REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO 126 OF 2014

CONSOLIDATED WITH CRIMINAL CASE NO. 64 OF 2016)

REPUBLIC.....RESPONDENT

VERSES

DANIEL KURIA MATARA.....1ST APPELLANT

GEOFFREY MUNGAI KAMAU.....2ND APPELLANT

(Being an appeal from original conviction and sentence in ***Criminal Case No. 1073 of 2012 of the Senior Principal Magistrate's Court at Kigumo – D. Orimba on 7th October, 2014).***

JUDGMENT

1. Upon arraignment, Daniel Kuria Matara (1st Appellant) and Geoffrey Mungai Kamau (2nd Appellant) were jointly charged as follows;

1. Robbery contrary to section 296(1) of the penal code. Particulars being that on the 22nd day of August 2012 at Kagurumo Sub-Location within Murang'a County, jointly with others not before Court while armed with dangerous weapons namely guns, pangas and wooden rod robbed Councillor CHARLES OBED THUO two mobile phones make Ideos and Samsung C5212 series all valued at Kenya Shillings Seventeen Thousand (Ksh. 17,000/=) and immediately at the time of such robbery killed him.

2. Robbery with violence contrary to section 296(2) of the penal code. Particulars being that on the 22nd day of August 2012 at Kagurumo Sub-location within Murang'a County, jointly with others not before Court while armed with dangerous weapons namely guns, pangas and wooden rod robbed DORCAS WATHONI THUO a mobile phone make Nokia 6700 series and a DVD make LG all valued at Kenya Shillings eleven thousand (Ksh. 11,000)/= and immediately at the time of such a robbery wounded her.

3. Robbery with violence contrary to section 296(2) of the penal code. Particulars being that on the 22nd day of August 2012 at Kagurumo Sub-location within Murang'a County, jointly with others not before Court while armed with dangerous weapons namely guns, pangas and wooden rod robbed CAROLINE WANJIKU THUO Kenya Shillings One hundred and immediately at the time of such a robbery threatened to use actual violence.

2. They were taken through full trial, convicted and sentenced to death on the first count while sentence on other counts was not pronounced but was ordered to be held in abeyance.

3. Aggrieved, the 1st Appellant appeals on the following grounds:

a) That the learned trial magistrate erred in both law and fact by basing conviction on circumstantial evidence which was too weak.

b) That the provision of section 169 (1) of the C.P.C was not complied with in relation to the 1st Appellant's statement of defence

c) That there was a crucial irregularity in the course of the trial as the provisions of section 207(1) of the CPC were not complied with when the trial started DE NOVO on 29th April, 2013.

d) That although the 1st Appellant was convicted and sentenced to death, this Court could take into account the fact that the mandatory death sentence has been declared unconstitutional by petition No. 15 of 2015 and order issued for such case to be remitted to the High Court for sentence rehearing upon mitigation.

The 2nd Appellant appeals on the following grounds:

a) That the learned trial Magistrate erred both in law and fact when he convicted the 2nd Appellant yet the required standard of proof was not discharged by the prosecution.

b) That the learned trial magistrate erred both in law and fact when he convicted the 2nd Appellant without proof of the property allegedly stolen as required by section 137(1) CPC.

c) That the learned trial magistrate erred both in law and fact when he convicted the 2nd Appellant basing his decision on an inadequately investigated case.

d) That the learned trial magistrate erred both in law and fact by shifting onus of proof to the 2nd Appellant.

e) That the learned magistrate erred both in law and fact when he failed to comply with section 211 CPC.

4. Facts of the case were that the deceased returned home on the night of the 22nd day of August, 2012 at about 8.00pm. PW 1 Dorcas Wathoni Thuo upon hearing the motor vehicle hooting, went to open the gate for her husband (deceased) only to be attacked by thugs who demanded money from her. They forced her back into house. The two individuals were armed with a big stick and a panga, respectively. They took her mobile phone. In the meantime, PW 2 Caroline Wanjiru, her daughter, heard a gunshot and ran out of the house. She witnessed as one of the individuals hit PW 1 on the head. He turned and ordered her to show them how to ignite her father's car. She complied and was forced to return to the house. However, she managed to escape to a neighbour's place. The thugs who failed to drive out the motor vehicle ran away. Neighbours answered the Complainants' call of distress and rushed the injured to hospital. The deceased passed on. Investigations revealed items that included: mobile cell-phones (make Ideos and Samsung owned by the deceased), Nokia 6700 series and a DVD make LG for PW 1; and Ksh 100/= for PW 2 had been stolen.

5. The victims did not identify the attackers. However, following investigations, a cell phone (Samsung C5212) was recovered. PW 7 John Kamanda Karanja claimed to have purchased it from John Mungania Ndoro, PW 5, who in turn stated that he purchased it from the 1st Appellant who was in the company of the 2nd Appellant. He assisted the police with the investigations. The police arrested the Appellants and charged them.

