REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 55 OF 2018

BENSON NGUGI KINYANJUI.....APPELLANT

=VRS=

THE REPUBLIC.....RESPONDENT

(Being an appeal against the Judgement of Hon. D. N. Musyoka – PM Kikuyu dated and delivered on the 17th day of May 2017 in the original Kikuyu Principal Magistrate's Court Cap. Case No. 22 of 2014)

JUDGEMENT

In the substituted charge dated 16th October 2015, the appellant, Benson Ngugi Kinyanjui was charged with 3 counts of **robbery with violence contrary to section 296 (2) of the penal code** and one of **having suspected stolen property contrary to section 323 of the penal code.**

Particulars of the 1st count were that on the 25th day of November 2014 at Kerwa village in Kikuyu Sub-county within Kiambu County jointly with others not before court while armed with dangerous weapons namely pangas and a multi-purpose pen-knife robbed **George Irungu Maina** a mobile phone make Samsung, personal documents and an unknown amount of money all of unknown value and at or immediately before and immediately after the time of such robbery used actual violence on the said **George Irungu Maina.**

The particulars of the 2nd count were that on the 11th day of November 2014 at Muguga Village in Kikuyu Sub-county within Kiambu county jointly with others not before court while armed with dangerous weapons namely pangas and a multipurpose pen-knife robbed **Paul Nganga Ndungu** a wallet, national identity card, police clearance certificate application receipt, a jacket , a bag, PSV conductors uniform and cash Kshs. 3,3()0/= all valued at Kshs. 5800/= and at or immediately before and immediately after the time of such robbery used actual violence on the said **Paul Nganga Ndungu.**

On count III, the particulars were that on the 4th day of November 2014 along Nairobi-Naivasha Highway at Kiambaa area in Kikuyu Sub-county within Kiambu county jointly with others not before court while armed with dangerous weapons namely pangas and a multipurpose pen-knife robbed **Moses Wainaina Wairimu** a mobile phone make Nokia C-3, a Tablet make Ezzar and a wallet containing his National Identity Card No. 29346129 and a voter's card all valued at Kshs. 23,000/= and at or immediately before and immediately after the time of such robbery used actual violence on the said **Moses Wainaina Wairimu.**

On count IV, the particulars of the offence were that on the 1st day of December 2014, at Rironi village Kikuyu Sub-county, having been detained by No. 231884 IP Christopher Kimiti, No 44921 Sergeant Hassan Eshimharamu, and No. 71514 Patrick Kibera in exercise of the power conferred upon them by section 26 of the criminal procedure code had in his possession eight assorted mobile phones namely two Nokias, a Techno, a for L 9, a M139, an IPhone, a Samsung and Nine assorted types of Jackets reasonably suspected to have been stolen or unlawfully obtained.

The appellant pleaded not guilty on all the charges whereupon the prosecution called thirteen witnesses to prove its case. On his part the appellant made an unsworn statement in which he maintained his innocence and detailed his arrest. After evaluating the evidence by both sides the trial Magistrate found the appellant guilty and convicted him on Counts I, III and IV and sentenced him to death on counts I and III and to two (2) years imprisonment on Count IV. The sentences on Count III and IV were however put on abeyance. Being aggrieved by the conviction and sentences the appellant preferred this appeal. The appeal is premised on the amended grounds in which he avers: -

> **"1. THAT, the learned trial magistrate erred in points of law and fact by failing to evaluate the evidence as a whole and observe that the prosecution never proved their case beyond reasonable doubt as required in criminal cases.**
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> **2. THAT, the learned trial magistrate erred in points of law and fact by relying on the prosecution's evidence, without observing that the charge facing the appellant was defective as it is the one termed in law as a duplex charge.**

3. THAT, the learned trial magistrate erred in points of law and fact by convicting me on account of numerous material inconsistencies and contradictory evidence and therefore failing to observe that the same was fatal to the prosecution case.

4. THAT, the learned trial magistrate erred in points of law and fact by shifting the burden of proof on recovery of the exhibits produced in court to the defence side which was contrary to legal requirements.

5. THAT, the learned trial magistrate erred in points of law and fact by not considering my defence including the own plea of guilty on one count and, or, not giving reasons as to why it was rejected.

