REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 11 OF 2018

MOHAMMED RASHID MUNGA .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against Judgement of the applicant in Criminal Case No. 292 of 2016 at Mariakani Law Courts delivered by Hon. N. S. Lutta on 24.8.2017)

CORAM: Hon. Justice R. Nyakundi

Appellant in person

Miss. Sombo for the Respondent

JUDGEMENT

Background

The appellant was arraigned in court and charged with the offence of robbery with violence contrary to Section 295 as read with Section 296 (2) of the penal code. The particulars of the offence were that on the **27.4.2016** at Mnangoni area, jointly with others not before court while armed with dangerous weapons namely pangas robbed off Juma Ngala of a mobile phone, umbrella and cash 600 all valued at Kshs.2,500/= and immediately before or immediately after the time of robbery threatened to use violence against the complainant Juma Ngala. The appellant denied committing the offence. After a full trial he was found guilty and convicted under Section 215 of the Criminal Procedure Code and sentenced to suffer death.

Being aggrieved with the entire Judgment, the appellant filed a memorandum of appeal dated **28.5.2019** and cited four grounds of appeal. Stated as follows:

> ***(1). That the Learned Trial Magistrate grossly erred in both Law and facts by failing to consider the prevailing circumstances at the scene of the crime were not conducive for positive and accurate visual identification of the appellant.***
>
> ***(2). That the identification parade was not duly conducted pursuant to chapter 46 of the standing orders, hence rendering the conviction unsafe.***
>
> ***(3). That the Learned Trial Magistrate erred in Law and fact by failing to consider the defence statement of the appellant.***
>
> ***(4). That the Learned Trial Magistrate erred in Law and facts by failing to consider that the death sentence impulse is unconstitutional.***
>
> **Prosecution evidence at the trial.**

The complainant in this case **Juma Ngala (PW 2)** testified that he hailed from Mwakiningo village. On the material day of **29.4.2016** while in company of **Francisca Kanze (PW 1),** they were walking from a church for choir at about 8.00 p.m. headed to their respective homes. While on the way it was the testimony of PW 1 and PW 2 that they came into contact of two boys standing next to a container. According to PW 1 and PW 2 the two boys confronted them and immediately stole a mobile phone from PW 1 and PW 2, an umbrella and cash in possession of PW 2. PW 1 and PW 2 further testified that the appellant and another not before court wielded pangas which they used to inflict physical harm. In cross-examination PW 1 told the court that the appellant was not known to her but did manage to give his description to the police. On the part of PW 2 in answer to the appellant cross-examination he gave evidence that he was able to identify the appellant at the scene.

PW 3 Moses Hamisi testified before the trial court that on 29.4.16 while at the stage he heard some screams from a person who had been robbed. It was his testimony that on responding to the distress screams he found two ladies whom he escorted to Mariakani Hospital using his Boda Boda. The following day according to PW 3 he met the appellant who was complaining about people making useless reports to the police. In his estimation together with others not called as witnesses thought this might be the suspect of the previous day robbery. That is how the appellant was later to be arrested by **PW 6 Corporal Sosten Rotich** on 30.4.2016. PW 6 did not recover the weapon used during the robbery nor the stolen goods of the complainant.

Apart from the evidence of PW 1 and PW 2, the only other evidence about the robbery was that of **PW 5 – Martha Saumu**. She was also attending the church function together with PW 1 and PW 2. There on or about 8.00 p.m., they walked home when suddenly they came face to face with the robbers.

PW 4 Edward Charo a clinical officer based at Mariakani Hospital examined PW 1 who came with a history of being assaulted on 29.4.2016. On examination PW 4 testified that he was able to establish bruises on both legs and had a tear on her vagina which was bleeding. He testified that on 12.8.2016 he filled P3 Form and PRC Form both admitted in evidence as exhibit 1 and 2 to support the prosecution's case on robbery against PW 1.

The Learned Trial Magistrate considered the evidence at the close of the prosecution case and did place the appellant on his defence. The appellant gave a sworn statement in which he denied being at the scene of crime as alleged by the complainants. When the Learned trial Magistrate proceeded to consider the surrounding circumstances of the offence, he held that PW 1 and PW 2 had an opportunity to see the appellant in company of another as they committed the robbery against them.

