REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 158B OF 2014

BETWEEN

MUSTAFA MARENJE HAJI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence dated 13.10.2014

by Hon Susan N. Mwangi, RM in Vihiga PMC Cr. Case no. 989 of 2012)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The appellant herein was charged with the offence of ***robbery with violence contrary to section 296 (2) of the Penal Code***. The particulars are that on the 1st day of October, 2012 at Majengo market within Vihiga County, Western Province jointly with others not before court, while armed with dangerous weapons namely pangas robbed Patrick Mwangi of one mobile phone make G-Tide , valued at Kshs.4,000/= and cash Kshs.4000/= and immediately after the time of such robbery wounded the said Patrick Mwangi.

2. After a full trial during which the prosecution called 6 witnesses, the trial court convicted the appellant of the offence of ***robbery with violence contrary to Section 296 (2) of the Penal Code*** and sentenced him to death as by law provided.

The Appeal

3. Being dissatisfied with the entire judgment, the appellant lodged an appeal vide a Petition of appeal dated 23.10.2014. In the petition, the appellant raised Six grounds of appeal which are as follows:

> **1. That the Learned Trial Magistrate erred in law and fact by failing to consider the fact that the appellant was not properly identified by the complainant to warrant a conviction.**
>
> **2. That the Trial Magistrate erred in law and in fact for failing to properly evaluate the evidence of the complainants who purported that there was light when the purported robbers shone a torch on him.**
>
> **3. That the Trial Magistrate erred in law and in fact in respect of the evidence of PW2 who never identified the appellant at the police station.**
>
> **4. That the learned Trial Magistrate erred in law and in fact by failing to establish who exactly identified the appellant at Kamukunji Police Station.**
>
> **5. That the Learned Trial Magistrate erred in law and in fact by not considering the fact that the appellant does not understand English and that he was never identified.**

6. That the Trial Magistrate erred in law and fact by failing to appreciate the fact that one Inspector John Oyugi indeed confirmed that he never changed the people who formed the two identification parades and it was an oversight for not filing two parades.

Duty of this Court

4. The duty of the first appellate court is to re-analyze and re-consider the evidence tendered before the trial court with a view to arriving at its own independent conclusions. See ***Okeno Vs Republic [1972] EA 32.***

5. In ***Kiilu & Another Vs. Republic [2005]1 KLR 174***, the Court of Appeal stated thus:

> ***"1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.***
>
> ***2. It is not the function of a first appellate Court merely to 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 findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."***

6. The principle in the ***Kiilu Case*** (above) was reiterated in the case of ***David Njuguna Wairimu V – Republic [2010] eKLR*** where the Court of Appeal stated:-

> ***"The duty of the first appellate court is to analyze and 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 appellate 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."***

The Prosecution Case

7. The Prosecution called 6 witnesses. Evidence was led that on the 1.10.2012 at about 2.00am the complainant Patrick Muriuki Mwangi, who testified as PW1, was woken up by his house girl Jackline Kadenyi, PW2 who informed him that people had entered the house. He stated that he saw two men enter his bedroom one tall another short as they shone a torch on him. PW1 had, before the assailants entered the bedroom, switched on the electricity lights. He stated that he saw the appellant and that he clearly saw him using the electricity light and that the appellant demanded money from him.

8. The complainant testified that he gave the appellant Ksh 4000 and a mobile phone before the other man cut him with the panga on his forehead and then escaped. During cross examination he confirmed that the appellant had a torch.

9. PW2 Jackline Kadenyi testified that the appellant with another broke into her room and asked her to take them to the complainant's bedroom where they attacked him and took his phone and cash. She identified the appellant as one of the assailants. During cross examination she confirmed that the appellant and his accomplice had a torch on and added that the complainant had switched on the lights in his room.

10. The investigating Officer Number 37677 PC Philip Gideon, who was PW5, confirmed that the alleged robbery took place and that the same was reported. He stated that an Identification parade was carried out during which the complainant identified the appellant as one of his assailants.

