REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 181 OF 2018

(An appeal from conviction and sentence in Judgment delivered by Hon.Jacinta A. Owiti, Principal Magistrate, on 4th July 2018 in Vihiga Criminal Case No. 539 of 2017)

EUGINE SUTCHIA LUKOBO…….APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

JUDGMENT

Background and Brief Facts

1. This appeal stems from the judgment of the learned trial magistrate aforementioned which was filed by the appellant on 4th December 2018 seeking that his sentence be set aside and conviction quashed on the grounds as set out in his petition of appeal *inter alia* THAT:

a) *I pleaded not guilty*

b) *The trial court failed to appreciate that the appellant was a first offender*

c) *The trial court failed to consider that the appellant is a young citizen whose future may be ruined by long incarceration*

d) *The appellant was the sole bread winner in a family of young school going ages who are only left with their old and disabled grandmother*

e) *I humbly pray to be served with trial court proceedings and wish to attend the hearing of this appeal.*

2. The appellant was 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 May 2017 at around 0120hrs, at Essaba village,within Vihiga County, the appellant jointly with others, while armed with dangerous weapons namely pangas and iron bars, robbed Amos Kulali of his 19 pieces of iron sheets, make *Simba*, a 6kg Hashi gas cylinder, a blue mattress, 14" Acuma TV and some fencing poles all valued at Kshs. 85,000/- and immediately before or after the time of such robbery used personal violence to the said Amos Kulali.

3. On the second count, the particulars were that on the 13th day of May 2017 at around 0120hrs, at Essaba village,within Vihiga County, the appellant jointly with others, while armed with dangerous weapons namely pangas and iron bars, robbed Peter Mudavadi of his National ID card, two mobile phones, X-Tigi and iphone, voters card and a pair of slippers all valued at Kshs. 25,000/- and immediately before or after the time of such robbery used personal violence to the said Amos Peter Mudavadi.

4. Moreover, the appellant was alternatively charged with the offence of handling stolen goods contrary to Section 322(1) and (2) of the Penal Code. At the conclusion of the trial, the learned trial magistrate found the appellant guilty on both counts for the offence of robbery with violence contrary to Section 296(2) of the Penal Code and proceeded to convict and sentence him to fifteen years imprisonment with both sentences running concurrently.

5. It is the said conviction and sentence that forms 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."

Issues for Determination

(a) Whether the appellant was in the company of one or more persons

(b) Whether the appellant was armed with either a rungu or iron bar

(c) Whether the appellant threatened or wounded any person immediately before, during or immediately after the robbery

(d) Whether the appellant was positively and properly identified

Whether the appellant was 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] KLR** and a 3-judge bench decision of this court in **Joseph Kaberia Kahinga & 11 others vs. Attorney General [2016] eKLR)**

9. **Amos Kulali,** testified as PW1 and stated that on 13th May 2017 at around 1.00 a.m., he was at his home with his wife and son when many people including the appellant suddenly entered the house and robbed him of iron sheets, a gas cylinder, a mattress and television. **Peter Mudavadi** testified as PW2 and stated that he is the son of PW1 and that on 13th May 2017 at around 1.20 am, the house was broken into by 'some men' through the rare door and he was robbed of a safety boot, open shoes, slippers and two cellphones. PW2 added that three of those men including the appellant were ransacking his room. **Cpl. Jared Atoni** testified as PW3 and stated that he was the investigating officer and that on 13th May 2017, PW1 reported to Luanda Police Station that he had been attacked and robbed by armed people who made away with a blue mattress, fencing posts, Acma television, Iron sheets belonging to PW1 and a National Identity card two phones (XTJ and iphone), a pair of slippers, hotel card and bank documents belonging to PW2.

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

Whether the appellant was armed with either a rungu or iron bar

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] KLR (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 attackers were armed with pangas and iron bars adding that the appellant had a long pointed panga. PW2 testified that the appellant held a panga on his neck during the robbery. PW2 added that an iron bar was recovered by the police in the nearby maize plantation and identified it during the hearing in the trial court. PW3 testified that PW1 reported that the attackers were armed with pangas, clubs and iron bars. PW3 added that he visited the scene and was able to recover an iron bar from the nearby maize plantation. 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)**. Pangas and iron bars are such dangerous and offensive weapons that do not need defining and from the evidence, I find that the respondent was able to satisfy this ingredient that PW1 and PW2's attackers were armed with dangerous and offensive weapons.

