REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CRIMINAL APPEAL NO. 26 OF 2019

(CONSOLIDATED WITH CRIMINAL APPEAL NOS. 27 OF 2019 AND 31 OF 2019)

MIKESON MUTINDA MUMBE.....1ST APPELLANT

HILDAH LILIAN NJERI.....2ND APPELLANT

JOSPHAT NJOROGE GACHUHI.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellants herein, MIKESON MUTINDA MUMBE, HILDA LILIAN NJERI and JOSPHAT NJOROGE GICHUHI were charged before the Chief Magistrate's court at Kerugoya in Criminal Case Number 591/2016, with the offence of Robbery with Violence Contrary to Section 296(2) of the Penal Code. The particulars of the charge were that on the 5th day of October, 2016 at Kabendeso area in Kerugoya Township within Kirinyaga County, jointly with others not before the court, while armed with dangerous weapons to wit Knives, robbed IBRAHIM MWANGI MBUGI of cash Kshs. 3,300/= (three thousand, three hundred shillings) and at or immediately before or immediately after the time of such robbery used actual violence on the said IBRAHIM MWANGI MBUGI.

The appellants also faced an alternative count of attempted Robbery with violence contrary to Section 297 (2) of the Penal Code. The particulars being that, on the 5th October, 2016 at Kabendeso area in Kerugoya township within Kirinyaga County jointly with others not before the court, while armed with dangerous weapons to wit; knives, attempted to rob IBRAHIM MWANGI MBUGI of his motor vehicle registration number KCC 308N make Toyota Fielder valued at kshs. 900,000/-(nine hundred thousand shillings) and at or immediately before or immediately after the time of such attempted robbery, used actual violence to the said IBRAHIM MWANGI MBUGI.

The appellants pleaded not guilty to the charges and the case proceeded to full trial and the trial court found them guilty of the offence of Robbery with Violence and sentenced them to death as prescribed by the law.

The appellants being dissatisfied with the conviction and the sentence, appealed to this court in Criminal Appeal case Numbers 26/2019, 27/2019 and 31/2019 which were consolidated on 10th September, 2019 under criminal case No. 26/2019 with the order of the appellants as follows:

1. Mikeson Mutinda Mumbe (1st Appellant)

2. Hilder Lilian Njeri (2nd Appellant)

3. Josephat Njoroge Gichuhi (3rd Appellant).

The 1st Appellant filed his petition of appeal dated 16th May, 2019 and listed four grounds of appeal as follows.

1. The Learned Magistrate erred in law and in fact in relying on the evidence that did not support the charges against the Appellant.

2. The Learned Magistrate erred in law and in fact in failing to find that the prosecution's evidence lacked corroboration and was not sufficient to sustain a conviction.

3. The Learned Magistrate erred in law and in fact in failing to consider the defence evidence which was credible

4. The Learned Magistrate erred in law and in fact by giving a harsh and excessive sentence against the Appellant.

The 2nd appellant filed her petition of appeal dated the 17th day of May, 2019 wherein she listed the following grounds of appeal;

1. The Trial Magistrate erred in both fact and the law in failing to find that the prosecution did not prove the case on the required standards thus occasioning prejudice to the Appellant.

2. The Learned Magistrate erred in law and in fact by failing to consider adequately the sworn defence statement contrary to Section 169(1) of the Criminal procedure Code Cap 75 Laws of Kenya.

3. The Learned Magistrate erred in law and in fact by failing to find that part of the evidence as adduced by the prosecution failed, for non compliance with Section 106 of the Evidence Act Cap 80 Laws of Kenya.

4. The Learned Magistrate erred in law and fact by meting out sentence that was both harsh and excessive in the circumstances of the case.

On his part the 3rd Appellant filed his on 23rd May, 2019 and set out the following grounds;

1. The Learned Magistrate erred in Law and in fact in relying on circumstantial evidence which was not corroborated.

2. The Learned Magistrate erred in Law and in fact by relying on evidence that was contradicting.

3. The Learned Magistrate erred in law and in fact when he failed to consider that there was no evidence adduced in court to link him with the offence of robbery with violence.

4. The Learned Magistrate erred in law and in fact by failing to consider his defence.

5. The Learned Magistrate erred in law and in fact in convicting the Appellant on insufficient and incredible evidence.

As noted, the appeals were consolidated. The court has perused through the grounds of appeal, and I am of the view that the following are the common and consolidated grounds of appeal raised by the three Appellants;

1. The Learned Magistrate erred in law and in fact in relying on evidence that did not support the charges against the Appellants.