6. Upon being put on their defence, the 1st Appellant who made an unsworn statement stated that he was arrested and taken to Thika Police Station where he was charged with touting. While in custody, it was alleged that he had sold to someone a cellphone. The allegations were that the seller had one (1) eye. He denied having committed the offence.

7. The 2nd Appellant who gave sworn evidence denied knowing anything to do with the case.

8. The 1st Appellant faults the trial Court for relying on weak circumstantial evidence. That PW 5 denied being aware of the fact that he (1st Appellant) was in custody at the time he was alleged to have sold the cell phone and his evidence to that effect was not disapproved. Secondly, he contended that when the case started afresh following what is provided by Section 200 (3) of the Criminal Procedure Code (CPC), the plea was not read to him which was in contravention of his fundamental rights; And that the sentence imposed is now unconstitutional.

9. The 2nd Appellant urged that PW 5 had no proof that he sold the cell- phone to him. That there was no evidence adduced as to how he was arrested. No evidence was tendered to establish the alleged tracking of the phone. No expert was called from the service provider to prove the alleged tracking. There was no witness for the transaction and no evidence of ownership of the cellphone was adduced.

10. Further, he complained that he was denied the opportunity to call a witness as indicated.

11. The Respondent (State) through learned State Counsel, Ms Keya, conceded the Appeal in respect to the 2nd Appellant, her argument was that the 2nd Appellant was in Company of the 1st Appellant but he did not sell the cellphone.

With regard to the 1st Appellant, she supported the conviction on grounds that the phone that was stolen was tracked through the mobile tracking process that led to PW 5 who stated that he bought the cellphone from the 1st Appellant. That the 1st Appellant failed to explain how he came to possess the cellphone. Relying on the case of **Simon Mareiro Mokaya –vs- Republic (2015) eKLR** she urged that circumstantial evidence adduced unerringly pointed to the 1st Appellant's guilt. "It is the cardinal principle of law that in a criminal case the legal onus is always on the prosecution to prove the guilt of an accused person, and the standard of proof is proof beyond reasonable doubt. The burden of proof therefore lies on the prosecution throughout to prove the guilt of an accused"

12. This being a first Appellate Court, I am duty bound to re-evaluate and re-consider evidence adduced at trial bearing in mind that I had no opportunity of either seeing or hearing witnesses who testified. I must therefore come to my own conclusion with that in mind. (**See Okeno vs Republic (1972) EA 32.)**

13. On the question of whether the case was proved to the required standard, in the case of **David Ruo Nyambura & 4 Others (2001) eKLR** it was stated that;

"The cardinal principle of law is that in a criminal case the legal onus is always on the prosecution to prove the guilt of an

accused person, and the standard of proof is proof beyond reasonable doubt. The burden of proof therefore lies on the prosecution throughout to prove the guilt of an accused".

Section 107 of the Evidence Act is also clear on the issue of proof, it requires whoever asserts the existence of a fact to prove the existence of those facts. In the instant case the burden was upon the prosecution to adduce evidence to prove existence of ingredients of the charges in question.

14. The elements of the offence of robbery with violence were elaborated by the Court of Appeal in the case of **Johanna Ndung'u –Vs- Republic, CR. APP. No. 166 of 2005 (UR)** as follows:

1. "If the offender is armed with any dangerous or offensive weapon or instrument, or

2. If he is in the company with one or more other person or persons, or

3. If at or immediately before or immediately after the time of the robbery he wounds, beats, strikes, or uses any other violence to any other person…"

16. The Complainants in the 2nd and 3rd count, victims of the offence saw two (2) attackers who were armed with a panga and stick, tools that were used to inflict injuries on PW1's person therefore were offensive weapons. PW1 sustained a cut wound on the occipital region of her head, injuries that were assessed as harm. The deceased was attacked and he sustained blunt trauma to the head which led to a depressed skull. As a result, he died of subdural haematoma and haemorrhage. Both PW1 and the deceased were wounded prior to items that belonged to them being taken. This was proof of robbery with violence beyond reasonable doubt.

17. The witnesses to the act did not identify/ recognize their attackers, therefore evidence against the appellants was circumstantial in nature. Principles required for purposes of establishing circumstantial evidence were enunciated in the case of **Abang'a Alias s/o Onyango –vs- Republic Cr. Appeal No.32 of 1990 (UR) as** follows**:**

"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

In addition, in the case of **Teper –vs- Republic (1952) ALL ER 480** it was stated that:

"It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

18. A cellphone was adduced in evidence that was alleged to belong to the deceased. PW11 No.83536 P.C. Ronald Emase took over investigations from Inspector Simon Too per his testimony, but he was one of the officers who visited the scene of crime. He told the Court that the victims had two (2) cellphones and one of them, Samsung C5212 was recovered from John Kamande (PW 7).

