



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT LODWAR

CRIMINAL APPEAL NO. 5 OF 2018

CONSOLIDATED WITH CRIMINAL APPEAL NO. 6 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

SAID OSMAN.....1ST APPELLANT

SIMOI EKAI.....2ND APPELLANT

(From original conviction and sentence in Criminal Case No. 390 by the Senior Resident Magistrate – Hon. M.K. Mwangi delivered on 21st February 2018 at Lodwar)

JUDGEMENT

1. The Appellants SAID OSMAN and SIMON EKAI were 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 which were that on the 23rd day of June 2017 at Lodwar Town in Turkana Central sub-county within Turkana County jointly robbed JANCINTA NJERI MACHARIA of one handbag, two mobile phones – make Samsung make J2 and X-TIGI, one bible, one rosary, one spectacle, one nice and lovely body lotion, mobile charger and four spiritual books all valued at Kshs.21,400/= and at immediately before or immediately after time of such robbery used actual violence to the said JANCINTA NJERI MACHARIA.

2. They faced an alternative charge of handling stolen goods contrary to **Section 322 (1)** as read with of **Section 322 (2)** of the **Penal Code**. The particulars of which were that on 23rd day of June 2017 at Lodwar town in Turkana central sub-county within Turkana County jointly handled one handbag, two mobile phones – make Samsung make J2 and X-TIGI, one bible, one rosary, one spectacle, one nice and lovely body lotion, mobile charger and four spiritual books all valued at Kshs.21,400/= the property of JANCINTA NJERI MACHARIA knowing or having reason to believe them to be stolen goods.

3. They both pleaded not guilty, were tried and convicted on the main charge and sentenced to suffer death as provided for in law.

4. Being aggrieved by the said conviction and sentence, both of the Appellants filed their respective appeals and in identical homemade grounds of appeal raised the following grounds:-

a) The trial magistrate erred both in law and facts in failing to observe the glaring contradiction in the prosecution case.

b) Crucial prosecution witnesses were never called.

c) The conditions for identification of the appellants were not conducive and neither was any identification parade done.

5. When these appeals came up for hearing before me both were consolidated for purposes of trial and determination. The Appellants appeared in person and filed written submissions which they relied upon with the 2nd Appellant submitting further that the name on the charge sheet was not his in support of which he produced his identity card No. 24243835 being the name PETER MONTIT ERENG and that he was during the trial called by a name he did not know and neither did he know the 1st Appellant. The 1st Appellant submitted further that the complainant did not know him and neither did she mention him.

6. Mr. Mong'are for the state opposed the appeal and submitted that the prosecution called all the relevant witnesses to enable it sustain a conviction. He submitted that there was no contradiction in the prosecution case and neither was an identification parade necessary since the Appellants were known to the complainant and the conditions were favourable for the complainant to identify the Appellants.

7. The 1st Appellant in his written submissions submitted as follows:-

1) There was contradicting statements made by PW2 as to how the 1st Appellant was arrested – that is to say whether he was assisted by members of the public in arresting the 1st Appellant for which **RUWALA v REPUBLIC [1934] EACA 570** was submitted in support. There was further contradiction on the date the complainant was examined by PW3. It was submitted that it was crucial to conduct identification parade the complainant having stated that she was not able to identify the 1st Appellant at the scene. It was finally submitted that vital prosecution witnesses including those that arrested the Appellant were never called.

8. The 2nd Appellant it was submitted that the complainant in his evidence in brief stated that she lost consciousness immediately she was attacked and that she did not know any of the accused persons before the attack. It was therefore submitted that the prevailing conditions were not favourable for identification. It was submitted that there was contradictions in the complainant's evidence and neither was her evidence corroborated by any independent witness and or identification parade so as to confirm that the complainant knew his attackers since the circumstances of identification were difficult for which the cases of **CHARLES OMTANYI v REPUBLIC [1986] CA 6** and **RAMADHAN v REPUBLIC [1990] CA 63** were submitted.

9. It was submitted that the trial court did not consider the 2nd Appellant's defence and in particular the fact that the names in the charge sheet were not his.

10. This being a first appeal the court is required to re-evaluate the evidence tendered before the trial court and to come to its own conclusion through taking into account the fact that it did not unlike the trial court have the advantage of seeing and hearing witnesses. See **OKENO v REPUBLIC [1977] EACR 32, SOKI v REPUBLIC [2004] 2KLR 2**.

11. I would therefore proceed to re-evaluate the case as recorded before the trial court. **PW1 JACINTA NJERI MACHARIA** testified that at 7.00 p.m. while coming from her place of work at Lodwar Hospital she was held by one man while the 2nd person strangled her until she lost consciousness. When she gained consciousness she screamed attracting people who gave chase and arrested the two people. In cross-examination she stated that she did not see any other person at the point when she was attacked. She stated that she saw the 2nd Appellant hold her by the belly through the use of her phone light before she was grabbed by the neck and that the Appellants were arrested soon after the attack.

12. **PW2 PC OSCAR OUMA** stated that he was in the company of **KPR LOCKAB NAKOLI** when they noticed that the complainant had been knocked down by two men and when the two men saw them they ran away and the **KPR** and members of the public gave chase arresting them. The 2nd Appellant had a handbag which the complainant identified as hers. It was his evidence that there were street lights through which he was able to identify the Appellants who were arrested 100 meters from the scene. He stated under cross-examination that he knew the name of the said Appellant whom he saw struggling with the complainant on the ground.

