REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 97 OF 2015

JAMES KIBUE NGUMBARU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera Cr. Case No. 4109 of 2013 delivered by Hon. E. Juma (SPM) on 12th June 2015).

JUDGMENT

1. The Appellant, **James Kibue Ngumbaru** was charged with two counts of robbery with violence contrary to **Section 295** as read with **Section 296 (2)** of the **Penal Code**. The particulars of the first count were that on the 26th day of August, 2013 along Argwings Kodhek in Nairobi within Nairobi County, jointly with others not before court, while armed with dangerous weapons namely pistol, robbed **Zenah Akinyi Atieno** of cash Kshs. 25,000/= and a mobile phone make Tecno all valued at Kshs. 30,999/= and at the time of such robbery used actual violence to the said **Zenah Akinyi Atieno.**

2. In the second count, the particulars were that on the 26th day of August 2013 along Argwings Kodhek in Nairobi within Nairobi County, jointly with others not before court, while armed with dangerous weapons namely pistol, he robbed **Cleophas Situma Tulienge** (deceased) of a motor vehicle registration number KBV 838N Isuzu bus valued at Kshs. 5,000,000/= the property of Kenya Bus Service management and at the time of such robbery threatened to use actual violence to the said **Cleophas Situma Tulienge.**

3. The Appellant was convicted on both counts and sentenced to suffer death. He was aggrieved by both his conviction and sentence against which he preferred the instant appeal.

4. The Appellant raised seven grounds of appeal in his Petition of Appeal filed alongside his written submissions on 11th March 2019. The same can be condensed into four grounds namely; that he was not properly identified, that a crucial exhibit being the bus in count was not produced in evidence, that police investigations were shoddy and that the case was not proved beyond a reasonable doubt.

Evidence

5. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced by the witnesses and arrive at its own independent verdict. (See **Okeno v Republic (1972) EA 32).**

6. The Prosecution's case can be summarized as follows: **PW1, Zenah Akinyi Otieno** and the late Cleophas Situma Tulienge were the conductor and driver respectively of bus registration number KBV 838N plying the Kawangware - City Centre route on 26th August 2013. While on their last trip from Kawangware at around 7.00 pm, they picked and dropped passengers at various places. Upon reaching Kirichwa Road, a young man who had been travelling in the bus as a passenger sprung up from the back seat and started hurling insults while walking towards the door where PW1 was standing. She saw him clearly since the lights in the bus were on. He was wearing a long sleeved suit and had a light complexion with short hands.

7. When he reached where PW1 was, he commanded his accomplices who had also posed as passengers to spring into action. He then held PW1 and ordered her to surrender all the money she had while the other men attacked the driver and the other passengers. He slapped PW1 on the face when she attempted to look at him. PW1 handed him the sum of Kshs. 25,000/= which was in her overcoat as well as her mobile phone make Ideos 3 which was in her pocket.

8. One of the robbers removed the driver from the steering wheel and forcefully took control of the motor vehicle while it was still in motion. When they reached Rangers Road, the thugs ordered all of them to alight and drove away with the bus. PW1 and the driver first reported the

incident to the management's office then Muthangari Police station. Thereafter, she was taken to MedHill Hospital for treatment. PW1 identified the photographs of the subject motor vehicle.

9. PW2, Ben Imbahahe a claims officer with Kenya Bus Management Limited, received investigation of the robbery on the same evening at about 8.30 pm through a radio call. He asked drivers to be on look out. The bus was found abandoned at Gatune area the same night and driven to Muthangari Police Station. Photographs of the motor vehicle were taken on 27th August, 2013 by **PW3, PC Edward Mutie** a scene of crime personnel. He produced the five (5) photographs as exhibits 2 a-e. **PW4, CPL Evans Anaya** was the investigating officer in this case. He stated that the Appellant had been arrested in connection with another incident but it emerged that he was linked to the subject robbery. His name was in a list of several people suspected to have been involved in a series of robberies. On 25th October, 2013, **PW5, CIP Chrisantrius Obuche** conducted an identification parade at Kilimani Police Station in which the Appellant was positively identified by PW1.

10. When placed on his defence, the Appellant gave a sworn statement. He testified that on 23rd October, 2013, he got up early as usual and went to where his mother stays. She sent him somewhere around 11.00 am but he met police officers who arrested him on an allegation of committing a robbery. He was taken to Kilimani Police Station and locked up in a cell. On 25th October, 2013, it was alleged that he had robbed a lady who was at the report office. He was later charged with the offence in question which he denied committing.

11. Upon cross examination, he stated that on the evening of 28th August, 2013 when the incident in question is alleged to have occurred, he was at his house at Kawangware. He stated that his mother who was in court at the time could confirm the same. However, when asked whether he wished to call any witness, he responded in the negative and chose to close his case.

12. In the judgment delivered on 12th June 2015, the trial court found that the circumstances prevailing at the time of the incident were favourable for a positive identification. The court also rejected the Appellant's defence that he was with his mother at the time of the robbery and held that the case had been proved beyond a reasonable doubt. Further, the trial court held that even though the driver passed on before testifying, the two robberies occurred at the same time and place simultaneously. As such, the evidence of PW1 was sufficient to establish the two robberies committed by the Appellant.

Analysis and determination

13. The Appellant entirely relied on written submissions filed on 11th March 2019. Learned State Counsel, Ms. Sigei for the Respondent made oral submissions. Upon carefully reevaluating the evidence on record and considering the parties' respective submissions, I find that the following issues arise for determination namely; whether the Appellant was properly identified, whether photograph evidence was improperly admitted in evidence, whether the prosecution failed to call a crucial witness, whether the prosecution proved its case beyond a reasonable doubt and whether the sentence imposed was legal and proper.

