



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.239 OF 2018**

*(An Appeal arising out of the Ruling and Order of Hon. Stephen Jalang'o (SRM) delivered on 9<sup>th</sup> November 2018 in Makadara CM.CR. Case No.1996 of 2014)*

**JOSEPH MAINA KINYUMU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Joseph Maina Kinyumu was charged with several counts under the **Penal Code** but was convicted of two counts of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on diverse dates between 1<sup>st</sup> and 23<sup>rd</sup> April 2014 at Buruburu Estate within Nairobi County, the Appellant, jointly with others not before court, while armed with dangerous weapons namely pistols and knives robbed Jared Makori Mose and Peter Njeru Mwangi of their motorcycles registration Nos.KMDE 703E make TVS Star and KMDB 561E make Boxer, respectively valued at Kshs.90,000/- and Kshs.85,000/- and immediately before or immediately after the time of such robbery threatened to use actual violence to the said Jared Makori Mose and Peter Njeru Mwangi. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged on the two counts. He was sentenced to serve a custodial sentence of twenty (20) years imprisonment on each count. The sentences were ordered to run concurrently. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal against the same before this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of the evidence of identification that was not free from error that did not establish his guilt to the required standard of proof. He faulted the trial magistrate for arriving at the verdict finding him guilty as charged yet the members of the public who were alleged to have apprehended him were not called to testify as prosecution witnesses. He was of the view that this failure fatally compromised the prosecution's case. He took issue with the fact that he had been convicted yet the recovered motorcycle was not produced as an exhibit before court. He was aggrieved that the trial court failed to properly evaluate the evidence and therefore arrived at the erroneous determination that the prosecution had established its case against him to the required standard of proof beyond any reasonable doubt. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. In summary, the Appellant questioned the manner in which the trial court had placed reliance on the evidence of identification which in his view was made in circumstances that were unfavourable to positive identification. The Appellant explained that if the trial court had properly analyzed the complainants' testimony, it would have reached the determination that the circumstances in which the said identification was made was not conducive to positive identification. He relied on several authorities in support of his submission to the effect that the evidence of the complainants that they had identified him was fickle and therefore the same ought not to have been relied upon to secure a conviction. He was of the view that it could not be ruled out that he was a victim of mistaken identity.

As regard the general evidence that was adduced, the Appellant was of the view that failure to produce the exhibit that he was alleged to have robbed from the complainant, fatally compromised the prosecution's case. He submitted that it was essential for the motorcycle that was said to have been stolen from the complainants and thereafter recovered to be produced as a prosecution's exhibit during the hearing of the case. He was finally aggrieved that the trial court had relied on the doctrine of recent possession to secure its conviction yet the circumstance in which the doctrine could be invoked were not established to the required standard of proof. He noted that if the trial court had properly evaluated the evidence it would have reached the determination that the prosecution failed to prove its case against him to the required standard of proof. He urged the court to allow the appeal.

Ms. Kimaru for the State opposed the appeal. She submitted that the prosecution was able to establish to the required standard of proof all the ingredients of the charge of **robbery with violence**. She explained that the Appellant, with his accomplices, lured boda boda riders to take

him to a certain place by pretending that he was a customer. When they reached the destination, his accomplices, while armed with pistols and knives robbed the boda boda riders of their motorcycles. Reports of the robbery were made to the police by the boda boda riders. A trap was laid whereby the Appellant was arrested. He was positively identified. He was sentenced to serve twenty (20) years imprisonment. She urged the court to uphold the Appellant's conviction and sentence.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellants. As was held by the Court of Appeal in **Njoroge -Vs- Republic [1987] KLR 19 at P.22:**

***“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwala v R [1957] EA 570)”.***

In the present appeal, the issue for determination by this court is whether the prosecution established the case against the Appellant on the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

