THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO 24 OF 2018

(Being an appeal from the original and sentence dated 20th January

2017 in criminal case No. 310 of 2016 by Hon. S. Shitubi Mrs. C.M)

ENOCK NYABUTO NYAKWEMBA.........APPELLANT

VERSUS

REPUBLIC...RESPONDENT

JUDGEMENT

1. The Appellant was charged with the offence of Robbery with Violence in contravention of **section 296(2)** of the Penal Code Cap 63, Laws of Kenya. The particulars of the offence are that on the 29th of February 2016 at Kitengela Township in Isinya District within Kajiado County jointly robbed Justus Harvester Onuko a sonny digital camera, mobile phone make itel and cash Kshs. 32, 800.00/= and immediately before or immediately after the time of such robbery wounded the victim.

2. A full trial was conducted the Learned trial Magistrate found the Appellant guilty as charged and proceeded to release the 2nd Accused citing failure on the part of the prosecution to prove the charges leveled against him to the required standard of proof beyond reasonable doubt. The Appellant was subsequently convicted and sentenced to suffer death in the matter provided by the law.

Grounds of Appeal

3. The Appellant was dissatisfied by the trial court's decision and displayed it by timeously filing a petition of appeal dated 29th September 2018. He appeals against both the judgment and sentence on the basis of the grounds couched on the phase of the petition of appeal.

4. A brief summary of the grounds of appeal is that the learned magistrate did not warn himself that the events transpired on the material night where not favorable for positive identification since there was no sufficient light at the crime scene, failure on the part of the court to consider that the Appellant was unrepresented by Counsel even though he was charged with a Capital Offence, and therefore the appellant could not properly defend himself.

5. It is also indicated in the petition of appeal that the learned trial magistrate erred in taking into consideration that the time difference given by each of the witnesses as to the occurrence of the alleged theft was sufficient to raised doubt as to truthfulness of the evidence adduced. Further that the totality of the Appellant's evidence was not taken into account, that the charge sheet was incurably defective as it did not disclose the time within which the alleged offence was committed.

6. In addition, the appeal is based on the grounds that the prosecution failed to prove its case beyond reasonable doubt by corroborating the complainant's evidence with that of the investigating officer as to prove ownership of the alleged stolen items without producing documents for the same and their value therein.

7. As this is a first appeal, I'm under a duty to examine the evidence on record afresh and exhaustively and to form my own independent decision on the evidence. See the Court of Appeal in ***Okeno v Republic (1972) EA 32,36.***

The Prosecution Case

8. The evidence at the trial was that PW1 was on a bicycle just before 9 pm as he was passing through a road that passes through Acacia supermarket to New Valley where he stays. He noticed that there were two people who were coming on a motor cycle behind him. They passed, went ahead and stopped at the same junction.

9. As he was about to reach a motor cycle approached him and he went aside to create space for it pass. He then heard one of the riders say "hit him from behind". He was then hit and fell of the bicycle. His phone fell and violence was visited on him. He stated that he managed to identify them during the robbery. Further that it is the 2nd Accused who took his phone, and the first accused to his camera and through it to the 2nd Accused. He stated that he raised alarm and tried to escape.

10. He also told the trial court that the 2nd Accused escaped on foot; he was the passenger as the Appellant was struggling to take his big camera from the bicycle. He then pushed the bicycle against him, he fell, stood up, picked his motor cycle and drove off. It is his testimony that the 1st Appellant's phone fell as he left. The mobile phone is make: Nokia Blue IMEI model 201 type RM-799 which was produced in court and marked as MFIY.

11. He reported the matter the following day, he was given P3 forms at the police station and referred to the hospital. He was treated and the P3 form was filled and signed. It is herein marked as MF1 "2". His camera was recovered and it was produced in court as evidence. A day later he was called at the police station where he found the accused persons handcuffed, he was asked to identify them.

12. His phone was not recovered as well the Kshs. 6,000/= he had during the robbery. He further stated that there were lights where the incident took place and that's how he recognised them. He also stated that he had never seen them before. Upon cross examination by the Accused persons, he stated that lights were on when he screamed and he managed to see the assailants. Further that the phone that dropped assisted him. He identified the 2nd accused from his colour.

