REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 178 OF 2011

MELVIN OWINO ONYANGO.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From the original conviction and sentence in Criminal case No.5074 of 2010 of the

Chief Magistrate's Court at Nakuru by Hon. B. Atiang– Senior Resident Magistrate)

JUDGMENT

1. **Melvin Owino Onyango,** 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 21st October 2010 at Teachers' Estate in **Nakuru** District within **Rift Valley** Province, jointly with others not before the court while armed with pangas robbed **Elizabeth Bior Aboi** of cash Kshs.40,000/=, 18 sets of cushion seat covers, 4 wedding dresses, 3 mobile phones to wit Nokia 1200, Nokia E73 and Nokia L600,2 pairs of shoes, 1 blue shopping bag and assorted clothes all valued at Kshs. 120,000/= and at or immediately before or after the time of the said robbery threatened to use actual violence to the said **Elizabeth Bior Aboi.**

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

4. The appellant was in person. He raised four 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 identification.

b) The learned trial magistrate erred in law and in fact by convicting the appellant when the prosecution failed to call material witnesses.

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

d) The learned trial magistrate erred in law and in fact by meting out an inappropriate sentence.

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 maintained that the sentence 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. 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?

The robbery in this case took place at 3 a.m. I will therefore endeavor to establish if the victims were in a position to identify any of the robbers. The appellant herein has raised an issue with the purported identification.

8. Elizabeth Bior Aboi (PW1) testified that at about 3 a.m., when the robbers gained access to her house, they put on the lights. The person whom she said was the appellant went to her wielding a machete and asked her for money. The appellant took some Kshs.3, 000/= under the mattress and took her mobile phone among other items which included her bag. She said the robbers were in her bedroom for about an hour.

9. The following morning while going to town they saw the appellant. He had her bag, one of the items that the robbers escaped with. On seeing them, the appellant ran away. When they were returning home from town, they saw the appellant and he was arrested. He had her blue bag. The appellant was taken to the police and her stolen phone was recovered from him.

10. Though Rebecca Ayok (PW2) did not testify to have identified the appellant at the time of robbery in her evidence in-chief, during cross examination she said that it was the appellant who held a machete to her sister. She testified like her sister (PW1) concerning the events of the following day.

11. Ajak Arui (PW3) a brother to PW1 and PW2 was in the house during the robbery. He testified that he saw the appellant carrying the complainant's bag.

12. Though the prosecution did not elicit evidence on how these witnesses identified the appellant, his conduct the following day in running on seeing the complainant and her siblings erased any doubts of identification that may have lingered. People do not ordinarily run away on seeing others. He must have run away on realizing that he had been identified. There was no error on the identification of the appellant.

13. The evidence of recovery of some of the stolen items during the robbery further confirmed that the appellant was one of the robbers. P.C Dennis Ochieng (PW6) testified that they recovered a bag which contained some cushions from where the appellant allegedly dropped them as he was fleeing. These items were identified by the complainant as hers which had been stolen at the time of the robbery. When the appellant was taken to the police, he (PW6) recovered a mobile phone which the complainant proved to be hers by production of a receipt which bore corresponding serial number. If we momentarily assume that the identification was erroneous, which was not, the fact that he was found with some stolen items was damning evidence against the appellant.

14. When an accused person is found in possession of a recently stolen items, the onus is on him to explain his possession of the items complained about. The doctrine of recent possession is invoked where such an explanation is not satisfactorily given. 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.

The appellant did not give any explanation as to how he came into possession of the complainant's items. The only inference to make was that he must have been one of the robbers.

15. After my perusal of the record, I did not come across any material witness that the prosecution failed to call. This ground is therefore dismissed for lack of merits.

16. The defence of the appellant amounted to mere denial. It did not cast any doubt to the prosecution case. The learned trial magistrate analyzed it before concluding that it had no merit.

17. Section 296 (2) of the Penal Code 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 assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

This is a mandatory sentence and it is erroneous to argue that the Supreme Court made death sentence unlawful in the case of **Francis Karioko Muruatetu & another v Republic [2017] eKLR**. At paragraph 112 the Court concluded as follows:

a) The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution.

b) This matter is hereby remitted to the High Court for re- hearing on sentence only, on a priority basis, and in conformity with this judgment.

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.

The Supreme Court was aware of the mandate of the other institutions in effecting the proposal and making it law. To the best of my knowledge this proposals that seek to eliminate death penalties from our statutes and defining with certainty what is meant by life sentence have not been acted upon by the relevant agencies. We all look forward to a time when the proposals will be actualized.

In the instant case, the appellant was sentenced to the only available penalty.

18. In a nutshell, I find that the conviction was safe and the sentence that was meted out was lawful. I accordingly dismiss the appeal.

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