REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 56 OF 2016

(An Appeal arising out of the conviction and sentence of Hon. B.M. Ochoi – PM

delivered on 25th February 2015 in Kibera CMC. Cr. Case No.5017 of 2013)

NKAKA LEMEIYAN...APPELLANT

VERSUS

REPUBLIC..RESPONDENT

JUDGMENT

The Appellant, Nkaka Lemeiyan was charged with the offence of **robbery with violenc**e contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offfence were that 28th October 2013 at Uaso Nyiro Village in Kajiado County, the Appellant robbed Nolare Ketuke of Kshs.1050/-, a mobile phone make Nokia 1208, airtime of Kshs.50 and an extra mobile phone battery all valued at Kshs.3,850/- and at or immediately before or immediately after the time of such robbery used actual violence by cutting the said Nolare Ketuke (hereinafter referred to as the complainant) with a panga. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, the Appellant was found guilty as charged. He was sentenced to death. He was aggrieved by his conviction and sentence. He has appealed to this court.

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 application of the doctrine of recent possession which was not established to the required standard of proof beyond any reasonable doubt. The Appellant asserted that the particulars and the evidence adduced to support the charge established the lesser charge of **robbery** contrary to **Section 296(1)** and not **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. He complained that his fundamental rights to fair trial were breached in that he was not availed the prosecution's witnesses' statements before trial. He was of the view that the trial magistrate erred in convicting him on the basis of inconsistent and contradictory evidence. 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. He urged the court to allow his appeal. Ms. Aluda for the State opposed the appeal. She submitted that the Appellant was convicted on the basis of the evidence of recognition and by application of the doctrine of recent possession which established the charge to the required standard of proof. She urged the court to dismiss the appeal.

Before giving reasons for its determination, this court will set out the brief facts of this case. The complainant in this case, a woman, was at the material time aged 25 years. She told the court that on 28th October 2013, she had gone to the local trading centre to purchase provisions. As she was returning home at about 6.00 p.m., she was accosted by the Appellant, who was known to her prior to the incident, and robbed of her wallet which was hanging in a strap on her shoulder. The complainant testified that the Appellant gain access to the wallet by cutting the strap with a panga. The Appellant also hit her with the panga causing her to sustain a cut injury on her face. Her injuries were confirmed when the complainant was examined by PW3 Dr. Joseph Maundu of the Nairobi Police Surgery who noted that the complainant had a cut injury on the right side of her face. The probable weapon used was a sharp object. He prepared a P3 form which was produced into evidence. The complainant stated that she was robbed of her mobile phone, a cellphone battery, two Safaricom lines and Kshs.1,000/- which was in different denomination. After the robbery, the Appellant ran away. The complainant walked a few metres and found some herd boys who assisted her home. She found her husband who escorted her to hospital where she was treated and later discharged. She told her husband that she had been assaulted by the Appellant. A manhunt was mounted. The Appellant was apprehended by members of the public on the following day. In his possession, were recovered a Nokia mobile phone 1208, a Safaricom line, a Nokia BV battery and Kshs.850/-. The complainant testified that she was able to clearly see and recognize the Appellant because the incident took place during daytime.

PW2 APC Peter Kimani then based at Ilbisil Administration Police Camp testified that on 29th October 2013 at about 2.30 p.m., members of the public brought the Appellant to the AP Camp. The Appellant was accompanied by the complainant who told PW2 of how she was robbed by the Appellant on the previous day. PW2 conducted a search on the Appellant's person and recovered from him a Nokia 1208 mobile phone, Kshs.850/- and a Safaricom line. The Appellant appeared drunk at the time. PW2 escorted the Appellant to Magadi Police Station on the following day i.e. 30th October 2013 where he was received by PW4 Inspector John Ambole. PW4 commenced investigation and recorded the statements of the witnesses. He asked the complainant how she was certain that the particular mobile phone recovered from the complainant was her property. PW4 was convinced that the complainant was the owner of the mobile phone when she switched it on and entered her password. The Appellant was unable to operate the mobile phone when he was requested to do so. After concluding his investigations, PW4 made the decision to charge the Appellant with the offence that he was convicted. The Appellant chose not to give any evidence when he was put on his defence.

