REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 99 of 2017.

PETER NDAMBUKI MUIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Nairobi Cr. Case No. 6048 of 2013 delivered by Hon. A. R. Kithinji, SPM on 4th July, 2017).

JUDGMENT.

Background

1. Peter Ndambuki Muia, hereafter the Appellant, was charged with the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. The particulars of the offence were that on 23rd December, 2013 at Mukuru kwa Reuben slums in Industrial Area within Nairobi County, jointly with others not before the court while armed with dangerous weapons namely knives robbed Movin Otieno Okeyo of his mobile phone make Nokia 1110, handbag and Kshs. 1,500/- in cash all valued at Kshs. 3,800/- and at the time of said robbery threatened to use actual violence against the said Movin Otieno Okeyo.

2. The Appellant was found guilty and sentenced to death. He was dissatisfied with the trial court's decision and has lodged the present appeal. The same is against both the conviction and sentence. He set out his grounds of appeal as an addendum to his written submissions filed on 18th April, 2018. They are that; (i) the provisions of Section 200(3) of the Criminal Procedure Code were not complied with, (ii)his fundamental rights to a fair and impartial trial under Article 25 of the Constitution were infringed, (iii)his conviction was bad and manifestly unsafe as it was premised on a duplex charge, (iv)the learned magistrate misdirected himself by finding that his identification was by recognition, and (v)the entire prosecution case was not proved to the required standard.

Submissions

3. The appeal was canvassed before me on 18th April, 2018 with Ms. Sigei acting for the Respondent and the Appellant in person. The Appellant relied on written submissions whilst Ms. Sigei made oral submissions.

4. With respect to non-compliance with Section 200 of the Criminal Procedure Code the Appellant submitted that the same respected Hon. Hon. A. R. Kithinji who took over the conduct of the trial from Hon. E. K. Nyutu. He submitted that this materially prejudiced him and meant he was not accorded a fair and impartial trial as required by Article 25(c) of the Constitution. He relied, *inter alia*, on **Bob Ayub alias Edward Gabriel Bwana alias Robert Mandiga *v.* Republic [CoA at Kisumu Cr. APP No. 106 of 2009], Raphael *v.*Republic[1969] EA 544** and **Richard Charo Mole *v.* Republic [2010] eKLR** to buttress this submission.

5. On identification, he submitted that the trial magistrate made an error when he concluded that he was identified by recognition contrary to the evidence on record. He thus urged the court to reevaluate the evidence afresh and accordingly allow the appeal.

6. Ms. Sigei conceded to the appeal on the basis of non-compliance with Section 200(3) of the Criminal Procedure Code. She submitted that while the court informed the Appellant of his right under the provision, the recalling of a witness who the court allowed was never followed up. She submitted that this rendered the proceedings a mistrial thereby violating the Appellant's right to a fair trial. She submitted that this was not a case suitable for a retrial as the same was old, given the Appellant had spent four years in remand before he was convicted on 4th July, 2017. She added that the evidence at hand was also not sufficient to found a conviction against the Appellant in the event that a retrial was ordered.

Determination

7. Before I analyze the evidence, it is important that I first address the issue of whether Section 200(3) of the Criminal Procedure Code was complied with. The same provides as under;

> ***"Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused of that right."***

8. The trial was first heard by Hon. E. K. Nyutu who recorded the evidence of PW1 and PW2. The matter was taken over by Hon. A. R. Kithinji who informed the Appellant of his right under the provision on 17th September, 2015. The Appellant made a submission that the matter should begin *de novo*. On 21st September, 2015 the investigating officer appeared before the court and informed it that he could not locate the complainant. The court made a ruling declining the request. On 11th January, 2016 the Appellant asked the court to recall PW1 and PW2. When the matter next came for mention on 18th January, 2016 the prosecutor informed it that the investigating officer was still tracing a witness. On 11th August, 2016 the court was informed that the investigating officer could not trace PW1 after he went into hiding after the Appellant's co-accused was released and went looking for him. The court therefore made an order that the matter proceeds from where it had reached. On 29th December, 2016 the Appellant made an application to be taken to court 1 and take plea for the case to start afresh as he lacked confidence in the trial court. The prosecution again opposed the application on the basis of the missing complainant. The court made its ruling on 20th January, 2017 declining the request on grounds that it found that the Appellant had sufficient time to cross examine the witnesses and that the complainant could not be traced. The court ordered that the matter proceeds from where it had reached.

