REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 31 OF 2016

(Appeal from convictions and sentences in Judgment delivered by Hon. E.W Muleka, Senior Resident Magistrate, on 23rd December 2015 in Kakamega Criminal Case No. 308 of 2015)

DERRICK MATUNDA.....1ST APPELLANT

OLIVER LIVONGA.....2ND APPELLANT

FELIX LIYAYI.....3RD APPELLANT

JANE KHAVERE NANDWA.....4TH APPELLANT

LINDA NALIAKA.....5TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Background

1. This appeal stems from the judgment of the learned trial magistrate aforementioned which was filed by the appellants on diverse dates and consolidated on 31st January 2019 where they sought that their sentences be set aside and convictions quashed on the grounds as set out in the petition of appeal of the 1st appellant *inter alia* THAT*:*

a) *I did not plead guilty to the charge I am convicted of*

b) *The learned trial magistrate grossly erred in law and facts to convict me by relying on the allaged purported identification without considering that circumstances were not favourable for proper identification.*

c) *The learned trial magistrate erroneously convicted me by relying on the alleged exhibits (shoes and mobile phone) without considering that there was no evidence of corroboration such as inventory records to connect me to the crime*

d) *The trial magistrate erred in the findings by convicting me without observing that the prosecution case was not proved beyond reasonable doubts in the absence of independent witnesses to corroborate the allegations of the recovery*

e) *The learned trial magistrate erred in law and fact to convict me while relying on the alleged recoveries of the mobile phones and shoes without observing that the duration and circumstances over the recovery was not entitled to doctrine of possession*

f) *The learned magistrate erroneously relied on the allegations of tracking me which culminated to my apprehension without observing that there was no evidence from Safaricom personel to connect me to the crime in question*

g) *My defence was rejected without cogent reasons whereas the same was capable of awarding for my acquittal.*

h) *That I wish to be served with the trial court's proceedings and wish to attend the hearing of this appeal.*

2. The appellants were charged together with another person with two counts for the offence of Robbery with violence, contrary to Section

295 as read with 296(2) of the Penal Code. On the first count, the particulars were that on the 13th day of March 2015, at Musasa village,in Hamisi sub-county, within Vihiga County, the appellants jointly with others, while armed with offensive weapons namely pangas and rungus, robbed Wycliffe Muhati of two *Nokia* phones,one *itel* phone, assorted packets of cigarettes and a dozen of golden lion batteries all valued at Kshs. 15,100/- and cash the sum of Kshs. 80,000/- and during the time of such robbery threatened to cut the said Wycliffe Muhati with pangas.

3. On the second count, the particulars were that on the 15th day of March 2015, at Mulundu village in Hamisi sub-county within Vihiga County,the appellants jointly with others and while armed with offensive weapons namely pangas and rungus, robbed Cleophas Anyinga of one *Nokia* mobile phone, two trousers, a pair of safari boots, a pair of open shoes and fifty eggs all valued at Kshs. 8,350/-, the property of the said Cleophas Anyinga and immediately after the time of such robbery raped Nancy Khasoa.

4. At the conclusion of the trial, the learned trial magistrate found the appellants guilty and proceeded to convict and sentence them to death.

5. It is the said convictions and sentences that form the basis of the instant appeal.

6. This is the first appellate court and as such it is guided by the principles set out in the case of David **Njuguna Wairimu vs. Republic [2010] eKLR** where the court of appeal stated:

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

7. In a much earlier decision, the Court of Appeal similarly held in Okeno **vs. Republic [1972] EA 32** that**:**

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). 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 finding and conclusion; it must make its own findings and draw its own 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, see Peters vs. Sunday Post [1958] E.A 424."***
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> **Issues for Determination**
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> **a) Whether the appellants were in the company of one or more persons**
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> **b) Whether the appellants were armed with pangas and rungus**
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> **c) Whether the appellants threatened and/or used actual force before, during or immediately after the robberies.**
>
> **d) Whether the appellants were positively and properly identified**
>
> **Whether the appellants were in the company of one or more persons**

