REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.29 OF 2015

(An Appeal arising out of the conviction and sentence of Hon. Ochoi – PM delivered on 19th January 2015 in Kibera CM. CR. Case No.4180 of 2012)

VINCENT KISIA KADIMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Vincent Kisia Kadima, was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on 9th September 2012 at Lavington in Nairobi County, the Appellant, jointly with others not before court, while armed with dangerous weapons, namely toy pistols, robbed the complainant Godfrey Kamau of motor vehicle registration No.KBQ 996Y Toyota Succeed valued at Ksh.750,000/-, a mobile phone Nokia 1100 valued at Ksh.2,000/-, National Identity Card and a driving licence, and at the time of such robbery, used actual violence to the said Godfrey Kamau. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged and sentenced to death. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial court for convicting him yet the prosecution failed to discharge its burden of proof to the required standard beyond any reasonable doubt. He was of the view that the evidence of identification by PW1 was not sufficient to sustain a conviction. He took issue with his conviction stating that the same was based on the evidence by the prosecution which was inconsistent and full of contradictions. He was aggrieved that the trial court failed to observe the provisions of Section 200 of the Criminal Procedure Code when the convicting magistrate took over the proceedings from the previous magistrate. The Appellant was further aggrieved that the prosecution failed to avail crucial witnesses required to prove its case. He faulted the trial magistrate for admitting in evidence exhibits allegedly recovered from the car by a witness who did not recover the said exhibits. He took issue with his conviction stating that the trial court shifted the burden of proof to the defence. He complained that the trial court failed to consider his defence in arriving at its decision. In the premises, the Appellant urged this court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, both parties filed their respective written submissions. In addition, this court heard oral submissions from Mr. Oriwa for the Appellant and Mr. Momanyi for the State. Mr. Oriwa submitted that the trial court dismissed the Appellant's application for the case to start *de novo*. The trial court infringed the Appellant's right to have the case start afresh as provided under Section 200 of the Criminal Procedure Code. He averred that the prosecution failed to call crucial witnesses to adduce evidence in the case. He stated that the Appellant was not arrested at the scene of crime. He asserted that the Appellant was framed by police officers. He was of the view that the trial magistrate shifted the burden of proof to the Appellant in asking him to give an explanation as to why his belongings were found in the complainant's vehicle. He submitted that the Appellant's defence was not properly evaluated by the trial court. The Appellant told the court that his belongings were removed from his pockets by the police and planted in the stolen vehicle. Mr. Oriwa maintained that the prosecution failed to adduce sufficient evidence to link the Appellant to the crime. In the premises therefore, he urged this court to allow the Appellant's appeal.

Mr. Momanyi for the State opposed the appeal. He asserted that the Appellant was positively identified and placed at the scene of crime. The complainant identified the Appellant during an identification parade conducted at the police station. He was of the view that the trial court complied with the provisions of Section 200 of the Criminal Procedure Code. The trial court took into account that PW1 had left employment and could not be traced to adduce evidence if the trial were to start *de novo*. He therefore urged the court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows: PW1, Geoffrey Kamau was the complainant. He was a taxi driver. He

operated a Toyota Succeed KBQ 996Y owned by his employer Mark Ngugi (PW3). On 9th September 2012, he was on duty at Ambassador Bus Stop with the said vehicle. Three young men hired him to drive them to Lavington. They told him that they wanted to pick a cake and afterwards desired to be driven to Uhuru Park. It was about 1.00 p.m. He drove them to Lavington. One of the men alighted. He stated that he was going to pick a cake. PW1 also alighted. Suddenly, the man who alighted approached him and knocked him with a pistol on the mouth. Another man who was seated at the rear passenger seat came and held him by his trousers. He was shoved into the rear passenger seat. They pushed him on the floor of the vehicle, covered him with a jacket and stepped on him. The man who was seated at the co-driver seat took control of the vehicle.

After driving for a while, they stopped and blindfolded him using a cello tape. They continued driving the vehicle. PW1 overheard them say that they were going to Ngong Forest. The vehicle finally came to a stop. He was removed from the car with the jacket still covering his head. The assailants tied him to a tree and abandoned him there. After sometime, a man found him and untied him. The man informed him that he was at a place known as Kabiria. He managed to get a lift to Muthangari Police Station where he reported the incident. He also told his colleagues what had happened. They raised money and took him to the hospital.

The following day, he received a call from a police officer who informed him that his vehicle had been recovered at Ongata Rongai. The assailants were being held at Kabete Police Station. He went to Kabete Police Station and identified one of the assailants. The said assailant was the Appellant. PW1 told the court that he positively identified the Appellant on the material day of the robbery. The Appellant was seated at the rear passenger seat when he was being shoved into the car. The Appellant told him not to spill any blood on him. During the robbery, the Appellant asked PW1 to surrender his belongings. PW1 gave the Appellant his driving licence, his ATM and PIN and his cellphone make Nokia 2010.

