REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 20 OF 2018

MAURICE AMULIESE MUTAMBI....................................APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(from the original conviction and sentence by C. C. Kipkorir, SRM, in Mumias SPMC Criminal Case No. 1147 of 2016 dated 12/2/2018)

JUDGMENT

1. The appellant was convicted in count 1 of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code and sentenced to death. The appellant was facing a second count of impersonating a police officer contrary to Section 101 (1) of the National Police Service Act, 2011 but he was acquitted of the charge. The appellant was aggrieved by the conviction and sentence over the charge of robbery with violence and filed the instant appeal. The grounds of appeal are that:-

> ***(1) The learned trial magistrate erred in law and in fact in not making a finding that the three ingredients of a robbery with violence case contrary to section 296 (2) as stipulated in the law were not proved beyond reasonable doubt. She further erred in not making of a finding that the forestated benefits of doubt were to be granted to the appellant and the appellant to be set at liberty.***
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> ***(2) The learned trial magistrate grossly misdirected herself in receiving the evidence of a sole identifying witness under difficult condition (unconsciousness) without the necessary cautions, circumspection and sceptism, hence arriving on a wrong decision.***
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> ***(3) The learned trial magistrate gravely erred in law and in fact in relying on discredited evidence that did not hold the laid down legal threshold and probative value to incriminate in a criminal liability.***
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> ***(4) The learned trial magistrate slipped on a few banana leaves in law and in fact in failing to make a finding the trial was marred and replete with material contradictions, discrepancy and uncolaborative evidence that impeached the consistence of the witness and rendered the same untenable.***
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> ***(5) The learned trial magistrate erred in law and in fact in not making a finding that the prime, crucial witness in this case were not called to clear up doubt as in Section 150 CPC hence convicting the appellant against the weight of the evidence.***
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> ***(6) The learned trial magistrate erred in law and in fact in not reading and recording Section 211 of the CPC which is absolute right to the appellant, hence denying the appellant the right of choice to his defence thus repugnant to the appellant's rights.***

2. The particulars of the charge in count 1 were that on the 21st October, 2016 at Isongo Location, Mumias East Sub-County within Kakamega County jointly with others not before court, they robbed Morris Osoro Maina (herein referred to as the complainant) of Ksh. 85,000/= and at the time of the robbery threatened to use actual violence against the said complainant. The particulars of the charge in count 2 were that at the same place and time as in count 1, jointly with others not before court, he without authority from the Inspector General of Police, presented himself to Morris Osore Maina as a police officer.

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

Case for the Prosecution -

4. The case for prosecution was that the complainant in Count 1, Morris Osore Maina (PW5) is a sugarcane farmer in Shirohii location in Kakamega County. That on the material day he went to a bank at Webuye and cashed a cheque of Ksh. 85,000/= being proceeds of his sugarcane farming. He boarded a matatu for Kakamega town. On the way a white car kept on passing them. On getting to Kakamega he boarded a vehicle for home. On getting to his home stage he alighted from the vehicle and picked a motor cycle to take him home. On the

way the same white car that he had seen on the way from Webuye blocked their way. There were 4 people in the vehicle who introduced themselves as police officers. They accused the rider of the motor cycle of riding without a helmet and a driving licence. One of the people held the complainant and put him in the vehicle. He was then handcuffed. The vehicle was driven away. The driver of the vehicle took the complainant's bag that contained the money. On reaching Isongo stage the vehicle stalled. A crowd gathered there.

5. Meanwhile the area chief PW3 while at Isongo market received a report from a motor cycle rider that there was a person who had been hijacked in a vehicle at Isongo –Makunga junction. The chief went and reported at Isongo AP Camp. He went to the junction with two AP officers, AP Kiptogeti PW4 and APC Aketch PW4. The AP officers were armed. On getting to the junction they saw 3 people outside the vehicle. The bonnet to the vehicle was open. On seeing them the people ran away in different directions. One of them took refuge in a toilet at a nearby home. He was arrested. He was the appellant. He was taken back to the vehicle. They found the complainant in the vehicle. He said that he had been hijacked and robbed of Ksh. 85,000/=. They were taken to Isongo AP Camp. The vehicle was towed to the AP Camp. The appellant was searched and found with handcuffs, his identity card, two driving licences one of which belonged to him and a certificate of appointment from Kenya Police indicating that he was an Inspector of Police. The money was not recovered. The appellant was then picked by police officers from Shianda Police Station.