8. One of the ingredients necessary to prove the offence of robbery with violence is that the offender must be in the company of one or more persons. (See the Court of Appeal in **Oluoch vs. Republic [1985] eKLR** and a 3-judge bench decision of this court in **Joseph Kaberia Kahinga & 11 others vs. Attorney General [2016] eKLR)**

9. **Wycliffe Muhati Indeche,** testified as PW1 and stated that he operates a kiosk and on the 12th -13th March 2015 at around 12.30 am, he was with his employee when people got into the house and robbed him of cash and other valuables which included sodas, four phones and assorted cigarettes. PW1 stated that he managed to see three people. **Martin Idenye** testified as PW2 and stated that he was an employee of PW1 working as a shopkeeper when he and PW1 were attacked and robbed of cash and other valuables. PW2 also stated that he saw three people. **Cleophas Ayuka** testified as PW3 and stated that on 15th March 2015, he and his wife were attacked in their home and he was able to see and identify at least two of the attackers. **Nancy Khasoa** testified as PW5 and stated that she was PW3's wife and that on 12th /13th March 2015, they were attacked by people including the 1st, 2nd and 3rd appellants and two ladies. **Cpl. Gilbert Ekwapa** testified as PW7 and stated that he was based at Cheptulu patrol base when he received complaints from PW1 and PW3 stating that they had been attacked by robbers. PW7 stated that his investigations led him to arrest six people he believed were the robbers that attacked PW1 and PW3

10. From the evidence, it is clear that the attack on PW1, PW2, PW3 and PW5 was committed by more than one person.

Whether the appellants were armed with pangas and rungus

11. Another ingredient necessary to satisfy the offence of robbery with violence is the fact that the offenders must have been armed with any dangerous and offensive weapon or instrument (See the Court of Appeal in **Oluoch vs. Republic [1985] eKLR (supra);** 3-judge bench

decision of this court in **Joseph Kaberia Kahinga & 11 others vs. Attorney General [2016] eKLR)(supra)**

12. PW1 testified that the appellants were armed with a metal and pangas. PW2 testified that the attackers were armed with pangas, and a crow bar. While some instruments or weapons would be obvious without the need of defining them, there are others which are not as obvious. For instance, under the definition of dangerous or offensive weapon, it includes at one extreme, a stone or stick and the other extreme a firearm **(Joseph Kaberia Kahinga & 11 others vs. Attorney General [2016] eKLR) (supra)**. Rungus, metal bars and crow bars are such weapons that can be dangerous and offensive when used against a person and do not need defining. This court finds that the respondent was able to satisfy this ingredient that PW1 and PW2's attackers were armed with dangerous and offensive weapons.

Whether the appellants threatened and/or used actual force before, during or immediately after the robberies.

13. Another ingredient necessary to prove the offence of robbery with violence is the fact that the offenders immediately before or immediately after the time of the robbery wound, beat, strike or threaten to use other personal violence (See the Court of Appeal in **Oluoch vs. Republic [1985] KLR(supra);** 3-judge bench decision of this court in **Joseph Kaberia Kahinga & 11 others vs. Attorney General [2016] eKLR)(supra)**

14. PW1 testified that the attackers hit him with a metal bar on the head after they robbed him and that the 1st appellant tied him up. PW2 corroborated PW1's testimony and stated that they were tied up and PW1 was hit with a metal bar on the head. PW3 testified that he was tied up and his mouth was gagged by the 1st appellant. PW3 added that he was beaten up on the shoulders. PW5 testified that she was raped by the 1st appellant during the robbery and corroborated PW3's testimony that he was tied up. PW5 added that she was taken outside where she saw two ladies who threatened to beat her up. **Emmanuel Oranya** testified as PW6 and stated that he worked at Sabatia sub-county Hospital and his colleague treated PW1 and produced a medical P3 report as *Pexhibit 4*. PW6 testified that as per the P3 report, PW1 had torn clothes and had injuries on his left shoulder and the upper joints had black marks. The P3 form further indicated that both his left and right wrist joints had black cylindrical marks and that his left and right ankle joints similarly had black cylindrical marks. This corroborates PW1 and PW2's testimony that they were tied up, hence the marks and injuries on the wrists and ankles. The P3 report further described the probable type of weapon causing the injuries as 'blunt'. **Stephen Videnyo** testified as PW4 and stated that he was a senior nursing officer working at Serem Police station and that he examined PW5 and produced her medical P3 report and treatment notes as *Pexhibit 6* and *Pexhibit 7*. The medical P3 form noted that there were no bruises/injuries to the external genital organs and there was no presence of vaginal discharge. However, PW4 noted that PW5 appeared disturbed and in panic.