11. Number 232565 Inspector John, testified as PW6 conducted the identification parade and confirmed that the complainant positively identified the appellant and that the identification parade was carried out in accordance with the law. Susan Korir, PW3, a Clinical Officer attached at Vihiga District Hospital examined the complainant on 1.10.2012. She testified that the complainant was bleeding profusely from the forehead which had two deep cut wounds. He also had bruises on the upper zone of the left chest. Stitching was done. PW3 filled, signed and duly stamped the P3 form. The treatment notes and P3 form were produced in evidence as Pexhibit 1 and 2 respectively.

Defence case

12. By a ruling dated 18.8.2014 the appellant was found to have a case to answer and accordingly placed on his defense. He testified that he did not commit the offence as alleged and that he was in Nairobi touting (working as a manamba) only for him to be arrested on the 5th November 2012. He stated that he did not attend any identification parade and that he is illiterate and a class 3 drop out.

13. During cross-examination he confirmed that he was working for Mbukinya Buses in Nairobi at the time of the alleged incident.

Submissions

14. The appeal proceeded by way of oral submissions .The appellant through his advocates Ms Hussein Mwae &Co Associates submitted on the issue of identification stating that the circumstances were not proper with regard to the lighting and its brightness.

15. They also challenged the fact the there was no one who identified the appellant to the Police before they arrested him in Nairobi and detained him at Kamukunji Police station. In their further submissions counsel submitted that the appellant is illiterate and did not understand the proceedings and that he was also not identified. They also faulted the manner in which the identification parade was conducted stating that the same was not done in accordance with the law.

16. The sentencing was also faulted as being unconstitutional.

17. The State opposed the appeal on grounds that it had proved its case to the required standards. They submitted that all the ingredients of the offence were proved and that the intensity of the light used to identify the appellant was not in dispute as the lighting described by the complainant was sufficient.

18. The state conceded that the Identification Parade was conducted for two witnesses rather than the two suspects. It was however their submission that the same did not prejudice the appellant as visual identification during the robbery was sufficient. They also argued that the appellant, despite claiming that he did not participate in the Identification Parade signed the Id Parade report confirming that he was okay with the process. The same was produced in evidence as P-exhibit 3. The appellant who was represented during the trial, did not oppose the production of the same.

19. The state also conceded the appeal on sentencing owing to the fact that jurisprudence on the same has changed and there was now the need to re-sentence the appellant.

Issues, Analysis and Determination

20. From the grounds of appeal, the evidence, the law and the submissions, the issues for determination by this Court are

(a) Whether the prosecution proved the offence of Robbery with violence to the required standard.

(b) Whether the evidence of identification irresistibly pointed to appellant.

a) Whether the prosecution proved the offence of Robbery with violence to the required standard.

21. The ingredients of robbery with violence are as set out in ***section 296 (2) of the Penal Code,*** as follows:

> ***"296. Punishment of robbery***
>
> ***(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.***
>
> ***(2) 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."***

22. Thus in determining whether the ingredients of the offence of robbery with violence were proved, the evidence on the theft, the number of attackers, the fact of being armed with a dangerous or offensive weapon and the beating of the complainant are determinants. See ***Titus Wambua v Republic [2016] eKLR.***

23. The Court of Appeal in the case of ***Odhiambo & Another vs Republic [Omolo, Githinji & Deverell JJA] [2005] 2 KLR 176*** explained the ingredients of the offence of robbery with violence as follows:

> ***"The act of being armed with a dangerous or offensive weapon is one of the elements or ingredients which distinguishes a robbery under section 296(2) and the one defined under section 295 of the Penal code. Other ingredients or elements under section 296(2) include being in the company of one or more persons or wounding, beating etc the victim and since all these are modes of committing the offence under section 296(2), the prosecution must choose and state which of those elements distinguishes the charge from the one defined in section 295."***

24. In ***Suleiman Kamau Nyambura vs Republic [2015]eKLR*** the Court of Appeal held:-

> ***"Proof of any one of the ingredients of robbery with violence is enough to sustain a conviction under Section 296 (2) of the Penal Code. See Oluoch vs Republic [1985] KLR 549."***
>
> **Proof of theft ,the number of attackers, and whether the appellant, being armed with a dangerous weapon, harmed the complainant.**

25. It was the complainant's evidence that his assailants asked him for money. He testified that they forcefully took from him Kshs 4000 and a mobile phone worth Kshs 4000/=. His evidence was corroborated by that of PW2.

