REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 63 AND 64 OF 2016 (CONSOLIDATED)

1. SILA MAUTA.....1st APPELLANT

2. ELIJAH KINYUA MUNENE.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence in Garissa Chief Magistrate

Criminal Case No. 1340 of 2014 by Hon. T. L. Ole Tanchu (SRM)

JUDGEMENT

1. These two appeals No. 63 of 2016 in which Sila Mauta is the appellant and No. 64 of 2016 in which the appellant is Elijah Kinyua Munene were consolidated and heard together. The appellants were represented by counsel C.K. Nzili & Co. Advocates.

2. The appellants were jointly charged in the Chief Magistrate's Court at Garissa with robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the offence were that on 7th August 2014 at 5 am at Modogashe Filling Station, Lagdera Sub-County within Garissa County, jointly with others not before court being armed with offensive or dangerous weapons namely; pangas, robbed Rage Abdi Kassim of cash 48,000/=, 5 mobile phones namely; Nokia 105, Nokia X2-02, Nokia 105, Nokia Asha 200, Nokia 1280, and Huawei Safaricom Modem all valued at Ksh.19,500/=, all to the total value of Kshs.67,500/= and at or immediately before or immediately after the time of such robbery fatally wounded the said Rage Abdi Kassim.

3. In the alternative, Elijah Kinyua Munene 2nd appellant was charged with handling stolen goods contrary to section 322 (2) of the Penal Code. The particulars of the offence were that on the same day at Eldera Market Center along wajir – Isiolo road on Lagedera within Garissa County otherwise than in the course of stealing dishonestly retained cash Kshs.18,810/=, Nokia 105, Nokia X2-20 and Nokia 1280 valued at Kshs.10,000/= all to the total value of Kshs.28,810/= knowing or having reason to believe them to be stolen goods.

4. The 1st appellant Sila Mauta was also charged in the alternative with handling stolen goods. The particulars of the offence were that on the same day and place (as the alternative charge of 2nd appellant) otherwise than in the course of stealing dishonestly retained cash Ksh.15,040/=, two (2) mobile phones; Nokia Asha 200, Nokia 105, and Huawei Safaricom modem valued at Kshs.9,500/= to the total of Kshs.24,540/= knowing or having reason to believe them to be stolen goods.

5. They denied all the charges. After a full trial, each of them was convicted of the main charge of robbery with violence and sentenced to suffer death as per the law.

6. They have now come to this court on appeal. Sila Muata filed his appeal through C.K. Nzili & Co. Advocates while Elijah Kinyua Munene filed his own appeal. The petition of appeal filed by C. K. Nzili & Co. Advocates in my view, encompasses both appeals and is on the following grounds –

(1) The learned trial magistrate erred in law and in fact in convicting the appellants when there was inadequate or no evidence supporting the charges levelled against them.

(2) The learned magistrate erred in law and in fact for failing to consider the appellants' defence.

(3) The learned trial magistrate erred in law and in fact in failing to consider relevant factors hence arriving at wrong

decision when there was no corroboration in the prosecution case.

(4) The learned trial magistrate erred in law and in fact in shifting the burden of proof to the appellants.

(5) The learned trial magistrate erred in considering irrelevant factors and failing to consider relevant factors in arriving at the decision.

(6) The learned trial magistrate erred in law and in fact in giving an excessive sentence in the circumstances of the case.

7. Counsel also filed written submissions and relied on a number of decided court cases.

8. At the hearing of the appeal, Mr. Nzili for both appellants highlighted the written submissions. Counsel submitted that no eye witness saw any dangerous weapon nor did the investigating officer indicate the type of weapon allegedly used. There was also no proof of violence or injuries as two alleged victims of the crime were merely mentioned by names. According to counsel, no P3 or postmortem report was produced in court, thus there was no proof of violence.

9. Counsel submitted also that this is a case where an identification parade should have been held or fingerprints taken. None of these was done, and thus the prosecution did not connect the appellants to the alleged offence.

10. Counsel also felt that an inventory of the items recovered by PW4 Sgt. Abdalla Osman who arrested the appellants forty five (45) Kilometres from Modogashe, should have been made with regard to exhibit 4, 1B, 2, 3A, and 3B, which was not done. This further weakened the prosecution case against the appellants.

11. Counsel submitted further that the only thing that PW4 had was a notebook and which he did not produce in court, and as the appellants in their defence raised an alibi, they should have been acquitted.

12. In response, Mr. Okemwa the Principal Prosecuting Counsel submitted that the prosecution had proved their case against both appellants beyond reasonable doubt through the evidence of six witnesses as the two had acted together in committing the offence. According to counsel, the facts and evidence on record satisfied the requirement of the offence of robbery with violence, as somebody had lost his life which demonstrated the use of violence.