6. ……"

At the hearing the appellant relied on written submissions to which Ms. Ndobi, Learned Prosecution Counsel, responded orally. I have duly considered those submissions but as the first appellate court I have also reconsidered and evaluated the evidence in the lower court so as to arrive at my own independent conclusion. I have in so doing borne in mind that I did not see or hear the witnesses who gave evidence and made provision for that.

The victim in Count1 (George Irungu Maina) did not give evidence. This is because he succumbed to injuries sustained during the robbery. The prosecution however called several witnesses in support of that count. Key among those witnesses were the Mbugua Jeremy (Pw2) and his son Paul Macharia (Pw4) who testified that on the material day at around 9pm they were at home in Karura in Kikuyu when their attention was drawn to a person who had been attacked close to their home. They went to the scene and found the deceased who they identified as their neighbour. He had a deep cut on the back of the head and was bleeding profusely. They put him in Pw2's car and took him to hospital. Their evidence was confirmed by Paul Kinyanjui Wangui(Pw6),another neighbour who arrived at the scene shortly after Pw2 and Pw4 had taken the deceased to hospital. Jeremiah Kamau Maina (Pw3) and Samuel Kimani Gatheri (Pw5), the deceased's blood brother and brother-in-law respectively, confirmed that they visited the deceased at St. Teresa Hospital in Kikuyu and found him unconscious. Pw3 testified that the deceased had a bandage on the head and that when his condition deteriorated they moved him to Coptic Hospital where he died. The body was then moved to Kikuyu Hospital Mortuary. Dr. Johansen Oduor (Pw11) gave evidence that on 1st December 2014 he performed a post mortem on the body of the deceased and came to the conclusion that his death was as a result of head injuries due to blunt trauma.

The prosecution called several police officers who testified that they arrested the appellant acting on a tip off and when they searched his house they recovered several items which included several mobile phones to wit, one Samsung slide phone (Exhibit 2), an ID for Moses Wainaina (Exhibit 4), a small hammer (Exhibit 5) 2 rolls of bhang, nine (9) jackets and two master keys. The court heard that the Samsung slide phone had the photograph of the deceased as its screen saver. Jeremiah Kamau Maina (Pw3), Paul Macharia Mwangi (Pw4), Samuel Kimani Gathere (Pw5) and Paul Kinyanjui Wangui (Pw6) all stated that they saw the photograph in the phone and it was the image of the deceased. They therefore identified the phone as his. Pw6 went further to state that he knew the phone well as he used to charge it for the deceased.

The court heard that the small hammer (Exhibit 5) recovered in the appellant's house was stained with blood and that with the help of clinical officer Ngatia Shadrack (Pw8) a blood sample was drawn from the appellant. The blood stained hammer (Exhibit 5), the blood sample of the appellant and a blood sample drawn from the deceased during the post-mortem were then taken to the Government Chemist for DNA analysis. Larry Kiptoo Sang (Pw12) a government analyst testified that when he examined the specimens he found that the blood on the hammer/knife belonged to the deceased.

In respect to Count III the complainant, Moses Wainaina Wairimu, testified that on 4th November 2014 at about 10pm he was walking home when he was hit on the back of the head by someone who was walking behind. The blow knocked him to the ground and the person who he described as a conman took his Essar tablet, a phone and wallet which had his voter's card and national identity card. The man then removed the sim card from the phone and put it on his (complainant's) chest. When he attempted to get up the assailant hit him with a metal bar and then left. The complainant testified that he was helped to his house by two men who were drunk and that the next day he went to Kikuyu PCEA Hospital where he was treated and discharged. It was his testimony and that of the investigating officer (Pw13) that he identified his phone a Nokia C3 among those that were recovered from the house of the appellant. He however stated that he did not identify his attacker.

The court heard that the appellant did not offer any explanation on how the other goods found in his house came into his possession.

In his defence the appellant stated that on the day he was arrested he was on his way back to work when two men alighted from a vehicle that abruptly stopped near him.He stated that he realized they were police officers when they cocked their guns and ordered him to stop and lie down. He stated that they searched him but all they found on him were two phones one a Nokia Asher 200 the other a Carsen, cash Kshs. 550/= and 2 rolls of bhang. He stated that the officers then inquired if he was Wainaina which he negated after which he was taken to the police station.