2. The Learned Magistrate erred in law and in fact in failing to find that the prosecution did not prove its case on the required standards.

3. The Learned Magistrate erred in law and in fact in failing to find that the prosecution's evidence lacked corroboration and was not sufficient to sustain a conviction.

4. The Learned Magistrate erred in law and in fact in relying on circumstantial evidence which was not corroborated.

5. The Learned Magistrate erred in law and in fact in failing to consider the defences offered by the Appellants.

6. The learned Magistrate erred in law and in fact by meting out sentence that was harsh and excessive in the circumstances of the case.

The Appeal was disposed off by way of written submissions. This being the first appellate court, it is imperative that this court examines and analyzes all the evidence adduced in the trial court and arrive at its own independent conclusion on both facts and the law but has to bear in mind that it did not have the benefit of hearing and observing the demeanor of witnesses as they testified. This principle has been espoused in several cases including ***Kiilu & Another Vs. Republic*** where the court of appeal held in part;

"..... the first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the 1st appellate court to merely 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 finding should be supported. In so doing, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses....."

It is imperative that this court summarizes the evidence that was adduced in the trial court before analyzing the same. The court has noted that the case had proceeded almost to conclusion but had to start de novo on the 11th July, 2018 for reasons that were not recorded.

Ibrahim Mwangi Mbugi testified as PW1. He is a taxi driver and on 5th October, 2016 he was at the stage at Jevanjee Gardens at Kerugoya at about 2.15pm when a man requested him to take him to the DC's office. He charged him Kshs. 300/=. On reaching the DC's office he told him to park besides the gate. The man made a call and another man and a lady came and joined them in the car and he instructed him to

drive them to Kabendoso using a murram road. On the way the lady said the land was okay and that there was a search to confirm the same.

On reaching where the land is, the man who hired him told him to stop and the lady pointed the land on the right side. The lady said the vendor was in the shamba and she requested that they go and pick him but before they could do so, two men approached. They boarded the vehicle and sat on the back seat. They pretended to be jostling for space and one of them was pushed in front and when he (PW1) turned to see what was happening one of them held him by the neck and said they were not looking for land and were not interested in him but were interested with his vehicle. He hooted to attract attention as there was a commotion with one of them attempting to put a rope on his neck. He stopped the vehicle and they started fighting. In the process, a tractor came from behind and they asked him what had happened. The assailants started running away but two of them were arrested within a short distance. He called a friend of his called Ken and the OCPD for assistance. The police went to the scene and arrested the two. He lost Kshs. 3,000/= to the assailants. After a few days, he recovered a techno mobile phone and safaricom line in the car. He was treated for the injuries that he sustained. He stated that it was during the day and he saw them clearly.

Kennedy Muturi Kinyua testified as PW2. He was called by Ibrahim Mwangi (PW1) on the 5th October, 2016 who told him that he was being car jacked. He went to the scene together with other taxi drivers where they found PW1's motor vehicle and a tractor. They found a huge crowd that had gathered and the 3rd Appellant was being beaten by the mob. They left the scene but later went back after they were told that the 1st Appellant had been arrested. They found him being beaten by the members of the public at the scene. They were told he was arrested at the scene while hiding in a chicken pen.

They were also told that a bag had been recovered in the banana plantation and upon checking the same, it had two identity cards one belonging to the 2nd appellant. It also had some substance in a plastic bag among other items.

Linus Njagi Maina gave evidence as PW3. He is the owner of motor vehicle KCC 308N. He was at work when his driver PW1 called him and told him that he was car jacked by persons who had hired the vehicle. He told him to go to hospital as he had been injured. He later took the ownership documents of the vehicle to the police.

Beatrice Nyawira, testified as PW4, she stated that on 5th October, 2016 she went to check on her chicken when she found a man inside the chicken pen. She raised alarm and the members of the public came and arrested him. He identified the man she found in the chicken pen as the 1st Appellant. She also indentified a phone that the 1st Appellant left behind make, Techno.

Wilson Getonto (PW5) was in the station as crime standby on 5th October, 2015. He was then stationed at Kerugoya Police station. He was called by the OCPD and was told to proceed to the scene at Kabendoso. On arrival he found the 2nd and 3rd Appellants being beaten by members of the public and he rescued them and took them to the station. The first appellant was arrested later.

Elizabeth Atieno Ogutu gave evidence as PW6. On 5th October, 2016 she was at the report office at Kerugoya Police Station when a black bag was taken to him by inspector Mutua and asked him to enquire if the bag belonged to the Appellants. The 2nd Appellant indentified the bag and some items as hers.