13. The matter was investigated by No. 66930 CPL James Karanja based at Kitengela Police Station. He testified that a report was lodged by the complainant at the police station on the 1st of March 2016. He reported that on the 29th he had been robbed of his phone, cash Kshs.6,000/ and a small camera. He indicated that the complainant explained the whole ordeal to him.

14. He stated after the Complainant had been treated, the Appellant was arrested using a photograph found in the phone (on the screen saver) and he the camera that belonged to the complainant was recovered in his house. Having arrested the Appellant, the police officer instructed him to lead them to the 2nd Accused. PW2 testified that the Appellant indicated that the 2nd Accused had gone with the money, the complainant's itel phone was not recovered. The complainant identified the camera herein marked as Ex 3.

15. Upon cross examination by the appellant, he indicated that he arrested him near his place of abode. He then recorded that the camera was recovered from the Appellant since it was found in his rental house. Upon Re-examination, the witness stated that on record that he recovered the camera from 2nd accused was slip of the pen.

16. PW3 is the clinical officer who treated, filled and signed the P3 Form for the complainant. The history presented to her by the complainant is that he had been assaulted by people well known to him and also stole from him. According to PW3, he sustained soft tissue injuries in scalp, face, through the back and chest. He had bruises on the scalp, face, neck and lips. Also, tenderness on the posterior and anterior chest was noted. Further findings were that there was history of cough associated with blood stain sputum, multiple bruises with swelling and redness on the upper limb and bruises on the lower limp with swelling and tenderness. The injuries were 2 days old.

The Defence Case

17. The Honourable Magistrate found that the prosecution had established a prima facie case warranting the accused persons to be place on their defence in accordance with law.

18. The Appellant, denied having robbed the complainant. He alleged that upon his arrest the police took his phone from his pocket, took him aside and asked him if the phone they had in their possession belonged to him. He told them it was his. They then alleged that he robbed the complainant. He denied having robbed anybody. He never the less was taken to the police station.

19. Further that they took him to his house, left him outside when they entered inside. They then returned him to the station and beat him up demanding that he reveals the other assailant. He stated he told the police there was none. They beat him up until he pointed the person who was near him (the 2nd Accused), they arrested him and took him to the police station where they were both charged with the offence of robbery.

Submissions

20. The Appellant filed submission through his Counsel of Mwaura Kelvin Karuga and Associates, Advocates. On the 1st ground of appeal, Learned Counsel indicates that the trial Court failed to warn itself of the dangers of convicting the Appellant on evidence of a single witness, pw1. He cited the ***Court of Appeal of Eastern Africa in Abdalla Wendo vs Republic (1953) 20 E.A. C.A 166; Roria v Republic (1967) EA 573; R vs Turnbull & Others (1976)3 All ER 549; Charles Amboko Anemba vs R; Wamunga vs Republic; Nzaro v. Republic (1991) and Isaac Nganga Kahiga*** to bolster the proposition that the conditions which prevailed at the crime scene on the material date were not favorable for a proper and safe identification of the Appellant.

21. It was also submitted that the charge sheet was defective. Further submissions were made to the effect that there were contradictions between the prosecution witnesses, specifically PW1 and PW2. Learned Counsel submits that had an identification parade been conducted, perhaps the results would have been totally different. He placed reliance on several Cases inclusive the case of ***Joseph Odhiambo vs. Republic Cr. Appeal No. 4 of 1980; Gopa s/o Gidamebanya & Others vs. Repblic Cr. No. 106 of 1983; Martin Oduor Lango & 2 Others vs. Republic (2014) eKLR; Patrick Muriuki Kinyua vs. R (2015) eKLR; Patrick Muriuki Kinyua vs. R (2005) eKLR*** among other cases in support of the above argument.

22. The Learned Counsel for the Appellant also submitted on the doctrine of recent possession. He relied on the cases of ***Peter Kibue vs. Republic (2001) eKLR; Malingi vs. Republic (1989) eKLR 225*** to support the was appellant found in possession of recently stolen items and failed to give a satisfactory explanation of how he came by them and although he died having the same, this amounted to the trial court allowing the shifting of the burden of proof to the Appellant.

23. In opposition to the instant appeal, the state through its Counsel, Mr. Meroka, filed submissions dated 19th October 2018 in support of the conviction and appeal. Learned Counsel argued that the prosecution discharged its burden of proving the offence of Robbery with violence in terms of Section 296(2) of the Criminal Code.