26. In ***Samuel Kariuki Wanjiku v Republic [2019] eKLR*** Muriithi J persuasively held that

"2. As shown in the definition of the offence of robbery in section 295 of the Penal Code, the offences of robbery or robbery with violence under section 296 must first prove theft

295. Definition of robbery

Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

15. The considerations as to the ingredients of robbery with violence, which distinguishes the aggravated robbery from simple robbery do not fall into consideration in the offence of robbery with violence until theft or stealing is proved. The alternative ingredients of the offence of robbery or robbery with violence go to the manner of execution of the offence of the theft or stealing component of the offence. They are not of themselves robbery. They are only the adjectival element of the offence of theft which for the circumstances in which it is done makes it simple robbery in circumstances of section 296(1) of the Penal Code, or robbery with violence if under circumstances set out in sub-section (2) thereof. It was of no consequence, therefore, whether or not the Prosecution proved that the appellant was (a) in the company of two other attackers or (b) whether they were armed with dangerous or offensive weapons or (c) whether he or they wounded, struck or beat any person, because the substratum of the offence, that is stealing, is not established."

27. From the evidence in the present case, it is clear that there was theft of cash and a mobile phone.

28. The complainant further testified that the appellant was in the company of another and that they were armed with a panga that they used to injure him. His evidence was corroborated by that of PW 2 who stated that she saw two men armed with pangas and that the other man cut the complainant on the forehead with the said panga.

29. PW3 Susan Korir, a clinical officer at Vihiga District Hospital, confirmed that on the 1st October 2019 the complainant was treated for cut wounds on his forehead. She testified that he had two deep cut wounds on his forehead and that he was bleeding profusely.

30. Though no weapons were produced as exhibits in court the evidence of PW3 confirmed that the injuries were caused by a sharp object. Both PW1 and PW2 testified that the cuts sustained by PW1 were caused by a panga which is a sharp object, and that the appellant and his accomplice were armed with pangas.

31. From the evidence, I am also satisfied that the evidence adduced by the Prosecution proved that the assailants were more than one ,they were armed with a panga that was used to injure the complainant on his forehead and that they robbed the complainant of his mobile phone and Ksh 4000 in cash, thereby proving all the ingredients of the offence of robbery with violence.

(b) Whether the evidence of identification irresistibly pointed to the appellant

32. The only evidence of identification was led by the complainant and PW2. The complainant testified that he saw the appellant among the group that assailed him. He stated that despite the fact that it was at 2.00am in the morning and it was dark outside, he was able to see his assailants using his bedroom electricity light which he switched on just as the attackers entered the room. He stated that the bedroom lights remained on throughout the ordeal which took about 15 minutes. Although he also identified the appellant during an identification parade conducted by PW6, this evidence of the identification parade was challenged by the appellant who stated that the complainant did not state the intensity and brightness of the light used to see him and that the identification parade was a sham. The appellant relied on the case of ***Maitanyi Vs Republic 1986 KLR 198.*** He also stated that being illiterate he was unaware of the report on the identification parade and did not participate in it.

33. In ***Wamunga v Republic [1989] KLR 424***, the Court of Appeal cautioned that:

"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of mere identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification."