Whether the Appellant was properly identified.

14. As regards this issue, the Appellant submitted that the circumstances prevailing at the time of the alleged robbery were not sufficient to place him at the scene of crime. He argued that PW1 had never seen him prior to the incident and only saw him briefly before the lights in the bus were switched off. In rebuttal, the learned state counsel submitted that the Appellant's identification was free from any possibility of error. She argued that PW1 identified the Appellant as there was sufficient light in the bus. Further, it was her view that PW1 had sufficient time to observe the Appellant as he moved from the back of the bus to the door where she was standing. She also positively identified him in an identification parade conducted upon his arrest.

15. The instant case presents a scenario of by identification by a single witness, namely PW1. The court must therefore be minded to warn itself of the danger of relying on the evidence of a single identifying, more so upon considering whether the conditions for identification were favorable. This is in view of the fact that there is a likelihood of a mistaken identity even when a witness strongly believes that he identified the suspect. In that case a miscarriage of justice may arise. (See **R v Turnbull & Others (1976) 3 All ER 549)**

16. In that respect, the court must critically test the circumstances under which the accused is identified. In the instant case, PW1 testified that she saw the Appellant walking towards her from the back seat of the bus to the door where she was standing. This was made possible with the help of the lights inside the bus which were on at the time. The Appellant was at the back seat whilst PW1 was near the door. The bus which was a 51-seat was long enough to enable PW1 to see clearly the Appellant as he walked to the front where she was. In my view, the conditions favoured a positive identification.

17. Furthermore, the Appellant was positively identified in the properly conducted identification parade by PW5. The Appellant faulted the parade since PW1's initial report to the police did not contain a description of the persons who robbed her. I agree that it is good practice for a witness identifying a stranger to give the description of her assailant in her first report, but as the Court of Appeal has held, the failure to do so would not render a properly conducted identification parade a nullity. See; ***Nathan Kamau Mugwe vs. R - Criminal Appeal No. 63 of 2008 (UR)*** the Court held that:

> ***"As to the complaint in ground six that the witnesses had not given to the police the description of the appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. ……. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to***

see if the witnesses can identify him. In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade. We reject the contention that because James had not given to the police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected."

18. In view of the above decision, my view is that the court should evaluate the circumstances of identification on a case to case basis. Where the conditions for a positive identification prevail and subsequently a properly conducted identification parade follows, a court should not nullify the parade merely because the witness had not given a description of the assailant to the police. This is the scenario that obtained in the instant case in which case I hold and find that the parade having been properly identified, the Appellant was properly identified.

19. Furthermore, the Appellant did not fault the manner in which the parade was conducted. He signed the parade forms to confirm that the parade officer complied with the procedure of conducting a parade. It mattered not therefore, that he was arrested in connection with another robbery. The evidence that the trial court relied on was that adduced in relation to the instant case. I cannot therefore fault the trial court's finding that the identification was fool-proof. The Appellant's alibi defence was ousted by the strong prosecution case.

Whether the photographs were properly admitted in evidence.

20. The Appellant faulted the trial magistrate for admitting the photographs of the subject motor vehicle in evidence instead of the actual vehicle. He submitted that the actual vehicle should have been produced for scrutiny by the court before being released. In his view, the failure to do so was a fatal error since the case depended on physical evidence. However, it is common practice in criminal trial to tender photographs in evidence where the actual exhibit cannot be produced so long as the photographs are processed in a manner authorized by law. (See **Republic v John Nganga Mbugua [2014] eKLR).** In any case, the production of the physical vehicle would not have added material value to the case. What was in issue was whether the Appellant participated in the robbery, a fact that the prosecution established.

Whether prosecution failed to call a crucial witness.

21. In addition the foregoing, the Appellant raised issues of the failure by the prosecution to call as a witness the police officer who arrested him. However, the prosecution is not obliged to call a superfluity of witnesses in order to prove a fact. What is paramount is that sufficient witnesses are called to establish the case. The prosecution in this case discharged its burden. No gap was left by the failure to call the arresting officer.

Whether the case was proved beyond a reasonable doubt.

22. In view of all the foregoing, I find that the prosecution properly discharged its burden by proving its case beyond a reasonable doubt. Necessary elements of the offence of robbery with violence as defined under **Section 296 (2)** of the **Penal Code** were established. These are that:

a) The offender is armed with a dangerous or offensive weapon or instrument; or

b) The offender is in the company of one or more person or persons; or

c) If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any personal violence to any person.

23. According to the evidence on record, PW1 and the deceased driver were robbed by a group of young men who had posed as passengers in their motor vehicle. One of them used personal violence on PW1 at the time of the robbery by slapping her on the face when she attempted to look at him. The robbers stole Kshs. 25,000/= and a mobile phone from PW1 as well as the motor vehicle which was being driven by the deceased driver. The Appellant's conviction was therefore safe and I find no reason to upset it.

Whether the sentence imposed was proper.

24. On this issue, the learned state counsel submitted that a pistol was used thus being an aggravating factor. She therefore urged the court to uphold the death sentence. The Appellant on his part did not tender any submissions in this regard. In the contrast, none of the witnesses stated that a pistol was used in the robbery despite the fact that the charge sheet indicates so. I have regard to the fact that the stolen bus was recovered intact and that the injuries PW1 sustained were not grave. Sustaining the death sentence would be harsh and excessive in the circumstances. I accordingly set aside the death sentence and substitute it with eight years imprisonment from the date of conviction. It is so ordered.

DATED and DELIVERED 7TH DAY OF MAY, 2019.

G.W. NGENYE-MACHARIA

JUDGE

1. Appellant in person.

2. Miss Akunja for the Respondent.