24. According to him, all the ingredients of the offence robbery with violence. On the violent nature of the robbery, Learned Counsel relied on the clinical officer's evidence which confirms that there was violence during the robbery. Further that the property of the accused was recovered from his house, that is the small camera and that it was the Appellant's phone which enabled the police to track him down.

Law and Analysis

25. I have considered the evidence on record, the petition of appeal and the written submissions made by both counsel in support and in opposition of the appeal. I have also considered the exhibits and all other relevant evidence available. I hold the following view of the matter. The issues for determination in this matter are as follows:

> ***a) Whether the Appellant was properly identified as the assailant who robbed the complainant.***
>
> ***b) Whether there are material discrepancies in the prosecution case.***
>
> ***c) Whether the charge sheet was incurably defective.***

26. In determining whether the ingredients of the offence of robbery with violence were proved, the court must be satisfied that there is credible evidence of theft, the attackers must be more than one, they must be armed with a dangerous weapon and that violence was visited on the complainant.

These ingredients of robbery with violence are as set down in section 296 (2) of the Penal Code, as follows:

> "***296. Punishment of robbery***
>
> *(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.*
>
> *(2) If the offender is armed with any* ***dangerous or offensive weapon or instrument****, or is* ***in company with one or more other person or persons,*** *or if, at or immediately before or immediately after the time of the robbery,* ***he wounds, beats, strikes or uses any other personal violence to any person,*** *he shall be sentenced to death." (See the* Court of Appeal in the case of **OLUOCH –VS – REPUBLIC [1985] KLR**).

27. The main issue for determination herein is whether the Appellant was properly identified as the perpetrator of the alleged robbery. I'm alive to the We are mindful of the fact that the evidence on identification is given by a single witness. This fact does not on its own render this evidence unreliable. In the case of **MAITIANYI –VS- REPUBLIC [1986] KLR** the Court of Appeal held that:

> I also rely on the dicta from the case of ***Abdullah Bin*** ***"Subject to well-known exceptions it is trite law that a fact maybe proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification ………."***

28. ***Wendo vs Rex 20 EACA 166*** that:

> ***"Subject to certain well known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a Judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error."***

29. Over and over again this court has emphasized that the quality of identification evidence is critical; if the quality is good and remains good at the close of the defence case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger. In ***R – v- Turnbull, (1976) 3 All ER 551,*** Lord Widgery CJ observed;

> ***"Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

30. In the instant case, the complainant gave a very cogent and concise account of the events of that day. He remained unshaken under cross-examination by the accused. The circumstances prevailing during the ordeal were undoubtedly difficult for a positive identification since

the incident occurred at night around 9: pm. Further, and more importantly the Appellant was a person who was a stranger to the complainant.

31. However, there is also evidence adduced by the prosecution which establishes a strong nexus between the Appellant and the robbery in question. It is indicated by the complainant that he recovered the Appellant mobile phone which he dropped before he took off from the scene of crime. He then handed the same to the police upon lodging the complaint. The said phone assisted the police in their investigations in this matter as indicated by PW2. PW2 told the trial court that in the said phone, there were pictures of the Appellant which they used to investigate the matter and eventually tracked him down. The Appellant did confirm that the phone belonged to him. This corroborates the tendered evidence by the complainant during trial.

32. Furthermore, the complainant's camera which was forcibly taken away from him during the ordeal was recovered in possession of the Appellant. Thus, in my view the only logical conclusion to be deduced from the foregoing evidence is that the Appellant was properly identified as the perpetrator of the robbery.

33. The 2nd issue for determination is whether the discrepancies cited by the Counsel for the Appellant were fatal. The law as regards the issues of contradictions and discrepancies is very crystal clear. It is trite law that inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected. ***(See Uganda vs Rutaro {1976} HCB; Uganda vs George W. Yiga {1979} HCB 217).***

34. In trying to shade light as to why there might be minor discrepancies between two witnesses testifying on the same case, the High Court of Kenya in ***Philip Nzaka Watu v Republic (2016) CR APP 29 OF 2015***, had this to say:

> ***"The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt.***
>
> ***However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."***