6. Sgt. Juma PW2 of DCIO's office Mumias investigated the case. He went to Shianda Police Station and was handed over the exhibits recovered from the appellant. The complainant gave him a withdrawal receipt for Ksh. 85,000/=. He went to Isongo AP Camp and towed the motor vehicle reg. No. KBX 765H to Mumias Police Station. He traced the owner of the vehicle to David Maina Njogu PW1 of Nairobi who said that he had hired the vehicle to the appellant on 17/10/17. PW1 produced a car hire agreement with the appellant. He said that the appellant had paid for car hire through M-pesa. He produced his Mpesa statement showing the payment by the appellant. Sgt. Juma charged the appellant with the offences. He said that the police identification card found with the appellant was forged. During he hearing the motor vehicle, the alleged forged police identification card, the appellant's identity card, a pair of handcuffs, among others were produced as exhibits. The appellant was convicted of the offence of robbery but acquitted of the offence of impersonating a police officer.

7. The complainant stated that the appellant was calling himself a police officer. That he took the bag containing the money from him and sat on it. That he is the one who handcuffed him.

Defence Case -

8. When placed to his defence the appellant stated in a sworn statement that he was in the business of cutting timber and selling second hand clothes. That on the 21/10/16 he was driving along Busia-Ekero-Makunga road on the way to West Kenya Sugar Company. He was alone. On the way the vehicle developed a mechanical problem and it stalled. He checked on the vehicle. Six young men came along and helped him to push it. He went to the toilet in a nearby school to answer to a call of nature. While there he heard guns shots. He came out and found a police officer who asked him whether he was the owner of the vehicle. He answered to the affirmative. The policeman hit him and handcuffed him. He told him that the vehicle was stolen. He was taken to the AP Camp and later taken to Shianda Police Station. Sgt. Rashid Juma then picked him and took him to Mumias Police Station. He was later charged.

9. In cross-examination the appellant said that the motor vehicle belonged to PW1. He denied that he was found with police identity card and handcuffs. He denied that he introduced himself to the complainant as a police officer. He said that he is not a police officer.

Submissions -

10. The advocate for the appellant, Mr. Malalah, submitted that the ingredients of the offence of robbery with violence were not proved as set out by the Court of Appeal in the case of **Johana Ndungu –Vs- Republic No. 116 of 1995**. That there was no evidence in the case against the appellant that there was any weapon used to either threaten or harm the complainant. That the complainant did not make mention of any weapon. Therefore that there was no violence used nor was there a weapon used. That if there was any robbery committed it was simple robbery and not robbery with violence. That in the case of **Juma –Vs- Republic (2003) EA 471** it was held that where the prosecution is relying on the ingredients of being armed, it must be stated in the particulars of the charge that the weapon or instrument with which the appellant was armed was dangerous or offensive.

11. Further that though the complainant says that he was beaten, there is no evidence to prove the injuries by way of a P3 form or treatment notes.

12. The advocate submitted that there was contradictory evidence as to the number of people who robbed the complainant. That the complainant said that they were four while the police officer PW7 said that they were three. That the appellant stated that he was all by himself. That there was evidence that a crowd had gathered there before policemen arrived. That it is possible that the people who ran away were curious onlookers or members of the public who were helping the appellant to fix the vehicle.

13. The advocate submitted that there was no proper identification of the appellant. That the evidence of the complainant ought to have been taken with a lot of caution as it was that of a single identifying witness. The cases of **Cleophas Otieno Wamunga –Vs- Republic (1989) KLR 424** and **Oluoch –Vs- Republic (1985) KLR** were referred to on identification.

14. It was submitted that the witnesses could not correctly identify the motor vehicle that was used in the commission of the crime. That PW1 said that the vehicle he had rented to the appellant was pearl in colour while the complainant and PW2 said that the car was white in colour.

15. The advocate concluded that the case was not proved beyond all reasonable doubt. He urged the court to acquit the appellant of the charges.

16. The prosecution counsel Mr. Ng'etich submitted that administration policemen found the appellant robbing the complainant. That the

appellant was arrested immediately and therefore that there was no room for error. That the appellant was found with handcuffs and a fake police identification card. That the trial court erred in acquitting the appellant of the second count. The prosecution counsel urged the court to reverse the finding in count 2 and convict the appellant accordingly.

Analysis and Determination -

17. This is the first appellate court and as such it is guided by the principles set out in the case of **David Njuguna Wairimu –Vs- Republic [2010] eKLR** where the Court of Appeal stated that:-

> ***"The duty of the first appellate court is to analyse the re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."***

18. The first ground of appeal is that the ingredients of the charge were not proved. The appellant was charged with robbery with violence contrary to Section 296 (2) of the Penal Code that states that:-

> ***"If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."***

19. The ingredients of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code were set out in the case of **Johana Ndungu –Vs- Republic** (Supra) and in **Oluoch –Vs- Republic (1985) KLR** where the Court of Appeal held that the charge under that section is proved –

> ***(a) If the offender is armed with any dangerous weapon or instrument; or***
>
> ***(b) If he is in the company with one or more other person or persons; or***
>
> ***(c) If at or immediately before or after the time of the robbery he wounds, beats, strikes or uses personal violence to any person.***

The court stated that if any of these 3 ingredients is proved is sufficient evidence to prove the offence. The trial magistrate in this case set out the three ingredients of robbery with violence and held that it was proved that the appellant was in the company of more than one person and therefore that the charge of robbery with violence was proved beyond all reasonable doubt.

