REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 81 OF 2018

1. AHMED MOHAMED DAUDI alias **SUBARU**

2. SIMON MUGO NJOROGE alias **SOLO.....APPELLANTS**

VERSUS

REPUBLIC..... RESPONDENT

(Appeal from a conviction and Judgment of the Chief Magistrate Court of Malindi

in Malindi Criminal Case No. 747 of 2018 as presided over

by Hon. Dr. Julie Oseko (CM))

CORAM: Hon. Justice R. Nyakundi

Appellant in person

Ms. Sombo for the State

JUDGMENT

The two appellants were charged of two counts of robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code. The brief particulars constituting the two transactions are that on the 7th August 2018 at Maweni Bar area along Casuarina Road in Malindi Sub-County within Kilifi, the appellants jointly with another not before court while armed with dangerous weapons namely a knife and a panga stole from **Erika Magagna** and **Roi Passarini**, Italian nationals of two mobile phones, make Microsoft Lumia 650 dual sim valued at Kenya Shillings 15,000/=, Honor Huawei 6A, one waist bag, cash Kshs.7,000/= and immediately after the time of such robbery threatened to use and did use actual violence against Roi Passarini inflicting harm on his left shoulder and further threatened to use violence against Erika Magagna. Each denied the offence.

After a full trial involving eight witnesses, summoned by the state the trial court convicted them for the two counts of robbery with violence and each was sentenced to 20 years imprisonment.

They were aggrieved with the Judgment and an appeal has been preferred on both conviction and sentence based on the following grounds:

The 1st appellant:

1. That the Learned trial Magistrate erred both in Law and fact by failing to consider the required standard of proof was discharged by the petitioner.

2. That the trial Magistrate grossly erred both in Law and fact to consider that the conviction was against the weight of evidence.

3. That the Learned trial Magistrate erred in Law and fact by failing to consider that there was no cogent evidence to link the appellant with the commission of the offence of robbery with violence.

4. That the pundit Magistrate failed to consider the defence which challenged the prosecution case.

The appellant further filed amended grounds of appeal date 13.8.2019 mainly on mitigation.

The 2nd appellant

> ***1. That the Learned trial Magistrate grossly erred both in Law and facts by failing to consider sharp contradictions in the prosecution witnesses which was in breach of Section 163 (1) (c) of the Evidence Act.***
>
> ***2. That the pundit trial Magistrate erred in both law and fact by relying on evidence of a single witness which was insufficient to warrant a safe conviction for the offence of robbery with violence.***
>
> ***3. That the Learned trial Magistrate erred in Law and fact by failing to consider the conviction was against the weight of evidence.***
>
> ***4. That the Learned trial Magistrate erred in Law and facts by failing to adequately consider the defence which was unrebutted by the prosecution.***

In compliance with the directions the appellants filed their respective submissions and a rejoinder was made by the prosecution counsel on the grounds of appeal. The submissions would be appraised insitu the Judgment of this court.

Analysis and determination

The appellants have challenged the findings and the Judgment of the trial court on both conviction and sentence. The grounds as formulated revolve around many issues of concern to the appellant to persuade this court to have a look for the second time with a view to allow the appeal.

> **1. At end of it all the appeal court must decide whether the trial court was right in fact and law in finding that the charge of robbery with violence contrary to Section 296 (2) of the Penal Code was proved beyond reasonable doubt?**

This being a first appeal the case of **Okeno v R [1972] EA 32** laid down the principles which obligates the court to analyze, re-evaluate the evidence before the trial court and independently be able to draw its own conclusions on the matter based on the formulated grounds of appeal.

Before embarking on the dispositions in this appeal, I find it plausible to recapitulate only briefly the evidence which formed the decision of the trial court. The facts as posted by the eight witnesses against the appellants are straight forward.