35. Again the court, in ***Joseph Maina Mwangi versus Republic Criminal Appeal No. 73 of 1993,*** held, *inter alia,* that:-

> "***In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies, must be guided by the wording of section 382 of the criminal procedure code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences"***

36. I'm also guided by the Court of Appeal decision in ***Erick Onyango Odeng' v. Republic [2014] eKLR*** citing with approval the Uganda Court of Appeal case of ***Twehangane Alfred v. Uganda Criminal Appeal No. 139 of 2001, [2003] UGCA, 6*** in which it was held as follows:

> ***"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case."***

37. The role of an appellate court in the circumstances as spelt out in numerous cases is to assume the role of the trial court, reconcile these and then determine whether they were prejudicial to the appellant and therefore fatal to the prosecution case or were inconsequential to the appellant's conviction and sentence. See the case of ***Josiah Afuna Angulu versus Republic, Nakuru CR Appeal No.277 of 2006 (UR) and Charles Kiplang'at Ngeno versus Republic Nakuru CR. Appeal No.77 of 2009 (UR).***

38. It is also important at this point to examine the nature and meaning of the word contradiction. I'm persuaded by the definition rendered by the Court of Appeal of Nigeria in the case of ***David Ojeabuo vs Federal Republic of Nigeria {2014} LPELR-22555(CA), Adamu JA; Ngolika JA; Orji-Abadua JA; & Abiru JA.*** Where the court stated as follows:-

> ***"Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."***

39. In light of the above decisions I now endeavor to make a determination on the above issue. The Learned Counsel for Appellant indicated that there is a serious disparity. He referred the court to the prosecution evidence that the 2nd accused was the passenger of the motorcycle used in the robbery. Whereas, PW2 said that the 1st Accused was the passenger. The proper evidence to rely on regarding who was the passenger is that of PW1. Clearly, he stated that the 2nd Accused took off from the scene of the crime by foot and that he was the passenger.

40. The evidence of PW2 was hearsay from PW1. Thus, hearsay evidence is prone to distortion in the process of moving from one person to another. In view of the above testimonies and the cases I have cited above, I find that the discrepancies and contradictions which I admit their existence in this case are not prejudicial to the Appellant and therefore not fatal to the prosecution case.

41. The question as to what constitutes a defective charge sheet was spelt out in the case of **YOSEFU AND ANOTHER -VS- UGANDA (1960) E.A., 236**. The East Africa Court of Appeal held:-

> ***"The charge was defective in that it did not allege an essential ingredient of the offence; i.e. that the skins came from animals etc, in contravention of the Act."***

42. And in **SIGILANI -VS- REPUBLIC (2004) 2 KLR, 480**, it was held that:-

> ***The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence."***

43. On the other hand, Section 134 of the Criminal Procedure Code provides for what the components/ingredients of the charge sheet constitute as follows:-

> ***"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.***

44. The underlying principle governing charge sheets is that an accused person ought to be charged with an offence known or recognized in law. The offence that the accused is charged with must be disclosed and stated in clear terms and unambiguous manner so as to enable the accused plead to a specific charge in which he understands.

45. This enables the accused in preparation of his defence. The Counsel for the Appellant contends that the particulars of the offence do not state Kshs. 6.000/=. Further that the charge is unambiguous because it is unclear whether the value of Kshs. 32,800/= is only for the Sony Digital Camera and the aitel mobile phone, or both off them. Further that the charge sheet is defective because it does not state the time of the offense which from the proceedings is only stated to be 9:30 pm by PW1.

46. In view of the foregoing contention advanced by the Learned Counsel, the ingredients of the offence of robbery with violence as envisaged in terms **section 296** are proof that the assailant was in company of another person or more, proof of theft, proof that violence was visited on the complainant and that the assailants were armed with a dangerous weapon. The fact that the time at which the offence was committed is missing on the charge sheet does not touch on the ingredients of the offence of robbery with violence.

47. Despite that, there is no question in my mind that the Accused person clearly understood the charges facing him (to wit, robbery with violence) well enough to understand the ingredients of the crime charged so that he could fashion his defence. The particulars of the offence were properly and clearly spelt out in the charge sheet which captures the date the offence was committed, the place it took place, the act that constitute the alleged offence and the names of the victim and that of the Appellant. This in my view, he understood it well enough to offer an explanation when the facts were read out to him.