20. The complainant PW5 did not state that the robbers were armed with any weapon though the investigating officer stated that the complainant was being prodded with an iron rod. Since the complainant did not mention such a rod there was no evidence of being armed with a dangerous weapon. The complainant stated that he was held and put in the vehicle. That he was handcuffed and beaten. That when policemen arrived they removed the handcuffs from the body of the appellant. The complainant did not explain how the handcuffs came to be found in the body of the appellant if the same had been used to handcuff him. If anything the policemen should have found him in handcuffs. It would then appear that the complainant was not handcuffed. Though he said that he was beaten, he did not give details of where he was beaten. It would appear that there was no violence used on the complainant.

21. The complainant said that there were 4 people in the vehicle that was used to rob him. The AP officer PW7 said that he saw 3 people running away. I do not think that there was a contradiction in the evidence of the complainant and PW7 as to the number of people who robbed the complainant. The complainant was in the vehicle with the people. He cannot fail to know how many people were in the vehicle. The fact that PW7 did not see the fourth person does not mean there was a contradiction in the number of people who robbed the complainant. The fourth person may have disappeared before policemen reached there. The fact of the matter is that it was proved that the appellant was in the company of other people when they robbed the complainant. There was no truth that the appellant was travelling alone in the vehicle.

22. It was proved that the appellant was in the company of other people when they robbed the complainant of his money. Proof that the appellant was in the company of one or more other persons was enough by itself to prove the offence of robbery with violence. The Court of Appeal in **Johana Ndungu –Vs- Republic** (Supra) held that once it is proved that at the time of the robbery the offender was in the company of one or more person or persons then the offence of robbery with violence is proved and the court is not required to look for the presence of either of the other two set of circumstances. The said court applied the same principle in **Daniel Muthoni Marimu –Vs- Republic (2013) eKLR** and stated that proof of any of the three elements of the offence of robbery with violence would be enough to sustain a conviction under Section 296 (2) of the Penal Code. This holding therefore disposes of the submission by Mr. Malalah that since there was no proof of violence the offence proved was simple robbery. It is reiterated that proof that the appellant was in the company of one of more persons was sufficient by itself to prove the offence of robbery with violence. The trial magistrate did not err in her holding on the issue.

23. A withdrawal receipt of Ksh. 85,000/- was produced to show that the complainant had withdrawn the said amount of money on the date of the robbery. It was proved that the complainant was robbed of the said sum of money.

24. Mr. Malalah submitted that the appellant was not sufficiently identified. The trial magistrate stated in her judgment that the appellant was found soon after when the complainant was still in the vehicle. That the issue of identification was properly proved.

25. The complainant stated that he was robbed during the day. The chief PW3 stated that he received the report at 6 p.m. and that it was not yet dark when they reached the scene. The administration police officers PW4 and PW7 testified that they received the report at about 6 p.m.

26. Though the complainant did not state the time that he was hijacked and the duration of time that he stayed in the vehicle before he was rescued, it is clear that the incident occurred during day time. The complainant stated that upon being hijacked the vehicle was driven upto Isonga before it broke down. This means that he had amble time to see the occupants of the vehicle. He said that the appellant is the one who took his bag from him and sat on it. The conditions were favourable for positive identification.

27. The prosecution witnesses said that the appellant and his colleagues ran away when policemen arrived. That the appellant entered into a toilet and he was arrested. The appellant stated that he had gone to a nearby toilet to answer to a call of nature when he was arrested by policemen. When the appellant cross-examined the prosecution witnesses he did not bring up the issue of going to the toilet to answer to a call of nature before policemen arrived. His defence to that effect can only have been an afterthought. The appellant must have entered into the toilet in an attempt to escape from the police chase. The trial court was correct in dismissing his defence to that end.

28. The appellant was arrested soon after running away. The complainant saw him immediately after arrest and identified him as one of the members of the gang that had hijacked him and robbed him. The appellant admits that he had been in his vehicle before he was arrested in the toilet. The prosecution witnesses did not make mention of the presence of any other vehicle at the junction when they went to the scene except that of the appellant. The appellant also did not make mention of any other vehicle at the junction at the time. The complainant stated that he was in the vehicle that had broken down there. The appellant admitted that his vehicle had broken down there. The chief and the administration policemen found the complainant inside the vehicle that had broken down there. There was then no doubt that the complainant had been hijacked in the appellant's motor vehicle. The appellant admitted that he was the driver of the vehicle. He was thereby identified beyond all reasonable doubt as one of the people who hijacked the complainant and robbed him. There was no possibility of error in the identification of the appellant.

