REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 9 OF 2013

PETER KINYUA NJERU....................APPELLANT

VERSUS

REPUBLIC..RESPONDENT

J U D G M E N T

A. Introduction

1. The appellant was convicted and sentenced of the offence of robbery with violence contrary to **Section 295 as read with Section 296 (2) of the Penal Code** and was sentenced to death.

2. The appellant preferred this appeal and filed a petition of appeal on the 27th February 2013 seeking for orders that this court to quash the trial magistrate's decision and set aside the sentence therein.

3. The appellant's petition of appeal is grounded on the following: -

> ***a) That there was no positive identification.***
>
> ***b) That the learned trial magistrate erred both in law and facts in relying on single identifying witnesses made in each count.***
>
> ***c) That I prayed to be furnished with a copy of the O.B. report dated 4th & 5th March 2004 of Runyenjes police station.***
>
> ***d) That further the trial magistrate erred in both law and facts when he convicted me by basing his findings on contradictory evidence adduced by the prosecution witnesses.***
>
> ***e) That the trial magistrate erred in law and facts when he rejected my defence without explaining proper reasons for its rejection thus violating the law provisions under section 169(1) of CPC.***

4. The parties agreed to argue the appeal by way of submissions. The appellant despite being granted time on several occasions failed to file his submissions. The respondent filed ad served its submissions as required.

B. Respondent's Submissions

5. In response to ground 1 of the appellant's petition, the respondent submitted that the question being raised by the appellant was one of fairness of trial on which it was submitted that the appellant was given a chance to cross-examine and re-examine all the witnesses.

6. The respondent further submitted, relying on the Canadian case of **Republic v Lifchus**, that the appellant's presumption of innocence was washed away immediately he was put on his defence, a presumption the appellant failed to rebut given that his defence of the prosecution witnesses having grudges against him was not sustainable against the overwhelming prosecution evidence tabled.

7. The respondent further submitted that the appellant's rights were upheld whenever a new trial magistrate took up the case considering the long time the trial took. She relied on the cases of **Ndegwa v Republic (1985) eKLR 535** and **Joseph Kamau Gichuki v Republic.**

8. In response to grounds 2, 3 and 4 the respondent submitted the appellant was positively identified and further that the appellant did not rebut the OB extract. It was the respondent's submission that the law on identification by way of recognition was settled and the appellant had not rebutted this. He relied on the cases of **R v Turnbull (1976) 63 Criminal Appeal R 132** as well as that of **Anjononi v Republic [1980] KLR 59.**

9. In response to ground 5, the respondents submitted that the evidence adduced clearly disclosed the offence the appellant was charged with and that there were no inconsistencies as alleged by the appellant.

10. In response to ground 6, the respondent submitted that the trial court's mode of writing the judgement was proper and the provisions of the law and procedure were complied with. Any failure to comply with Section 169 of the CPC was not fatal to the prosecution's case.

C. Analysis of Law

11. This being a first appeal, this court is mandated to analyze and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that: -

> ***"On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".***

12. Moreover, a first appellate court could not interfere with those findings of the lower court which are based on the credibility of witnesses unless no reasonable tribunal could make such findings or where it is shown that there existed errors of law (**Republic vs. Oyier [1985] KLR 353)**.

13. The appellant stated that he pleaded 'not guilty". I have perused the court record and note that trial court complied with the law and practice related to the taking and recording of pleas of guilt was stated in iconic decision in *Adan v Republic [*1973] **EA 445 at 446.**

14. From the court record, it is clear that the charges against the accused were read to him, in Swahili, and explained to him and he answered that they were not true. I further note that the appellant's response was noted verbatim. Consequently, I find that the appellant's plea was unequivocal.

15. Grounds 2, 3 and 4 all relate to identification of the appellant. The appellant contends that the trial court erred by relying of evidence of his identification by recognition. A perusal of the court record reveals that the appellant was previously known to PW1, PW2, PW3 and PW4. PW1 identified the appellant by his nickname, "Kamucie". PW1 further testified that the appellant was a frequent customer at the bar and that he had known him since childhood. PW1 said he even knew the parents of the appellant.