13. Counsel emphasized that the items recovered from the appellants were identified as some of those stolen, while the appellants were on the run when they were arrested and refuted that the appellants raised a defence of alibi.

14. Mr. Nzili in response stated that no P3 form or postmortem reports were produced in court, and no independent witness testified. Counsel said that even where an accused raises a defence of alibi the burden still remained on the prosecution to prove their case beyond any reasonable doubt.

15. This is a first appeal. As a first appellate court, I am required to re-evaluate all the evidence on record and come to my own independent conclusions and inferences. See the case of **Okeno vs Republic [1972] EA 32.**

16. The offence of robbery with violence is defined under section 296 (2) of the Penal Code, and all the ingredients are contained therein.

17. I have considered the evidence on record. There is an allegation that a person was injured in the robbery, and another person was killed in the same robbery. I have seen photographs showing splashed blood. I have however not seen any postmortem report or a P3 form that was produced in the trial court in respect of the deceased victim and the injured victim.

18. The investigating officer PW6 PC Paul Kamau Kiarie received all documents including photos, the mobile phones, the money mentioned in the charge sheet, and recorded witness statements from the prosecution witnesses and the appellants. He however, did not say anything about a P3 form for the injured victim or a postmortem report form for the deceased victim.

19. In my view however, both the injury suffered and death of the two victims respectively could be proved without necessarily producing doctor's reports. However, the investigating officer PW4 in particular, and the prosecution in general had an obligation to explain to the trial court why those vital documents could not be availed in court. They did not do so, and one wonders whether indeed there was such an alleged robbery. Maybe there was such an incident, maybe not.

20. In a criminal trial, the court is not entitled to rely on guess work but on evidence put to it and where there is a justifiable gap; same has to be explained to the court. In this particular case, that gap to establish the violence was not explained to the trial court, thus merely leaving suspicion as to what was alleged as the particulars of robbery, which suspicion cannot be a basis for a conviction. See the case of **Sawe vs Republic [2003] KLR 364.**

21. A number of items including mobile phones, modem, and money were said to have been recovered from the appellants. However, from the evidence on record, the police officer who searched the appellants and recovered the items did not testify. PW4 Snr. Sgt. Abdalla Osman used the plural saying "We" on the recovery of the items, but did not say "I" searched and recovered anything. PW5 Abushoro Guyo the driver of the lorry on his part said that the 1st appellant had a cloth which was blood stained. He also stated as follows in cross examination, on how the appellants were arrested –

"All passengers went back to the motor vehicle but before barrier could be opened, the Sergeant came and asked me where

each and every passenger had boarded motor vehicle. I told him and the passengers I had picked from Chanjo were ordered to alight.

I cannot remember whether any had a jacket. The first search by a police officer, he saw the phones. I did not prepare an inventory of what was recovered from the accused persons. Accused persons didn't give any numbers."

22. It is clear to me from the above evidence that the Sergeant PW4 was not involved in the search. Instead another police officer conducted the search. PW4 could not thus state exactly what was recovered from each of the two appellants. Curiously the police officer who did the search was not called by the prosecution to testify. From the evidence of PW5 also the reason why the two appellants were arrested was because they boarded the lorry from Chanjo not because they had been found with the items alleged to have been lost in the robbery.

23. In my view, if the two appellants were arrested because of having been found with the mobile phones and money stolen from the scene of crime and one of them had a blood stained piece of cloth, such could have been stated very clearly as the reason for their arrest. The reason for the arrest given was merely because they boarded a lorry at Chanjo leaves a gap as to whether indeed they were arrested for having been found with the alleged items related to the offence. As a very crucial witness the search officer was not called to testify on the recovery of the items from the appellants, and no reason was given. I draw an adverse inference on the prosecution evidence and give the benefit to the appellants. See **Bukenya vs Uganda [1972] EA 549**. In my view, the magistrate erred in finding that the prosecution proved its case.

24. In my view, both the investigations herein and the prosecution of this case were not conducted by the state officers with the seriousness they deserved. They ended up creating loopholes that weakened the prosecution case to the extent that even if the robbery took place, it was not easy for the trial court to know that it occurred, and that the appellants were involved in the robbery. It would not be easy for the criminal court to determine whether or not the appellants were the culprits. In my view, the investigators and the prosecutor could have done better than they did.

25. Considering the high standard of proof required in criminal cases, which is beyond any reasonable doubt, the advantage of the doubt goes to the appellants. I find that there was sufficient doubt in the prosecution case which should have entitled the trial court to acquit each of the two appellants of this serious crime. I find that the prosecution did not prove its case against the appellants beyond any reasonable doubt and thus the conviction cannot be sustained.

26. For the above reasons, I allow the appeal, quash the conviction and set aside the sentence. I order that each of the two appellants be released unless otherwise lawfully held.

Dated, signed and delivered in open court at Garissa this 11th July, 2018.

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George Dulu

JUDGE