REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 58 OF 2015

ANDREW KHANDA MAKOKHA Alias

FRANCIS MAKOKHA MUKULO Alias ABDALLA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(from the original conviction and judgment of S. K. Ngetich, SRM, in Mumias SPMC Criminal Case No. 936 of 2012 delivered on 13/5/2015)

JUDGEMENT

1. The appellant was convicted in counts 1 and 2 of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code and sentenced in Count 1 to suffer death. The sentence in Count 2 was left in abeyance. The appellant was aggrieved by the conviction and the sentence and filed the instant appeal. The grounds of appeal are in summary that the appellant was not identified during the robbery; that there was no prove of the amount of money stolen; that the prosecution evidence was uncorroborated, fabricated, malicious and lacked probative value; that the trial court erred in rejecting the appellant's alibi defence; that the trial court did not conduct the trial in accordance with procedure and that the sentence meted out was harsh, excessive and unconstitutional.

2. The particulars of the charges against the appellant were that on the 11th October, 2012 at Mukhweya area, Matungu Location in Matungu District within Kakamega County while armed with a dangerous weapon namely AK 47 rifle jointly with others (who were acquitted of the charges) robbed Francis Maitha Musembe (herein referred to as the complainant/driver in count 1) of cash Ksh. 337,000/=, motor vehicle registration No. KBR 835S Isuzu lorry loaded with 158 bags of beans and 16 bags of greed grams all valued at Ksh. 6,441,000/= and that at the same time and place as in Count 1 robbed James Ndirangu Ndaba (herein referred to as the complainant in Count 2/turnboy) of cash Ksh. 1,490/= and a mobile phone Nokia C101 all valued at Ksh. 5,690/= and immediately before such robbery threatened to use actual violence to the two complainants.

The state opposed the appeal through the oral submissions of the prosecution counsel, **Mr. Ng'etich**.

Case for the Prosecution -

3. The prosecution case was that the complainant in Count 1, Francis Musembi (PW2) was employed as a driver of motor vehicle KBR 835S lorry. His duty was to ferry goods between Mombasa and Busia. That the complainant in Count 2, James Ndirangu (PW9) was his turnboy on the said lorry. That on the material day they were transporting cereals from Busia to Nairobi. That on reaching near Bungoma town they took a short cut to Bungoma town. They were hijacked by a group of people two of whom were riding on a motor cycle. One of the robbers was armed with a gun and was wearing police uniform. They were robbed of cash and the vehicle. The turn boy (PW9) was also robbed of a Nokia phone Model CI01. The robbers bundled them into the back of the lorry and drove with them to an unknown place. On the way they escaped and reported the incident at Harambee Police Post. The vehicle had a car track. It was traced to a certain place in Mumias. Policemen who included Sgt. Rashid Juma PW8 went to the place and found the lorry outside a homestead. Six bags of beans had been removed from the lorry and kept in a house at the homestead. They were re-loaded onto the lorry. A motor cycle was also found at the place. The motor cycle and the lorry were taken to Mumias Police Station. A suspect was arrested. He led policemen to a bar in Bungoma town where the appellant and another person, the 2nd accused who has already been acquitted, were arrested. The appellant was found in possession of a Nokia phone model C101. He was taken to Mumias Police Station.

4. Sgt. Rashid PW8 investigated the case. A suspect, the 4th accused who has also been acquitted of the charges, was arrested. He led policemen to a shamba where a gun was found. The gun was suspected to be the one used by the robbers during the robbery on the complainants. A girlfriend to the appellant called Eunice (PW1) recorded a statement to the police that she had seen a gun at the house of the appellant. The mobile phone model C101 that was found in possession of the appellant was identified by the lorry conductor PW9 as the one that was stolen from him on the night of the robbery. Two suspects, the 2nd and 5th accused persons recorded statements under inquiry before CIP Shadrack Opiyo PW3 in which they implicated the appellant with the robbery. Another suspect, the 3rd accused also implicated

the appellant in a statement recorded under inquiry by CIP Mwania PW4. The appellant was charged. During the hearing the turnboy's Nokia phone that was recovered from the appellant and the gun were produced as exhibits. The statements recorded under caution from the 2nd, 3rd and 5th accused persons were also produced as exhibits.

Defence Case -

5. When placed to his defence the appellant gave a sworn statement in which he stated that he was a plumber at Kanduyi township. That on the evening of 12/10/2012 he and some other people were unblocking sewage at a site in Bungoma town. That the work started at 9 p.m. and they finished it at 11.30 p.m. After they finished he took a walk towards his house. On the way he was arrested by policemen for failure to produce an identity card. He was tortured by policemen who were demanding that he produces a gun. He was later charged with the offences. He denied that he was involved in robbing the complainants.