16. PW2 said that he also knew the appellant for a long time before the incident as a police informer. This was echoed by PW6 the officer who arrested the appellant. He said that the appellant used to lie to the public that he was a police informer. PW3 was also very specific that the appellant "came in last and put off the lights."

17. PW3 testified that he knew the appellant as he (appellant) "walks with police" and further referred him by his nickname "Kamuzi". PW3 further corroborated PW2's evidence that the accused was the one who switched off the lights. PW4 also identified the appellant by his other nickname as "Kamucii". I take judicial notice that the appellant who was well known by the witnesses had two nicknames "Kamucii" and "Kamuzi".

18. It was observed by the Court of Appeal in the case of **Karanja & another V Republic [2004] 2 KLR 140, 147 (Githinji JA, Onyango Otieno & Deverell Ag JJA): -**

> ***"The law as regards identification under difficult conditions is now well settled. In the case of Cleophas Otieno Wamunga vs Republic Court of Appeal Criminal Appeal No. 20 of 1989 at Kisumu, this Court states as follows: -***
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> ***"We now turn to the more troublesome part of this appeal, namely the appellant's conviction on counts 1 and 2 charging him with the robbery of Indakwa (PW1) and Lilian Adhiambo Wagude(PW3). Both these witnesses testified that they recognized the appellant among the robbers who attacked and robbed them……… What we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleged to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification.*** *The way to approach the evidence of visual identification was succinctly stated by Lord Widgery, CJ in the well known case of R vs Turnbull [1976]3 All ER 549 at page 552 where he said:-*
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> ***'Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.'"***

19. There was electricity lights in the bar when the gang of four struck. The appellant was dressed in a jungle jacket and a white trouser as PW3 said and was the one who switched off the lights. He was seen and recognized by PW2 and PW3 as he did so. He had been in the bar earlier according to PW2 when he asked to be bought beer by the witness who declined on the ground that he had no money. This confirms that PW2 saw the appellant twice, during the robbery and a short while before the gang struck.

20. The witnesses were aided to see the appellant by the light in the bar before it was switched off.

21. From the evidence of the key witnesses, the appellant was from the neighbourhood and a frequent customer in that bar explaining why the key witnesses who were customers in the bar that night recognized him. Most of them were from the same area and there was prior interaction between them and the appellant.

22. As was held in the **Karanja & Another** case (supra) the trial magistrate warned himself as to the possibility of error in identification and reached the conclusion that there was no error based on the overwhelming evidence of positive circumstances.

23. It was held in the case of **Kiriungi vs Republic [2009] KL**R **638** that: -

> ***The identification evidence did not stand alone. Anthony (PW3) lent support to it when, shortly after the complainant reported the incident, they went to the scene and PW3 also managed to identify the appellant. Even if it was a different gang, the appellant was the common factor in both and was properly identified. The ground of appeal failed.***

24. The appellant was arrested with the assistance of the key witnesses PW2, PW3 and PW7 the same night about one hour or less after the robbery. The witness knew the home of the appellant and led PW6 to arrest him immediately after making the report at Runyenjes police station. The robbery took place at around midnight and the report was made at 12.30 am. The accused arrested almost immediately afterwards after being positively identified to PW6 by the complainants. PW6 said the complainants referred to the appellant as peter Kinua Njeru alias Kamucii.

25. The facts of this case are similar to those of the **Kiruingi** case (supra) because the recognition evidence "did not stand alone" and was overwhelming. The defence of the appellant that there was mistaken identity does not shake the weighty evidence of recognition.

26. I am satisfied that the evidence of recognition of the appellant was positive and no mistake as to the identity was likely to arise.

27. Just like the trial court, I am convinced that the identification of the appellant by the prosecution witnesses in the circumstances of this case was free from possibility of error.

28. The appellant in one of the grounds stated that he requested of OB of Runyenjes police station and was not supplied with it. I have perused the record and noted that the OB the appellant wanted No. 23 of 8/1 of 2003 was availed by PW6 by order of the court. It was given to him and he read it over to the court. It contained an assault report by the appellant himself.

