REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 98 OF 2014

JAMES OKONG'O …….... APPELLANT

VERSUS

REPUBLIC ……. RESPONDENT

(From the original conviction and sentence in Criminal case No.1260 of 2011 of the Senior Principal Magistrate's Court at Molo by Hon. H.M. Nyaga– Senior Principal Magistrate)

JUDGMENT

1. **James Okong'o,** the appellant herein, was convicted in two counts for the offence of robbery with violence contrary to section 296(2) of the Penal Code.

2. The particulars in count one were that on 11th June 2011 along Molo- Elburgon road in **Molo** District within **Rift Valley** Province, jointly with others not before the court while armed with pangas and firearms robbed **Henry Muna Kimani** of motor vehicle registration number KBM 246C and cash Kshs. 1,400/= all valued at Kshs. 1, 890,000/= and at or immediately before or after the time of the said robbery threatened to use actual violence on the said **Henry Muna Kimani**.

3. The particulars in count two were that on 11th June 2011 along Molo- Elburgon road in Molo District within Rift Valley Province, jointly with others not before the court while armed with pangas and firearms robbed Oura Henry Nyairo of motor a Nokia 2690 mobile phone, a pair of shoes and cash Kshs. 3,000/= all valued at Kshs. 10,000/= and at or immediately before or after the time of the said robbery threatened to use actual violence to the said Oura Henry Nyairo.

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

5. The appellant raised ten grounds of appeal and nineteen supplementary grounds 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 identification.

b) The learned trial magistrate erred in law and in fact by convicting the appellant for the offences of robbery based on contradictory evidence.

c) The learned trial magistrate erred in law and in fact by failing to appreciate that the prosecution concealed some key suspects.

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

6. The appeal was opposed by the state through Mr. Chigiti, learned counsel who contended that the prosecution proved their case to the required standards.

7. 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.**

8. Whenever a case revolves around the issue of identification which the defence contends was not proper, the trial court has an obligation to ascertain that the said purported identification is free from error. 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 make. 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?

In the instant case, the robbery occurred at about 2 a.m. and I will therefore interrogate the circumstances under which the purported recognition was made.

9. The witness who purported to identify the appellant was Henry Muna Kimani (PW1). He was the driver of the motor vehicle that the robbers took off with. He left Molo at 2 a.m. and on reaching at the Turi Trading Centre (about 6km from Molo), they found a roadblock which they assumed was manned by police officers. They were however confronted by robbers who were wearing woolen hats. The robbers stopped the vehicle and he was ordered to go to the back sit and he complied. One of the robbers took control of the motor vehicle. He said the robbers had not covered their faces and he was able to identify the appellant when the robbers put on the lights in the matatu. He however did not describe the appellant or give evidence as to what features he noted to make him identity him later. His purported identification at an identification parade had no basis.

10. Henry Nyairo Owio (PW2) was a passenger in the motor vehicle driven by PW1. On his part, he said he did not identify any of the robbers for the lights in the matatu were off and could not recall them being put on. I therefore find that the appellant was not identified by Henry Muna Kimani (PW1).

11. The other evidence of purported identification of the appellant as the person who was in possession of motor vehicle KBN 246C was by Paul Muthondu (PW3) a caretaker at a hotel in Kitale. Though he initially said that he identified the appellant as the man who had the vehicle, he later conceded that when the appellant went back to the facility with the police he could not remember him. In any case, the registration number of the vehicle that he only described as having a broken window on the driver's side, was not given. His evidence of identification of the appellant is therefore worthless.

12. David Mwangi Nganga (PW3) testified that he was a mechanic at Matunda trading Centre. He purported to have identified the appellant 2 weeks later when he went back to the garage with police officers as a man who had taken a vehicle there for repairs. He however did not tell the court why he could remember the appellant and yet in his own evidence he had said that he repairs many vehicles in a given day. Without the evidence of special reasons as to why he could remember the appellant, his evidence cannot be of any assistance to the court.

13. The purported facial identification of the appellant could not be relied upon to reach a decision that the appellant must have been involved in the offence of robbery.