PW2, Sgt. Wilson Koech was the arresting officer. He was based at Ongata Rongai Police Station. He was on duty on 9th September 2012. He got a radio call at about 3.30 p.m. informing him of the robbery of a motor vehicle registration No. KBQ 996Y. The robbery had occurred around Dagoretti area. The vehicle‘s tracking system indicated that the vehicle was near Arap Moi Primary School located in Nkoroi area in Rongai. He went to the said primary school accompanied by other police officers. They found the vehicle parked inside the school. They saw two men standing next to the vehicle. There were other people playing at the school’s field. PW2 left two officers interrogating the two people found standing next to the vehicle. He went outside the school’s compound. He saw three men along Magadi Road. Two of the men were holding spanners. The third man started running away when he spotted PW2. PW2 shot in the air as he chased down the said man. The man finally surrendered. However, the two men who were holding spanners managed to escape. PW2 took the man he had apprehended back to the school compound. The man who was apprehended was the Appellant. He was wearing a checked shirt. His fellow police officers searched the recovered vehicle. They found a jacket containing two toy pistols and a wallet inside the vehicle. The jacket was recovered from the front passenger seat. The wallet contained an identity card as well several other cards containing the Appellant’s name.

PW3, Mark Ngugi was the owner of the motor vehicle registration No. KBQ 996Y, the subject matter in the present case. He told the court that the said car was in PW1’s possession on 9th September 2012 when the robbery took place. He had employed PW1 as a taxi driver. The taxi operated at Ambassador Bus Stop. He was informed of the robbery incident by a taxi driver (Douglas Kanyiri) who was also based at the said Ambassador Bus stop. The vehicle had an installed car tracking system. The tracker indicated that the vehicle was at Arap Moi Primary School located along Magadi Road. He informed the police. He drove to Magadi Road. He found police officers at the scene. The vehicle was towed to Ongata Rongai Police Station. PW3 produced ownership documents of the vehicle into evidence.

PW4, IP Hezekiel Oundo conducted the Appellant’s identification parade on 10th September 2012. It was his testimony that the parade was conducted in accordance with the guidelines set out in the Police Force Standing Orders. He stated that PW1 identified the Appellant as one of the robbers during the said parade. He produced the parade forms into evidence. PW5, CP Johana Tanui was the scene of crime officer. He was based at Ongata Rongai Police Station. On 10th September 2012, he was instructed to take photographs of the complainant’s motor vehicle make Toyota Succeed registration No. KBQ 996Y. It was white in colour. He produced the said photographs in evidence.

This case was investigated by PW6, Senior Sgt. Josephat Okello, attached to Dagoretti Divisional Police Office. He received instructions from his superiors to investigate the present case on 10th September 2012. The Appellant, who was suspected to have been involved in the robbery, was already in custody. The complainant reported the robbery the previous day on 9th September 2012. The stolen vehicle was recovered the same day in Ongata Rongai. A brown jacket, two toy pistols, a leather wallet, the Appellant’s identification card as well as several other cards were recovered from the motor vehicle. PW6 interrogated the complainant. The complainant informed him that he was able to identify his assailants. He requested PW4 to conduct an identification parade. The complainant identified the Appellant by touching him on his left shoulder. He afterwards charged the Appellant with the present offence.

When the Appellant was put on his defence, he testified that he resided at Ongata Rongai. He was employed as a salesperson in a shoe shop. On the material day of 9th September 2012, he went to work as usual. He closed the shop at about midday. He went to play football at Nkoroi. On the way to the football field, he heard gunshots. He started running away. Police officers chased him. They caught up with him and arrested him. He was taken to Ongata Rongai Police Station. He denied involvement in the robbery. In essence, he was saying that he was a victim of mistaken identity.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make a comment regarding the demeanour of the witnesses (See Okeno vs Republic [1972] EA 32).

In the present appeal, the issue for determination is whether the prosecution established the charge of robbery with violence contrary to Section 296(2) of the Penal Code to the required standard of proof beyond any reasonable doubt. This court has re-evaluated the evidence adduced before the trial court. It has also considered the rival submission made by the parties to this appeal. It was evident from the facts of the case that the prosecution relied on direct evidence of identification as well as other circumstantial evidence to secure the conviction of the Appellant. This court has a duty to thoroughly examine the evidence on identification before confirming a conviction based on the same.

PW1 was the only identifying witness. Evidence of a single identifying witness must be examined carefully to ensure that it is water-tight before a conviction is founded on it (See Kiilu & Another vs Republic [2005] 1 KLR 174). The robbery in the present appeal took place in broad daylight. Three young men hired PW1 to drive them from town to Lavington. It was about 1.00 p.m. They negotiated and agreed on the price. When they arrived at Lavington, one of the men alighted. He stated that he was going to pick the cake. PW1 also alighted. The said man approached him and hit him with a pistol on the mouth. The second man came out and held him by his trousers. They shoved him into the rear passenger seat where the Appellant was seated.

PW1 stated that he was able to identify the Appellant. He told the court that the Appellant told him not to spill any blood on him. He also asked him for his phone, driving licence, ATM card and PIN number. On cross-examination, PWI told thecourt that he described one of the assailants as a short young man. He described the Appellant's large eyes.