Eunice Wamuyu Njogu (PW7) works for a government Chemist. On 4/11/2016 she received some exhibits from CID Kirinyaga Central to ascertain the contents. She tested them and made findings and conclusions.

Corporal Simon Mutua (PW8) was in the office at the DCI Kirinyaga Central on 5th October, 2016 when he was asked to investigate a robbery. By then the 2nd and 3rd appellants had been arrested. He received information that the 1st appellant had been arrested at Kabendoso area and was being subjected to mob justice. They rushed to scene and rescued him and took him to hospital. They got information that he had been arrested in a chicken pen. He went to the house where 1st Appellant was arrested and recovered a set of keys and a black hat which the Appellant indentified as his. He produced several exhibits which included some clothes which were found in the bag that was recovered at the scene, ID card for the 2nd Appellant and a sisal rope.

Hezron Macharia (PW9) an ENT specialist based at Kerugoya examined the complainant (PW1). He had a swollen upper limb with a swollen laceration on the right upper limb. His head and neck were tender on the right side and also had thorax and abdominal tenderness on the back. He had human bite abrasion on the left arm. The age of the injuries was 1 ½ hours. The probable weapons were both blunt and sharp object consistent with human teeth.

He produced a copy of the P3 from Kerugoya and stated that. The complainants clothes were dirty, not torn but with blood stains.

When put on their defence, the Appellants gave sworn statements but none of them called any witnesses.

In his testimony, the 1st Appellant told the court that at the material time, he was working with a company called Virji Vishram Construction Company along Garissa road, Thika. That he had been invited by his girlfriend in Sagana and he reached there at 4.00pm. They entered a hotel where they ate and drunk. They left there at around 7.00pm. He requested her to show him a place to sleep and they boarded a vehicle to where they went to sleep and on arriving there, they continued to drink and he only recovered on 5th October 2016. He found himself sleeping on the fence of a small house where there was a cow shed. He was woken up by PW4 who called the neighbors who beat him up. He stated that the phone that was recovered was not his nor was the hat. He lost consciousness and when he recovered he was arrested and charged.

On her part the 2nd Appellant stated that she was a business woman dealing with timber. On 5th October, 2016 a broker told her there was land for sale in Kirinyaga. She was given directions to where the land is and she went there and met the broker. As they were waiting for the broker, a small car approached and she was told to enter so that she could go and see the land. She had a handbag containing Kshs.

120,000/=, one brown trouser, a blouse, identity card and some cosmetics. In the vehicle there was an old man who was carrying a black bag, an envelope a newspaper and the driver.

After viewing the land, the agent held her hand and snatched the bag from her. The old man who was in the vehicle removed a knife and threatened her, then both men left the car and escaped. She asked the driver if indeed the land was for sale or the man had planned to rob her. The driver slapped her on the face but after she screamed, he let her to go. She found a tractor behind the small car and the passengers in the tractor asked her what the problem was and she explained to them that she had been robbed. She followed the two men for some distance and when the driver of the small car saw her walking back to where he was, he went out of the vehicle and slapped her again. She lost consciousness and recovered at the police station. She was taken to hospital. She recovered her phone and the handbag at the CID department.

On his part, the 3rd Appellant stated that on the 5th October, 2016 he had gone to Mikinduri to buy bananas but did not get any. On his way back at about 200 meters from where he had gone to buy the bananas, he found a small car and a tractor behind it. He stood at 200 meters from the car and before long two men came out from the small car and one was carrying a bag.

A while after, a woman came out of the car and followed the two men while screaming but after short distance she went back. The driver of the small car asked her why she was saying she had been robbed yet she was one of the robbers, he slapped her. He (3rd Appellant) asked him (the complainant) why he was beating her and why he could not report to the police instead. The driver of the taxi (complainant) called other taxi operators who came with a lot of anger and attacked him without giving him time to explain. He was arrested and taken to the police station and later charged. He lost his phone and documents in the process but he later recovered them at the police station.

The appeal was disposed off by way of written submissions. The court has carefully re-evaluated the evidence on record and has considered the parties' respective submissions.

