



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NUMBER 161 of 2017.

BETWEEN

JAMES MAINA MWAI APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara Cr. Case No. 997 of 2013 delivered by Hon. A. R. Kithinji, P.M on 11th October, 2017).

JUDGMENT.

Background.

1. James Maina Mwai, hereafter the Appellant was charged with the offence of robbery with violence contrary to Section 295 as read with 296(2) of the Penal Code. The particulars of the offence were that on 27th January, 2013 at Eastleigh Section III in Nairobi County being armed with a dangerous and offensive weapon, namely; kitchen knife, robbed Leah Chesang Kogo of one mobile phone Nokia 6070 valued at Kshs. 4,000/- and Kshs. 180 in cash, all valued at Kshs. 4,180/- and immediately before or immediately after the time of such robbery used actual violence on the said Leah Chesang Kogo. He was arraigned in court and at the conclusion of his trial found guilty and sentenced to suffer death. He was lodged the present appeal against both the conviction and sentence.

2. His grounds of appeal are annexed to his written submissions. They were that; (i) his right to a fair trial was infringed (ii) he was not properly identified, (iii) his conviction was based on mere suspicion, (iv) the prosecution failed to discharge its burden to prove.

Submissions.

3. The Appellant canvassed the appeal by way of written submissions whilst Ms. Akunja gave oral submissions. With respect to the ground of appeal that his right to a fair trial was violated, the Appellant submitted that he asked for the Occurrence Books entries from 27th January and 27th February, 2013 but the same were never supplied to him which was contrary to Article 50(2) of the Constitution which provides for the right to; at (c), adequate time and facilities to prepare a defence and at (j), to be informed of the evidence the prosecution intend to rely upon and to have reasonable access to the same. He cited several cases to buttress this submission.

4. He submitted that he was not properly identified. He pointed to the fact that there lacked conducive environment for a positive identification. He submitted that while the evidence was that PW1 knew him well and that the matter was reported by the complainant on 27th January, 2013, these assertions were controverted by the extracted Occurrence Book extract No. 3 of 25th February at 0500hrs. He submitted that his identification being by a single witness namely PW1 was not full proof. His view was that there was no direct, cogent, convincing or compelling evidence to warrant his conviction. He concluded by urging the court to find that the evidence fell well short of the standard required and that it was just that the appeal be allowed.

5. Ms. Akunja opposed the appeal. She submitted that the prosecution proved its case beyond a reasonable doubt as the Appellant was armed with a knife and stabbed the complainant in the stomach. That the offence occurred at a bus stop where there was sufficient electric light and given that the complainant previously knew the Appellant prior to the incident her evidence placed him at the scene. She submitted that the Appellant was properly identified and that the conviction was therefore safe. She urged the court to dismiss the appeal.

Evidence.

6. **PW1, Leah Chesang Kogo** was the complainant. She lived in Makongeni. On 27th January, 2013 she was coming from work at around midnight. When she reached EastMart Supermarket she saw a man approach her from the left side who offered to escort her as she was afraid of dogs. She recognized him as Mwai as they used to live in the same compound. She agreed to be escorted but on the way the man turned against her and produced a knife which he stabbed her with before asking for her money and mobile phone. He took her phone and Kshs. 180/- . He then ordered her to walk away and she went to the Eastleigh Police Base where she reported the matter. The phone stolen was a Nokia 6070 worth Kshs. 4,000/- but that she had misplaced the receipt. She was treated in hospital and a P3 form filled on 27th February, 2013. In cross examination she stated that she identified to the police the house of the Appellant on 28th February, 2013.

7. Upon reporting the matter to the police, PW1 was issued with a P3 Form which was filled by **Dr. Maundu** of Police Surgery and who testified as **PW2**. He examined her on 22nd February, 2013. He found a cut wound on the lower abdomen which was stitched. There was also a wound on the elbow and a bruise on the forearm. The injuries were about 4 weeks old and were inflicted by a sharp object. **PW3, PC Paul Kelebei** of Eastleigh Patrol Base was assigned to investigate the matter. He recorded PW1's statement. He also arrested the Appellant and preferred the present charge. **PW4, C.I. Francis Muthee Muchiri** of Eastleigh Patrol Base participated in the arrest of the Appellant alongside PW3 on 27th February, 2013. His testimony was that he got a call from members of the public that a wanted criminal was sighted at Mugunda slums. He proceeded to the scene alongside one of his officers where they arrested the suspect, the Appellant and escorted him to Eastleigh Patrol Base. He then called PW1 who came to the station and identified the Appellant.