34. Further in ***Francis Kariuki Njiru & 7 others v Republic [2001]eKLR***, the Court of Appeal stated that:-

"The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered. Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all"

35. Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of the light in relation to the accused and the time taken by the witness to observe the accused so as to be able to identify him (see ***Maitanyi v Republic [above]*** and ***R v Turnbull [1976] 3 ALL ER 549).*** The Court of Appeal was categorical in ***Kiarie v Republic [1984] KLR 739***, that reliance on such evidence of identification must be "**absolutely watertight**" to justify a conviction. Also see ***Daniel Oginga & 2 others v Republic [2019] eKLR.***

36. The appellant in this case contended that the prosecution did not give any evidence as to the intensity of the light and its location, but the state argued and contended otherwise.

37. In ***Brown Tunje Ndago & another v Republic [2014] eKLR*** the Court of Appeal observed that:-

> ***"The issues to be addressed in considering the evidence of identifying witnesses usually touch on the lighting available during the occurrence of the crime, the distance between the witnesses and the perpetrators, the time it took for the witnesses to observe the perpetrators before? How often if so? If occasionally, had he any special reason for remembering the accused? The time/period that has elapsed between the original observation and the subsequent identification to the police? And any material discrepancy between the descriptions of the accused given to the police by the witness when seen by them and his actual appearance. All these go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger."***

38. As earlier stated that complainant in this case adduced evidence that he was able to see his assailants as his bedroom lights were on during the entire ordeal which lasted 15 minutes. It is my considered view that the bedroom electric lights were sufficient to enable the complainant identify his assailants coupled with the fact that he had 15 minutes with them and was able to give an accurate description of the appellant to the police, thereby ruling out the possibility of mistaken identity.

39. Regarding evidence of identification during the parade, identification parade procedures are regulated by ***Police Force Standing Orders*** now under the ***National Police Service Act 2011***, and previously under the Police Act (repealed). These procedures have been the subject of discussion in a murder of cases to the effect that:-

> ***i. The accused has the right to have an advocate or friend present at the parade;***
>
> ***ii. The witness should not be allowed to see the suspect before the parade and the suspects on parade should be strangers to the witness;***
>
> ***iii. Witnesses should be shown the parade separately and should not discuss the parade among themselves;***
>
> ***iv. The number of suspects in the parade should be eight (or 10 in the case of two suspects);***
>
> ***v. All people in the parade should be of similar build, height, age and appearance, as well as of similar occupation, similarly dressed and of the same sex and race;***
>
> ***vi. Witnesses should be told that the culprit may or may not be in the parade and that they should indicate whether they can make an identification; and***
>
> ***vii. As a recommendation, the investigating officer of the case should not be in charge of the parade, as this will heighten suspicion of unfair conduct in the courts.***

40. The appellant contends in his submissions that the complainant saw the appellant before the identification parade was carried out. The appellant's allegation was not substantiated and was denied by the complainant, and so it remains just an allegation.

41. The appellant further contends that the investigating officer influenced the complainant to select the appellant during the identification parade. These allegations are unfounded as at no point in evidence does the same emerge. It is trite that whoever alleges must prove. In this case the appellant is merely making assumptions that the investigating officer informed the complainant as to who the appellant was. These allegations have not been substantiated.

42. The appellant in his evidence stated that he did not attend any identification parade. He stated that he is illiterate and thus could not understand the proceedings. How then is it that he is questioning the conduct of the identification parade? It is worth noting that all through the trial the appellant was represented by an Advocate. PW6 testified that he went to the appellant and explained to him the meaning of an identification parade and that he agreed and signed that he was satisfied with the manner in which the same was conducted.

43. At no moment during the trial did the appellant rebut this evidence. In cross examination the appellant's signature was not challenged and the Identification Parade Form was produced in evidence as Pexhibit 3 with no objection as to the authenticity of the appellant's signature. The appellant's complaints about the identification parade are therefore baseless and accordingly dismissed.

44. There was also an issue of PW6 having conducted two identification parades with two different complainants. The evidence adduced in court pertains only to the identification parade in which the complainant herein identified the appellant. The other complainant is a stranger to these proceedings and in my humble view, there was no prejudice to the appellant neither did the same affect the quality of the identification parade evidence.