The appellants herein faced charges of robbery with violence and attempted robbery with violence. The ingredients constituting the offence of robbery with violence were stated in the case of ***Johana Ndungu Vs. R. CRA 116/1995*** thus

> ***"In order to appreciate properly as to what constitutes an offence under Section 296(2) of the Penal Code, one must consider the subsection in conjunction with Section 295 of the Penal Code. The essential ingredient of robber under Section 295 is use of or threat to use actual violence against any person or property at or immediately after to further in any manner the act of stealing. Thereafter, the existence of the afore described ingredients constituting robbery are presupposed in the three sets of circumstances prescribed in Section 296 (2) which we give below any one of which if proved will constitute the offence under the subsection."***
>
> ***1. If the offender is armed with any dangerous or offensive weapon or instrument***
>
> ***2. If he is in the company with one or more other person or persons or***
>
> ***3. At or immediately before, or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person***

The use of the words "or" implies that a proof of any of the three elements is sufficient to establish the offence of robbery with violence as was stated in the case of ***Dima Denge Dima & Others Vs. R. (Criminal Appeal No. 300 of 2007)*** thus,

"The elements of the offence under Section 296(2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to find an offence of robbery with violence"

The word "robbed" was defined by the court of appeal in the case of ***Mueni Ngumbau Maingi Vs. Republic (2006) as follows;***

> ***"The word "robbed" is a term of art and connotes not simply a theft but a theft preceded, accompanied or followed by use of threat or use of actual violence to any person or property in order to obtain or retain the stolen property"***

I now proceed to consider the grounds of appeal alongside the above stated ingredients constituting the offence of robbery with violence facing the Appellants herein.

On whether the Appellants were armed with dangerous weapons or instrument, the evidence of the complainant (PW1) is that the Appellants attacked him and he sustained injuries that were confirmed by PW3 who examined him. On examination, his finding was that the probable weapons were both blunt and sharp weapon. When he was cross examined by the 1st Appellant, he stated that he, the 1st Appellant ,had a sharp object in his hand. From that piece of evidence, it is therefore clear that the appellants were armed with dangerous or offensive weapons

On the 2nd ingredient, the evidence by PW1 is that he was attacked by five people, being the three Appellants and two others who ran away. The appellants were jointly charged with the offence and as the court will demonstrate shortly, the 2nd and 3rd appellants were arrested at the scene while the 1st Appellant was arrested in a chicken pen within 200 meters from the scene of the robbery.

On the identification of the Appellants, there is no doubt that the issue of identification and/or recognition is very critical in a case of robbery with violence. For a court to convict an accused charged with the above offence, the complainant must have indentified the assailant

positively. In the case of ***Waruinge Vs. Republic Criminal Appeal No. 20 of 1998*** the court held;

> ***"it is trite law that where the only evidence against a dependant 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 favorable and free from the possibility of error before it can safely make it the basis of conviction"***

The court was also of the same view in the case of ***Munda Vs. Republic criminal Appeal No. 51 of 1989*** where the court held;

> ***"Whenever the case against an accused person depends wholly or substantially on correctness of one or more identification of the accused, special need for caution before convicting in reliance of correctness of identification is necessary. The court should warn itself of the possibility that mistaken witness could be a convincing one and that a number of such witnesses could be mistaken. The court should further examine closely the circumstances in which the identification by each witness can be made. How long did the witness have the accused under observation?***

With regard to the identification, the 1st Appellant submitted that he did not have his cap on and the cap that was produced as an exhibit was allegedly brought to the police station after he had been arrested and that the house where he was arrested was never searched. It was also submitted that three items were alleged to have been collected from the chicken pen and were said to belong to him. However, PW4 in her evidence only stated that they recovered a phone which phone was never produced as an exhibit. He therefore argued that there is no evidence as to who and where the items were recovered.

In regard to the 1st Appellant, it was the evidence by the complainant that he found him near the land that was allegedly being sold. On reaching there, the person who hired him made a call and soon thereafter the 1st Appellant and another men approached (this other man was identified as the 3rd Appellant). They boarded his vehicle, sat at the back and after a short while, there was commotion. The 1st Appellant escaped and according to the complainant, he was wearing a cap written UCCC and when the complainant went to the police station after the 1st appellant was arrested, he described to the police how he was dressed when he saw him at the scene of the robbery.

It is also worth noting that the offence happened in broad day light and before the 1st Appellant ran away the Appellant had sufficient time to identify him.

With regard to the 2nd and 3rd Appellants, the evidence adduced was that they were arrested at the scene of the accident. The complainant's evidence being that after the commotion started, it did not take long before he saw the tractor which was carrying the people who rescued him. The complainant called his fellow taxi operators who responded within a short time and on their arrival at the scene, they found the 2nd and 3rd Appellants being beaten by members of the public. The complainant was able to identify them clearly as it was during the day and he was with them for quite some time.

Considering the evidence on record, I find that the 2nd and 3rd Appellants were also properly identified and placed at the scene where the offence was committed.