8. In his defence, Appellant stated that he lived in Eastleigh Section 3 where he used to sell fruits and pack miraa. He recalled that on 24th February, 2013 he finished work and went to Pumwani to wait for *miraa*. That day the *miraa* came late and he finally went home around 10.40 pm. On his way home he met a probox car full of men and was ordered to stop at gunpoint. The men took him to Eastleigh Patrol Base where he spent two days before being transferred to Shauri Moyo Police Station and finally being charged in court.

Determination.

9. It is now the onerous duty of this court to reevaluate and reanalyze the evidence afresh and arrive at independent findings, In doing so, the court must bear in mind that it has neither seen nor heard the witnesses and give due regard for that. See **Pandya v Republic [1957] EA,336**.

10. I have accordingly considered the evidence on record and the respective rival submissions before arriving at the conclusion that the issues arising for determination are whether the Appellant's right to a fair trial was infringed, whether the Appellant was properly identified and whether the offence was proved beyond a reasonable doubt.

11. On the first issue, the Appellant submitted that he was not supplied with the Occurrence Book entries integral to the trial for 27th January and 27th February, 2013 notwithstanding requests for the same to be supplied. The record shows that on 7th July, 2015 the Appellant sought the supply of extracts of the two occurrence books and an order made for their supply. This was before he cross examined PW1. On 26th September, 2016 he again renewed his application on a day when no witness appeared in court although PW1 was to be recalled for cross examination. On 4th July, 2017 he again requested for the Occurrence Book entries and urged the recall of PW1. However, the court revised its order of 11th November, 2015 finding that the Appellant had sufficiently cross examined the complainant. The court however ordered that the Occurrence Book extract be supplied. The case proceeded on the same day with PW3 and PW4 testifying and the prosecution consequently closed its case.

12. It is abundantly clear that the Appellant did not receive the extracts. The importance of occurrence book entries cannot be overlooked as they are the initial reports of crimes and indicators of the detainment of suspects. They also bear very vital information particularly as regards the actual complaint the complainant or other witnesses made in the first instance. The information they carry especially in a case of robbery with violence also gives an indicator as to whether an accused was identified. Having them at hand before cross examining a witness is a vital tool or facility for preparation of a defence. In their absence, it is gain said that an accused lacks a crucial tool that would enable him not only to cross examine the witnesses but also to prepare for his defence.

13. In the present case, the occurrence book extracts sought relate to the initial report and the arrest of the Appellant. An extract from 25th February, 2013 and the Appellant's arrest was finally supplied to this court but a report relating to the initial report made by PW1 on 27th January, 2013 was still not forthcoming. The prosecution's case was that the Appellant was arrested on 27th February, 2013. The extract raises further issues surrounding the Appellant's arrest as it states he was booked at 0500hrs while the evidence of PW4 was that he was booked at 1.00 p.m. on the 27th. Further impropriety is clear from the evidence of the two arresting officers particularly PW3 who testified that the Appellant was arrested at his *kibanda* (stall) where he was selling vegetables contrary to the Occurrence Book entry which indicates that he had been terrorizing the residents and was arrested in a dark place hiding with a view of robbing passersby.

14. The fact that the Appellant was not privy to this Occurrence Book extract during his trial clearly disadvantaged him as he could not call into question the evidence adduced. The absence of the extract of 27th January, 2013 also buttresses this fact. No doubt then that his right to a fair trial was infringed as the failure to supply him with the OB extracts denied him the opportunity to ably cross examine PW1. It was therefore a misdirection on the part of the learned magistrate to conclude that the Appellant had ably cross examined the witness which again beat logic to order that the extracts be supplied after the cross examination. And as pointed out, the extract that was furnished before this court went against PW1's evidence as regards to how and why the Appellant was arrested. It brings into question the conclusion that the Appellant was identified by way of recognition. Furthermore, I note that according to PW4's evidence, PW1's statement was recorded after the Appellant's arrest. This lends credence to the conclusion that the Appellant's recognition by PW1 was concocted and PW4's evidence was not corroborative of that of PW1.

15. I then come to a safe conclusion that the identification of the Appellant was that of a single witness and was not full proof for the aforesaid reasons. I am unable to arrive at a conclusion that he participated in the robbery. Accordingly, the conviction of the Appellant was not safe.

16. In sum, on the re-evaluation of the evidence on record, I find that the prosecution did not prove its case beyond a reasonable doubt. I quash the conviction, set aside the sentence and order that the Appellant be forthwith set free unless otherwise lawfully held. It is so ordered.

DATED and DELIVERED this 18th day of July, 2018

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Appellant in person.
2. Miss Sigei. for the Respondent.