REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 16 OF 2018

MP...APPELLANT

VERSUS

REPUBLIC.......................RESPONDENT

(An appeal against conviction and sentence by Hon. M. Kasera, PM, delivered on 4th May 2017 in Criminal case No. 163 of 2017 at Kajiado)

JUDGMENT

1. The appellant was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. Particulars of the offence were that on the night of 14th day of January 2016, at Bisil township in Kajiado Central Sub County within Kajiado county jointly with others before court, while armed with panga, Iron bar, rungu and knife, robbed **Ziporah Syombua Kimondo, Damaris Mbuli Kimeu** and **Mercy Wanjiru Waweru** Kshs.51,510, five mobile phones, four packets of sportsman cigarettes, four bottles of King Fisher beers, one Tusker and one Alsops beer all valued at Kshs.1,410 and immediately before or immediately after the time of such robbery, threatened to harm them.

2. The prosecution called 4 witnesses to prove their case and after a full trial, the trial magistrate found the appellant guilty, convicted him and sentenced him to suffer death. Aggrieved, the appellant lodged this appeal against both conviction and sentence and raised the following grounds, namely:

> ***I. The trial Magistrate erred in law and in fact by convicting the appellant herein on the basis of contradictory and unsatisfactory evidence.***
>
> ***II. The trial Magistrate erred in law and in fact by convicting the appellant on evidence that did not meet the "Beyond reasonable doubt" threshold and consequently shifting the burden of proof to the appellant.***
>
> ***III. The trial Magistrate erred in law and in fact in conducting an unfair and seriously flawed trial therefore convicting the appellant on a seriously unfair and pre-determined, biased and lopsided hearing.***
>
> ***IV. The learned Magistrate erred in law and in fact by failing to take into consideration that the appellant was a child at the time (sic) the alleged offence.***

3. He urged the court to allow the appeal, quash the conviction and set aside the sentence.

4. During the hearing of the appeal Mr. Nairi, learned counsel for the appellant, submitted highlighting this written submission dated 3rd May, 2019, that the prosecution did not discharge its burden to prove its case beyond reasonable doubt; that the prosecution did not prove that the appellant was armed; that he was in company of two or more persons or that violence was used against the complainants.

5. Learned counsel submitted, referring to the evidence of PW1, that a person placed a panga on her neck but she did not state that she had seen the appellant. With regard to PW3, counsel contended that the witness told the court that the appellant and 3 other people had metal bars and pangas. According to counsel, there was a contradiction on the weapons the robbers had and further that there was no possibility that PW2 could have seen a group.

6. With regard to PW4, counsel argued that her evidence was hearsay and should therefore have been disregarded. He contended that apart from recording witness statements, PW4 did not do any other investigations in the matter.

7. On whether the appellant was in the company of more than one person, learned counsel submitted only PW1 and PW3 claimed to have seen four people while PW2 stated that she only saw the appellant. According to counsel PW1 testified that four people knocked at the door,

two entered the house and forced her to call her colleagues from their house. He submitted that it was not possible that the witness could have seen 4 people when two were left outside.

8. With regard to violence, counsel argued that there was no attack or violence used against the complainants thus the offence of robbery with violence was not proved. He also submitted that the attack took place at night and since PW1 had testified that the appellant broke the bulb using stones it was not possible to identify the appellant. Learned counsel further argued that the appellant had raised an alibi that he was away between 13th January, 2016 and 26th January, 2016 and faulted the trial court for shifting the burden of proving the alibi to the appellant.

9. Regarding recognition of the appellant, learned counsel submitted that the complainants, PW1, PW2 and PW3, had told the court that one of the attackers was known to them and that it was on that basis that the appellant was arrested. Counsel argued, however, that when the complainants reported the incident to the police, they neither gave the name nor descriptions of the assailants given that the robbery took place at night and the witnesses did not explain how they recognized the appellant. He also submitted that the witnesses did not tell the court how long they had dealt with the appellant as a customer to make recognition possible.

10. Mr. Nairi went on to submit that the appellant was not given a fair trial. He contended that the appellant requested for statements on 22nd March, 2016 but there is no indication that statements were supplied to him. On the appellant's age, counsel submitted that although the appellant had informed the court that he was 17 years old and the court ordered for age assessment but there was no follow up thus the appellant's rights were violated.