The complainants **Passarini Roi (PW1)** and **Erika Magagna (PW2)** gave a description on what transpired on 7.8.2018 at about 9.00 am as they both jogged around Casuarina road – Vas co Da Gama pillar area. It was **(PW1)** testimony that he saw some men approach (PW2) while armed with a knife and panga. In a short while the men robbed PW2 of her bag and started to run away from the scene. That prompted PW1 to pursue them and when he caught up with one of them an altercation ensued as he wanted to free (PW2) bag from their custody. In the process PW1 explained that by use of the knife and panga he was threatened and inflicted with actual bodily harm on the shoulder and stomach subduing him to surrender. In the meantime, the robbers forcibly got an opportunity to run away with the bag. Thereafter PW1 and PW2 told the court that they travelled back to the residence and informed one **Ronald** of the incident.

There is also the evidence of **PW3 APC Justus Omoningiwa** of Marine Police Station, **PW 4 APC Stephen Muema of Malindi Police Station** and PW5 **CPL Ryan Israel** who testified that at different times they came to learn of the robbery with violence involving PW1 and PW2 identified as tourists from Italy on a visit to Malindi. Acting on the report PW3, PW4 and PW5 commenced intelligence gathering on the occurrence of the offence with a view to arrest the suspects.

It was the evidence of PW3 and PW4 that working together in concert they received credible information that there are some suspects in an unfinished construction site. That on PW3, PW4 and PW5 pursing the information visited the location only to find two men and one identified as the 2nd appellant and in possession of a pen knife and the 1st appellant with a panga.

A quick search conducted at the scene two mobile phones were recovered from the pocket of the 1st and 2nd appellant respectively. PW3, PW4 and PW5 further testified that the two men (now appellants) were arrested and an investigations conducted by PW6 – CPL George Ouma resulted in the arrest and an indictment for the offence of robbery with violence.

According to PW6, a P3 Form was issued to PW1 which on medical examination at Malindi Hospital by Ibrahim Abdullah (PW8) showed that he suffered cuts on the upper abdomen and abrasion of the right shoulder joint. The P3 filled and produced in evidence by PW8 confirmed that (PW1) indeed sustained physical harm inflicted with sharp object.

PW6 further testified that the two mobile phones recovered from the appellants were positively identified by PW1 and PW2 as the ones they were robbed on the material day of the offence. The mobile phones were admitted in evidence in support of the charge against the appellants. PW6 further stated that in view of the circumstances of the commission of the crime he made arrangements for an identification parade.

The parade officer was **IP Charles Getende** of Malindi Police Station (PW7). The witness stated that on 9.8.2018 upon request from PW6 he conduct an identification parade involving the appellants with PW1 and PW2 as identifying witnesses. The witness led evidence was that in compliance with CAP 46 on Force standing orders on identification on the two parades PW1 and PW2 positively identified the appellants

amongst the parade members. The details of the identification parades in exhibit 8 (a), (b) was admitted in evidence to proof the fact of a complaint Identification parade by (PW7).

At the conclusion of the prosecution case each of the appellant elected to give unsworn testimony in answer to the charge the 1st appellant denied any wrong doing as alleged by the prosecution witnesses.

On the other hand, the 2nd appellant told the court that on 9.8.2018 he met the 1st appellant being beaten by the police. He was also arrested and charged with the offence he did not commit.

Arising from the above brief its imperative that in compliance with the principles in **Okeno v R** this court re-evaluates and scrutinizes the evidence in order to come up with its own decision.

The gist of the appellants submissions was that the evidence and the burden of proof in criminal cases as set out in Section 107 (1) of the Evidence Act, the right on presumption of innocence under Article 50 2(a) of the constitution and the principles in **Miller v Minister of pensions [1947] 3 ALL ER:** That the Magistrate erred in fact and Law to come to a conclusion that the offences of robbery with violence was proved beyond reasonable doubt.

