



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.26 OF 2016

(An Appeal arising out of the conviction and sentence of Hon. J. Jalango - SRM delivered on 23rd October 2015 in Makadara CMC. CR. Case No.1008 of 2012)

OBED KAHANYA FUHASHO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Obed Kahanya Fuhasho was charged with three (3) counts of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the 1st count were that on 5th February 2012 at Uhuru Market in Nairobi County, the Appellant while armed with a dangerous weapon namely a pen knife robbed Harrison Thurania and immediately before or immediately after the time of such robbery threatened to use actual violence to the said Harrison Thurania. The particulars of the 2nd count were that on 18th February 2012 at St. Peters Clavers in Nairobi County, the Appellant while armed with a dangerous weapon, namely a pistol and a pen knife, robbed Jacqueline Njeri of her mobile phone make Samsung Galaxy and Kshs.1,000/- cash and immediately before or immediately after the time of such robbery, threatened to use actual violence to the said Jacqueline Njeri. In respect of the 3rd count, the particulars were that between 1st and 31st January 2012 along Heshima Road within Nairobi County, the Appellant while armed with a dangerous weapon, namely a pistol, robbed Leon Okoth of his mobile phone make Sonny Erickson S500 and immediately before or immediately after the time of such robbery threatened to use actual violence to the said Leon Okoth. After full trial, the Appellant was convicted of the 1st and 3rd counts. He was sentenced to death. He was aggrieved by his conviction and sentence. He filed an appeal to this court against the said conviction and sentence.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of the evidence of identification that did not stand up to legal scrutiny. In particular, he was irked that no identification parade was mounted to enable the complainants confirm their alleged identification of the Appellant as the robber. The Appellant complained that his right to fair trial was infringed because he was not availed a counsel especially taking into consideration that he was a minor at the time that it was alleged that he had committed the offences. The Appellant was of the view that the evidence adduced against him by the prosecution witnesses was unreliable, inconsistent, untruthful and exaggerated and was advanced with the sole aim to achieve the object of depriving him of his freedom. In particular, he complained that the evidence adduced before the trial court did not meet the threshold of establishing his guilt to the required standard of proof beyond any reasonable doubt. He was finally aggrieved that he had been sentenced to serve an excessive and unjustified punitive sentence. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. His counsel Mr. Okemwa made further made oral submission urging the court to allow the appeal. The thrust of the Appellant's submission was that the prosecution had failed to establish the necessary ingredients upon which the trial court would have relied on to convict him. The Appellant argued that the evidence of identification that was tendered against him was weak and did not establish that he had robbed the complainants. He complained that he had been tried and sentenced to death yet during the entire proceedings he had informed the trial court that he was a minor and should have been tried and sentenced as such. The Appellant stated that the evidence adduced by the prosecution witnesses was contradictory and inconsistent to the extent that the only inference that can be drawn is that he did not commit the offences. Ms. Atina for the State did not support the conviction. She submitted that the Appellant was a minor at the time he took plea. He should have been tried before the Children's Court. The Appellant's rights to fair trial were therefore infringed. On the evidence, she was of the view that the facts of the case did not support the charge.

Before giving reasons for its decision, it is imperative that the facts of this case be set out, albeit briefly. The 1st complainant, Harrison Thurania was at the material time a student at Aquinas High School. He was 17 years. He testified that on 5th February 2012 while he was going back to school, he was accosted by a man who identified himself as Obed. He asked him if he knew a student in his school by the

name Steven. When he responded in the negative and started walking away, the man asked him for money. The 1st complainant gave him Kshs.17/- in coins. The man took offence and demanded to be given more money. He forcefully removed the sum of Kshs.800/- which was in the 1st complainant's pocket after threatening him with a knife. After getting the money, the man ran away. The 1st complainant reported the incident at Jogoo Police Station. He recalled that when he told the police that he had been robbed by a suspect by the name Obed, the police officer at the Report Office told him that he knew the Obed he was referring to. Sometime later (it is not clear when from the evidence), the 1st complainant was called to the police station and shown the Appellant. He told the court that it was the Appellant who had robbed him.

In respect of the 3rd count, PW4 Leon Okoth testified that at the material time, he was a student at Ofafa Jericho Secondary School. He was 14 years at the time of the incident. He recalled that between 1st and 31st January 2012, he used to go to Mary Immaculate School at Bahati to pick up his sister. On a day that he could not specify, he told the court that he was robbed of his Sonny Erickson S500 mobile phone as he was walking along Jogoo Road near the Church Army stage. He testified that he was confronted by a man who demanded that he surrenders his mobile phone. The man identified himself as Obed. PW4 told the court that he had previously had heard of a dangerous man called Obed who was terrorizing people in the area. After he was robbed, the man ran away. He was later called to the police station and asked if the Appellant was the one who had robbed him after the Appellant's arrest. The 2nd complainant confirmed that indeed it was the Appellant who had robbed him after threatening him with a gun.

