REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 164 OF 2018

BETWEEN

JOSHUA MOSE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistarte's Court at Makadara Cr. Case No. 604 of 2014 delivered by Hon. H.M.Nyaga,CMon on 9th July, 2018).

JUDGMENT

1. The Appellant Joshua Mose Otiso Mogere was charged with two counts of robbery with violence contrary to **Section 295** as read with **296(2) of the Penal Code**. In count I, it was alleged that on 17th January, 2014 at Comfort Bar Ciiko in Kasarani District within Nairobi County jointly with others not before court while armed with a pistol robbed Beatrice Wamuyu Rukwaro of her mobile phone make Nokia 501 and cash Kshs. 5185/= all valued at Kshs. 9185/= and at or immediately before or immediately after such robbery threatened to use actual violence on the same Beatrice Wamuyu Rukwaro. In count II, it was alleged that on the night of 17th January, 2014, at Comfort Bar Ciiko in Kasarani District within Nairobi County jointly with others not before court while armed with a pistol robbed Susan Wangari Njoki of her two mobile phones make Nokia 5130 Music Express, Nokia 2600 and cash Kshs.13, 000 all valued at Kshs. 27,000/= and at or immediately before or after such robbery threatened to use actual violence on the said Susan Wangari Njoki. The Appellant was convicted of both counts and sentenced to serve 25 years imprisonment on each of the counts.

2. Dissatisfied with both the conviction and the sentence the Appellant preferred the instant appeal. The appeal was canvassed on 21st May, 2019. The Appellant who was in person relied on amended grounds of appeal filed contemporaneously with written submissions on 21st May, 2019. He raised four grounds of appeal namely; that his right to a fair trial under **Article 50 (2)(j) of the Constitution** was violated, that Section 211 of the Criminal Procedure Code was not complied with, that he was not properly identified and that crucial witnesses did not testify and important exhibits were not produced.

Submissions

3. On the issue that his right to a fair trial was violated, he submitted that he was not supplied with prosecution witness statements and documents despite several requests in court. His submission was that the court made several orders for him to be furnished with the prosecution witness statements but no compliance was made by the prosecution. It was his further submission that Section 211 of Criminal Procedure Code was not complied with. That is to say that the court did not explain to him how he was required to proceed with his defence as the provision stipulates. He stated that the court only made a brief ruling stating that he had a case to answer and was accordingly placed on defence. However, the manner in which he was to adduce his defence was not explained to him.

4. As regards his identification, the Appellant pocked holes in the manner of his arrest. He stated that he was arrested on 30th January, 2014 but in the charge sheet it was indicated he was arrested on 3rd February, 2014. Intertwined with this submission, he stated that having been arrested on 30th January, 2014 he ought to have been arraigned in court on 1st February, 2014 but it was not until the 3rd of February, 2014 that he was taken to court. In that regard, he submitted that his right to a fair trial under Article 49(1) of the Constitution was violated.

5. He further submitted that the key prosecution witnesses PW1 and PW2 did not explain how they were able to identify him at the time of the robbery. Furthermore, they failed to describe their assailants to the police which description would have enabled the police to identify him. In addition to this, he wondered why if PW3 knew him by the name Bashir, that name was not included under his names in the charge sheet. It was also his view that the circumstances of his identification were not conducive since it was at night. In this regard, he submitted that the witnesses failed to explain the nature and the intensity of the lighting that would have enabled them to identify him. For this reason,

the accuracy of identification was marred by darkness. It was his view that he was a case of mistaken identity. To buttress his submission he cited the case of **R V TURNBULL AND OTHERS (1976) 3ALL ER 549, WAMUNGA V REPUBLIC (1989) KLR 424 & MAITANY VS REP (1986) KLR 198.**

6. As regards the non-production of vital exhibits, he cited the gun that was allegedly used in the robbery namely a pistol which the witnesses said he was armed with. According to him the failure to produce the pistol implied that the investigators could not link him with the robbery. He also pointed to the failure by the investigators to recover the alleged lost mobile phones which would have demonstrated that indeed PW1 and 2 were robbed. He submitted that the failure to adduce the mobile phones rendered a fatal blow to the prosecution case by failing to prove their case beyond a reasonable doubt. Further, it was his view that he could not be linked to the robbery for want of forensic evidence specifically the failure to take finger prints of the persons who visited the complainant's premises on the fateful night. As regards the failure to call crucial witness, the Appellant submitted that all the prosecution witnesses were connected or related in one way or the other. Thus, no independent witness was called to give an account of how the robbery took place and whether he was culpable.