14. Superintendent of police Joseph Kioko (PW8) testified that Henry Muna Kimani (PW1), took to him a printout from the Safaricom. From this printout he noted that there was an attempt to transfer fund from mobile number 07233114482 to mobile number 0702781798. On 23rd June 2011, they tracked mobile number 0702781798 to Molo town and tracked it to the mobile phone of the appellant. The phone of the appellant that had the sim card in respect of the said number were produced as exhibits upon the arrest of the appellant they recovered from his shirt pocket an insurance certificate in respect of motor vehicle KBM 246C. It was produced in court as an exhibit. An inventory that included these items and which was signed by the appellant was produced as an exhibit in court.

15. In his submissions, Mr. Maragia advocate for the appellant urged the court to find that the insurance certificate was wrongly produced in court in breach of sections 33 & 77 of the Criminal Procedure Code. Section 33 talks on the mode of disposal of an arrested person whereas section 77 provides for criminal proceedings to be held in an open court. I suspect he meant to invoke the evidence Act. Section 33 of the Evidence Act is on how the statement of a deceased person or by other persons whose attendance cannot be procured without unnecessary delay. Section 77 on the other hand provides on the mode of admission of reports by government analysts.

16. The prosecution produced the disputed insurance certificate to show that the appellant was found with it and that it belonged to the stolen motor vehicle the subject of the trial. The maker of such a document would only be required where its authenticity was an issue. In the instant case, this sticker was among the items the appellant was found with and he signed the inventory. There was, therefore no breach of the law in its production.

17. The appellant was arrested with the damning evidence on 23rd June 2011. This was about twelve days after the robbery. This was therefore an appropriate case for invoking the doctrine of recent possession. The principles of law upon which the doctrine of recent possession is based were well laid out in the case of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. R Criminal Appeal No. 82 of 2004** The principles are that:

... It is trite that before a court of law can rely on the doctrine of recent possession as a basis of 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. 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. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view, any discredited evidence on the same cannot suffice no matter from how many witnesses.

In the case of Malinga vs. R [1989] KLR 225 Bosire, J (as he then was) expressed himself at page 227 as follows:

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 the 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.

18. At the time of the trial, or at the investigation stage, the appellant did not explain his possession of the insurance sticker of the motor vehicle the subject of the trial. He also did not offer an explanation as to why there was an attempt to transfer funds from mobile number 07233114482 of PW1 to his mobile number 0702781798. The learned trial magistrate correctly inferred that he must have been one of the robbers.

19. Section 296 (2) provides as follows:

> **If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.**

This section was the subject of interpretation by the Court of Appeal in the case of **Johana Ndungu v Republic [1996] eKLR.** The Court held:

> **Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s.296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:**
>
> **1. If the offender is armed with any dangerous or offensive weapon or instrument, or**
>
> **2. If he is in company with one or more other person or persons, or**
>
> **3. If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.**

In the instant case the offence of robbery under section 296 (2) was proved against the appellant. Contrary to the notion that the Supreme Court outlawed the death sentence my opinion is that, that was not so. At paragraph 69 the court delivered itself as follows:

> **Consequently, we find that Section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, *this decision does not outlaw the death penalty*, which is still applicable as a discretionary maximum punishment.**

The Supreme Court proposed that the relevant government organs play there role to actualize the decision. At paragraph 112 the Court ordered:

> ***c) The Attorney General, the Director of Public Prosecutions and other relevant agencies shall prepare a detailed professional review in the context of this Judgment and Order made with a view to setting up a framework to deal with sentence re-hearing cases similar to that of the petitioners herein. The Attorney General is hereby granted twelve (12) months from the date of this Judgment to give a progress report to this Court on the same.***
>
> **d)** ***We direct that this Judgment be placed before the Speakers of the National Assembly and the Senate, the Attorney-General, and the Kenya Law Reform Commission, attended with a signal of the utmost urgency, for any necessary amendments, formulation and enactment of statute law, to give effect to this judgment on the mandatory nature of the death sentence and the parameters of what ought constitute life imprisonment.***

There is only one penalty provided under the law; any person found guilty shall be sentenced to death. The appellant was sentenced to life imprisonment. This is an unlawful sentence. I therefore set aside the life sentence and substitute it with the death sentence prescribed under the section.

20. The appeal is therefore dismissed. The conviction is upheld except the sentence which I have substituted as herein above explained.

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

…….

KIARIE WAWERU KIARIE

JUDGE

DELIVERED at Nakuru this 10th day of December, 2019

…….……...

JOEL NGUGI

JUDGE