15. Based on the evidence above, this court finds that the attackers of PW1, PW3 and PW5 threatened and actually used personal violence against them during and after the robbery.

Whether the appellants were positively and properly identified

16. Identification is another crucial ingredient necessary to satisfy the offence of robbery with violence. The ultimate question in all criminal proceedings is whether the person(s) brought before the trial court actually committed the offence(s) with which they have been charged.

17. PW1 testified that he recognized the 1st appellant as he used to see him in Cheptulu area and that even though it was dark and the 1st appellant had a flash light, the attackers were in the house for close to two hours and he was able to confirm that it was the 1st appellant. On cross-examination, PW1 reiterated that he informed the police in his initial statement that he knew the 1st appellant. PW1 further stated that he knew the 2nd appellant by face and not by name but that he saw him moving around in his house that night and that he was able to see the 2nd appellant's face. PW2 stated that he was able to see the attackers using the spotlights they had adding that he saw the 1st and 2nd appellants and that he was called to the police station where he confirmed the same. On cross-examination, PW2 stated that at the police station, it was only the 2nd appellant's photo that was there and not the 2nd appellant himself. PW3 testified that he was called to the Police Station to identify the attackers and he was able to identify the 1st and 2nd appellants. PW3 added that on the material day, he was able to see the 1st appellant using a hurricane lamp that was on. On cross-examination, PW3 stated that he recognized the 2nd appellant as he used to drink at his place. PW5 testified that it was the appellant who tied her and her husband PW3 and that it was the 1st appellant who raped her. PW5 added that the 2nd appellant was also present at the scene and that it was the 1st, 2nd and 3rd appellants who took her out of the house and forced her to knock on the door of the house of one Hezbon so that they could rob him as well. PW5 stated that she saw all the appellants herein and recognized the 1st appellant as he was her customer and that she only saw the 3rd, 4th and 5th appellants for the first time on that day. PW5 added that she knew and recognized the 2nd appellant. On cross-examination, PW5 gave a more vivid and detailed description of the 1st appellant whom she said was dressed in jeans trouser and grey T-shirt on the material day and that she had known him for over six months. PW5 added that she was able to see using a hurricane lamp that was on, corroborating her husband, PW3's testimony. PW5 added that the 2nd appellant was her neighbor and that she knew him quite well as he used to drink at her place.

18. PW7 testified that after receiving complaints from PW1 and PW3, they acted on that information by launching raids on the attackers who had been identified. They carried out a search in the house of the 1st appellant where they recovered a *Nokia* phone, a tray, three packets of super match cigarettes, two pairs of batteries under the bed and safari boots, all of which he could not account for. PW7 stated that PW1 was able to identify the Nokia phone as they had his initials. PW7 added that the batteries and safari boots were also identified. PW7 then arrested the 1st appellant together with those who were with him in the house including the 3rd and 5th appellants. The 4th appellant was arrested after PW7 found that he was calling the 2nd appellant asking him to run away. They went to the 2nd appellant's house where nothing was recovered but then arrested him a few days later.

19. The Court of Appeal, in the case of **Jali Kazungu Gona vs. Republic [2017] eKLR** held that:

> *"In **Wamunga vs. Republic [1989] KLR 424** this Court while discussing the caution to be taken where the only evidence against an accused is of identification succinctly stated: -*

"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".

…….