11. Regarding sentence, counsel argued that the sentence meted out was harsh and the court did not consider mitigating factors. He relied on ***Joseph Kahinga & 11 Others v Attorney General*** [2016] eKLR for the submission that persons convicted under sections 296 and 297 of the Penal Code were not afforded fair hearing and full benefit of the right to fair trial under Article 50(2) of the Constitution.

12. Mr. Njeru, learned prosecution counsel did not support the conviction and sentence. He informed the court that he was conceding the appeal on grounds that when the appellant appeared before the trial court for plea, he informed the court that he was 17 years old; that following this allegation, the court ordered for age assessment but there is no record in the proceedings that this was complied with. Counsel submitted that if that was true, then section 19 of the SOA and rule 12 were not complied with and the therefore, the sentence should not have been imposed.

13. Secondly, Mr. Njeru submitted that he was not supporting the conviction and sentence because the circumstances for recognition and identification were not favourable. According to Mr. Njeru, PW1 testified that she recognized the appellant by aid of sport lights yet when the investigating officer (PW4) testified, he told the court that light was from bulbs. He submitted that due to these contradictions and taking into account the severity of the sentence, he was constrained to concede the appeal. He also pointed out that witnesses had contradicted themselves on the weapons that were used.

Determination

14. I have considered this appeal; submissions and the authorities relied on. I have also perused the record of the trial court. Although the prosecution conceded the appeal, that does not mean the appeal should automatically succeed. This court has a duty to consider the evidence that was before the trial court and make its own determination on that evidence. In this regard, the court stated in ***Odhiambo v Republic*** [2008] KLR 565, that;

> ***"The court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence."***

15. This being a first appeal, this court as a first appellate court, has a duty to re-evaluate, and scrutinize the evidence that was placed before the trial court and come to its own conclusion on that evidence, though it must bear in mind that it did not see the witnesses testifying and should therefore make allowance for that. This legal position has been stated in a number of decisions.

16. In ***Okeno v Republic*** [1972] EA 32, the Court of Appeal set out the duties of a first appellate court stating:

> ***"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 the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion... 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 finding and conclusion; it must make its own findings and draw its own 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…"***

17. in ***Kiilu & Another vs. Republic*** [2005]1 KLR 174, the same Court held that:

> ***"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. 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."***

18. And in ***Naziwa v. Uganda*** [2014] UG CA 28 (10th April, 2014), the Court of Appeal of Uganda observed that it is the duty of the first appellate court to re-evaluate all the evidence on record and make its own findings of fact on the issues while giving allowance for the fact that it had not seen the witnesses as they testified, before it can decide on whether the decision of the trial court can be supported. This view was reiterated by the Supreme Court of Uganda in ***Fr. Narsensio Begumisa & 3 others v Eric Tibebaga*** [2004] UGSC 18 (22 June 2004), where the Court held that;

> ***"It is a well settled principle that on a first appeal, the parties are entitled to obtain from the court of appeal its own decision on issues of fact as well as of law. Although in a case of conflicting evidence, the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions."***

19. PW1 testified that on the night of 14th January, 2016 while she was asleep, she heard noise and saw a torch light. Someone demanded Kshs. 40,000/- from her but she told them that she did not have the money. She however told them that she could check in the bar. They went with her to the bar; that they then put a panga on her neck and ordered her to give them money. One person put a panga on her head and a rungu (a club) on hand. She testified that the appellant flashed a touch on her face. She testified that the attackers were 4 but only two entered in the house and she gave them Kshs.25,550/-

20. The witness told the court that the assailants took 4 customers' phone which had been deposited as security for beers taken on credit namely; Dell Wahili and Tecno; one tusker, Alsop, kingfisher and cigarettes. She was then ordered to knock at one of her employees and when she came out, they demanded more money from her but she did not know how much they were given. She told the court that the attackers flashed torches at her and she was able to recognize the appellant who was her customer. They then left and locked her door from outside. She testified that the attacker broke the bulb in her room; that when she called her neighbours to open for her, they told her that they had also been locked from outside. She then called her employer who broke the door in order to open for her. She then went to her boyfriend who assisted her call the police.