Whether the appellant threatened or wounded any person immediately before, during or immediately after the robbery

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 the offender wounds, beats, strikes or threatens 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 threatened to kill him if he raised any alarm during the robbery. PW2 testified that the appellant placed a panga on his neck while watching guard as the others robbed him and PW1. PW2 added that one of the men even asked the appellant to cut him with the panga but that at the end of the ordeal, he did not suffer any injury.PW3 testified that he was informed by PW1 that the

attackers beat him up together with his children during the robbery.

15. Based on the evidence above, I find that PW1 and PW2 were threatened with personal violence during 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 appellant during the robbery being that the appellant used to be his casual laborer at his home. PW1 added that the electricity lighting in his house aided him to confirm that indeed it was the appellant who was part of the people robbing him. Similarly, PW2 testified that he recognized the appellant being that he used to work at their (PW1's) home and that he was able to spot the appellant using the torch light the attackers were using to search his room. PW2 stated that it was the appellant who placed a panga on his neck and stood guard until they were done with the robbery. PW2 added that the appellant accessed his room first and switched on the electricity light before switching it off. PW2 added that this happened many times during the robbery. PW3 testified that PW1 and PW2 reported that they recognized the appellant during the robbery assisted by flashing torch lights and the electricity lighting adding that he was informed by PW1 and PW2 that the appellant used to be their employee. PW3 added that he conducted a raid on the appellant's house and was able to recover a blue mattress, gas cylinder and PW2's identity card (*Pexhibit 1, 2 and 3* respectively) which were identified by PW1 and PW2 as theirs. On cross-examination, PW3 stated that when PW1 and PW2 reported the incident, they vividly described the appellant as one of the people of who robbed them.

18. In his defence, the appellant testified as DW1 and stated that he did not know PW1 and only saw him for the first time during the hearing of the case and that he never worked for PW1 as claimed. The appellant denied accompanying PW3 to his house where the recovered items were found and that he had no knowledge of the items recovered. On cross-examination, the appellant stated that he lived with his father and that he was arrested while attending a function of the area member of parliament.

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: -***
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> ***"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".***

(See **Court of Appeal in Maitanyi vs. Republic [1986] KLR 198** and **D.K Kemei J** in **Hassan Abdallah Mohammed vs. 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:*
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> ***"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:***
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> ***"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."***
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> ***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."***
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> **……**
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> *"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 vs. 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. This court finds that the appellant was positively and properly identified by PW1 and PW2 by recognition and there is no reason to doubt the identification of the appellant by PW1 and PW2. Further this court finds that the lighting and time the attackers took inside PW1's house was sufficient for the appellant to be spotted and recognized.

22. It is my further finding that the items were recovered from the appellant's house and it is a mere denial by the appellant to claim that the same was never recovered from his house or that he had no knowledge of them. The burden was on him to prove how he came about those items and in the absence of any logical explanation, there can only be an inference of Guilt.

The Disposition

23. 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 appellant.

24. 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."

25. From the record, the learned trial magistrate was aware of the apex court's decision and considered the fact that the appellant was aged 20 years old and that he was young with a bright future if he decided to change.

26. The Court of Appeal, in the case of **Peter Mbugua Kabui vs. Republic [2016] eKLR** held as follows:

> "*The principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court are now old hat. The predecessor of this Court, in the case of* ***Ogolla s/o Owuor vs Republic, [1954] EACA 270****, pronounced itself on this issue as follows: -*
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> ***"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)." See also Omuse - v- R (supra) while in the case of Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus: -***
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> ***sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)"***

In the more recent case of ***Kenneth Kimani Kamunyu -vs- R. (2006) eKLR,*** *this Court reiterated this principle and stated that an appellate Court can only interfere with the sentence if it is illegal or unlawful."*

27. Additional to the factors considered by the learned trial magistrate, the court notes that there were no injuries to PW1 and PW2 and that some of the items that were stolen were recovered. The record indicated that the appellant was a first offender and in his mitigation, the appellant pleaded leniency, with the learned trial magistrate noting that the appellant was remorseful.

28. In light of the mitigating and aggravating circumstances, this court finds that the 15 years was manifestly excessive. This court sets aside the trial court's sentence imposed upon the appellant and substitute therefor a sentence of 10 (ten) years from the date of arrest.

29. The upshot is that this appeal fails on conviction but partly succeed on sentence.

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

E. K. OGOLA

JUDGE