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs Republic (unreported)** stated thus;

"We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as 'neighbours from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants."(Emphasis supplied.)

21. Consequently nothing turns on this issue.

22.. Finally the Appellant contended that he was not given a chance to take plea according to Article 50 (2) (b) of the Constitution of Kenya and as such his right to a fair trial was violated. The proceedings in the lower court record show plea was taken on 24th May 2015 and appellant pleaded not guilty. He ably cross examined the prosecution witnesses and even requested witnesses statements. Similarly after conclusion of the prosecution's case, Section 211 of the Criminal Procedure Code was explained to him whereupon he elected to give a sworn statement with no witness to call. It is also imperative to note that he never raised the issue of not having taken plea throughout the trial.

23. In **David Irungu Murage & another v Republic [2006] eKLR the Court of Appeal** stated as follows;

The record of the trial court shows that the two appellants were not asked to plead to the charge. When they first appeared before the Principal Magistrate a hearing date was taken straight away. It is worthy of note that though the appellants were represented by counsel throughout the trial which lasted more than a year, the question of the appellants not having pleaded to the charge was never raised. We also note that the appellants in their respective defences categorically denied the charge. It is manifestly clear, therefore, that the appellants were tried with the false notion that they had pleaded not guilty. It is also clear that the omission to plead was never raised before the first appellate court, though the appellants had representation by counsel. The issue then that arises in these circumstances is whether the appellants had a satisfactory trial. We have carefully scrutinized the records of the two courts below and we are satisfied that the irregularities and the omission arising from the lack of opportunity to plead did not occasion a failure of justice and that whatever irregularities were committed were curable under section 382 of the Criminal Procedure Code.

24. I fully associate myself with the sentiments expressed by the Learned Judges of Appeal in the above case and am satisfied that no prejudice would have been occasioned to the Appellant by failure to take plea if indeed he didn't take plea.

25. With regard to sentencing, the Appellant was handled a death penalty. The Supreme Court decision in ***Francis Karioko Muruatetu & Another v Republic [2017] eKLR***. held that mandatory death penalty for murder is unconstitutional the maximum penalty for both murder

and robbery with violence is the death penalty but the Court has discretion to impose any other penalty that it deems fit and just in the circumstances.

26. In the instant case 3 robberies were committed by the Appellant and his accomplices in one night in a span of hours. In all the said robberies actual violence was used on the victims.PW1 for instance was hit on the head and right hand with a metal bar.PW2 on the other hand suffered a fractured left hand and was subjected to degrading treatment whereby the robbers whipped her buttocks with sticks, poured water on her and inserted fingers on her anus as they searched for money and sat on her naked body as they swigged beer bottles they were carrying. PW3 on the other hand was hit on the head and on the right eye with a machete until she lost sight. The prosecutor on the other hand intimated to court that though they were no records, the Appellant had in the year 2009 been convicted for the offence of stealing stock. The Appellant indeed appeared to admit this fact in his defence when he stated that in the year 2005, he had been framed up. It is also not lost on this court that the Appellant was not even remorseful in mitigation when he simply stated that he left his fate in the hands of the court.

27. Taking into totality all the circumstances in this case, it is my considered opinion that there are aggravating circumstances warranting this court not to interfere with the death sentence imposed upon the Appellant herein and I see no reason to disturb the same.

28. Accordingly, the Appellant's appeal is without merit and the same is accordingly dismissed in its entirety.

HON A. ONG'INJO

JUDGE

JUDGEMENT DELIVERED, DATED AND SIGNED IN COURT ON 9TH DAY OF MAY 2019.

In the presence of :

C/A: Kinoti

State:- Ms Mbithe

Appellant:-Present in person

Order : Copies of appeal to be supplied.

HON A. ONG'INJO

JUDGE