29. Mr. Malalah submitted that identification of the appellant was from a single witness. That it was not credible and free from the possibility of error. In **Abdalla Bin Wendo –Vs- Republic (1953) 20 EACA 166** the Court of Appeal stated that:-

> ***"Subject to 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 respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be 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 the possibility of error."***

The fact that the appellant was seen by PW4 and PW7 running away from the vehicle in which the complainant was in is evidence that proves that the identification of the appellant by the complainant was free from possibility of error. Similarly the fact that the complainant was found in the complainant's vehicle proves the complainant's evidence that he had been hijacked by the appellant and his accomplices. The evidence on identification of the appellant was therefore not from a single witness. There are other witnesses who corroborated the evidence of the complainant on the robbery.

30. Ground 5 of the appeal was that a crucial witness was not called to clear up doubt in the prosecution case. The only witness who was mentioned and not called was the motorcycle rider who was said to have reported to the Chief PW3 that a passenger he had been ferrying had been hijacked by people who had introduced themselves as policemen. The prosecution is not obliged to call a plurality of witnesses if the evidence called is sufficient to prove the charge even without the evidence of other witnesses who are material to the case - See **Donald Majiwa Achilwa & 2 Others –Vs- Republic (2009) eKLR**. In this case chief went to the scene and confirmed what he had been told by the motor cycle rider that a person that he had been carrying had been hijacked in a vehicle. Failure to call the motor cycle rider was not fatal to the prosecution case. An inference that the evidence of the motor cycle rider would, if called, have tended to be adverse to the prosecution evidence cannot be made as the evidence adduced by the prosecution was sufficient even without the evidence of the motor cycle rider – See **Bukenya & Others –Vs- Uganda (1972) EA 549**.

31. Ground 6 of the appeal was that the trial court infringed on the appellant's rights of trial in that the trial magistrate did not explain the rights of the appellant under Section 211 of the Criminal Procedure Code. The said section requires that upon the court making a finding that an accused person has a case to answer to explain to him that he could choose to either sworn evidence or unsworn statement or to exercise his rights under Article 50 of the Constitution of remaining silent. In the instant case the appellant gave sworn evidence. Since the appellant chose to give sworn evidence the most likely thing that happened is that his rights under S. 211 of the Criminal Procedure Code were explained but the court inadvertently failed to record that fact. This error did not occasion a failure of justice to the appellant as he gave sworn evidence. The error is curable under Section 382 of the Criminal Procedure Code.

32. The state prosecutor asked the court to make a finding that Count 2 of which the appellant was acquitted had been proved beyond reasonable doubt. The state however did not file a counter-appeal in respect to the finding of the learned trial magistrate in Count 2. There is then no basis for this court to delve into the findings of the trial court in that respect. The acquittal thereby stands.

33. Upon my own analysis of the evidence adduced at the lower court, I find that the appellant was convicted on solid and water tight evidence in respect to the charge in Count 1 of robbery with violence contrary to Section 296 (2) of the Penal Code. The said charge was proved beyond all reasonable doubt. The appeal on conviction has no merit and is accordingly dismissed.

Sentence –

34. The appellant was sentenced to the mandatory death sentence imposed by Section 296 (2) of the Penal Code. The trial court when sentencing the appellant the trial magistrate hinted that she was aware of the Supreme Court decision in *Francis Karioko Muruatetu* case declared the sentence of death for the offence of murder provided under Section 204 of the Penal Code to be in consistent with the

Constitution as it does not allow discretion to the trial court to impose any other sentence in deserving case other than death. As a corollary the Court of Appeal in **William Okungu Kittiny –Vs- Republic (2018) eKLR** applied the decision in *Muruatetu case mutatis mutandis* to Section 296 (2) of the Penal Code held that the mandatory death sentence provided under Section 296 (2) of the Penal Code is inconsistent with the Constitution and therefore that the death sentence provided under the section is a discretionary death sentence. The fact that Section 296 (2) of the Penal Code has not been amended to align itself with the current position of the law in regard to the death sentence is no bar to accused persons enjoying the fruits of the Court of Appeal decision in **William Okungu Kittiny** case. The trial court thereby erred in not considering whether the appellant deserved the death sentence or any other sentence alternative to the death sentence. I will thereby give the appellant an opportunity to mitigate on his sentence.

Delivered, dated and signed in open court at Kakamega this 17th day of October, 2019.

J. NJAGI

JUDGE

In the presence of:

Miss Kibet for state/respondent

Mr. Malalah for appellant

Appellant - present

Court Assistant - George

14 days right of appeal.