Upon interrogation, PW 7 admitted having been in possession of the cellphone but alleged that he bought it from his brother-in-law, John Mungai Ndoro(PW 5) who was arrested, and he mentioned the 1st Appellant as the person who sold to him the phone. Consequently, the 1st Appellant was arrested and charged. When concluding his testimony, the Investigating Officer stated that John Ndoro told them that the cellphone was sold to him by the two (2) accused persons.

19. The evidence of the Investigating Officer was silent on how ownership of the cellphone was proved. The wife of the deceased stated thus:

"My husband mobile phone Samsung (sic) was stolen but it is here."

The daughter Caroline stated thus:

"I knew my Daddy Samsung C52 make phone (sic) ….. I was shown the phone in Court. I identified it as the one belonging to my father."

PW3 Chris Gathogo Thuo, the son of the deceased, simply stated:

"I identify the phone"

It is apparent that none of the witnesses gave any peculiar mark that made them believe the cell phone belonged to the deceased. Needless to add that there was absolutely nothing to prove that the deceased purchased and consequently owned the phone that was adduced in evidence.

20. That notwithstanding, the Investigating Officer was silent on how they were led to PW4 who was in possession of the cellphone that was adduced in evidence. According to PW4, Elina Wangare Gitau, the wife of PW7 John Kamande Karanja, her husband left the house on 26/8/2012 at 7.00 p.m. going to purchase for her a phone and returned shortly with a secondhand phone, make Samsung. She inserted her sim card – line number 0728-135817 in the phone and used it for three weeks. Thereafter she was summoned by the Assistant Chief and when she encountered the police, the lady officer scrolled the phone and her interest was "Kate" her daughter. Kate was interrogated regarding text messages that she was sending. Apparently, her husband PW7, had bought the cellphone from his brother, therefore, he led them to PW5 John Mungaria Ndoro who admitted having sold the cellphone to PW7, but, alleged that the issue of the cellphone being sold was brought to his attention by Wamathenge. He said that the two (2) Appellants were together when they were selling the cellphone and he did not know how they were arrested and placed in cells.

21. At the outset PW5 was a suspect and an accomplice of handling a Cellphone suspected to have been stolen. It was important for the trial Court to establish if the witness was credible. He needed to get some other evidence to confirm his allegations.

22. The Court believed PW5. It rendered itself thus:

> **"He told the Court how he was led by his friend Wamathenge to two (2) men who were selling a secondhand phone…PW5 told this Court that the two men were not strangers to him. They were times they worked together at the construction site. There was no mistaken identity by PW5 when he led the police to arrest the Accuseds."**

23. The learned trial magistrate believed PW5, but failed to query whether Wamathenge could have affirmed what he stated. While the prosecution is not obliged to call a superfluity of witnesses to prove a fact, same instance may require some witnesses being called. **(See Bukenya & Others –vs- Uganda [1972] EA 549).** The agreement of sale was not in writing therefore verbal. This called for evidence to prove the fact of sale. Wamathenge was not availed to testify, but a person that was not mentioned by PW5, James Rukenya Ndegwa, PW6 testified. On his part he stated that he was approached by the Appellants who had three (3) cellphones that they wanted to sell. He declined and the persons sought to see PW5 who bought the phone. He divulged the information that he did inform the police that the 1st Appellant was at the GK prison having been arrested while in possession of a cellphone.

24. In his testimony, the Investigating Officer did not tell the Court how the 1st Appellant was arrested. But on cross examination he stated that the 1st Appellant was arrested at Thika town. His evidence is contradicted by that of PW6 who claimed to have played an important role in the arrest of the 1st Appellant.

25. It is however argued by the 1st Appellant that he was in police custody having been charged with the offence of touting and he was removed from the cells by the CID amidst allegations that he had sold a cellphone to someone. The allegations that the 1st Appellant was in custody when the incident took place was raised when PW5 testified. At the point of the Investigating Officer testifying, he had a chance of clarifying why the 1st Appellant was in custody to disapprove the allegations put up by the defence but he failed to do so. The law is very clear; even when the accused person introduces some new matter that introduce some doubt in the prosecution case, in his defence, the prosecution can seek leave to rebut it. This was not the case in the instant case. (See **Philip Muiruri –V-Republic (2016) eKLR**)

26. The evidence that was tendered by the Court left a doubt as to whether the cellphone was in possession of the Appellants prior to passing over to PW5 who sold it to PW7. Without Wamathenge's evidence, the doubt should have been entertained by the trial court and resolved in favour of the Appellants.

27. In the result the finding that the Appellants were culprits who attacked the complainants, robbed them and murdered the deceased was not safe.

28. Therefore, the appeal by both appellants succeeds. In the result, I quash the conviction on all counts, set aside the sentence imposed and direct the Appellants to be set at liberty, unless otherwise lawfully held.

29. It is so ordered.

DATED, DELIVERED AND SIGNED AT MURANG'A THIS 10th DAY OF SEPTEMBER, 2019

L N MUTENDE

JUDGE