REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 42 OF 2015

ANTHONY KAMAU MWANIKI …… APELLANT

VERSUS

REPUBLIC ……...…… RESPONDENT

(An Appeal from the Judgment of the Senior Principal Magistrate Honourable S. Mokua in Eldoret Criminal Case No. 4397 of 2012, dated 20th February, 2015)

JUDGMENT

1. The appellant *Antony Kamau Mwaniki* was tried and convicted jointly with two other persons namely *Douglas Imwana* and *Silvester Kiptoo Kemei* in three counts with the offence of Robbery with violence Contrary to *Section 296* of the *Penal Code*. They were each sentenced to death in count I but the sentence in the other two counts was held in abeyance in view of the sentence in count 1.

2. The particulars in count I alleged that on the night of 4th and 5th day of July 2012 at Kabokbok Market Center in Keiyo South District Elgeyo- Markwet County, jointly with others not before court, while armed with dangerous weapons namely pangas and big sticks and using Motor Vehicle Registration No. KAZ 310X Toyato Vitz and No. KAK 516 Toyota Starlet, they robbed *Everlyne Orgut* of 40 pieces of sunlight soap, 26 pieces of Geisha soap, 15 packets of Omo of 500gms each, 30 Ariel soap of 500gms each, 20 Lido bar soaps, pieces of Menengai bar soap, 20 pairs of slippers, 25 Kitenge lessos, 20 pairs of white striped bed sheets, one yellow bed sheet, 30 white striped bed covers, 20 White braziers, 20 white Baby vests, an empty sugar sack, 20 Hair pieces, one Blue bag, Brown brief case, 40 credit cards of YU- 15 credit cards of 50/- each, 30 credit cards of Airtel, 15 credit cards of 10/- each, 25 credit cards of 20/- each, 5credit cards of 50/- each and 5 credit cards of 100/- each, 40 credit of Orange, 30 credit cards if 50/- each and 10 credit cards if 100/- each, a mobile phone make Nokia 1200 and another Mobile phone make Nokia C2 of IMEI No. 35933880441962706 and 359338041962714 and cash Ksh 303,110/= all valued at Kshs 353,110 and at the time of such robbery, they wounded the said *Everlyne Orgut.*

3. In the second count, it was alleged that on the night of 4th and 5th July 2012 at about 12.30 at Kabokbok market center in Elgeyo Marakwet County jointly with others not before court while armed with dangerous weapons namely Pangas and big sticks and using motor vehicles Registrations numbers KAZ 310X Toyota Vitz and KAK 516K Toyota starlet, they robbed *Lilian Tuitoek* of her mobile phone make X2 Itel serial No. 860312011741244 and 860312011741236 valued at 2,800/- and at the time of such robbery threatened to use actual violence to the said *Lilian Tuitoek.*

4. In the third count, the particulars thereof alleged that at the same place and time, jointly with others not before court while armed with dangerous weapons namely Pangas and big sticks and using motor vehicles Registrations numbers KAZ 310Z Toyota vitz and KAK 516K Toyota starlet, they robbed *Chelagat*

Reuben of her mobile phone make Nokia 1616 valued at 1500/- and at the time of such robbery threatened to use actual violence to the said *Chelagat Reuben*.

5. The appellant was aggrieved by his conviction and sentence hence this appeal. In his petition of appeal dated 25th March 2015, the appellant relied on eight grounds which can be condensed into the following three main grounds;

(i) That the learned trial magistrate erred in law and in fact in convicting and sentencing the appellant on evidence which did not support the charge.

(ii) That the learned trial magistrate erred in law and in fact in convicting the appellant on the basis of circumstantial evidence which was insufficient to prove the charges preferred beyond reasonable doubt.

(iii) That the learned trial magistrate erred in law and fact in shifting the burden of proof to the appellant.

6. The appeal was prosecuted by way of oral submissions. At the hearing, learned counsel *Mr. Omusundi* argued the appeal on behalf of the appellant while learned prosecuting counsel *Ms Oduor* represented the state. In his submissions, *Mr. Omusundi* urged the court to find that the appellant was wrongly convicted as none of the prosecution witnesses identified him at the scene of the robbery; that the appellant was not arrested at the scene but was arrested later following a public uproar. Counsel further submitted that the prosecution failed to prove the charges against the appellant beyond any reasonable doubt. He urged the court to allow the appeal.

7. The state contests the appeal. *Ms Odour* in her opposition to the appeal submitted that the prosecution proved every element of the charges in the three counts beyond any reasonable doubt; that the appellant was linked to the commission of the offences as he was found in possession of money and other items stolen during the robbery; that he was also positively identified by the complainants during the robbery. On the strength of those submissions, she invited the court to dismiss the appeal for want of merit.

8. This is a first appeal to the High court. I am alive to the duty of the 1st appellant court which is to revisit the evidence tendered before the lower court, re-evaluate it and reach my own independent conclusions but giving due allowance to the fact that unlike the trial court, I did not see or hear the witnesses.