The other ground of appeal is that the trial court failed to consider the defences offered by the appellants. The court has read through the defences. The defence by the 1st Appellant does not add up. Though he stated that he had gone to visit his girlfriend, she was not called as a witness to support his evidence. He did not tell the court the name of the hotel where he slept and how he ended up in the chicken pen where he was arrested. On cross-examination, he stated that in his statement that he gave to the police, he admitted having left the allen keys and a cap in the chicken pen. In my considered view, the defence is not tenable and the story was not convincing.

On the part of the 2nd Appellant, as I had stated earlier on, she was arrested at the scene. Though in her defence she tried to explain her presence at the scene, the explanation is not satisfactory. According to her, she was visiting the two pieces of land for the first time and by then, she had not even met the owner so that they could agree on the price. She had not even decided which one she was buying between the two parcels. It cannot therefore be true that she had carried Kshs. 120,000/- to purchase the land. She had not even carried out official search to ascertain its legal status as to the ownership and encumbrances if any. The complainant identified her as one of the people he picked at the DC's office and he had sufficient time to see and identify her. This court finds that the defence does not hold.

As for the 3rd Appellant, his defence was that he had gone for business at Mikinduri area. He had gone to buy bananas when he found a truck and a small car parked on the road side. That there was a commotion involving a man and a woman and he was caught up in the same when he tried to intervene. Similarly, this court does not belief his defence. If indeed he was not among the people who robbed the complainant, he could not have been attacked by the members of the public. The only reason he was attacked is because the complainant had identified him as one of his attackers. He was with the 1st Appellant near the land that was allegedly being sold and they were said to be the vendors. Going by the evidence of the complainant, the 3rd Appellant had not even left the scene where the offence was committed and he was arrested there. This court believes the complainant's account and dismisses the 3rd Appellant's defence. The Learned Magistrate was right in dismissing their respective defences.

From the foregoing, I find the trial court having not fallen into error. The appeal against the conviction is dismissed.

Regarding the sentence, the Appellants contend that the same is harsh and excessive.

In this regard, this court is guided by the case of ***Francis Karioko Muruatetu & Others vs. Republic Petition No. 15 and 16 of 2015*** where the supreme court set out guidelines with regard to mitigating factors that are applicable in a re-hearing sentence for conviction of a murder charge.

a. The age of the offender

b. Being a first offender

c. Whether the offender pleaded guilty

d. Character and record of the offender

e. Commission of the offence in response to gender based violence

f. Remorsefulness of the offender

g. The possibility of reform and social re-adaptation of the offender

h. Any other factor that the court may consider relevant.

See the case of ***Daniel Muthami Soro Vs. Republic (Criminal Appeal 11 of 2018) at Kitui.***

This being the first appellant court, and noting that this court has jurisdiction to assume the role of the trial court in re-assessing and re-evaluating the evidence on record and arriving at its own independent conclusion but bearing in mind that it neither heard or saw witnesses testifying, I would proceed to exercise the jurisdiction to re-sentence the appellants. In so doing the court is guided by the guidelines set out hereinabove. The court notes that all the Appellants are first offenders and that they stated to the trial court that they are remorseful. The court has also considered their mitigation.

In the circumstances of this case, I set aside the sentence imposed and substitute it with sentence of 7 years imprisonment which will be effective from the date of conviction and sentence by the trial court.

Before I conclude, it is clear that the Appellants were charged with two main counts. The court has perused the record of the proceedings and I note that the Learned trial Magistrate did not address the 2nd count in his judgment. It is a charge of Attempted Robbery with Violence contrary to Section 297 (2) and not 296 (2) of the Penal Code as stated in the charge sheet.

A closer look at the elements of the offence of attempted robbery with violence and those of robbery with violence are the same. In fact, the wording of the two sub-sections are exactly the same and even the sentence provided for is the same. The Learned Magistrate failed to address himself to the second count after he convicted the Appellants in the first count.

From the evidence on record and in view of this court's observation on the elements of the two offences, the evidence adduced was sufficient to convict the Appellants with the second count as well.

It was an error on the part of the Learned Magistrate to fail to convict and sentence on it. Having re-evaluated the evidence on record, I am of the view that the Appellants were guilty of the same and I hereby convict them as charged. As for the sentence, I would apply the same principles that I have discussed above and in view of the Muruatetu case, proceed to sentence them to serve seven (7) years imprisonment in count two.

The sentences imposed in the two counts to run concurrently.

It is so ordered.

Signed, Dated and Delivered at Kerugoya this 4th Day of October, 2019.

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L. NJUGUNA

JUDGE