9. After the Appellant was informed of the requirement under Section 200(3) of the Criminal Procedure Code he initially chose to have the matter begin *de novo* before later choosing to have the witnesses recalled. While the court was willing to re-summon the witnesses it transpired that PW1, the complainant, could not be traced. The reasons for his disappearance were said to be due to the release of the Appellant's co-accused who then went looking for the complainant.

10. The Appellant's co-accused one Joshua Onyango Odhiambo was admitted to bail on 30th January, 2014 upon the approval of a surety, one Wilfred Mwangi Itimo. He never again appeared in court and while a warrant of arrest was in force it was strange that the surety was never summoned to court to explain the accused whereabouts. The fugitive's presence may explain why the complainant went into hiding and could not be located for the matter to be reheard. This leaves the court in an agonizing situation given that although the provisions of Section 200(3) are couched in mandatory terms there is a need to look at what would serve the interests of justice.

11. In this case, the trial court accommodated the Appellant's request for the witness to be re-summoned but the case did not proceed for a period of more than a year as the witness in question was not traced. An inference can be made that his disappearance was necessitated upon the escape of the Appellant's co-accused. The question then arises whether the court should allow the Appellant to benefit from this mischief? The answer lies in the maxim, "**the law will sooner suffer a mischief than an inconvenience (***La ley voit plus tost suffer un mischiefe que un inconvenience***)".** Ends of justice can only be served if the mischief prevails for the sanctity of law to prevail. The court hereby finds that the failure to re-summon the witnesses for cross examination or to restart the trial upended the Appellant's right to a fair trial and rendered the trial a nullity. Furthermore, the ordering of the case to proceed without the Appellant reneging on his option to recall the complainant violated Section 200(3).

12. The test now is whether the court should order a retrial or acquit the accused. Muriithi, J ably set out the factors to be considered before a retrial is ordered in **Rashid Wachilu Kasheka *v.* Republic[2015] eKLR** at para. 24, thus:

> ***"...although some factors may be considered, such as illegalities or defects in the original trial; the length of time elapsed since the arrest and arraignment of the Appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution's making or not; whether on a proper consideration of the admissible or potentially admissible evidence a conviction might result from a retrial; at the end of the day, each case must be depend on its particular facts and circumstances and an order of retrial should only be made where the interest of justice require it."***

13. Whilst in the opinion of this court the prosecution's evidence was sufficient to support a conviction, I am minded that the trial begun in 2013 and the Appellant has been in custody since he took plea for a period of almost 4 years and 5 months. Further, whereas the errors were not of the prosecution's making their nonchalance in following up on the Appellant's co- accused may have led to the inevitable non-compliance with Section 200(3).

14. I also take into account that the circumstances of the case are not so grave as to insist on a retrial. In brief, **PW1,** Movin Otieno Okeyo who was the complainant recalled that on 23rd December, 2013 he left work at midday after receiving his wages and he was walking home after alighting from a matatu when he met three men walking towards him. One of the men stood in front of him while the rest stood by his side. The men brandished knives with the one in front of him pointing the knife to his neck. He identified the man pointing the knife as the Appellant and also identified the knife in question. He testified that he pleaded with the men not to hurt him and they ordered him to give them all his possessions. He gave up his mobile phone, money and a bag. The phone was a Nokia 1110, black in colour with faded buttons. He identified it in court. He recalled that after the robbery the men ordered him to go and he ran and reported the matter to the police at a police post that was about 20 meters from where he was robbed. He was escorted to the scene by two officers but they did not find the robbers. As they looked for them he spotted them and on noticing the police they tried to run away but two were arrested amongst them the Appellant. That upon searching the Appellant the police found the complainant's phone but the Appellant insisted it was his. To prove ownership the police restarted the phone and asked the Appellant to input the PIN which he could not do but the complainant could. The witness later recorded his statement with the police.

15. Clearly the complainant was not hurt, and his phone was recovered. The Appellant has suffered enough as a warning not to commit a similar offence. I find that the only remedy available to the court would be to order the Appellant's acquittal.

16. In the end therefore, I allow the appeal. I quash the conviction, set aside the death sentence and order that the Appellant be forthwith set free unless he is otherwise lawfully held. It is so ordered.

DATED and **DELIVERED** this **7th** day of **June, 2018.**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Appellant in person.

2. Miss Atina for the Respondent.