REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 213 OF 2015

FREDRICK ONYANGO MAJUMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal case No.6442 of 2008 of the

Chief Magistrate's Court at Nakuru by Hon. W.Kagendo – Senior Resident Magistrate)

JUDGMENT

1. **Fredrick Onyango Majuma,** the appellant herein, was convicted for the offence of robbery with violence contrary to section 296(2) of the Penal Code.

2, The particulars were that on the 18th October 2008 at **Weavers Estate**-Nakuru town, in **Nakuru** District within **Rift Valley** Province, jointly with others not before the court while armed with pangas robbed **Patrick Echesa Muruka** one bicycle make Neelam and a Nokia mobile phone all valued at Kshs. 8000/= the property of the said **Patrick Echesa Muruka** and at or immediately before or after the time of the said robbery used actual violence to the said **Patrick Echesa Muruka**.

3. The appellant was sentenced to suffer death. He now appeals against both conviction and sentence.

4. The appellant raised nine grounds of appeal that can be summarized as follows:

a) The learned trial magistrate erred in law and in fact by convicting the appellant on erroneous evidence of recognition.

b) The learned trial magistrate erred in law and in fact by convicting the appellant for the offence of robbery yet the report to the police was of assault.

c) The learned trial magistrate erred in law and in fact by convicting the appellant without sufficient evidence.

d) The learned trial magistrate erred in law and in fact by dismissing the appellant's defence.

e) The learned trial magistrate erred in law and in fact by proceeding with the hearing in violation of his Constitutional rights to fair trial.

5. The appeal was opposed by the state through Mr. Chigiti, learned counsel who contended that the prosecution proved their case to the required standards. He urged the court to find that the sentence meted was lawful.

6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32.**

7. The complainant in this case testified that he had known the appellant prior to the incident of the robbery. He said he knew him for he used to operate boda-boda. He said he recognized the appellant and Abbey by help of some electricity light. After the complainant was injured and robbed, the appellant was arrested by a police dog while fleeing from the scene. He was arrested while armed with a machete. How did the complainant purport to recognize the appellant?

8. As he was pushing his bicycle at Ponda Mali trading Centre, he saw some three men. He recognized the appellant and Abbey. The third man was not known to him. He went to greet them. After they declined to shake his hand, they attacked and robbed him. Lord Widgery in the case of **R vs. Turnbull and others [1976] 3 All ER 549** while addressing the issue of identification gave the following guidelines:

> **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 the 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 his actual appearance?**

He went on to add:

> **Recognition may be more reliable than identification of a stranger: but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relative and friends are sometimes made.**

In the instant case, the issue was that of recognition. I am satisfied that the appellant and Abbey were people known to the complainant. He offered that a hand in greetings for he had known them. There was, therefore, no mistake by the complainant in recognizing the appellant. Even if there could have been some doubts, which did not exist in this case, the arrest of the appellant by the police dog at the scene, could have displaced such doubts.

9. The appellant contended that the complainant had initially reported to the police a case of assault but was tried for robbery. PC Bernard Githinji (PW5) who was the investigating officer in this matter testified that the complainant reported to him that he had been robbed. There is no evidence that supported the appellant's contention. This ground therefore lacks merit.

10. The learned trial magistrate had ample evidence at her disposal to convict the appellant. She therefore rightly dismissed his defence.

11. In his submissions the appellant contended that his rights under Articles 21 (1), 25(c) and 50 (2) of the Constitution of Kenya (2010) were violated. These Articles cannot be applicable for the trial commenced and was concluded before the enactment of the 2010 Constitution of Kenya. These Articles provide for the fundamental rights and fair trial. The law applicable is the repealed Constitution. The same rights were provided for under chapter five. I will therefore endeavor to establish if his rights were breached.

12. One of the allegations he raised was that he was not informed of his right to witnesses' statements and documentary evidence. Section 77(2) (c) of the Constitution of Kenya (repealed) provided:

> **Every person who is charged with a criminal offence -**
>
> **(c) shall be given adequate time and facilities for the preparation of his defence;**

This Constitutional provision was subject to interpretation in the case of **George Ngodhe Juma, Peter Okoth Alingo and Susan Muthoni Nyoike v Attorney-General [2003] eKLR (**A. Mbogholi Msagha and R. Kuloba JJ) observed:

> **There is the overriding concern that failure to disclose impedes the ability of the accused to make full answer and defence. The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted; and the erosion of this right due to non-disclosure may lead to the conviction and incarceration of an innocent person. Anything less than complete disclosure by the prosecution falls short of decency and fair play.**
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> **An accused person needs to know in advance the case which will be made against him if he is to have a proper opportunity of giving his answer to that case to the best of his ability. Failure to disclose statements and/or exhibits in advance, and their use at the trial may lead to material irregularity in the course of the trial. We find arguments against the existence of a duty to disclose before trial groundless while those in favour are overwhelming. We, therefore, hold that there is a general duty on the part of the State to disclose to the accused all material which is known or possessed and which ought to be disclosed, and it proposes to use at the trial and especially all evidence which may assist the accused even if the prosecution does not propose to adduce it.**

Since This decision and before the Commencement of the Constitution of Kenya 2010, it had become an ingrained practice to supply accused persons with copies of statements and documentary exhibits.

13. In this case the appellant was not supplied with copies of statements or of documentary exhibits. He raised this issue after the matter had proceeded. Although this was the case and the fact that he was making the trial very difficult, the court still had a duty to ensure that he was supplied with the said copies to ensure trial. This vitiated the trial process.

14. When there is sufficient evidence on record on which a conviction was based, the practice is to order for a retrial. The offence for which the appellant was tried and convicted was committed on 18th October 2008. The trial was concluded on 20th April 2009 and judgment was delivered on 4th May 2009. If a retrial is ordered, it may not be easy to trace the witnesses. This being an urban set up the witnesses could

have relocated. Secondly, the complainant was desirous of withdrawing his complaint against the appellant but the prosecution misadvised him on how to go about it. It is my considered opinion that to order a retrial will not be in the interest of justice. I will therefore allow the appeal due to this reason. Consequently, the conviction is quashed, sentence set aside and the appellant set free unless if otherwise lawfully held.

DATED and SIGNED at Nakuru this 5th Day of December, 2019

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KIARIE WAWERU KIARIE

JUDGE

DELIVERED at Nakuru this 10th day of December, 2019

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JOEL NGUGI

JUDGE