21. In cross examination, the witness told the court that the robbery took place at night between 12.30 and 1.00 a.m; that the appellant ordered her to look down and that he was arrested 2 weeks after the robbery. She also told the court that on 14th January 2017, the appellant had gone to the bar between 7.30 p.m. and 8.00 p.m. The witness insisted that she knew the appellant and had recognized him during the robbery.

22. PW2 - Daniel Muli Kimeu, a worker at the bar, told the court that on that night a man demanding money from him and when he told them that he did not have money, they demanded the phone which he gave them. He also gave them Kshs. 4,000/- . He further told the court that that they broke the door using a stone and that he gave his phone to the appellant whom he knew since he was a customer. He also told the court that he identified the appellant because the phone was on. Cross examined, the witness told the court that the robbers flashed torches on the wall which enabled him to see and recognize the appellant.

23. PW3, Mercy Wanjiku Waweru, a waiter in the bar, told the court that that on the material night she heard PW1 raise an alarm; that she then heard them open the bar and demanding money from PW1 but did not know who the people were. She told the court that when she opened her door, they also demanded money from her but she told them that she did not have any money. She however gave them her phone and in the process she recognized the appellant who was one of the attackers. She stated that she gave them Kshs. 3,300/-; that the appellant was their customer and that he had a metal. According to this witness, she saw 4 men in her house who had pangas and metal bars. In cross examination she told the court that the appellant used to call her and that saw and she recognize him when he flashed the torch.

24. On his part, PW4 No. 40164 PC. John Lekalimoi, a police officer attached to Bisil Patrol Base, testified that on 15th January, 2016 PW2 and PW3 reported that on the previous night 14th January 2016, they were attacked by 4 people one of whom they recognized. They reported that the robbers broke the door to PW1's house using a stone and that the attackers who were armed with knives and rungus took Kshs. 41,270/-. He further told the court that on 25th January, 2016 between 7 and 8.00 a.m. PW1 called and informed them that the suspect was in the bar. They proceeded to the bar where PW1 pointed out the appellant. They arrested him and preferred the charge against him. In cross examination the witness told the court that it was PW1 who identified the appellant and that he did not recover any stolen property from the appellant.

25. On being put on his defence, the appellant told the court that he is a sand broker as well a casual worker. He testified that he did not know what was happening on 14th January, 2016 since he was away between 13th January, 2016 and 26th January, 2016 and that he went to Pw1's bar on 26th January only to be arrested by policemen without being told why.

26. The learned trial Magistrate believed the prosecution evidence, convicted the appellant and sentenced him to suffer death. In doing so, the learned trial Magistrate stated:

> ***"The evidence by the 3 witnesses is that accused in the company of 3 other men robbed them. They all concur that they were able to recognize the accused who they had known earlier on because he was their customer. Accused did not wear anything on his head that night. With the help of the light from the torches which his colleagues had and light from the phone they were able to see the accused person. Accused disappeared for 2 weeks. He showed up at the bar where he was arrested."***

27. The learned Magistrate then continued:

> ***"The prosecution evidence is well corroborated. All the 3 witnesses saw the accused at the time of the incident and were able to recognize him. In this case the complainants identified a person whom they had known earlier and were able to recognize him reducing the risk of mistaken identity"***

28. The learned trial Magistrate concluded, therefore, that the appellant was recognized by his victims because he was known to them and that recognition was made possible by aid of light from the torches and a phone.

29. From the review of evidence, all the three witnesses agreed that the robbery took place at night but stated that they were able to recognize the appellant who was one of the attackers. They testified that they recognized the appellant by aid of light from torches and a phone. According to PW1, the robbers flashed torches at her which enables her to see and recognize the appellant since they had broken the electric bulb. She did not however tell the court that she had earlier seen the attackers by aid of light from the bulb before it was broken. PW2's evidence was similar to that of Pw1 in that she saw the appellant using light from torches and a phone. This was also the case with PW3.

30. Recognition is a matter of fact and where the prosecution relies solely on the evidence of recognition, it has the onus to prove that the circumstance were conducive for such recognition. In ***Tumusiime Isaac v Uganda*** [2009] UGCA 23(10th June2009)**,** the Court of Appeal of Uganda set out the factors which the trial court should consider in deciding whether the conditions under which the identification was made were conducive for positive identification without the possibility of error or mistake. They include; whether the accused was known to the witness at the time of the offence, the conditions of lighting; the distance between the accused and the witness at the time of identification and the length of time the witness took to observe the accused.