The offence of robbery with violence is proved if: -

(i) The offender is armed with any dangerous weapon or instrument, or

(ii) Is in the company with one or more person or persons, or

(iii) 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.

The standard of proof is as in all criminal cases beyond reasonable doubt.

In this case there is no direct evidence that the appellant committed the offences as there was no eye witness to either of the incidents. I am however satisfied that there is sufficient circumstantial evidence to connect him to the robberies. There is evidence that upon his arrest police officers went to his house and conducted a search which yielded several mobile phones, a hammer cum pen-knife, 2 rolls of bhang, several jackets and an identity card belonging to Wainaina. There was overwhelming evidence from those who knew George Irungu Maina, deceased, that one of those phones, a Samsung, had his image as its screen saver. One of the witnesses (Pw6) had charged the phone for the deceased and it is my finding that he knew it well. The witnesses more especially Pw2 and his son Pw4 gave evidence that proved beyond reasonable doubt that the deceased was attacked on 25th November 2014. It was them who took him to hospital a fact that was corroborated by the deceased's brother (Pw3) and brother-in-law (Pw5). They all testified that he had an injury on the back of the head. The pathologist (Pw11) confirmed that the injury was what caused the death of the deceased. Moreover, apart from the evidence connecting him to the deceased's phone there is evidence that a pen-knife cum hammer found in the appellant's house had blood belonging to the deceased. These two pieces of evidence – recent possession of the phone stolen from the deceased during the incident and possession of a weapon that had blood belonging to the deceased prove beyond reasonable doubt that the appellant was involved in the crime. I am satisfied that two ingredients of robbery with violence namely, that the offender was armed with a dangerous or offensive weapon and that the offender used actual violence during the robbery, were proved. In my view there is nothing in the evidence to suggest that the appellant was framed. To the contrary I find that the charge against him was proved beyond reasonable doubt and it is immaterial that the informer was not called to testify. The recovery of the deceased's phone and the blood stained hammer in his house so soon after the robbery provided proof of his guilt beyond reasonable doubt. I do not consider the discrepancy in the description of the instrument fatal to the prosecution's case. As for his defence the same was weak in the face of such cogent and credible evidence and it offered no rebuttal.

The complainant in Count II did not testify and so the appellant was properly acquitted.

On Count III there was evidence that the complainant (Pw1) was violently attacked. He was very candid that he did not identify the attacker. That attacker was however armed with a metal bar which in the circumstances of this case was a dangerous instrument. There was also overwhelming evidence that Pw1 identified the Nokia C3 phone stolen from him during the robbery from among the phones recovered from the appellant's house. I am satisfied that he positively identified the phone and that a period of four weeks is not too long to negate the doctrine of recent possession. I am satisfied that Count III of the charge was also proved beyond reasonable doubt.

The appellant did not explain how he came by the nine jackets and other articles found in his house either to the police or to the court and I am satisfied that Count IV of the charge was also proved to the standard required. Accordingly the appeal on conviction is found to be without merit and is dismissed.

The appellant did not make submissions specific to the sentences imposed. However, it is clear that the only reason he was sentenced to death on Counts I and III was because it was a mandatory sentence. In the case of **Francis Muruatetu & 2 others v Republic [2017] eKLR** the Supreme Court held that such mandatory sentences are unconstitutional and the courts should be left to determine the sentence depending on the circumstances of the case. The appellant when asked to mitigate stated that he had nothing to state. Nevertheless, I find that considering that he did not have any antecedents the sentence of death is excessive. Accordingly, I uphold the convictions on all the three counts but set aside the sentences of death on Count I and III and substitute thereof a sentence of thirty (30) years imprisonment on each of those counts. The sentences shall run concurrently but consecutively to the sentence of two (2) years imprisonment in respect of Count IV. It is so ordered.

Signed and dated this 4th day of November 2019.

E. N. MAINA

JUDGE

Signed and delivered in Kiambu this 14th day of November 2019.

C. W. MEOLI

JUDGE