Submissions -

6. The appellant tendered written submissions in which he submitted that the evidence on identification was inadequate to sustain a conviction. That the driver to the lorry PW2 testified that it was drizzling at the time of the incident and that it was dark. More so that PW2 said that the appellant was dressed in police uniform including a police cap. That the witness did not explain how he was able to identify the appellant if the appellant was wearing a police cap. Further that the police did not conduct an identification parade after the arrest of the appellant. That the complainants only identified the appellant from the dock which dock identification is unsafe to rely on.

7. The appellant further submitted that the investigating officer PW8 and the turn boy of the lorry PW9 gave contradictory evidence on the serial number of the mobile phone Nokia C101. That PW8 said that the serial number was 3593320438856217 while the turnboy said that it was 359332043885627. That it was not proved that the phone belonged to the turnboy PW9. That the doctrine of recent possession of stolen property was unsafe to rely on in the case.

8. The appellant submitted that there was contradiction as to what the lorry was carrying. That the charge sheet indicated that the lorry was carrying 158 bags of beans and 16 bags of green grams. That the driver PW2 said that the lorry was carrying 180 bags of beans.

9. The appellant submitted that the trial failed to meet the threshold of a fair trial as set out in Article 50 of the Constitution in that the appellant was not provided with a statement of PW1 before the witness testified in court. That the trial court declined to recall PW1 at the request of the appellant. That the appellant, for fear of impartiality by the trial court requested the court to transfer the case to another court which the court declined and proceeded to hear the case. That these instances caused prejudice to the appellant. Therefore that the conviction and the sentence imposed on the him was unsafe. The appellant urged the court to quash the conviction and set aside the sentence.

10. In opposing the appeal, the prosecution counsel **Mr. Ng'etich** submitted that the complainants PW2 and PW9 identified the appellant from the headlights of the lorry and the robbers' motor cycle lights. That the witnesses identified the appellant from the dock which evidence the trial court found was sufficient.

11. The prosecution counsel submitted that any contradictions in the case were not as grave as to cause injustice to the appellant. That it was proved that the appellant was armed with a gun and that he was in the company of other people. That the appellant's girlfriend PW1 saw the gun at the house of the appellant before the appellant was arrested. Therefore that the charge against the appellant was proved beyond reasonable doubt.

Analysis and Determination -

12. This is a first appeal. It is the duty of a first appellate court to analyze and re-evaluate the evidence adduced at the lower court and draw its own conclusion while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify –See **Okeno Vs Republic (1972)EA 32**.

13. In his judgment the trial magistrate considered that there was no identification parade conducted against the appellant and that the evidence against him on identification was dock identification. The magistrate was aware that evidence of dock identification is weak evidence but he cited the case of **Edward Otsudi –Vs- Republic (2013) eKLR** where the court cited the case of **John Njagi Kadogo & 2 Others –Vs- Republic (2006) eKLR** where it was held that:-

> ***"a court might base conviction on the evidence of dock identification if it is satisfied that on the facts and circumstances of the case, the evidence must be true and if prior thereto, the court warns itself of possible dangers of mistaken identity. We have perused the record of appeal and are satisfied that the two courts below considered the totality of the evidence and found that all the appellants had positively been identified. We are satisfied that there was no error in the dock identification of the 2nd appellant".***

14. The magistrate then considered the evidence of the complainants PW2 and PW9 and held that he was satisfied that the two witnesses identified the appellant during the robbery though no identification parade was held.

15. It was the evidence of the lorry driver PW2 that the robbery took place at 8.30 p.m. That a motor cycle with three occupants passed them and the people who were on the motor cycle looked at them suspiciously. That after about a kilometer they found the motor cycle blocking the road. He stopped the lorry. He saw a person in police uniform holding a gun. The person went and opened his door and greeted him. He ordered him to alight from the vehicle and sit down. He complied. Two other people removed his turnboy from the vehicle. Soon after he saw some light coming from behind. The person with the gun ordered them to stand up and move some steps behind. They stood up.

The person ordered them to produce money. The turnboy gave out 1,400/=. They were ordered to climb onto the back of the lorry. They did so. The lorry was driven away. The motor cycle that had blocked them followed them from behind. The person with the gun was being carried on the motor cycle. They later escaped from the lorry.