PW2 PC Reuben Nyayodi, then based at the Crime Office at Jogoo Road Police Station, testified that on 19th February 2012 at about 12.00 noon, the Appellant was taken to the police station by members of the public who alleged that the Appellant had robbed a student of his mobile phone. PW2 detained the Appellant at the police station. He then recalled that several complainants had been made about a man who had robbed several students of their properties. He called the complainants in this case. The complainants were able to positively identify the Appellant as the man who robbed them. None of the stolen items were recovered from the Appellant. Neither the pistol nor the knife that was allegedly used in the course of the robbery were recovered from the Appellant.

When the Appellant was put on his defence, he denied committing the offence. He told the court that at the material time, he was a Class 8 pupil at Jogoo Primary School. He recalled that on 19th February 2012 at about 5.00 p.m., he had gone to the local shopping centre to purchase an exercise book. He met some police officers who appeared drunk. They arrested and took him to Jogoo Police Station despite his protestation that he was a student. After staying three days in custody, he was surprised when he was charged with the offences which he knew nothing about. He urged the court to acquit him.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22:**

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)”.

The issue for determination by this court is whether the prosecution established to the required standard of proof beyond any reasonable doubt, the charges brought against the Appellant of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**.

There are several issues that arose for determination by this court. The first issue is the question of the age of the Appellant. When the Appellant was arraigned before the trial magistrate's court to take plea, he told the court that he was aged 16 years. The court that took plea did not take any steps to investigate whether the claim made by the Appellant that he was a child within the meaning ascribed to the term under **Section 2** of the **Children Act**. If the trial court accepted the Appellant's claim that he was a child, the court that had jurisdiction to try the Appellant was the Children's Court. That is the court that has been conferred jurisdiction under **Section 73** of the **Children Act**. Due to this failure to ascertain the Appellant's age, the Appellant's rights to be accorded the privileges available to him as a child were denied to him. He was kept in remand custody with adults during the entire period of trial because he could not raise bond. After his conviction, instead of the Appellant being sentenced in accordance with **Section 191** of the **Children Act**, he was sentenced as an adult. This was another omission that infringed the Appellant's right to fair trial.

On the merits of the case, the Appellant has a case when he states that the evidence that was adduced against him did not establish his guilt on the two counts of robbery with violence that was brought against him. In the present appeal, it was clear that the Appellant was convicted on the sole evidence of identification. The two complainants testified that they were robbed by a person who identified himself as Obed. They did not give the description of this man to the police in the first report that they made to the police. They did not give his facial description nor did they give his physical description. They did not give the description of the clothes that the robber wore during the robberies. It was important that in the first report made to the police, the victims of the robbery described the colour of the clothes that the robber wore. In **John Njagi Kadogo & 2 Others –vs- Republic [2006] eKLR**, the Court (Lesiit, Makhandia JJ) held thus:

“In the absence of a first report to the police by these witnesses giving a description of the Appellant, their subsequent identification of the Appellant on an identification parade cannot be said to be foolproof. It is trite law that an identification parade can only be said to be properly conducted where a witness has given a description of the attackers in the first report and then his alleged identification is tested by the subsequent identification parade. Failure to observe the foregoing renders the subsequent identification to be dock identification that adds little value to the prosecution case. In Kamau Njoroge –vs- Republic (1982 - 88) KLR, the Court of Appeal held:

“...dock identification is worthless unless preceded by a properly conducted identification parade. The complainant should

also be asked to give the description of the suspect, and the police should arrange for a fair identification parade.””

In the present appeal, it was clear that the evidence of identification that was adduced by the two complainants was not up to the scratch. They both testified that the person who robbed them identified himself as Obed. This evidence is unbelievable. It was improbable that a person robbing his victims could identify himself to them.

On re-evaluation of the evidence adduced, it was apparent to this court that the Appellant was known by police officers based at Jogoo Police Station. After reports had been made of a spate of robberies, the police decided to charge the Appellant when he was taken to the police station by members of the public on allegations that he was robbing people. None of the members of the public who were said to have apprehended the Appellant were called to court to testify before the trial court. None of the robbed items were recovered in the Appellant's possession. This court holds that the evidence of identification adduced by the complainants was not sufficient or comprehensive to secure the conviction of the Appellant. That evidence fell short of the standard expected by the law when the evidence of identification is being considered to determine the guilt of an accused.

The upshot of the above reasons is that the Appellant's appeal has merit. It is hereby allowed. His conviction is quashed. He is acquitted of the charges of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** that were brought against him. The Appellant is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 12TH DAY OF JUNE 2018

L. KIMARU

JUDGE