7. As regards the sentence, he submitted that the same was harsh and excessive in the circumstances more so, that the learned trial magistrate failed to follow the law in imposing the sentence. It was his prayer that the appeal be allowed, the conviction quashed and the sentence set aside.

8. The Responded through learned counsel, Ms. Nyauncho opposed the appeal. On the issue of identification it was her submission that the house where the robbery took place was well lit reasons wherefore the witnesses were properly able to identify the Appellant. Furthermore, he was a customer in the bar where PW1 was a bar attendant. PW1 was therefore familiar with his face. In addition, PW2 was present at the time of the robbery and she entirely corroborated the evidence of PW1. She too knew the Appellant who was a frequent bar customer. PW3 who was a husband to PW2 on the other hand clearly saw the Appellant during the robbery. Although he initially was in the bedroom that was behind the bar, he later moved to the living room where he found PW1 and 2 lying on the floor from where clearly saw the Appellant whom he knew to be one of the robbers. It was therefore Ms. Nyauncho's submission that the evidence on identification was overwhelming. Furthermore, the Appellant was known to PW3 by his nickname, Bashir. Counsel further submitted that all the ingredients of the offence of robbery with violence were sufficiently proved.

9. Counsel denied that Section 211 of Criminal Procedure Code was not complied with. She referred the court to the record of proceedings where after the close of the prosecution's case the court gave the directions after which the Appellant opted the manner in which he was to adduce his defence.

10. As regards the sentence, she urged the court not to interfere with it having regard to the fact that the Appellant was armed with a pistol.

11. In rejoinder, the Appellant considered that the complainants were his neighbours but he never was a customer to any of the witnesses. He stated that he was charged because PW1 and 3 distasted his friendship with their son. According to him, since their son was educated they did not want them to be in the company of a person they deem was not of his education level. He also alluded that their son was a drunkard yet he never took alcohol. He emphasized this submission by pointing to the Occurrence Book (OB) first report which indicated that the initial complaint was a case of burglary but was later changed to a case of robbery with violence.

Summary of evidence

12. The case for the prosecution is set by the evidence of **PW1, Beatrice Wamuyu Rukwaro** who was a bar attendant at Comfort Bar Ciiko located in Kasarani. The bar was owned by **PW3, Francis Chege Gacharu** and **PW2, Susan Wangari Njoki**. Both PW2 and 3 lived behind the bar. On the fateful day at about 11.00 pm, PW1 was preparing to close the bar when somebody entered from the back door. The lights were still on and PW1 was clearly able to see who was coming in. The intruder demanded that she gives all the money that she had with her. When she appeared to delay, the intruder pulled out a pistol from his waist and pointed at her. She recalled that the intruder was the Appellant who then ordered her to lie down. He then called out his accomplices to enter into the bar. He ordered that more money be given to them whilst pointing a knife at her. He demanded that she calls her boss. It is then that PW2 opened the back door and was confronted by the robbers who beat her up. The robbers then entered into their bedroom and pulled out PW3 demanding that he gives the money. They managed to steal a meko gas cooker, two mobile phones and cash Kshs. 13,000 from PW2. From PW1 they stole her mobile phone and cash Kshs. 9,185/=.

13. After the robbers left, the complainants screamed and neighbours came to their rescue, they then proceeded and reported the matter to Sunton Police Post. According to PW2, she knew the Appellant very well and was able to identify him through the help of electric lighting that was on in the house. She also recalled that the Appellant hit her with a pistol. PW3 too stated that he knew the Appellant by the nickname Bashir. According to **PW4, PC Joseph Mwali** who was the investigating officer, the Appellant was arrested on 30th January, 2014 but no weapon or the stolen goods were recovered.

14. After the close of the prosecution case, the court ruled that the Appellant had a case to answer and was accordingly put on his defence. He gave a sworn statement in which he denied committing the offence. He stated that he was charged because PW2 and 3 were against his friendship with their son. He stated that their son whom they deemed was educated and was also a drunkard ought not to have been relating with him. He stated that both witnesses were his neighbours and the initial report they made to the police was a case of burglary but was instead charged with robbery with violence.

Analysis and determination

15. I have accordingly considered the respective rival submissions as well as the evidence on record. It is my deduction that the issues arising for determination are whether the Appellant was properly identified and whether the offence of robbery with violence was proved beyond all reasonable doubt. This is a case in which both the Appellant, PW2 and PW3 were known to each other. The same is attested by the evidence of the prosecution witnesses as well as the Appellant in his sworn defence. What this court needs to grapple with is whether the Appellant was involved in the offence of robbery against the complainants. The key prosecution witnesses PW1 to PW3 all confirmed that

the bar and the house were well lit with electric lighting. They all indicated that they well knew the Appellant. Therefore, what would place the Appellant to the scene is their proper description of the attackers.