29. It is therefore not correct to say that the OB was not supplied to him. This ground of appeal has no basis.

30. The appellant contended that the trial court erred by convicting him on contradictory evidence produced by the prosecution witnesses. The appellant has not cited instances where evidence tendered by the prosecution is contradictory. I have perused the court record and find that the testimony of PW1, PW2, PW3, PW4 and PW7 was corroborative and RELIABLE. The trial magistrate who had the opportunity of observing their demeanour found these witnesses credible.

31. I am inclined to further state that it is trite law that minor contradictions assuming they existed on their own are not sufficient to impeach the testimonies of the prosecution witnesses. In **Erick Onyango Ondeng' v Republic [2014] eKLR** the Court of Appeal stated that not every contradiction would cause the evidence of witnesses to be rejected. There would need to be more to the contradiction.

32. The appellant contended that trial magistrate erred by rejecting his defence without giving proper reasons for its rejection thus violating the law provisions under section 169(1) of CPC. Section 169 of the CPC provides;

> *"169. (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it."*

33. I have perused the trial court's judgment and I have found that the same is signed and dated. Although it does not specify the point or points for determination, it consists of the decision and the reasons for the decision. The trial magistrate after summing up the prosecution and defence case stated as follows: -

> *"The identification herein linked the accused to the charges herein. The identification is without error. In sum the prosecution have proved their case beyond reasonable doubt as demonstrated in the evidence herein, the accused person is found guilty in all the counts and convicted thereof – for offences contrary to section 292 (2) of the penal code."*

34. In the instant case the trial court did not set out the point or points for determination but generally considered the entire evidence on record and made conclusions on the issues in this case. The ingredients of the offence were discussed and found to have been established. The judgment is dated and signed and it is in my considered opinion that the judgment is sound and valid.

35. The failure to fully comply with **Section 169 (1) of CPC** by the trial Court did not prejudice the appellants. This position is informed by the evaluation by the court of the entire evidence and reasons given for the finding.

36. The ingredients of the offence of robbery with violence were clearly set out by the Court of Appeal in the case of **OLUOCH –VS – REPUBLIC [1985] KLR** where it was held:

“Robbery with violence is committed in any of the following circumstances:

a) ***The offender is armed with any dangerous and offensive weapon or instrument; <u>or</u>***

b) ***The offender is in company with one or more person or persons; <u>or</u>***

c) ***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 ………”*** *[our own emphasis].*

37. The use of the word **OR** in this definition means that proof of **any one** of the above ingredients is sufficient to establish an offence under section 296(2) of the Penal Code.

38. In this case, it is clear that the appellant and his companions were armed with a gun and pangas. There was evidence of shots mad in the air to scare the victims. Spent cartridges were collected at the scene of crime. This fulfills ingredient that the complainant and other prosecution witnesses were accosted by a group of about four men who were armed with dangerous weapons. PW7 sustained injuries during the robbery and the P.3 form was produced by PW7. All the ingredients of the offence of robbery with violence under section 296(2) were established.

39. The defence of the appellant was that the key witnesses had a grudge against him. He did not explain what sort of grudge each of the five (5) witnesses PW1, PW3, PW4 and PW7 had against him. The magistrate evaluated the defence and found that it was a mere denial incapable of dislodging the overwhelming evidence of the prosecution. I am in agreement with the learned magistrate that the defence was not plausible.

40. It is therefore not correct that the appellant’s defence was not considered in the judgment.

41. I find that the prosecution proved the offence of robbery with violence contrary to **Section 296(2) of the Penal Code.**

42. The conviction was based on cogent evidence and it is hereby upheld.

43. As regards the sentence, the appellant was sentenced to death. He was a first offender. In regard to the decision of the Supreme Court in **FRANCIS KARIOKO MURUATETU & ANOTHER VS REPUBLIC [2017] eKLR,** I take notice that the mandatory nature of death sentence in murder cases was declared unconstitutional. The same principle is applicable to the mandatory death sentence under Section 296(2) of the Penal Code in regard to the offence of robbery with violence.

44. For these reasons, I hereby set aside the death sentence imposed by the trial magistrate and substitute it with twenty-five (25) years imprisonment to run from the date of conviction on 28/01/2009.

45. The appeal stands dismissed save for the sentence.

46. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 11TH DAY OF DECEMBER, 2018.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Nandwa for the Respondent