"To begin with BP was clear that she did not know the appellant prior to the incident hence, it was crucial for the veracity of her identification of the appellant to be tested through an identification parade. For the reason that identification parades are meant to test the correctness of a witness's identification of a suspect. See this Court's decision in ***John Kamau Wamatu & another vs. Republic [2010] eKLR****. Unfortunately, her identification of the appellant at the trial as submitted by the appellant amounted to dock identification. In that regard, we reiterate the findings in the decision of this Court in* ***Ajode vs. Republic [2004] eKLR*** *which expressed that:-*

"It is trite law that dock identification is generally worthless and a court should not place much reliance on it unless it has been preceded by a properly conducted identification parade."

(See **Court of Appeal in Maitanyi vs. Republic [1986] KLR 198** and **D.K Kemei J** in **Hassan Abdallah Mohammed v Republic [2017] eKLR**,)

20. In the case of Simon **Mareiro Mokaya vs. Republic [2015] eKLR, Nyamweya J** held that:

"On the first issue, the doctrine of recent possession is stated in the case of ***Malingi vs Republic (1989) KLR 227*** *as follows:*

"The doctrine in one of fact. It is a presumption of fact arising under section 119 of the Evidence Act, Cap 80 Laws of Kenya which provides:

"The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

So as applies to the offence of theft or handling, recent possession raises a presumption of fact that the one in possession is either the thief or guilty receiver (R – v – Hassan s/o Mohamed (1948) 25 EACA 121). The trial court has the duty to decide whether from the facts and circumstances of the particular case under consideration the accused person either stole the item or was a guilty or innocent receiver. By the application of the doctrine 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 have proved certain basic facts. Firstly that the item he had in his possession had been stolen; it had been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and 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."

…….

"The Appellant argued that the entire evidence linking him to the robbery was circumstantial evidence, namely that he was in possession of a phone that was stolen during the robbery. We are in this regard guided by the principles that apply before a court can rely on circumstantial evidence as was stated by the Court of Appeal in Erick ***Odhiambo Okumu vs Republic (2015) eKLR (Mombasa Criminal Appeal No. 84 of 2012)*** *as follows:*

"It has long been accepted that the guilt of an accused person does not have to be proved by direct evidence alone. Circumstantial evidence, namely evidence that enables a court to deduce a particular fact from circumstances or facts that have been proved, can form as strong a basis for establishing the guilt of an accused person as direct evidence. Indeed, as this Court stated in MUSILI TULO V. REPUBLIC (supra),

"[C]ircumstantial evidence is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics."

But for circumstantial evidence to form the basis of a conviction, it must satisfy several conditions, which are intended to ensure that the circumstantial evidence unerringly points to the accused person, and to no other person, as the perpetrator of the offence. In ABANGA ALIAS ONYANGO V. REPUBLIC, CR. APP. NO 32 OF 1990 this Court tabulated the conditions as follows:

"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the

crime was committed by the accused and none else."

(See also SAWE V. REPUBLIC [2003] KLR 364 and GMI V. REPUBLIC, CR. APP. NO. 308 OF 2011 (NYERI)).

Before a court can draw from circumstantial evidence the inference that the accused is guilty, it must also satisfy itself that there are no other co-existing circumstances, which would weaken or destroy the inference of guilt. (See TEPER V. R. [1952] All ER 480 and MUSOKE V. R [1958] EA 715). In DHALAY SINGH V. REPUBLIC, CR. APP. NO. 10 of 1997 this Court reiterated this principle as follows:

"For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an accused is entitled to an acquittal."

21. From the evidence of witnesses, this court finds that the 1st and 2nd appellants were properly and positively identified by PW1, PW2, PW3 and more so PW5. The two appellants were identified by way of recognition and were placed squarely at the scenes of crime. The evidence of the PW1, PW3 and PW5 was firm and unshaken even during cross-examination as to the identity of the 1st and 2nd appellants and this court has no doubt that the two were part of the gang that attacked PW1, PW2, PW3 and PW5.

22. Some of the recovered items that were stolen from PW1 and PW3 were recovered in the 1st appellant's house. As per the doctrine of recent possession, the burden was on the 1st appellant to show how he came into possession of those items, which he could not do. This court draws an inference that he was the one who stole those items in the absence of any other logical explanation.