It is trite that a charge under Section 295 as read with Section 296 (2) of the Penal Code, the prosecution must prove three ingredients:

> ***1. That there was a robbery and the offender was armed with dangerous and offensive weapons or instruments.***
>
> ***2. That the offender was in company with one or more other person or persons or***
>
> ***3. At or immediately before immediately after the time of robbery he wounded, so or used violence against the victims. (***See also ***Johanna Ndungu v R Criminal Appeal 116 of 1995)***

The appellants contend that the prosecution failed to proof the above ingredients. The respondent counsel who vehemently opposed the appeal submitted that during the trial they managed to present both direct and circumstantial evidence consistent with the elements and other facts ascertained and proved.

In dealing with this appeal from the brief appreciation of the evidence it is based on two key issues:

> ***1. Evidence on identification.***
>
> ***2. The doctrine of recent possession.***

These two depending on the evidence will either sustain the Judgment of the trial court or allow the appeal.

Issue No. 1

In determining the reliability on the probative value of the evidence adduced by the prosecution on identification the following key settled principles and guidelines must be satisfied by either direct or circumstantial evidence pointing to the appellant as the perpetrators of the robbery. The celebrated case of **R –vs- Turnbull [1976] 3 All ER 549,** is one of the earliest recognized precedent setting on identification. **Lord Widgery C.J.** stated and held as follows:

> ***"First, wherever the case against an accused depends wholly or substantially on the correctness or one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance?....***

The question raised on this appeal are whether there are any contradictions such that the findings of facts by the trial court would be rendered unreliable. On many occasions in criminal trials identification plays a remarkable in identifying the offenders to the crime. Some cases are lost purely on lack of identification evidence. The conceptual framework on identification runs through a thread of evidence commonly referred to visual identification, recognition or dock identification. In all these, the test is as laid down in the **Turnbull case (supra)** and further illuminated in the various superior court decisions. In the case of **Simiyu & Another v Republic [2005]1KLR 192** the Court of Appeal further stated without necessarily departing from the dominant principle Turnbull case as follows:

> ***"In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by a person or persons who gave the description and purport to identify the accused and then by the person or persons to whom the description was given."***

From the earliest opportunity the court has to alienate the evidence and in applying the test in the Turnbull case and Simiyu case make a determination whether the fact support visual identification, recognition or the broad concept on identification. The case of **Ajononi vs Republic** emphasis the legal proposition that recognition is more reliable depending on the particulars of each case than general identification.

From the facts of this case, the visual identification which placed the appellant at the scene was that PW1 and PW2 respectively. Their testimony was consistent with a common feature that on the day of the robbery they were jogging around Casuarina Road at about 9.00 a.m. In the course, without notice two men came directly to their location and accosted them immediately robbing PW2 of her handbag. The two men later identified by PW1 and PW2 were found in possession of two mobile phones positively identified to belong to the complainants.

The appellants in executing the commission of the offence has said to have laid ambush by stopping PW2, snatching the bag and immediately taking flight. According to PW1, he followed the 1st assailant in hot pursuit but he was overpowered and left the scene without any arrest. The second search for the suspect was through information conveyed to the police who worked in conjunction with the complainants to trace the suspects to an unfinished and abandoned construction site not far away from the scene of crime. In the testimony of **PW3 APC Julius Omoningina** ,**APC Constable Muema** and **PW5 CPL Ryan Israel** was to the effect that upon acting on criminal intelligence information they visited the scene and arrested the two appellants who were armed a panga and knife respectively. Each of the witness confirmed the 1st appellant had a penknife and the 2nd appellant a panga. Further, two mobile phones were recovered in possession of the appellants. According to the evidence of PW1 and PW2 on being shown the mobile phones, they fitted in description and particulars with one stolen in the morning of 7th of August 2018 during the robbery.