31. Similarly, in ***Wamunga v Republic*** [1989] KLR 426, the Court stated that:

> ***"[I]t is trite that where the only 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 favourable and free from possibility of error before it can be safely make it the basis of conviction"***

32. This principle was stated in ***R v Turnbull & Others*** (1976) 3 ALL ER 549 thus:

> ***"... The Judge should… 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."***

33. And in ***Francis Kariuki Njiru & 7 others v Republic*** [2001]eKLR, the Court of Appeal state that;:

> ***"The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinised carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered. Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all"***

34. Applying the above principles to this appeal, the prosecution's evidence presents several questions. First, the witnesses stated that the torches were flashed at them not at the attackers or the appellant in particular. If this was the case, the light must have blinded the witnesses which would have made it difficult to for them to positively see the appellant in order to recognize him.

35. Second, there is no evidence on record regarding the intensity of that light. There is also no evidence at all that the torch light was shone at the appellant which would have enabled the witnesses recognize him. Third, there is no indication of how long the witnesses were with the attackers to enable them recognize the appellant. This, in my view, raises doubt regarding the witnesses' evidence on their ability to have seen the appellant and recognized him.

36. Despite the above challenges on the possibility of a proper and positive recognition of the appellant, the trial Magistrate concluded that the three prosecution witnesses were able to recognize the appellant because he was a customer they had known. As rightly observed by the learned trial Magistrate, recognition is more important in criminal cases than mere identification. Recognition may be due to long association and where a witness is able to recognize his or her attackers, evidence of recognition is more assuring than that of identification, for it reduces the possibility of mistaken identity or error.

37. However, where the trial court is returning a conviction on the sole evidence of recognition, it must carefully scrutinize such evidence and be satisfied beyond reasonable doubt that the circumstances under which the attacker was recognized, were such that the recognition was free from the possibility of error.

38. In this appeal, the robbery took place at night and as I have already stated, the intensity of the light from the torches that the robbers are said to have flashed, raises doubt as to whether it gave the witnesses an opportunity to clearly see the appellant and recognize him. The witnesses did not say that they knew his voice but that they saw and recognized being a person they had known before. This, in my view, was not satisfactory to conclude that recognition was free from the possibility of error. And although all the 3 witnesses told the court that the appellant was their customer and they knew him, none of them said that s/he knew his name or how long they had known him or mention any special features that made them recognize him.

39. It is also noteworthy, that when the complainants reported the incident to the police, they never mentioned the appellant by name or give any description that enabled them identify or recognize him as one of the robbers. This raises doubt on the prosecution case that the

complainants recognized the appellant. That is why courts have been unequivocal that evidence of recognition should only be relied on as the sole basis for conviction after a critical and careful scrutiny to eliminate the possibility of error.

40. The above position was aptly stated by the Court of Appeal in ***Mohamed Elibite Hibuya & Another v. R***. (Criminal Appeal No. 22 of 1996), that:

> ***"[I]t is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so, the conspicuous details regarding his features given to anyone and particularly to the police at the first opportunity. Both the investigating officer and the prosecutor have to ensure that such information is recorded during investigations and elicited in court during evidence. Omission of evidence of this nature at investigation stage or at the time of presentation in court has, depending on the particular circumstances of a case, proved fatal – this being a proven reliable way of testing the power of observation, and accuracy of memory of a witness and the degree of consistency in his evidence.'"***

41. And in ***Okwang Peter v Uganda*** [2001] UGCA 6 (22 March 2001), it was held that:

> ***"Subject to certain well-known exceptions, it is trite law that a fact may be 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 in respect to identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it is 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 possibility of error."***

42. Taking the above authorities into account, the evidence on record and the circumstances under which the robbery was committed, I am persuaded that the appellant has valid grounds to complain that his identification or recognition was not free from the possibility of error. The learned trial magistrate did not carefully and critically scrutinize the evidence, including the circumstances obtaining at the material time and only act upon it if satisfied that the identification was positive and free from the possibility of error. The eye witnesses did not give a description of appellant to the police at the earliest opportunity or at all, not even to the court during trial**.** In that regard, Mr. Njeru properly conceded this ground of appeal.

