REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 187 OF 2018

(Being Appeal against conviction and sentence in Judgment of C. C. Kipkorir SRM Mumias on 6/12/2018)

CHRISPINUS OGOLA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Introduction

1. The Appellant herein Chrispinus Ogola was charged on Count II with the offence of Robbery with Violence Contrary to Section 296 (1) of the Penal Code. The particulars being that on the 18th November 2017 at Buchifi location Mumias within Kakamega County jointly with another not before court being armed with crude weapons namely hammer they robbed Buchichi Johnson Omungala of a motorcycle Reg. KMDK 810G make TVS valued at Ksh 92,000/= the property of Abdallah Mutanyi and at the time of such robbery used actual Violence to the said Buchichi Johnson Omungala. The Trial Magistrate convicted the Appellant of the offence of Robbery Contrary to Section 296 (1) of the Penal Code and sentenced him to serve 10 years imprisonment.

The Appeal

2. The appellant, being dissatisfied with the judgment of the Trial Court, brought this appeal and sets out five grounds which can be summarized as follows:

1. That the trial Magistrate erred in law and facts in presiding over a trial without observing that the charge sheet was defective.

2. That the Trial Magistrate grossly erred in law and facts in basing conviction of the Appellant on flimsy and uncorroborated evidence.

3. That the Trial magistrate grossly erred in law and facts in presiding over a trial that seriously offended Section 198 (4) of the C.P.C.

4. That the Trial magistrate grossly erred in law and facts in rejecting the Appellant's defence without proper evaluation.

5. That the Trial Magistrate grossly erred in law and facts in presiding a trial and went on to convict without considering the argument of the Appellant's advocate.

3. This being the first appeal, the duty of this 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**.

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."

The same was reiterated in the case of **David Njuguna Wairimu vs. Republic [2010] e KLR** where the court of appeal stated:

"The duty of the first appellate court is to analyze the 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 appellant 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."

4. The main issue for determination before this Court is whether the conviction is sustainable on the strength of the evidence adduced in the trial court. This will require analysis of evidence adduced at the trial.

5. The prosecution called 5 witnesses. Evidence was led that on the 18th November 2017 at about 8 pm, while Pw1 was riding the afore stated motor cycle, the Appellant stopped him and requested him to take him to lyabo. PW1 testified that the appellant was well known to him and that he could see him using the street lights at the stage. He testified that when they got to Ushindi Baptist Church, the Appellant hit him on the back with hammer causing him to lose control of the motorcycle and fall. He stated that the appellant hit him on the legs and made away with the motorcycle leaving the hammer behind.

6. PW1 was later taken to hospital and was treated of head and right knee injuries evidence that was corroborated by the P3 form produced to evidence and that of PW3 and PW4 who saw him at the scene and PW4 who examined him. PW2 confirmed that the motorcycle belonged to him and that he had employed PW1 as his rider. PW6 the investigating officer confirmed that the incident was reported. He stated that the Complainant had described the appellant to him and stated that he knew him very well and it was on that basis that the Appellant was arrested.

Defence Case

7. The trial court vide ruling dated 9th August 2018 found the Appellant had a case to answer and accordingly put him to his defence. The Appellant testified that on the date of the alleged incident, he was at home with his father. He denied committing the robbery. His evidence was corroborated by DW2 his father, who stated that he was with him in the house at about 7.00 p.m. He also confirmed that the appellant was also called "Obara" at home.

Submissions

8. The appellant in his submissions challenged the evidence adduced by the Prosecution as being flimsy and uncorroborated. He submitted that the charge sheet was defective as the section did not describe the offence and that it was invalid. He also contended that the investigations were unfair.

Issues for determination

9. Upon a careful reconsideration and evaluation of the evidence on record, and taking into account all the submissions made by both the appellant and the respondent, and further upon careful consideration of the law, the following issues arise for determination; -

a) Whether the charge sheet was defective.

b) Whether in the final analysis the prosecution proved the case against the appellant beyond any reasonable doubt.

c) Whether the sentence meted out on the Appellant's was excessive and unconstitutional.