See: ***Okeno V Republic 1997 EA 32***; ***Njoroge V Republic (1987) KLR 19.***

9. In support of its case, the prosecution called a total of thirteen witnesses. Briefly, the prosecution case was that the complainant in count 1 who testified as PWI was in her house asleep on 4th July, 2012 at around 12.30 am when she was awoken by noise outside her door. She was living in a house behind her shop. Her daughter *Lilian* (PW2) and house help (PW5) were sleeping in the shop.

10. PWI recalled that on hearing the noise, she went to switch on the lights and this is when about three people stormed into the house after breaking the door open. They pushed her under the bed. One of them started strangling her while the others ransacked the house after which they went to her shop which they also ransacked. They stole her money amounting to Ksh 303,100, an assortment of shop goods, a bag, towel, bedsheet and assortment of credit cards and mobile phones. One of the mobile phones stolen belonged to Pastor *Grace Sang* (PW8). She had left it charging in the shop. Three other phones were stolen from PW2 and PW5. The robbers loaded the stolen items into a vehicle and left.

11. When the robbers left, PWI, PW2 and PW5 raised an alarm and neighbours gathered. PW1 also reported the robbery to the area chief (PW4) who in turn notified the O.C.S Tambach police station (PW12) and Administration Police officers at Chepsigor AP camp who included PW9 Senior sergeant *Tarias Kidugale*. On receiving PW4's report, PW9 decided to mount a road block at the Iten/Tot junction using some lorries. Soon thereafter, a motor vehicle approached at high speed. It stopped at the

roadblock and on being asked to surrender, its driver who he allegedly identified as the appellant herein refused to surrender. Instead, he fired a gun shot and ran away.

12. Members of the public who subsequently gathered at the scene set ablaze the vehicle together with another which had also stopped at the road block. They did so after removing goods which had been loaded in one of the vehicles. The goods were an assortment of shop goods, money amounting to Ksh 303,100, a bedsheet and a bag. The complainant went to the scene and identified all recovered items as part of her property stolen during the robbery.

13. According to PW3's evidence, the motor vehicle in which the various items were recovered belonged to him. It was registration No. KAK 516K, a taxi he had given to the appellant at 7pm on 4th July, 2012 to carry on his taxi business. He had also given him his phone in case some of his clients called him. The appellant was a fellow taxi driver. PW3's phone was recovered from the appellant when he was later arrested by PW12 on a road with gunshot wounds. The phone was produced in evidence as Pexhibt 11. Upon his arrest in the company of one of his co-accused, the appellant was taken to Tambach police station where he was charged with the offences in respect of which he was convicted.

14. The appellant in his defence elected to give a sworn statement and called his wife as his witness. In his statement, he denied having committed the offences as alleged. He swore that after PW3 gave him his vehicle and phone, he was hired by his co-accused (2nd accused in the lower court) who alongside the 3rd accused led him to a place where they were to collect some luggage. He was left waiting on a road and after loading their luggage on the vehicle, he started his way back. However, on the way, he found lorries blocking the road. He stopped the vehicle and gunshots were fired at them. He was wounded. He crawled to a nearby bush for safety. He claimed that he did not know his customers before; or that they had committed any offence or the kind of luggage they had loaded into the vehicle he was driving.

15. I have re-evaluated and re-considered the evidence tendered before the lower court in its entirety. I have also considered the grounds of appeal, the judgment of the learned trial magistrate and the oral submissions made on behalf of the appellant and the state.

16. Having done so, I find that only two key issues arise for my determination which are as follows;

(i) Whether the evidence on record proved beyond any reasonable doubt the offence of robbery with violence preferred against the appellant in each count; and;

(ii) Whether there was sufficient evidence direct or otherwise to prove beyond doubt that the appellant participated in the robberies.

17. Before considering the above issues, I wish to briefly comment on the appellant's complaint that the trial court disregarded his defence. A reading of the learned trial magistrate's judgment leaves no doubt that the trial court considered the appellant's defence but dismissed it as untrue. Nothing therefore turns on that ground of appeal.

18. Turning now to the first issue, for the offence of robbery with violence to be proved, the prosecution must tender evidence proving the three essential ingredients which constitutes the offence. There must be proof beyond doubt that any of the following circumstances existed;

(i) That the offender was armed with any dangerous and offensive weapons or instruments; or

(ii)That the offender was in the company of one or more persons; or

(iii) That at, or immediately before or after the time of the robbery, the offender wounded, beat, struck or used other personal violence on the victim.

I hasten to add that proof of any one of the above ingredients is sufficient to establish the offence**.** See: ***Oluoch V Republic (1985) KLR 549; Johana Ndungu V Republic Criminal Appeal No. 116 of 1995***

19. In this case, I wholly concur with the learned trial magistrate that the prosecution managed to prove beyond any reasonable doubt that the offences of robbery with violence as charged had been committed. There is sufficient evidence to prove that more than one person broke into the complainant's house; inflicted injuries on PW1 (See the evidence of PW10) and stole an assortment of shop goods, cash, scratch cards and mobile phones.