23. On the other hand, I do not find the identification of the 3rd, 4th and 5th appellants to be safe in the absence of an identification parade, since none of the victims knew the three of them prior to the incident. Even if they were able to spot them on the nights they were attacked, the veracity of their identification ought to have been tested through an identification parade.

Disposition

24. It is the finding hereof that the respondent discharged the burden of proof to the required standard of beyond reasonable doubt for the offence of Robbery with Violence contrary to section 296(2) of the Penal Code as against the 1st and 2nd appellants. The respondent was able to prove that PW1, PW2, PW3 and PW5 were robbed by the 1st and 2nd appellants together with other people.

25. The defence put up by the 1st and 2nd appellants were mere and general denials and I am in agreement with the learned trial magistrate that they made no attempt to challenge the evidence of the respondent. This court upholds the conviction of the 1st and 2nd appellants.

26. On sentencing, following the Supreme Court decision in **Francis Karioko Muruatetu & Another vs. Republic,** Petition No. 15 of 2015, (**Muruatetu's case**), the mandatory death penalty was declared unconstitutional but the said death penalty is still lawful. The Supreme Court of Kenya stated that courts ought to take into account certain factors before deciding on the appropriate sentence to be meted out which include:

(a) age of the offender;

(b) being 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."

27. The Court of Appeal in the case of **William Okungu Kittiny vs. Republic [2018] eKLR,** held as follows:

"Robbery with violence as provided by Section 296 (2) and attempted robbery with violence as provided under Section 297 (2) respectively provide that the offender:-

"…shall be sentenced to death."

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.

In the Mutiso case which was affirmed by the Supreme Court, the Court of Appeal said obiter that the arguments set out in that case in respect of Section 203 as read with Section 204 of the Penal Code might apply to other capital offences. Moreover, the Supreme Court in paragraph 111 referred to similar mandatory death sentences.

[9] From the foregoing, we hold that the findings and holding of the Supreme Court particularly in paragraph 69 applies mutatis mutandis to Section 296 (2) and 297 (2) of the Penal Code. Thus, the sentence of death under Section 296 (2) and 297 (2) of the Penal Code is a discretionary maximum punishment. To the extent that Section 296 (2) and 297 (2) of the Penal Code provides for mandatory death sentence the Sections are inconsistent with Constitution.

……

"By Article 163 (7) of the Constitution, the decision of the Supreme Court has immediate and binding effect on all other courts."

28. In this case, the record indicates that the 1st appellant had a record for the offence of burglary. In mitigation, the 1st appellant showed no remorse by insisting that he did not commit the offence. The 1st appellant inflicted injuries on PW1, PW3 and raped PW5 in as much as the said injuries to the victims were not grievous. I also take note that a few items of the victims were recovered. In light of the mitigating and aggravating circumstances, I still find that the sentence of death was harsh on the 1st appellant. I hereby set aside the death sentence imposed upon the appellant and substitute therefore a sentence of 20 (twenty) years from the date of arrest.

29. The 2nd appellant stated in his mitigation that he had a family with two children who all depended on him and that he was also sick. I note that his role in the robberies was more so that of *'standing guard'* and acting as a *'helper'* of the 1st appellant but none of the witnesses stated that he injured or threatened to injure any of them. In his submissions, the 2nd appellant admitted that he was indeed involved in the robbery. He was remorseful and sought forgiveness. I have considered his mitigation and request for forgiveness. I therefore set aside the sentence imposed on the 2nd appellant and substitute thereof a jail term for eight (8) years from the date of arrest.

30. In the upshot, orders are as under:

(i) Oliver Livonga the 2nd appellant, is jailed for eight (8) years from date of arrest.

(ii) Derrick Matunda, the 1st appellant is jailed for eighteen (18) years from date of arrest.

(iii) Felix Liyai, Jane Khavere Nandwa and Linda Naliaka, being respectively the 3rd, 4th and 5th appellants are set free, and released unless validly held.

Right of appeal within 14 days.

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

E. K. OGOLA

JUDGE