16. The witness said that it was drizzling when they were robbed and that it was dark. That on the following day he recorded a statement at Mumias Police Station. He was asked whether he could identify the robbers if he saw them. He was called to the CID office where he saw all the accused persons and was able to identify three of them. That his turnboy was also called to see the people.

17. The witness testified that the appellant is the person he saw armed with a gun. That he saw him clearly when they were seated on the ground as the hazard lights and the dim lights of the lorry were on. That he was wearing a police jacket, a jungle trouser and a jungle cap. The witness stated in cross-examination that he had not given the description of the robbers to the police when he recorded his statement.

18. The turnboy PW9 testified that they found a motor cycle parked on the middle of the road and three people standing on the road one of whom was wearing a rain coat and a cap like those of policemen. The said person was holding a gun. He signaled to them to stop. They did so. They ordered them out of the vehicle. They alighted. They were ordered to sit on the ground. They complied. He was robbed of cash Ksh. 1,490/=. His driver was robbed of Ksh. 7,000/=. They were ordered into the lorry which was driven away. They later escaped. Later they found the lorry at a homestead. He had left his mobile phone Nokia C101 in the lorry. They found it missing. Ksh. 330,000/= was also missing from where they had kept it underneath the seat at the cabin.

19. The witness said that he had seen two of the robbers clearly and noted their features as the lorry had full lights on. That the appellant is the one who was armed with a gun and dressed in police uniform. That at the police station he stated that he could identify two of the people. However that he was not called to an identification parade. The witness stated in cross-examination that he had not given the description of the robbers to the police.

20. The investigating officer PW8 said that when the driver of the lorry made a report to the police he said that he could identify the robbers physically though he did not give their description. However that he did not conduct an identification parade because the complainants saw the suspects at the police station before an identification parade was conducted.

21. The robbery on the complainants occurred at night. It is trite law that evidence of identification in difficult circumstances has to be tested with great care so as to satisfy the court that it is free from the possibility of error. In **Wamunga –Vs- Republic (1989) KLR** the Court of Appeal stated that:-

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

22. The trial court relied on the evidence of dock identification and held that the complainants had positively identified the appellant during the robbery even though an identification parade was not conducted.

23. Evidence relying on dock identification is evidence of very weak kind that should not be relied upon as the basis of a conviction – See **John Mwangi –Vs- Republic (2014) eKLR**.

24. The importance of holding an identification parade is to test whether a witness is able to identify an accused person whom he alleges that he was in a position to identify. Where an identification parade should have been conducted and was not done then the prosecution has itself to blame. In the instant case no such parade was conducted. The evidence of the witnesses that they could have identified the appellant if they saw him was therefore not tested.

25. Evidence was adduced that the appellant was wearing a police cap and that it was drizzling and dark. There was no evidence that the appellant's face was clearly visible. The witnesses did not explain how they were able to see his face when he was wearing a cap. In my consideration the evidence on identification was not adequate. It could not be relied on as basis of a conviction. The trial court could thereby not say with certainty that the complainants positively identified the appellant during the robbery.

26. The trial magistrate held that there was sufficient evidence that the turn boy's (PW9) stolen mobile phone Nokia C101 was recovered from the appellant two days after the robbery. That the recovery was strong evidence that connected the appellant with the robbery.

27. The investigating officer PW8 testified that he arrested the appellant at GF Night Club in Bungoma during which time he found him with a mobile phone Nokia C101. That the said phone was on the 13/10/12 identified by the turn boy PW9 as that stolen from him during the robbery. The trial court believed the evidence of the investigating officer that he recovered the phone from the appellant. I find no basis to hold otherwise.

28. The turn boy positively identified the phone during the hearing. He produced a purchase receipt for the said phone and the phone's box container with a tallying serial number. The trial court considered the said evidence and was satisfied that the phone belonged to the turn boy and that it was stolen from him during the robbery. I have no reasons to differ with the finding of the trial court on the issue.

29. The phone was recovered from the appellant a day after it was stolen from the turnboy. The trial court considered whether the doctrine of recent possession applied in the case of the appellant. It cited the case of **Erick Oherio Arum –Vs- Republic** as reported in **Edward Otsudi –Vs- Republic (2013) eKLR** where the Court of Appeal held that:-

> ***"… In our view, before a court of law can rely on the doctrine of recent possession as basis of conviction in a criminal case the***

possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively identified as the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses …"

30. The appellant did not give an explanation of how he came into the possession of the turn boy's stolen mobile phone. His possession of the phone a day after it was stolen was recent possession of stolen property. A mobile phone is not something that changes hands often from one person to another. His possession of the phone a day after the theft led to the conclusion that he was one of the people who robbed the complainants. I could not find any material contradiction between the evidence of the investigating officer and the turn boy concerning the serial number of the phone. The investigating officer made it clear that the other serial number was for different phone and not the one in this case.