Defective Charge Sheet

10. The Appellant contends that the charge sheet was defective as the section did not disclose the offense of robbery with violence.

In **Brian Kipkemoi Koech vs. Republic [2013] eKLR** the court held that:

"What constitutes a defective charge sheet was spelt out in the case of YOSEFU AND ANOTHER -VS- UGANDA (1960) E.A., 236. The East Africa Court of Appeal held: -

"The charge was defective in that it did not allege an essential ingredient of the offence; i.e. that the skins came from animals etc., in contravention of the Act."

And in SIGILANI -VS- REPUBLIC (2004) 2 KLR, 480, it was held that: -

"The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The

offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence."

On the other hand, Section 134 of the Criminal Procedure Code provides for what the components/ingredients of the charge sheet constitute as follows: -

"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. "

11. The Court of Appeal in **Peter Ngure Mwangi vs. Republic [2014] eKLR,** quoted the **Isaac Omambia** case with approval and further stated that:

"A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archbold, Criminal Pleading, Evidence and Practice (40th Edn), page 52 paragraph 53, this Court stated in YONGO v R, [198] eKLR that:

"In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:

(i) when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,

(ii) when for such reason it does not accord with the evidence given at the trial."

The Court of Appeal in the Peter Ngure case was further guided by the case of Peter Sabem Leitu v R, Cr. App No. 482 of 2007 (UR) where the Court held thus:

"The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant."

12. In the case of **Obedi Kilonzo Kevevo vs. Republic [2015]** the Court of Appeal stated that:

"The test applicable by an appellate court when determining firstly the existence of a defective charge, and secondly its effect on an appellants' conviction is whether the conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the appellant. In the case of JMA v. Republic (2009) KLR 671, it was held inter alia that:

"It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the CPC was meant to cure such an irregularity where prejudice to the appellant is not discernible."

Applying this principle to the rival arguments of the parties, we are satisfied in the instant case that this was an omission and discrepancy which did not prejudice the appellant and that no miscarriage of justice has been occasioned as a result of the difference in dates. The errors on the dates cannot make the charge sheet defective or the conviction a nullity. This defect is therefore curable under

Section 382 of the Criminal Procedure Code which provides;

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

The above statutory curative position is also replicated in Section 214(2) of CPC which provides that:

"…variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof."

We are therefore of the considered view that the discrepancy on the dates as contained in the charge sheet and as contained

in the facts read out to the appellant did not occasion a miscarriage of justice."

13. The Charge herein contains a penalty described under Section 296 (1) of the penal code. The particular of the charge described the offence of robbery. The evidence adduced by the prosecution was geared towards proving the offence of robbery in the view of the facts that the assailant was armed and used violence on the complainants.

14. From the evidence and the proceedings, it is clear that the error and /or discrepancy was a minor omission curable under Section 382 of the Penal Code and that the said error did not in any way occasion any injustice or prejudice to the Applicant. See **Philemon Kipkosgei Kimaiyo vs. Republic [2019] eKLR**. It is the finding hereof that the Applicant's ground on the defective charge cannot stand, and is herewith dismissed.

b) <u>Whether the prosecution proved the case against the appellant beyond any reasonable doubt.</u>

15. Section 295 of the Penal Code defines robbery in the following terms:

> **"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."**

Section 295 sets out the elements of the offence of robbery as follows -

(i) The act of stealing, and

(ii) Use of or threat to use actual violence to any person or property immediately before or immediately after stealing intended to obtain or retain the stolen item or prevent or overcome resistance to the stealing.

See Philip Musyimi Ndeti & another v Republic [2018] eKLR.

Section 296 of the **Penal Code** provides for both the offences of robbery and aggravated robbery and their respective penalties under sub-sections **(1)** and **(2)** as follows:

(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

16. It is the Prosecution evidence that the motorcycle that the Complainant was riding was stolen. Evidence was led that the said motorcycle is yet to be recovered save for the motorcycle seat that was found. PW1 testified that the Appellant hit him with a hammer on the head and knees. The said hammer was recovered at the scene. Evidence was led that after the Appellant was hit the Complainant lost control of the motorcycle and fell and that was when the appellant took the motorcycle. The complainant also sustained injures as proved by the P3 Form.

