REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL 248 OF 2015

KELVIN OTIENO OBARA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the Senior Resident Magistrate at Nakuru (Hon J Nthuku SRM) dated 1st August 2013 in Criminal Case No. 3099 of 2012)

JUDGMENT

1. On the 10th September 2012, the appellant with another were jointly charged with the offence of Robbery with violence contrary **to Section 295 as read with Section 296(2) of the Penal Code.** The particulars of the offence were that on the 1st September 2012 at Shabab Estate in Nakuru District they jointly with others not before the court, while armed with dangerous weapons namely knives robbed Derrick Munene Murungi a mobile phone, one pair of shoes and Kshs.300/=, cash all valued at Kshs.9,300/= and at or immediately before or after such robbery threatened to use actual violence to the said Derrick Munene.

The trial court convicted the appellant Kelvin Otieno Obara as charged and sentenced him to death as per the law provided.

2. This appeal is against both the conviction and sentence. It is based on summarised grounds of insufficient contradictory and inconsistent evidence, and failure by the trial magistrate to consider the appellant's defence and shifting the burden of proof to the appellant as stated in his amended petition filed on the 1st July 2019. The appellant filed submissions which he relied on fully, while the respondent did not file any.

3. The complainant testified as **PW1.** His evidence was that on the 7th September 2012 at about 7.30 p.m as he walked home he was accosted by some six youngmen who robbed him of his Nokia phone Serial No. 359825/01/1397766/5 whose purchase price was Kshs.7500/= and produced purchase price receipts. It was his evidence that on the following day after making a report at the police station, he saw someone he identified as the accused using his phone upon which he informed the police who arrested him who led them to the appellant as the person who sold the handset to him. They were both arrested and charged as accused number one and two.

4. Accused number one was later acquitted for lack of evidence of the offences of robbery with violence and Handling stolen property contrary to Section 322(2) of the Penal Code.

5. In his unsworn defence, the appellant testified that he did not rob anyone and denied having taken the stolen phone to his cousin, the first accused. He did not call any witness.

Upon the above brief evidence the trial court made a finding that the appellant had used force prior to robbing the complainant of his phone set and a pair of shoes, and convicted him.

6. The duty of first appellate court is to re-examine the entire evidence adduced before the trial court to satisfy itself, and come to its own conclusion – **Republic –vs- George Anyango Anyang and Another (2016) e KLR, and Okeno –vs- Republic (1972) EA 32**.

7. The offence of robbery with violence is anchored under **Section 296(2) of the Penal Code**. For it to be proved, three ingredients must be satisfied,

(a) That the offender was armed with dangerous, and offensive weapon or instrument.

(b) The offender was in the company of one or more persons, or

(c) At or immediately before or after the time of the robbery the offender used the weapon to wound, beat, strike or used violence to the person

The **Court of Appeal in Mohamed Ali –vs- Republic (2013) e KLR** rendered that proof of any one of the above ingredients is sufficient to establish the offence under Section 296(2).

8. I have stated that the complainant's evidence was very brief. His evidence was that it was not very dark and identified the robber by his height and skin complexion. More importantly, he saw his telephone handset being used by another person who upon arrest led the police officers to the appellant who alleged to have sold it to the first accused. The appellant's unsworn defence was a mere denial, and not substantiated.

The telephone handset, subject of the robbery was certified to have belonged to the complainant by its serial number and the purchase receipt.

9. The Appellant could not explain how it came into his possession so as to sell it to the co-accused. There was no mistake as to identification as the purchaser of the item led the police officers to the person stated to have sold it to him , his own cousin. I find that the piece of evidence to be cogent and credible – **Antony Muchai Kibuika –vs- Republic (2013) e KLR,** and **Simiyu** and **Another –vs- Republic (2005) e KLR.**

10. The complainant testified that the youngmen who robbed him were armed with knives. No such knives were tendered to court. He did not say that the youngmen, and in particular the appellant, used the knives, which by all standards are dangerous weapons, to wound, beat, strike nor did they use violence on him. In his own words the complainant stated that the youngmen assaulted him and took the phone and his shoes; that they kicked him. He did not testify that they used knives on him, but only kicked him. He did not state that any weapon be it dangerous or not, was used to assault him. Kicking is normally by use of legs and legs in my understanding cannot be termed to be use of dangerous weapons.

To that end, I cannot come to a finding that actual violence was indeed used on the complainant using dangerous weapons.

11. I agree with the trial magistrate that the co-accused evidence that led to the arrest of the appellant was not controverted. Indeed he called the appellant on the same stolen phone and arranged meeting in the presence of the police officers and the complainant. The phone set was matched with the serial number and purchase price of the complainant's phone and therefore was positively identified.

I however do not agree with the trial magistrate that the offence of robbery with violence was proved to the required standard, beyond reasonable grounds.

12. In my opinion, the lesser offence of robbery contrary to section 295 of the Penal Code was what was proved by the evidence before the trial court. In **Emmanuel Mwadio Munyasya –vs- Republic (2001) e KLR**, **Waki J** (as he then was) rendered, in regard to **Section 179 Criminal Procedure Code**

(2) when a person is charged with a an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

13. The trial court ought to have invoked **Section 179(2)** to convict the appellant on the lesser charge of robbery contrary to **Section 295** as read with **Section 296(1)** thereof, the punishment upon conviction being imprisonment for fourteen (14) years.

I therefore find that the evidence on record does not support the conviction upon which the appellant was charged, but on the offence of robbery.

The evidence is thus insufficient and cannot sustain the conviction as aforestated.

14. On the matter of sentence it is obvious that the death penalty, was not merited at all. It is quashed and set aside. Having found that the appellant committed the offence of robbery, I must now determine the appropriate and consumerate sentence.

The **Supreme Court** in **Francis Kariokor Muaratetu & Another –vs- Republic (2017) e KLR** outlawed the death penalty as unconstitutional, and opened doors to give courts discretion to decide on the appropriate sentences taking onto account circumstances and character of each case.

15. The property stolen was valued at Kshs.7,500/=. Nobody should remain behind bars for stealing such property. This is not so to say that it is okay to steal even Kshs.10/=. Far from it. But as I have stated above, appropriate and consumerate sentence ought to be meted.

16. I come to a finding and hold that the sentence of death meted to the appellant was excessive and unreasonable. It is set aside, and substituted with the period the appellant has already served in prison, being five years. The appellant is thus set at liberty unless otherwise lawfully held.

Orders accordingly.

Delivered, Signed and Dated at Nakuru this 7th Day of November 2019.

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J.N.MULWA

JUDGE