In this appeal the appellant in his four grounds mainly challenged the finding of the trial magistrate on placing the decision on identification which had no proper evidence to prove it beyond reasonable doubt. The other complaint was the failure by the trial magistrate to consider that mandatory death penalty has since been considered unconstitutional by the Supreme Court in Francis Muruatetu decision (2017) EKLR. This being a first appeal it is the duty and mandate of this court to re-evaluate and analyze the evidence adduced before the trial court to come up with its own conclusion on the matter. However, in doing so as held in **Okeno –v- R (1972) EA 3ZJ** the court is to bear in mind that it did not have the advantage of the trial court of hearing, seeing and determining the credibility of the witnesses which involves a foot note on the demeanor of a witness.

In determining this appeal being a first appellate court, the expectation of the appellant is for the whole evidence to be subjected to a fresh and exhaustive re-evaluation on both conviction and sentence. Guided by the above requirement and having outlined the evidence adduced at the trial its imperative to look at the petition filed accompanied with the grounds advanced and the rejoinder by the state.

The Law, analysis and determination

The first ground to me which is central to the entire appeal is whether the prosecution discharged the burden of proof beyond doubt on the ingredients of the offence in terms of Section 295 as read with Section 296 (2) of the penal code on robbery with violence. The court of appeal has now and again reiterated for guidance to the trial courts in several decisions as to what constitutes the offence of robbery with violence under Section 296 (2) of the penal code. In addressing these provisions, the court of appeal in **Ganzi & 2 Others –v- R 2005 IKLR 52** held as follows:

That the elements of the offence of robbery with violence are

1. The offender is armed with any offensive weapon or instrument.

2. Or the offender is in company with one or more other persons or

3. at or incidentally before and or incidentally after the robbery the offender wounds beats strikes or use other personal violence to any other person.

Citing the provisions of Section 296 (2) of the penal code, the same court in the case of **Moneni Ngumbao Mangi –v- R 2006 eKLR** adopting the passage in **Opoya –v- Uganda 1967 EA 752** The court made the following observation:

"The word robbed is a term of art and connotes simply a theft but a theft preceded, accompanied or followed by the use of threat or use of actual violence to any person or property in order to obtain or detain stolen property."

With regard to the above definition the facts of the case must proof use of threat or actual violence meted out against the complainant. The use of force must be involved in the stealing of the property from the complainant accompanied by an intention to deprive him or her of it permanently.

In the case of **Woolmington –v- DRP 1935 AC** and further as provided in Section 107 (1) of the Evidence Act it is trite Law that the burden of proving every element of the offence in a criminal case lies with the state through the Director of Public Prosecution. The office of the Director of Public Prosecution under Article 157 of the constitution has the singular mandate to initiate, continue or discontinue any criminal proceedings save those ones under court martial without any authority or consent from any other person or organ of state. In doing so, in the commencement of an indictment the prosecution has to discharge the standard of proof beyond reasonable doubt against a defendant to a criminal trial. Turning to this ground, the evidence in this appeal shows that PW 1, PW 2 and PW 5 were on 29.4.2016 at 8.00 p.m. walking home at Mnagoni area after leaving a church function. It was on this scene they came into contact with two men apparently armed with pangas. PW 1 alludes to the source of lights from moving vehicles which assisted her to identify the assailants who included the appellant. PW 2 who happened to be with PW 1 at the same scene stated that he was held from behind and slapped before the theft of his mobile phone and cash took place. At this time PW 2 managed to disengage from the robbers and took flight. He describes the appellant as one he saw at

the scene of the robbery without giving the physical description which assisted him to conclude positively that he was the scene. PW 5 who was in company of PW 1 and PW 2 states that she did not know the assailants prior to the attack but he saw the appellant being part of the duo who committed the offence on 29.4.2016. On cross-examination, PW 5 confirms to the court that she identified the appellant at the police station.

In the entire episode of robbery, PW 1 and PW 2 properties stated to be cash and mobile phones were stolen by the assailants. During the investigation and arrest of the appellant, none of the properties was recovered from the person of the appellant. The doctrine of receiving possession as defined under Section 4 of the penal code was therefore not applicable to the facts of this case. It was not even invoked by the learned trial magistrate in his Judgement or conviction and sentence. The particulars of the offence and information by the prosecution supports an occurrence of a robbery as deduced from the testimonies of PW 1, PW 2 and PW 5. There is no doubt that PW 1, PW 2 and PW 5 by the nature of their presence at the scene as victims of the offence. They fall under the category of eye-witnesses, delivering direct evidence against the appellant.