48. On whether the doctrine of recent possession of any probative value, Section 2 of the penal code provides for the definition of possession. It states as follows:

> **(a) To be in possession or have in possession includes not only having in one's own personal possession but also knowing anything in the actual possession or custody of any person, or having anything in any place (whether belonging to or occupied by one self or not) for the use or benefit of oneself or any other person.**
>
> **(b) If there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or her custody or possession, it shall be deemed and taken to be in custody and possession of each all of them.**

49. In the case **of *Malingi versus Republic1989 KLR225*** the court of appeal analysed the doctrine of recent possession as follows;

> ***"By the application of the doctrine the burden shifts from the prosecution to the accused to explain in his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. Firstly, that the item he has is in his possession, that the lapse of time from the time its loss of the time the accused was found with, it was from the nature of the time and circumstances of the case recent; that there are no co existing circumstances which point to any other person as having been in possession of the items. The doctrine being a rebuttable presumption of facts, the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole or was a guilty receiver."***

50. In the instant case the Appellant was found in possession of the complainant's camera. The complainant says that the Appellant stole it from him during the robbery. No satisfactory explanation was given by the Appellant to that effect. In view of the above cited case, I reject the learned counsel contention the court by seeking any explanation from the appellant was an illegal act. The Appellant contention on this limb has failed.

Conclusion

51. The upshot of this matter is that the ingredients of the offence of robbery with violence were proved beyond reasonable doubt. The Appellant was positively identified by PW1 and the phone that he dropped at the scene of the crime helped the police officers to investigate the matter. The same led to the arrest of the Appellant. Upon arrest he was also found in possession of the complainant's camera which he stole during the robbery. He also visited violence on the complaint as exhibited by the evidence of the clinical officer. In the premises, my considered view is that the instant appeal fails.

52. On sentence, the Learned Counsel for the Appellant did not make any submission on the same. I'm alive to the fact that death sentence is no longer mandatory in Kenya. The holding of the Supreme Court in **Francis Muruatetu and another vs. Republic (2017) eKLR** declared mandatory death sentence in Kenya. This Court has discretion to impose a proper sentence in light of the totality of the evidence on record and the circumstances of this case.

53. I have considered other sentences which were meted after the Muruatetu case. In **Benjamin Kemboi Kipkone Vs Republic (2018) eKLR** where 3 robbers armed with an Ak 47 rifle robbed the complainants of Kshs. 250,000/= and a mobile phone, **Chimitei J** substituted the death sentence with 20 years' imprisonment with effect from the date of judgment.

54. In **Paul Ouma Otieno Vs Republic (2018) eKLR** where the convict was armed with an AK 47 rifle and a kitchen knife and robbed the complainant of cash Kshs. 450,000/= and 3 mobile phones, **Majanja J** substituted the death sentence with 20 years' imprisonment commencing on the date of the sentence by the trial court.

55. I have taken note of the fact that the accused visited violence on the complainant which caused him of considerable injuries and robbed him his mobile phone and cash and a camera which was later recovered from his house. Upon mitigation he stated that he is young man full of energy and potential. He for asked for forgiveness.

56. I have considered **Section 333(2)** of the Criminal Procedure Code requires a sentencing court to take into account the period that a convicted person has spent in custody prior to the sentence.

57. The Appellant was in custody for almost a year. He has already served approximately two and half years from the date of conviction which is 20th January 2016. Which makes the time he has lost his liberty approximately three and a half years. At the other end of the spectrum is existence of the fact that the complainant property was recovered during the arrest of the appellant. Given the jurisprudence in Muruatetu case the application and the exercise of discretion in sentencing remains a free pick and mix of factors to impose a sentence for both the interest of the victim and the offender. In this matter the appellant faced a serious offence of robbery with violence. It is therefore not lost by this Court that there are aggravating factors for the offences of this nature when proved beyond reasonable doubt which outweigh any mitigation offered by the offender.

58. Having considered the foregoing, I hereby sentence the Appellant to 10 years imprisonment from the date of the arrest.

SIGNED, DATED AND DELIVERED THIS 7TH DAY OF JUNE, 2019, IN OPEN COURT.

HON. R. NYAKUNDI

JUDGE

In the presence of:

Ms. Nkirote for DPP-present

Appellant in person present.