This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced before the trial magistrate's court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court is required to be conscious of the fact that it neither saw nor heard the witnesses as they testified and therefore cannot make comments regarding the demeanor of the witnesses (See **Okeno –vs- Republic [1972] EA 32).** The issue for determination by this court is whether the prosecution established its case, to the required standard of proof beyond any reasonable doubt, to secure the conviction of the Appellant on the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**.

From re-evaluation of the evidence adduced before the trial magistrate's court, and the submission made by the parties to this appeal, it was apparent to this court that the prosecution relied on the evidence of identification and that of the recovery of the stolen items to secure the conviction of the Appellant. The complainant testified that she was accosted by the Appellant as she was walking home from the local trading centre. The complainant knew the Appellant prior to the incident. The robbery incident took place at daytime. The Appellant in his submission before this court disputed that he had been properly identified by the complainant. On re-evaluation of this evidence, this court was convinced to the required standard of proof beyond any reasonable doubt that indeed the complainant recognized the Appellant during the course of the robbery. The Appellant wore no disguises. His face was clearly visible to the complainant.

Recognition is more assured as compared with the evidence of identification of a total stranger. As was held by the Court of Appeal in **John Muriithi Nyaga –vs- Republic [2014] eKLR:**

> ***"26. It is acceptable in law that evidence of recognition is stronger than that of identification because recognition of someone known to one is more reliable than identification of a stranger. But in Wanjohi & 2 Others –vs- Republic [1989] KLR 415, this court held that "recognition is stronger than identification but an honest recognition may yet be mistaken.""***

In the present appeal, if there was any doubt that the complainant had recognized the Appellant, that doubt was removed when the Appellant was arrested on the following day and some of the items that he had robbed from the complainant were recovered from him. The doctrine of recent possession was properly applied by the trial court to convict the Appellant. The complainant proved to the required standard of proof beyond any reasonable doubt that she was the owner of the Nokia 1208 mobile phone that was found in the Appellant's possession at the time of his arrest. She proved her ownership by switching on the mobile phone and entering a password that enabled her to operate the mobile phone. That being the case, this court holds that the prosecution established to the required standard of proof that indeed the Appellant robbed the complainant of the particular mobile phone.

The Appellant argued that the ingredients to establish the charge of robbery with violence were not established in the evidence that was adduced by the prosecution witnesses. To establish a case of robbery with violence contrary to **Section 296(2)** of the **Penal Code**, the Court of Appeal in **Oluoch –vs- Republic [1985] KLR** 549 at Page 556 held thus:

> ***"Under Section 296(2) of the Penal Code robbery with violence is committed in any of the following circumstances:***
>
> 1. ***The offender is armed with any dangerous or offensive weapon or instrument or***
> 2. ***The offender is in company with one or more other person or persons or***
> 3. ***At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses other personal violence to any person."***

In the present appeal, the prosecution was able to establish to the required standard of proof beyond any reasonable doubt that indeed the Appellant robbed the complainant of her mobile phone and other valuables, and in the course of the robbery wounded her by cutting her on the face with a panga. The Appellant's assertion to the effect the prosecution had failed to establish the ingredients of the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** therefore lacks merit.

The upshot of the above reasons is that the appeal lodged by the Appellant against conviction lacks merit and is hereby dismissed. As regard sentence, following the recent decision of the Supreme Court in **Francis Karioko Muruatetu & Another –vs- Republic [2017] eKLR** this court is mandated to consider whether the death sentence imposed upon the Appellant should be sustained. This court has considered the circumstances in which the robbery took place. This court is of the considered view that a custodial sentence rather than the death sentence is called for in the circumstances of this case. It was apparent that the Appellant was intoxicated at the time he committed the offence. This diminished his criminal responsibility. The death sentence imposed upon the Appellant is therefore set aside and substituted by a sentence of this court sentencing the Appellant to serve five (5) years imprisonment from the date that he was charged. The court has taken into account the fact that the Appellant was in remand custody from the date of his arrest on 29th October 2013 to the time of his conviction by the trial court on 25th February 2015. The Appellant has been in prison since then. The totality of the period that he shall be in lawful custody is sufficient punishment. The custodial sentence of the Appellant is thus commuted to the period served. He is ordered set at liberty and released from prison forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 5TH DAY OF JULY 2018

L. KIMARU

JUDGE