In relation with the element on the threats or use of actual violence, it was contended by the prosecution that the injury suffered by PW 1 was clearly documented in the P3 Form and Post Rape Care Form produced as exhibits by the clinical officer PW 4. Reference was made by PW 1 in her evidence that not only was her mobile phone taken away by the robbers but they also raped her in the process. It was necessary under Section 137 of the Criminal Procedure Code for the provision to indicate in the charge sheet and information that the appellant also committed rape against PW 1. The charge sheet as drawn shows no particulars that the robbers who were armed with pangas stole from PW 1 and also had carnal knowledge unlawfully without her consent. There was therefore no sufficient notification to the appellant in regard to the offence of rape which the prosecution secured before the trial court through PW 4.

The ultimate position of this appeal remains to be whether the appellant was positively identified and picked at the scene of the crime.

It is an established position that the evidence of visual identification of an offender to a criminal charge must be carefully tested by the trial court to avoid a miscarriage of justice. In the case of **Wamunga –v- R 1989 KLR** The Court of Appeal held as follows:

> ***"It is trite Law that where the oral evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it the basis of a conviction."***

The degree and level of inquiry to weigh the evidence inorder to draw an inference on positive identification or recognition is as laid down by the Landmark case of **R –v- Turnbull and others 1976 3 ALL ER 549** in light of the above principles the appellant on this ground of identification raised the following concerns; That PW 1, PW 2 and PW 5 failed to demonstrate the source of light and prevailing circumstances which assisted them to positively identify him at the scene. Secondly, PW 1 description of using lights from moving vehicles was insufficient for failure to comply with the guidelines in **R –v- Turnbull case.** Thirdly, the appellant contended that the police failed to carry out an identification parade which could have tested the velocity of the testimony by PW 1, PW 2 and PW 5. In approaching identification evidence on his part the appellant submitted that the prosecution had no other independent evidence to implicate him with the offence. In my view the approach taken by the Learned Trial Magistrate in his Judgement on identification of the appellant is at variance with principles guiding trial courts in exercise of their power to admit such evidence as successfully set out in **R –v- Turnbull(supra) Abdalla Ban v Wendo Wamunga v R (Supra).**

There are several critical areas of the evidence by PW 1, PW 2 and PW 5 which renders it suspect in its entirety. The first one as observed from the record is as adequately covered by the appellant in his submissions. It is not indispute that the robbery occurred at night. PW 1 alludes the source of light which aided her on identification to the moving vehicles. She however fails to give the description of the appellant, the distance between her and the appellant, the position of the light with her and the appellant, whether there were any significant features which made her identify the appellant, if it was the first time she saw the appellant, how long did it take her to observe him at the scene. How long did the entire process of observation and visible identification take place, Was their any obstruction to impact a positive identification? In respect of PW 2 the record actually shows that he was held from behind by the assailants. He describes the attackers as people who took turns to go away with the ladies to some location which he did not give better particulars. Further evidence indicates that he got an opportunity to run away from the scene. The question is that how did he get an opportunity to identify the appellant? The testimony of PW 5 pointed to see appellant as one of the robbers but falls short of providing credible and tangible evidence that render her identify the appellant. In view of the unanswered questions with regard to the evidence of PW 1, PW 2 and PW 5 the identification relied upon by the Learned Trial Magistrate was indeed in serious doubt to be used to convict the appellant. The salient features of their respective evidence which tend to implicate the appellant as one of the perpetrators was unsafe and not free from error or mistake to properly identify him to have committed the robbery. The issue of identification being the core ground to this appeal, my respectful view was wrongly applied by the Learned Trial Magistrate to enter verdict of guilty and subsequently convict the appellant.

In the circumstances of this appeal and the offence of robbery committed on 29.4.2016, the prosecution failed to demonstrate that the appellant was either a principal or accessory to the offence. Therefore, mere suspicion without cogent and sufficient evidence to sustain a conviction there was no basis for the trial court to have convicted the appellant with a serious offence of robbery. Failure to exercise due diligence on the part of the prosecution and the court occasioned a miscarriage of justice on the part of the appellant. The dock identification which the court applied to sustain a conviction is generally unacceptable unless some weight from the evidence is attached by giving reasons as mandated under Article 10 of the constitution.

In the premises, lack of identification and in absence of any other independent evidence to link the appellant with the robbery weakened the prosecution case to render it untenable. For the above reasons, I find merit in the appeal and do issue orders to quash the verdict of guilty, conviction and sentence against the appellant. He is at liberty to be freed from custody unless otherwise lawfully held in connection with any other offence.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 19TH DAY OF JULY 2019.

R. NYAKUNDI

JUDGE