31. The appellant faulted the trial court for rejecting his alibi defence. The appellant's defence was on how he was arrested on the evening of 12/10/2012. The complainants stated that they were robbed on the evening of 11/10/2012. The appellant did not state where he was on that evening. He thereby did not raise an alibi defence as he contended. The trial court did not err in rejecting the appellant's defence.

32. The appellant stated that the trial court failed to supply him with the statement of PW1 before she testified in court and that the court declined to recuse itself from the case. The evidence of the appellant's girlfriend PW1 was that she had seen a gun in the house of the accused. She could not know whether the gun she saw in his house was the one produced in court. The appellant is not the one who was found with the gun that was produced in court. The conviction on the appellant was based on identification by the complainants and recent possession of recently stolen property. The conviction was not based on the evidence of PW1. The appellant did not suffer prejudice in not being provided with the statement of PW1.

33. The appellant and his colleagues asked the trial court to recuse itself from proceeding with the case. The appellant did not give a convincing reason on why he wanted the magistrate to recuse himself from the case. The magistrate was reported to have been new at the station. The appellant did not show that the trial court was impartial in the case.

34. Upon my analysis of the evidence I find that the charges against the appellant were proved beyond all reasonable doubt. The appeal on conviction has no merit and is thereby dismissed.

Sentence -

35. The appellant in a separate petition of appeal sought for review of his sentence in tandem with the Supreme Court decision in **Francis Karioko Muruatetu & Another –Vs- Republic, Petition No. 5 of 2015 (2017) eKLR** where the Court declared the mandatory death sentence for murder under Section 204 of the Penal Code to be inconsistent with the Constitution. As a corollary, the Court of Appeal in **William Okungu Kittiny –Vs- Republic (2018) eKLR** considered the effect of the Supreme Court decision in the *Muruatetu case* on the offence of robbery with violence as provided in Section 296 (2) of the Penal Code and held that the mandatory death sentence under the said section was inconsistent with the Constitution and therefore that the death sentence under Section 296 (2) of the Penal Code is a discretionary maximum sentence.

36. The appellant was sentenced to death before the Supreme Court decision in the *Muruatetu case*. He therefore has a right to a review of his sentence. He pleaded with the court to find that the period he has served in prison is enough punishment for the offence committed.

37. Sentencing is a discretion of the trial court. In **Ambani –Vs- Republic (1990) KLR**, Bosire J. (as he then was) stated that a sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in its entirely before settling for any given sentence.

38. Section 333 (2) of the Penal Code requires a court when sentencing an accused person to take into account the time spent in custody awaiting trial.

39. I have considered sentences meted out in other cases involving robbery with violence. In **Douglas Muthaura Ntoribi –Vs- Republic, Meru High Court Misc. Criminal Appeal No. 4 of 2015** where the accused had been sentenced to death, Chitembwe J. substituted the sentence with a prison term of 15 years upon considering that the robbers stole a paltry Ksh. 500/= and that the victim sustained minor injuries.

40. In **Benjamin Kemboi Kipkone –Vs- Republic (2018) eKLR** where 3 robbers armed with an AK 47 rifle robbed the complainant of Ksh. 250,000/= and a mobile phone Chemitei J. substituted the death sentence with 20 years imprisonment.

41. In **Paul Ouma Otieno –Vs- Republic (2018) eKLR** where the accused was armed with an AK 47 rifle and a kitchen knife robbed the complainant of Ksh. 450,000/= and 3 mobile phones, Majanja J. substituted the death sentence with 20 years imprisonment.

42. In **Wycliffe Wangugi Mafura –Vs- Republic Eldoret Criminal Appeal No. 22 of 2016 (2018)** the Court of Appeal imposed a sentence of 20 years imprisonment where the appellant was involved in robbing an Mpesa shop agent with the use of firearm.

43. The appellant stayed in custody for two years awaiting trial. He was in a gang that was armed with a rifle during the robbery. They robbed the complainants of a vehicle, money and a mobile phone. Be that as it may be, I am of the view that the death sentence was not warranted in the case. The death sentence is therefore set aside. I re-sentence the appellant to eighteen (18) years imprisonment commencing from the date of sentence by the trial court.

Delivered, dated and signed in open court at Kakamega this 16th day of October, 2019.

J. NJAGI

JUDGE

In the presence of:

Miss Ombega for State

Appellant

Court Assistant - George

14 days right of appeal.