17. The Complainant also testified that the Appellant was well known to him and that he saw his face using the street lights. He testified that the Appellant was a familiar face and that he was popularly referred to as "Obare". PW6 testified that the Complainant described to him his assailant and that it was based on that description that the Appellant was arrested.

18. The Appellant denied having been referred to by the name Obare. However, DW2 confirmed that that was his name and that was how they referred to him at home.

19. This court is satisfied that although the identification was by a single witness the same was based of recognition and although the incident took place at 8.00pm the circumstances as described by the Complainant were suitable for positive identification. See Michael Kerue Wanjiru vs. Republic [2019] eKLR.

20. In the upshot, it is the finding hereof that the prosecution proved all elements of the offence as charged.

21. The Appellant also contended that the trial court did not consider his evidence of alibi, stating that he was home with his father at the time of the robbery. In the case of **Victor Mwendwa Mulinge vs. Republic, [2014] eKLR** adopted in **Stephen Nguli Mulili vs. Republic [2014] eKLR** the Court of Appeal rendered itself thus on the issue of alibi:

> **"It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see KARANJA V R, [1983] KLR 501 … this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought."**

In **Godfrey Oluoch Ochuodha vs. Republic <u>[2015] eKLR</u>** the court held that:

> **"The law is settled that an accused person who raises the defence of alibi does not thereby assume the burden of proving it. The burden always remains with the prosecution to prove that the accused committed the crime. In this case the appellant did not give notice of his intention to give alibi defence in order for the prosecution to call evidence in rebuttal, the court was therefore left with the task of comparing the alibi defence with the prosecution evidence"**

22. In **Kossam Ukiru vs. Republic [2014] eKLR** Court of Appeal was of the view that the defence of alibi may be rejected as an afterthought when it is not raised at the earliest opportunity and when weighed against all the other evidence it is established that the appellant's guilt has been established. The court said -

> **"We are fully alive to the principle that an accused person who sets up an alibi does not assume any burden to prove the same. In this case, however, the two courts below rejected the appellant's alibi defence on the basis first, that it had not been raised at the earliest opportunity in the proceedings and second, that weighing the defence with all the other evidence adduced, the appellant's guilt was established beyond all reasonable doubt. The appellant's complaint that his defence was not considered is therefore without merit and we reject it."**

23. In this instant case, the defense of alibi was raised by the Appellant during the defense hearing, he did not in any way raise it during cross examination of the prosecution witnesses neither did he issue a notice to the prosecution of his intention to rely on it. It is obvious that the same was an afterthought and could not be responded to by the prosecution. As stated in the case of **Morris Mutie Thomas vs. Republic [2016] eKLR** when a trial court is faced with such a circumstance, the correct approach is for it to weigh the defense of alibi against the prosecution evidence.

24. The evidence tendered by the prosecution was water tight based on the testimony of PW1. The Appellant's evidence was uncorroborated and in fact doubtful owing to the evidence by DW2 who could not vouch for the Appellant's where abouts at the exact time of the offence. It is the finding of this court that the defence evidence was doubtful and an afterthought and therefore was properly rejected.

25. From the foregoing, this court finds that the prosecution proved its case to the required standard and thus the conviction was proper and safe.

Sentencing.

26. The Trial Magistrate convicted the Appellant to serve 10 years imprisonment. Section 296 of the Penal Code provides for robbery penalty under Sub-Sections (1) as follows:

> "Any person who commits the felony of robbery is liable to imprisonment for fourteen years"

27. During mitigation, the Appellant submitted that he was a first time offender and a father of two young children. The Trial court sentenced him to 10 years imprisonment. It is the finding of this court that the sentencing was lenient. This court will not therefore interfere with the discretion of the trial court on sentencing. For the foregoing reasons the appeal herein fails and is dismissed accordingly.

Dated, Signed and Delivered in Open Court at Kakamega this 13th day of December, 2019.

E. K. OGOLA

JUDGE