45. In light of all the above, I am satisfied that the trial court's findings on conviction were well grounded, and that the prosecution proved all the ingredients of the offence of robbery with violence.

Sentencing

46. The appellant herein was sentenced to death by the trial court. He prayed that the court takes his mitigation with a view to reducing the

sentence. He contends that the sentence was harsh and excessive.

47. The Supreme Court in ***Francis Karioko Muruatetu & Another versus Republic [2017] eKLR*** gave certain guidelines to be considered by courts for re-sentencing purposes. These include:-

> ***a. age of the offender;***
>
> ***b. whether the offender is 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 considers relevant.***

48. As the Supreme Court set out the above guidelines, it made the point clear that sentencing guidelines cannot replace judicial discretion of the trial court. The guidelines are only intended to ensure consistency and transparency in re-sentencing hearings.

49. The Court of Appeal in ***William Okungu Kittiny vs. Republic ([2018] eKLR*** applied the Supreme decision in the ***Muruatetu Case*** (Supra) to a robbery with violence case where it was stated:

> ***"...The appellant was sentenced to death for robbery with violence under Section 296 (2). The punishment provided for murder under Section 203 as read with Section 204 and for robbery with violence and attempted robbery with violence under Section 296 (2) and 297 (2) is death. By Article 27(1) of the Constitution, every person has inter alia, the right to equal protection and equal benefit of the law. Although the Muruatetu's case specifically dealt with the death sentence for murder, the decision broadly considered the constitutionality of the death sentence in general...From the foregoing, we hold that the findings and holding of the Supreme Court particularly Paragraph 69 applies mutatis mutandis to Section 296 (2) and 297 (2) of the Penal Code. Thus the sentence ... is a discretionary ..."***

50. Traditionally, courts have, in exercising their sentencing discretion been guided by factors such as just punishment for the offender, desire to deter the offender from becoming a repeat offender, the possibility of rehabilitation and restorative justice to the victim as well as protection of the community and the community's attitude towards the particular offence. These factors are intended to guide the offender while protecting the victim and the community at large.

51. In ***Peter Maina Kimani v Republic [2019] eKLR*** the Petitioner jointly with others while armed with a panga and metal rod robbed a complainant of Kshs.4000/- and an Itel Phone valued at Ksh 3,500/=. During re-sentencing the court took into account the fact that appellant was a first offender and that the sentence imposed on an offender must be commensurate to his moral blameworthiness. The Court set aside the death sentence and sentenced the appellant to serve 20 years imprisonment.

52. In the present case, the appellant was armed with a panga with which he inflicted two deep cut wounds on the complainant's forehead. The complainant survived by God's grace. The appellant also stole the complainant's mobile phone G-tide valued at Kshs.4,000/- and a further Kshs.4,000/- in cash. The appellant was said to be a first offender and in mitigation his counsel told the court that he (appellant) was very remorseful. Taking all these circumstances into account and considering the Supreme Court decision in the ***Muruatetu Case*** (above) and the subsequent Court of Appeal decisions on the issue, I am inclined to quash aside the sentence of death imposed upon the appellant and in lieu thereof, sentence him to thirty (30) years imprisonment.

Conclusion

53. In summary, these are the final orders in this appeal:-

> **1. The appellant's appeal on conviction be and is hereby dismissed.**
>
> **2. The appellant's appeal on sentence is allowed to the extent that the sentence of death is quashed and in its place, the appellant is sentenced to thirty (30) years with effect from 13.10.2014.**
>
> **3. Right of appeal within 14 days from the date of this judgment.**

54. It is so ordered.

Judgment written and signed at Kapenguria

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kakamega on this 15th day of November 2019

WILLIAM MUSYOKA

JUDGE

In the Presence of:-

Mustafa Marenje Haji - Appellant in person

Ms Omondi for respondent

Erick - Court Assistant