That therefore brings us to the application of the evidence on the doctrine of recent possession of property. The application of this doctrine and its invocation to the facts of a particular case is clearly illustrated in the case of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v Republic – Criminal Appeal No. 272 of 2005,** this court held:

> ***"… it is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first: that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."***

This being the position, the evidence of the mobile phones placed the appellants at the scene. The prosecution having discharge the burden of proof on the element of robbery and identification of the appellants as the ones who committed the crime the burden was on the appellants to explain how they came to possess the stolen property identified to be of the complainants. Section 111 of the Evidence Act shifts that burden and it provides as follows:

> ***"When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him."***

The explicit of this burden is as expressly stated in the case of **Stephen Njenga Mukiria & Another –vs- Republic Criminal Appeal No. 175 of 2003,** this court held:

> ***"The burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts, firstly, that the item he had in his possession had been stolen a short period prior to the possession, that the lapse of time from the time of the loss, to the time the accused was found with it was, from the nature of the items and the circumstances of the case recent; that there are no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine being a presumption of fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver ……"***

Further PW1 confirmed that the 2nd appellant attacked him with the panga in his possession. In the struggle, he was also robbed of his bag containing a mobile phone. The mobile phone stolen from (PW1) was recovered from the appellants during an arrest operations carried out by PW3, PW4M, PW5 and PW6 respectively. It was also record from the testimony of (PW1) that having suffered injury inflicted by the appellants, he was treated at Malindi Hospital and P3 form filled who certified the harm suffered consistent with (PW1) testimony. The P3 Form in view satisfactory passed the test on expert evidence. Under Section 48 of the Evidence Act the charge indicates that the appellants robbed the complainants (PW1) and (PW2) while armed with dangerous weapons identified as a panga and a knife.

The chase of the initial robber and subsequent emergence of two appellants armed with dangerous weapons has a probative value than this was a gang stationed ready to attack their victims.

I was opportuned to read the Judgement of the trial court. I support her reasoning on the legal question of the doctrine of recent possession in the case against the appellants. Unfortunately, for the appellants in their defence it lacked cogent and compelling evidence on how they came into possession of the two mobile phones. Suffice to say that the prosecution case arising from the evidence was also based on the doctrine of recent possession.

That being the position as defined in Section 4 of the Penal Code on the doctrine of possession and as expressly construed in the **Isaac Nganga** case the burden of proof on recovery of phones shifted to the appellants to explain on how they came to possess the phones.

Turning to the issue of contradictions, I have reviewed the nature of the evidence as well as the medical evident to prove the charge against

the appellants. The trial court analyzed the evidence and the defence by the appellants, particularly on their involvement with the robbery. On a claim by the appellants particularly on contradictions from all these no, specifics have been given as to the fundamental contradictions between the testimonies of the witnesses summoned to discharge the burden of proof under Section 107(1) of the Evident Act the case put forward by the appellants was that of absolute denial of knowledge of their participation in the commission of the offence.

In the circumstances and by the reasons advanced therein in this evaluation of the evidence, I uphold the trial court's decision on conviction of the appellants, and do accordingly affirm the Judgment.

Sentence

One of the consequences on conviction for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code is one to be liable to suffer death. The Supreme Court in **Francis K. Muruatetu v R [2017]** held that the mandatory death penalty under Section 204 of the Penal Code was unconstitutional. By that principle the automatic imposition of the death penalty under Section 204 and Section 296 (2) of the Penal Code confirmed to such cases was left to trial Judges and Magistrates to exercise discretion over sentence to address the following question:

> ***"Whether the offence in their view under Section 204 or Section 296 (2) of the Penal Code is eligible or ineligible for the death penalty or any other proportionate sentence."***

The Learned trial Magistrate following the dicta in **Muruatetu case (supra)** decisively exercised discretion and sentenced the appellants to 20 years custodial sentence.

It is trite, that an order on sentence by a trial court being a question of fact is discretionary and can only be interfered with on appeal only within the principles set out in the case of **Bernard Kimani Gacheru v Republic Cr. App. No. 188 of 2000** held that:

> ***"It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."***

The facts of this case and evidence in support, there are no grounds to interfere with the decision on sentence by the trial court neither is it excessive nor punitive. I therefore find no merit on sentence in this appeal. I accordingly order it dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 3RD DAY OF DECEMBER 2019.

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R. NYAKUNDI

JUDGE