16. There is no doubt that a report of the robbery was made almost immediately after the robbery took place. According to PW4 who was an investigating officer, he confirmed that the Occurrence Book entry indicated that the complainants were able to identify one of the attackers. It had also been reported that the identified attacker used to be a customer in the bar. Based on that description, the police started looking for the suspect and were able to arrest the Appellant on 30th January, 2014. The fact that the Appellant was known to PW2 and 3 is not disputed. In my view therefore, this is a case in which the Appellant was identified by way of recognition. I therefore hold that the learned trial magistrate did not err when he held that the identification of the Appellant was by way of recognition and as the court held in the case of **Ajanoni vs Republic [1976-1980] KLR 1986** that:

> ***"Recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends on a personal knowledge of an assailant in some form or other"***

17. No doubt PW1 to PW3 were not strangers to the Appellant which information was given to the police in the first instance. The Appellant submitted that PW3 failed to inform the police that he also knew the Appellant by the name Bashir. In my view, this omission did not render the positive identification of the Appellant faulty because in his own admission, he also lived in the same neighborhood with PW2 and PW3. It was concretely a case of recognition.

18. What this court would therefore emphasize is that the conditions for identification were suitable. This is buttressed by the testimony of PW1 who stated that when the Appellant entered into the bar, the lights were on. He then confronted her demanding for money which she gave. She also witnessed the Appellant calling out his accomplices to get into the bar when the lights were still on. It is also the Appellant who went into the bedroom of PW3 and pulled him out of the bed while demanding for money whilst the lights were still on. PW3 clearly saw the Appellant and recognized him as a person he knew well. Equally, PW2 entered into the bar when the lights were still on and was confronted by the Appellant who hit her with a pistol. She too was able to recognize the Appellant as a person who lived within the neighborhood. These are circumstances in my view that made a good case for recognition as opposed to identification and under conditions that were conducive for identification. I have no doubts in my mind that there was no case of mistaken identity. That said, I conclude that the Appellant was involved in the robbery.

19. As to prove of the elements of the offence of robbery with violence the same are set out under **Section 296(2) of the Penal Code** which are that:

> a) If the offender is armed with any dangerous or offensive weapon or instrument, or
>
> b) If the offender is in the company with one or more other person or persons, or
>
> c) If at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person.

20. The interpretation of the above provision is that a proof of any of the three elements of the offence of robbery with violence is sufficient to warrant a conviction. Needless to state is that the Appellant was armed with a dangerous weapon, namely a pistol. He was also in the company of two other persons and he threatened to shoot and stub PW1 if she did not oblige to the commands and further beat up PW2 with the pistol to subdue her. Therefore, the prosecution ably discharged their burden in establishing that the offence of robbery with violence was committed.

21. I have taken into account the defence the Appellant adduced. He brought up the issue of personal grudge between himself and on one hand and PW2 and 3 on the other. A summary of the prosecution evidence clearly demonstrates that he did not bring these issues while cross examining the witnesses. It is a defence that he brought up as an afterthought. The same did not oust the strong prosecution case. Just as the learned magistrate dismissed it, I also find that it lacked credibility and equally dismiss.

22. In sum, I find that the prosecution discharged their burden by proving their case beyond all reasonable doubt and the conviction of the Appellant was therefore safe. I uphold the same.

23. As regards the sentence, it is now trite that the mandatory death sentence provided under **Section 296(2) of the Penal Code** is unconstitutional following the decision of the Supreme Court in the case **Francis Karioko Muruwatetu and Anor vs Republic {2017} eKLR**. In considering the most appropriate sentence, the court must consider both the aggravating and mitigating factors. As regards the former, it is a case where a gun was used to subdue the complainants. It is also a case where the complainants lost money and valuable goods. However in mitigating the aggravating factors, the Appellant in the trial pleaded remorsefulness. Before this court he denounced the offence but added that the sentence was harsh and excessive the circumstances. I take into account that although the goods were lost and a gun used, no one was injured and the goods were not of such high value to attract a very stiff penalty. The Appellant was also a first offender. In the circumstances, I set aside the 25 years imprisonment and substitute it with a seven year jail term which will run from the date of arrest which is 30th January, 2014.

Dated and Delivered at Nairobi This 5th day of November, 2019.

G.W.NGENYE-MACHARIA

JUDGE.

In the presence of;

1. Appellant present in person.

2. Mr. Momanyi for the Respondent.