In the present appeal, it was the prosecution's case that the Appellant, with his accomplices, lured the complainants (boda boda riders) to ferry him from Nairobi CBD to a place in Buruburu whereupon the complainants were robbed of their motorcycles after being threatened with violence with pistols and knives. The complainants PW1 Otaigo Samuel Marwa, PW2 Gerald Makori Mose and PW3 Peter Njeru Mwangi testified that on 20<sup>th</sup>, 23<sup>rd</sup> and 12<sup>th</sup> April 2014 respectively, a customer approached them while they were at their place of work in Nairobi CBD. The customer requested to be taken to a place in Buruburu near Jamaa Hospital. They negotiated the fare. They were able to agree. They then ferried the customer to Buruburu. On reaching Buruburu area, they were accosted by the Appellant's accomplices who robbed them of their motorcycles after threatening them with violence. The robbery incident took place in the morning hours. There was therefore sufficient light to enable the complainants identify the Appellants. The complainant in the 3<sup>rd</sup> count that the Appellant was convicted, testified that the customer **“was light in colour wearing black leather jacket and dark blue jeans.”** The other complainant testified that in the process of negotiating the fare with the customer, he was able to note his facial features and was therefore able to identify the Appellant as the customer who had lured him to the place where his motorcycle was robbed from him when he was arrested. After each robbery, the complainants reported the incidents to the police.

PW5 Cpl. Gideon Chelanga then working at Buruburu Police Station was assigned to investigate the case. He told the court that on 24<sup>th</sup> April 2014, the Appellant was brought to the police station by a GSU officer and boda boda riders. They accused the Appellant of having orchestrated various robberies of their motorcycles. After interrogating the Appellant, the Appellant agreed to assist him to arrest his accomplices after pretending that he (the investigator) was a boda boda rider. The police laid a trap. They told the Appellant to call his accomplices. When they reached the destination, the accomplices approached them. They were ordered to stop when they tried to escape. They were arrested and later charged. During the course of investigations, PW1's motorcycle was recovered together with several motorcycle number plates. These were produced as exhibits into evidence by the prosecution. Similarly too, the motor cycles documents of ownership together with photographs were produced into evidence.

When the Appellant was placed on his defence, he denied committing the offence. His defence was that he was a victim of an altercation that took place between him and one of the complainants. He told the court that the altercation was as a result of the disagreement on the fare to be paid. He denied that he committed the offences that he was charged with.

Upon re-evaluation of the evidence adduced before the trial court and the submission by the parties to this appeal, it was clear to this court that the prosecution did indeed establish to the required standard of proof that the Appellant robbed the complainants of their motorcycles. It was apparent from the evidence that the Appellant had put in place a *modus operandi* whereby he pretended to be a customer and then lured boda boda riders to ferry him to a place in Buruburu area where they were robbed of their motorcycles after being accosted by the Appellant's accomplices. The Appellant's accomplices were armed with knives and pistols. The Appellant urged the court to find that the complainants' testimony to the effect that they had identified him was not sufficient to secure his conviction in view of the fact that they did not give a description of their assailant in the first report that they made to the police. This court observed that the robbery incidents took place in broad daylight. The complainants had ample opportunity to note the physical and facial features of the Appellant in the course of negotiating fares with him. The complainants were able to positively identify the Appellants when he sought to put in place his *modus operandi* to lure yet another boda boda rider to a place where he would be robbed. After his apprehension, the Appellant led the police to the recovery of one of the robbed motorcycles.

This court formed the view that the evidence of identification coupled with the evidence of recovery of the stolen motorcycle established to the required standard of proof beyond any reasonable doubt that the Appellant indeed robbed the complainants of their motorcycles after luring them to the location where his accomplices would assist him rob the complainants. The prosecution was able to establish the ingredients of **robbery with violence** *i.e.* that the Appellant and his accomplices were armed with dangerous and offensive weapons namely knives and pistols. They were able to establish that in robbing the complainants, the Appellant was in company of more than one other person and finally that to secure the complainants' cooperation, they threatened to harm him. The Appellant's testimony in his defence to the effect that he was a victim of an altercation between him and one of the boda boda riders does not dent the otherwise strong, cogent, credible and corroborated evidence that was adduced against him by the prosecution witnesses.

In the premises therefore, the Appellant's appeal against conviction lacks merit and is hereby dismissed. On sentence, this court considered the Appellant's mitigating circumstances and formed the view that the sentence of twenty (20) years imprisonment that was imposed by the trial court was harsh and excessive in the circumstances. That sentence is set aside and substituted by a sentence of this court sentencing the Appellant to serve fifteen (15) years imprisonment with effect from the date that the Appellant was convicted by the trial court. This court has taken into consideration the period that the Appellant was in pre-trial custody in arriving at this custodial sentence. It is so ordered.

DATED AT NAIROBI THIS 6<sup>TH</sup> DAY OF NOVEMBER 2019

L. KIMARU

JUDGE