20. What is of fundamental importance in this appeal is a determination whether the learned trial magistrate erred in finding that the appellant was one of the persons who executed the offences. I note that in his judgment, the learned trial magistrate based his conviction of the appellant on his finding that the prosecution had adduced circumstantial evidence that pointed exclusively to the guilt of the appellant as charged. But was this actually the case?

21. On my re-appraisal of the evidence, I agree with the learned trial magistrate that there was no direct evidence connecting the appellant to the commission of the offences. The prosecution relied solely on circumstantial evidence. For circumstantial evidence to sustain a conviction, it must be such that it was incapable of any other explanation except the accused person's guilt as charged.

22. The Court of Appeal in ***Milton Kariuki & 4 others V Republic (2015) ekLR*** re-iterated the principle enunciated by its predecessor, the Court of Appeal for Eastern Africa in ***Rex V Kipkering Arap Koske & 2 others (1949) EACA 135*** that "***in order to justify a conviction on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused".***

23. The court continued to express itself as follows;

> ***"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which would weaken or destroy the inference".***
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> See also: ***Kariuki Karanja V Republic (1986) KLR 190***; ***Sawe V Republic (2003) KLR 354; Mwendwa V Republic (2006) I KLR 133.***

24. Applying the above principle to the present case, i find that the only evidence adduced by the prosecution connecting the appellant to the commission of the offences was the claim that the appellant was the driver of the vehicle from which the items stolen from the complainants were recovered; that he refused to obey PW9's order to surrender and instead fired a gun and ran to a nearby bush. But PW9 did not explain in his evidence how he was able to identify the appellant as the person who fired a gun in the darkness considering that the motor vehicle was intercepted at night and he did not claim that there was any source of light.

25. In his judgment, the learned trial magistrate held as follows;

> ***"The defence of the accused person was that he did not know the accused persons. They hired him and he took them where they wanted to collect their luggage. Foremost, PW3 gave him his vehicle before dark. The incident herein took place at 12.00 a.m. The 1st accused did not tender any explanation as to how he rendered his taxi services for a duration of 8 hours. He also did not indicate whether he raised bones with the 2nd and 3rd accused pertaining to what they were upto, the silence as demonstrated herein is a clear indication that he was part of the robbery herein".***

26. In my view, the learned trial magistrate misdirected himself by finding that the appellant had rendered taxi services to his co-accused persons for eight hours. This finding was not based on any evidence. There is no indication from the evidence on record regarding the actual time in the evening that the appellant's services were hired in order to justify the conclusion that as the robbery took place at around

12 a.m, the appellant had been hired for eight hours. In any event, the learned trial magistrate fell into error when he found that the appellant had indeed been hired to transport his co-accused to the place which turned out to be the scene of the robberies but proceeded to find him guilty because he failed to explain why he rendered the taxi services for a long time and why he did not question his customers about their intentions. In my opinion, this amounted to shifting the burden of proof to the appellant which is against the well-established principle of criminal law that the burden of proving any charge against an accused persons rest squarely on the shoulders of the prosecution and never shifts to an accused person. An accused person has no obligation to prove his innocence.

> See: ***Ramanlal Trambaklal Bhatt V Republic (1957) EA 332; Abdalla Bin Wendo & Another V Republic 1953 EACA 166.***

27. Besides, if the learned trial magistrate believed that the appellant's taxi services had been hired by his co-accused and there was no evidence to suggest that he actually knew them previously, I find that there was no basis for the trial court to find that the appellant had a common intention with his co-accused to commit the offences.

28. In my view, a careful interrogation of the evidence presented by the prosecution and the appellant's statement in defence reveals that there was a set of co- existing circumstances at the material time which weakened and/or destroyed the inference of the appellant's guilt as charged. The appellant protested his innocence claiming that he had been hired by his co-accused persons; that he did not know his co-accused before ferrying them to a place around Iten to collect their luggage; that he was not aware of the commission of the offence or the nature of luggage they loaded into the motor vehicle. These evidence which was not materially shaken by the prosecution, in my view provided an explanation which was more compatible with the appellant's innocence rather than his guilt as charged.

29. I am also unable to agree with *Ms Oduor's* submission that the fact that the appellant ran away from the scene was evidence of guilty knowledge on his part. This is because there is evidence that the appellant had sustained gunshot wounds in the shooting that ensued the interception of the motor vehicle and any human being in the appellant's position would have behaved the same way he did in order to save his life his innocence notwithstanding.

30. For all the foregoing reasons, I am satisfied that the appellant's conviction in each of the three counts was not safe and it cannot be allowed to stand. In the circumstances, I find merit in the appeal and it is hereby allowed. The conviction in each count is accordingly quashed and the sentence of death imposed in count 1 set aside. The appellant shall be set free forthwith unless otherwise lawfully held.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 15th day of February 2017

In the presence of:

The appellant

Mr. Kimani for the appellant

Mr. Mwaura for the State

Mr. Lobolia court Clerk