13. This evidence was corroborated by **PW4 JACOB MAKORI** an **NPR** who stated that there was adequate security lights. **PW3 PC JOSEPHAT MUYA** testified that he saw the Appellants attack the complainant and raised alarm attracting **PW2** and **PW4** who responded and arrested the Appellants. In cross-examination by the 1st Appellant he confirmed that he was the investigating officer and what he had stated in this evidence-in-chief came from his investigations. He confirmed that he was not an eye witness to the offence. **PW3 KENNETH WASILWA** produced P3 form confirming that the complaint sustained injuries classified as harm.

14. When put on their defence the 1st Appellant stated on oath that on 22/6/2017 he had quarreled with his mother-in-law who threatened and reported him to the police. She was referred to the area chief who summoned him to appear before him on 26/6/2017. He went to the mosque for prayers and on the way back met two police officers and a **KPR** who arrested him and took him to the police station where he met someone he had never seen before and was thereafter charged in court for this offence.

15. The 2nd Appellant stated that his name was **PETER MONTIT ERENG** and that on 23/06/2017 at about 8.00p.m. he had gone to the hospital to see his aunt. On the way back home he went for a short call when he was arrested by two police officers who took him to the police cells where he was beaten before being given another name and charged in court for an offence he did not commit.

16. From the record of appeal the analysis of evidence herein and the written submission by the Appellants I have identified the following issues for determination:-

1) Whether the conditions prevailing were suitable for positive identification of the Appellants.

2) Whether the prosecution case was proved beyond any reasonable doubt.

3) What order should this court make as regards sentence.

17. On the issue of identification of the Appellants the evidence tendered by the prosecution was that there was adequate street lights at the scene and that **PW1** was at the time of the attack using her phone light which enabled her to identify the 2nd Appellant. The Appellants were immediately arrested at the scene and as per the evidence of **PW2** and **PW4**, there was nobody else at the scene. I therefore find that there was no mistaken identity of the Appellants. The 2nd appellant in his defence placed himself at the scene. It is clear from the judgement that the Appellants defence was considered and properly rejected by the trial court.

18. The Appellants having been arrested at the scene and properly identified thereat by **PW9**, I find and hold that it was not necessary to conduct identification parade and therefore find no merit on this ground of appeal. Whereas there were some contradictions between the testimony of the investigating officer and the arresting officer, I find that these contradictions were of minor nature and did not prejudice the

Appellants in any way as the evidence tendered pointed to the Appellants participation in the commission of the offence herein.

19. The Appellants have also raised the issue of crucial witnesses not being called to testify against them by the prosecution. I have however noted that they have not identified any of the alleged crucial witnesses who were not called. From the proceedings the only witnesses who were not called are the members of the public who allegedly gave chase and assisted in arresting the Appellants but I see no prejudice that was occasioned to the Appellants by failure to call them guided by the principle set out by the Court of Appeal in the case of **DANIEL MUHIA GICHERU v REPUBLIC CRIMINAL APPEAL NO. 90 OF 2007 (UR)** where the court had this to say:-

*“The often trodden principle of law is that the prosecution is obliged to prove its case against an accused person beyond any reasonable doubt. How many witnesses is it expected to call to satisfy that burden? In **BUKENYA and OTHERS v UGANDA [1972] EA 349** the Court of Appeal for Eastern Africa held that the prosecution has the discretion to decide as to who are the material witnesses. That Court, however, qualified that general principle by stating that:*

“... There is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent ... While the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case.”

20. The 2nd Appellant raised the issue of his name and submitted that the trial court erred in convicting him using his name **SIMOI EKAI** while his actual name as per the identity card number 24243835 the original of which he produced before me was **PETER MONTIT ERENG**. Whereas the Appellant raised this issue in his defence before the trial court, the same was never addressed in the judgement appealed against. Whereas there is possibility that the Appellant was charged under wrong names, the 2nd Appellant did not raise the issue during the testimony of the arresting and investigating officer so as to give the opportunity for the same to respond to the allegation raised. I have noted that the Appellant attended to that trial all along and there is no evidence tendered to show that he was not the person arrested and charged with the offence under which he was convicted.

21. I further find and hold that the Appellant did not suffer any prejudice and there was no miscarriage of justice in the use of the name which he has denied belonged to him. In this I find support in the decision of **JMA v REPUBLIC [2009] KLR 67** where the court held in respect of defect on the charge sheet as follows:-

“It is not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the Criminal Procedure Code was meant to cure such an irregularity where prejudice to the appellant is not discernible.”

I am therefore satisfied that the names used whether belonging to the 2nd Appellant or not did not prejudice the Appellant as he was able to offer his defence to the said charges and was properly convicted based on evidence on record which I find credible having reviewed the same herein.

22. The final issue for determination regards the sentence imposed by the trial court. It is evident that the court did not take into account while sentencing the Appellants the Supreme Court decision in **FRANCIS KARIOKO MURUATETU v REPUBLIC [2017] eKLR** where the court declared the mandatory nature of **Section 204** of the **Penal Code** unconstitutional. I have therefore looked at the sentence given against the fact that all the items stolen from the complainant were recovered and the fact that the Appellant only applied “*ngeta*” on the same and has come to the conclusion that the court ought to interfere with the court’s exercise of discretion on sentencing the Appellants herein noting that the sentence of death was manifestly excessive in the prevailing circumstances.

23. In the final analysis, I find no merit on the appeal against conviction which I hereby dismiss but will allow the appeal against sentence which I hereby set aside and substitute with a sentence of seven (7) years from the date of Judgement of the trial court and it is so ordered.

Dated, delivered and signed at Lodwar this 8th day of November, 2018.

.....

J. WAKIAGA

JUDGE

In the presence of:-

_____ for the Respondent

_____ for the Appellant

Accused - _____

_____ - Court assistant