



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 117 OF 2015

(An Appeal arising out of the conviction and sentence of HON.G. ADHIAMBO

– (SRM) delivered on 27th August 2015 in Kapsabet PM CR. Case No.233 of 2015)

JOSPHAT MACKOMERE MULINDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Josphat Mackomere Mulindi was charged with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 20th January 2015 at around 11.30 p.m. at Meswo Sub-Location of Nandi County, the Appellant robbed Timothy Kipngetch of Kshs.49,000/- and one Nokia mobile phone and at or immediately before or immediately after the time of such robbery used actual violence to the said Timothy Kipngetch (hereinafter referred to as the complainant). When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was found guilty as charged. He was sentenced to life imprisonment. He was aggrieved by his conviction and sentence. He has filed an appeal 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 was convicted on the basis of the evidence of a single identifying witness who made the identification in difficult circumstances. He faulted the trial magistrate for convicting him despite the fact that there was no other credible evidence which corroborated the complainant's alleged identification. He was of the view that the police failed to conduct any investigation to establish the allegation made by the complainant against him. He was aggrieved that he had been convicted yet the evidence adduced by the prosecution witnesses was contradictory and failed to muster the standard of proof beyond any reasonable doubt. He faulted the trial magistrate for failing to consider his defence before reaching the impugned verdict that he was guilty as charged. The Appellant was of the view that his constitutional right to fair trial was infringed when he was denied an opportunity to call witnesses in his defence. 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. In summary, the Appellant faulted the trial court for failing to take into consideration the fact that the prosecution had relied on the evidence of a single identifying witness who made the identification in circumstances that were not conducive for positive identification. He pointed out that the robbery incident took place at night. The complainant was drunk at the time of the incident. He could not therefore be in a position to be positive that he had identified him during the robbery incident. The Appellant urged the court to find that due to the contradictory nature of the evidence of identification that was adduced by the prosecution witnesses, especially regarding whether or not he was a friend to PW2, this court should find that the prosecution failed to establish its case to the required standard of proof.

The Appellant posed the question, *if he was indeed the robber, why were the exhibits that were stolen from the complainant not recovered in his possession?* He accused the police of conducting shoddy investigations and relying on the untested testimony of the complainant to charge him. He was of the view that the charges were fabricated against him. He noted that at one point he was prosecuted by an unqualified prosecutor. He also complained that his right to fair trial was infringed in that his right as provided under **Section 211** of the **Criminal Procedure Code** was not read to him before he was put on his defence. He was also denied the opportunity to make his closing submission. In the premises therefore, he urged the court to allow the appeal.

Ms. Oduor for the State opposed the appeal. She submitted that the prosecution had adduced sufficient culpatory evidence which connected the Appellant to the robbery to the required standard of proof. She explained that the Appellant was identified prior to the robbery and was intimately known to PW2. All the ingredients supporting the charge of robbery with violence were established. The complainant was injured during the robbery. She therefore urged the court to find that the prosecution had established its case. She therefore urged the court to find the Appellant's appeal to be without merit and should be dismissed.

This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced so as to arrive at its own independent determination whether or not to uphold the conviction of the Appellant. In reaching its verdict, this court is required to always bear in mind that it neither saw nor heard the witnesses as they testified and therefore give due allowance in that regard. (See **Okeno –vs- Republic [1972] EA 32**). In the present appeal, the issue for determination by this court is whether the prosecution adduced evidence that established the Appellant's guilt on the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the evidence adduced before the trial magistrate's court. It has also considered the submission made by the parties to this appeal. It was clear from the evidence that was adduced before the trial magistrate's court that the prosecution relied on the evidence of identification to secure the conviction of the Appellant. According to the complainant, who testified as PW1, on 20th January 2015 at about 11.30 p.m., he requested his friend PW2 Solomon Kiptanui to fetch for him a motorcycle to take him home. From his evidence, it was apparent that the complainant had taken some alcoholic drinks. PW2 worked as a waiter at County Pub where the complainant was having his drink. According to the evidence, PW2 escorted the complainant to a place where the Appellant (who was known to him prior to the robbery incident) had parked his motorcycle. The Appellant was a boda boda rider. The complainant confirmed from PW2 the identity of the Appellant. The complainant was concerned of his safety. When he was given the assurance, he rode on the Appellant's motorcycle as a pillion passenger.

It was the complainant's evidence that when they reached a forest on the way to his home, the Appellant stopped the motorcycle, strangled him and then robbed him of his Nokia mobile phone and Kshs.49,000/-. The complainant managed to make good his escape. He walked up to his home. Although he was injured, he slept until the following day when he made a report to the administration police particularly PW3 APC Erick Jasper Magoma based at Show Ground Administration Police Post. A report was later made to Kapsabet Police Station. The complainant was referred for treatment at Kapsabet County Referral Hospital where he was treated by PW5 Patrick Kemei, a clinical officer based at the Hospital. PW5 noted that the complainant sustained bruised injuries on his neck, thorax and abdomen. He also had injuries on his elbow and lower limbs. The injuries were consistent with injuries caused by a blunt object. PW5 produced a duly filled P3 form as an exhibit in the case.

When the complainant lodged a complaint with the police at Kapsabet Police Station, he met with PW4 PC Omondi Tula. While making the report, he saw the Appellant at the police station. The Appellant had gone to the police station in a bid to retrieve his motorcycle which had been detained for operating outside official hours. The Appellant was arrested and detained. In his defence, the Appellant denied robbing the complainant. He denied that he had the motorcycle on the night he is claimed to have given a ride to the complainant. He told the court that during that period his motorcycle had been detained by the police. Therefore he was not in business.

This court's re-evaluation of the evidence adduced leads it to the inevitable conclusion that indeed the prosecution established to the required standard of proof that it was the Appellant who robbed the complainant. The identity of the Appellant was not in doubt. He was well known to PW2 prior to the robbery incident. PW2 referred to him by his name. It was PW2 that introduced the complainant to the Appellant. Although the complainant may have been drunk at the time, there is no doubt that he was robbed in the manner he testified before court. No other person was involved other than the Appellant. It was the Appellant and the complainant who travelled together on the motorcycle on the fateful night.

The ingredients to establish the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** as set out in the case of **Titus Wambua -vs- Republic [2016] eKLR** were proved to the required standard of proof. The Appellant robbed the complainant of cash and his mobile phone, and in the course of the robbery injured him. The element of violence meted out on the complainant was established by medical evidence which showed that the complainant sustained injuries caused by a blunt object which was consistent with complainant's testimony that he was strangled and assaulted by the Appellant. The Appellant's appeal against conviction therefore lacks merit and is hereby dismissed.

As regard sentence, the circumstances in which the offence occurred which included the fact that no offensive weapon was used and the fact that the Appellant is a first offender, and the fact that this was a crime of opportunity, does not call for the sentence of life imprisonment that the Appellant was sentenced to serve. This court is of the opinion that a lesser custodial sentence is called for. In the circumstances therefore, the Appellant sentence of life imprisonment is set aside and substituted by a sentence of this court sentencing the Appellant to serve ten (10) years imprisonment with effect from 27th August 2015 when the Appellant was convicted by the trial court. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF SEPTEMBER 2018

L. KIMARU

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 11TH DAY OF OCTOBER 2018

HELLEN OMONDI

JUDGE