43. Mr. Nairi also argued that the trial magistrate fell into error by shifting the burden of proving the defence of alibi to the appellant. The general principle in law is that were an accused raises the defence of alibi, he assumes no burden to prove the truth of his alibi. The burden to disprove an alibi always lies with the prosecution. The prosecution has to disprove the alibi by adducing credible evidence placing the accused at the scene of the crime at that particular time when he claims he was elsewhere.

44. The Court of Appeal emphasized on this point in ***Moses Nato Raphael v Republic*** [2015] e KLR, stating that "***the burden of disproving the alibi is always on the shoulders of the prosecution."*** In ***Victor Mwendwa Mulinge v R,*** [2014] e KLR, the same court stated on the same issue of alibi that; ***"it is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution.*** And in ***Karanja v Republic*** [1983] KLR 50, it was held that;

> ***" [I]n a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought."***
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> (See also ***Batagenda Peter v Uganda S.C.C.A No. 10 of 2006.***)

45. I have perused the record and the appellant's evidence during his defence as well as the judgment of the trial court. It is true that the appellant testified that he did not know what happened on the night of 14th January 2016 when the robbery took place because he had been away from 13th to 26th of January 2016. In his judgment the trial magistrate stated;

> ***"The accused denied committing of the offence. He said he was away from 13th January, 2016 to 26th January, 2016. He pleaded alibi. It is therefore upon him to prove that on 13th January, 2016 to 26th January, 2016 he was working for Ngure and he did not leave the place. He did not call any witness to proof the same."***

46. The holding by the trial magistrate that it was up to the appellant to prove that he was not around when the offence was committed, was a wrong approach where the defence of alibi is raised. The trial magistrate did not dismiss the defence of alibi because he did not believe it but because the appellant did not call witnesses to prove this fact thus shifted the burden of disproving the alibi to the appellant which is against the well settled legal principles.

47. Rather than dismissing the appellant's defence of alibi off hand, the learned trial magistrate, in testing its falsity or otherwise, should have weighed that defence against the other evidence to determine if the appellant's guilt had been established beyond reasonable doubt, taking into account the fact that he had not put forward the defence of alibi at the earliest opportunity to give the investigating officer an opportunity to test the alibi. This would prevent any suggestion that the defence was an afterthought.

48. I have gone through the trial court's entire record and although the defence of alibi was not raised at the earliest opportunity that did not mean, as I have already stated, the trial court should not have considered it instead of shifting the burden to the appellant. This was against the time honoured principle that the prosecution bears the burden of proving the accused person's guilt beyond reasonable doubt.

49. Lastly the appellant raised the concern that although he told the court that was 17 years at the time he was arrested and charged with the offence, this fact was ignored by the trial court and his trial proceeded as though he was an adult. Mr. Njeru again agreed with the appellant and conceded the appeal on this ground.

50. The record of the trial court shows that when the appellant appeared in court on 27th January, 2016, he informed the court that he was 17 years old. The court ordered for age assessment. Subsequent proceedings do not show that the issue was ever revisited by either the court the prosecution or the appellant. According to the record, another magistrate took over the conduct of the matter.

51. Despite the fact that the record of the trial court is silent on whether or not age assessment was conducted, there is in the file age assessment dated 1st February, 2016 from the Hospital showing that the appellant was then 18 years due to the presence of the third molar. With this evidence, though not formally recorded in the proceedings, there no prejudice occasioned to the appellant. Neither was his right violated.

52. All that would have happened had the new magistrate's attention been draw to the issue of age or had he come across it upon perusing the record, was to check and ask whether age assessment had been done and since the form was on record, the matter would have ended there. I therefore do not agree with the appellant that failure to formally record that his age had been assessed and that he was 18 years old rendered his trial, conviction and sentence invalid.

53. Having independently re-evaluated and re-examined the evidence which was presented before the Learned Senior Resident Magistrate, the conviction of the appellant was unsafe and as the prosecution conceded the appeal, and rightly so in my view, the upshot is that this appeal must succeed. Consequently, the appeal is hereby allowed, conviction quashed and the sentence set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Dated Signed and Delivered at Kajiado this 19th Day of July 2019.

E C MWITA

JUDGE