This court notes that the identification parade took place the following day after the robbery occurred. PW1's memory of the robbers was therefore still fresh in his memory. PW1 drove the assailants from town to Lavington where they attacked him. He therefore spent a considerable time with his assailants. PW1 had given a description of the Appellant as a short young man with big eyes. The robbery took place in broad daylight. This court is of the view that conditions favouring a positive identification were present in this case. PW1 identified the Appellant during an identification parade conducted by PW4. PW4 testified that the identification parade was conducted in accordance with the Police Force Standing Orders. PW1 identified the Appellant by touching him on his shoulder.

The Appellant submitted that he had been exposed to PW1 the previous day prior to the identification parade. This is a false assertion. PW1 was not present when the Appellant was arrested. The Appellant was arrested and taken to Ongata Rongai Police Station. He was transferred the following day to Kabete Police Station where the identification parade was conducted. PW1 was instructed to go to Kabete Police Station where he identified the Appellant. What PW1 meant on page 20 of the proceedings was that he had seen the Appellant the previous day during the robbery. The Appellant's assertion that he was exposed to the witness prior to the identification parade being conducted was false and meant to mislead this court. This court therefore holds that the identification parade was properly conducted. The Appellant was positively identified and placed at the scene of crime.

The prosecution adduced other circumstantial evidence connecting the Appellant with the robbery. The stolen vehicle had a car tracking system which indicated its location. It was at Arap Moi Primary School in Nkoroi area. PW2 went to the said school. He found the car parked at the school's playing field. He left two officers at the scene. He went outside the school compound. He saw the Appellant and two men who were holding spanners. When the Appellant saw PW2, he started running away. PW2 gave chase and shot twice in the air. The Appellant finally surrendered and was arrested. They went back to where the stolen motor vehicle was parked inside the school compound. PW2 testified that his fellow officers searched the said vehicle. They recovered a jacket on the front passenger seat of the vehicle. The jacket contained two toy pistols and a wallet. Inside the wallet, they found the Appellant's identity card as well as other documents containing the Appellant's name.

The Appellant submitted that PW2 did not participate in the search of the vehicle. He asserted that the officers who participated in the search ought to have been called as witnesses to produce the recovered items. This court is of the opinion that even though the exhibits were produced irregularly, the fact that the Appellant's items were recovered from the stolen vehicle corroborated the evidence of identification by PW1. The Appellant was arrested at the scene where the stolen motor vehicle was recovered. He admitted as much in his defence. He however testified that he only ran away because he heard gunshots. He denied being involved in the robbery of the motor vehicle. The Appellant failed to give an account of how his items were found in the recovered motor vehicle.

After weighing the explanation offered by the Appellant against the prosecution evidence, this court is of the view that the prosecution's evidence was truthful, credible and consistent as opposed to the highly improbable defence offered by the Appellant. From the above analysis of the evidence, this court is of the view that the prosecution has established its case on the charge of robbery with violence contrary to Section 296(2) of the Penal Code to required standard of proof beyond any reasonable doubt. The ingredients of the charge of robbery with violence were established. The Appellant, in company of others, while armed with dangerous weapons namely toy pistols, robbed the complainant, and in the course of the robbery used violence on the complainant.

The Appellant also contended that the trial court failed to observe the provisions of Section 200 of the Criminal Procedure Code. He was aggrieved that his application for the trial case to start *de novo* was dismissed by the trial magistrate. This court has perused the trial court's record. When Hon. Ochoi took over the matter from Hon. Wachira, the Appellant was informed of his right under Section 200 of the Criminal Procedure Code. The Appellant applied for the case to start afresh. However this court notes that he did not give any reasons why he wanted the case to start afresh. The prosecution opposed the Appellants application stating that PW1 could not be traced as he had since left his employer's employment. PW1 was PW2's employee. In this court's view, the Appellant did not advance sufficient reasons to warrant the trial magistrate to exercise his discretion in favour of the Appellant's application for the case to start *de novo*. In addition, no prejudice was occasioned against the Appellant by failure to start the matter start *de novo* since he was accorded the opportunity to cross-examine the witnesses who had testified. This ground of appeal must therefore fail.

From the foregoing, the Appellant's appeal against conviction therefore lacks merit and is hereby dismissed. On sentence, following the recent Supreme Court decision in the case of Francis Karioko Muruatetu & Another vs Republic [2017] eKLR, this court has jurisdiction to relook at the sentence of the Appellant to determine whether the death sentence that was meted on him was deserved or another sentence ought to be imposed. In the present appeal, it was clear to this court that, taking into consideration the entire circumstance in the case, that the death sentence that was meted on the Appellant was not deserved. This court has been guided by the guidelines issued by the Supreme Court in the above case. This court is of the considered view that the circumstance of this case calls for a custodial sentence.

In the premises therefore, the death sentence that was imposed on the Appellant is set aside and substituted by a sentence of this court. The Appellant is sentenced to serve ten (10) years imprisonment with effect from today's date. This court has taken into consideration the period that the Appellant was in pre-trial detention and the period he was in prison prior to the hearing and determination of this appeal. It is so ordered.

DATED AT NAIROBI THIS 10TH DAY OF JULY 2019

L. KIMARU

JUDGE