REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 42 OF 2016

KELVIN ONYANGO…..............................……APPELLANT

VERSUS

REPUBLIC……...........................…………RESPONDENT

(Appeal against Judgment, Conviction and Sentence imposed in Criminal Case Number 709 of 2014 in the Chief Magistrate's court at Kisumu delivered by Thomas Obutu P.M. on 28.9.16).

JUDGMENT

The trial

The Appellant herein Kelvin Onyango has filed this appeal against his conviction and sentence on a charge of robbery with violence contrary to Section 295 as read with section 296 (2) of the Penal Code. The particulars of the offence were that:-

> ***"On the 11th December 2014 at about 12.22 Hrs at Triple Frogers Hotel at Milimani in Kisumu East District within Kisumu County jointly with another not before court robbed David Onyango of a motor cycle Reg. No. KMDE 146 make Boxer red in color valued at Kshs. 90,000/- and immediately before the time of such robbery wounded the said Daniel David Onyango***

The prosecution called a total of five (5) witnesses in support of their case. The brief facts were that on 11.12.14, complainant David Onyango was riding motor cycle Reg. No. KMDK 146D when he met the appellant near Triple Frogers Hotel. That the appellant snatched the keys from complainant and drove the motor cycle away. PW1 Samwel Otieno Opinde and PW2 Lawrence Nicholas Ochieng said that after receiving information of robbery of motor cycle KMDK 146; they traced it to a garage in Manyatta area and the garage owner informed them that it belonged to the appellant who was sitted nearby. That appellant was consequently arrested and handed over to the police. PW4 Daniel Ochieng stated that he had given his motor cycle Reg. No. KMDK 146Q to the complainant to use in bodaboda business. That on 11.12.14; complainant informed him that the motor cycle had been stolen but it was recovered the same day. PW5 Sgt Robert Muset received the appellant from members of public who included the complainant who reported that appellant had robbed him of motor cycle Reg. No. KMDA 146 after hitting him with a blunt object as a result of which he lost consciousness.

At the close of the prosecution case the appellant was ruled to have a case to answer and was placed on his defence. He gave sworn defence in which he denied the charges. On *28.9.16*, the learned trial magistrate delivered his judgment in which he convicted the appellant and after listening to mitigation sentenced him to suffer death.

The appeal

Being dissatisfied with the conviction and sentence, the appellant lodged the instant appeal. In his amended grounds of appeal filed on 14th March 2017, the appellant raised six (6) grounds to wit:-

> **1. THAT the trial court erroneously convicted him on a defective charge sheet**
>
> **2. THAT appellant was not accorded a fair hearing under Article 50(2)(j) of the Constitution**
>
> **3. THAT the trial court erroneously failed to comply with section 211 of the CPC**
>
> **4. THAT the trial court erroneously convicted him in the absence of evidence by essential witnesses**
>
> **5. THAT the trial court erroneously relied on the alleged recovered motor cycle to convict him**
>
> **6. THAT the defence statement was not given due consideration and the court relied on inconsistent evidence by prosecution witnesses**

Analysis and Determination

This being a court of first appeal, I am guided by the ruling of the Court of Appeal in the case of ***OKENO VS. REPUBLIC [1972] E.A.32***, where it held that:-

> ***"It is the duty of a first appellant court to consider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld"***

The trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and this court is in dealing with this appeal obligated to give allowance for that. I have perused the written submissions of the appellant and I note that they reiterate the six (6) grounds of Appeal stated herein above.

The appeal was opposed by the state. I have carefully read the written submissions and considered oral submissions by the appellant and on behalf of the state.

In dealing with this appeal, I will separately consider the grounds of appeal.

a. Was the charge of robbery with violence proved?

Ms. Wafula, learned counsel for the state submitted that the state had no objection to reduction of the offence to that of simple robbery since no violence was proved.

In the case of ***Ganzi & 2 others versus Republic (2005) 1KLR 52*** the Court of Appeal set out elements of the offence of robbery with violence as:-

> "***(a) The offender is armed with any offensive weapon or instrument; or***
>
> ***(b) The offender is in company with one or more other persons; or***
>
> ***(c) At or immediately before and or immediately after the robbery the offender would beats, strikes or use other personal violence to any other person.***

The learned trial magistrate correctly set out the ingredients of robbery with violence and stated:

> ***……it is not disputed that a robbery took place wherein the complainant was assaulted.***

Contrary to the learned magistrate's finding and as correctly submitted by the appellant complainant

stated that he was robbed by a lone, unarmed man. He claimed to have been assaulted but tendered no evidence in support thereof. The state has indeed conceded that the ingredients of robbery with violence were not proved and that the conviction and sentence was erroneous.

Having so found; I will then consider if the lesser charge of simple robbery contrary to section 295 of the Penal Code was proved.

b. Defective charge sheet

PW3, the complainant described the motor cycle stolen from him as KMDK 146 Q. PW1 told the trial court that he recovered motor cycle KMDK 146 while PW2 who was present during recovery referred to motor cycle KBDK 146 Q. The investigating officer stated that the motor cycle that was handed over to him and which complainant reported was robbed from him was KMDK 146 Q. The motor cycle produced before the court was KMDK 146 Q. The charged sheet describes the robbed motor cycle as KMDK 146.

Section 134 of the Criminal Procedure Code dealing with the framing of charges states:-

> "***Every charge or information shall contain and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.***

The charge as framed is clear, it discloses the offence which the appellant was charged and it one of robbery with violence contrary to Section 295 as read with section 296 (2) of the Penal Code. I do not think that the failure to include, in the charge sheet, the letter Q to the registration number of the motor cycle in question prejudiced the appellant or occasioned a miscarriage of justice. Such an error is curable under section 382 of the *Criminal Procedure Code* which provides:-

> ***Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:***
>
> ***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.***

c. Fair hearing under Article 50(2)(j) of the Constitution

Article 50 (2) every accused person has the right to a fair trial, which includes the right—

> ***(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;***

I have perused the record of the trial court and the appellant did not raise the issue of statements either during trial or when he made his submissions. I therefore find no merit in this ground of appeal.

d. Section 211 of the CPC

The appellant has complained that Section 211 of the Criminal Procedure Code was not complied with. After evaluating the above evidence presented before the court, the learned trial magistrate was satisfied that a *prima facie* case had been established and put the accused on his defence. Indeed the trial court did not put it on record that section 211 of the Criminal Procedure Code was complied with. However it is clear from the record that the appellant chose to make a sworn defence and proceeded to do so at length. The totality of this shows that the options available to the appellant were explained and he made his

choice. In my considered view, I find that failure by the learned trial magistrate to record that he had complied with section 211 CPC did not occasion the appellant any prejudice.

e. Failure to call essential witnesses and recovery of motor cycle

The appellant submitted that the mechanic that was found repairing the motor cycle in question was neither charged nor called as a witness. Both PW2 and PW3 stated that they traced the motor cycle to a garage where they found it being repaired. PW2 stated:-

> "***I approached the fundi who told me that the motor cycle belonged to accused who was sitted next to it. The fundi ran away but we arrested accused who had taken the motor cycle for repairs".***

PW3 on the other hand stated:-

> ***"We found the motor cycle being repaired. I asked the mechanic who said that the motor cycle belonged to accused".***

In cross-examination by the appellant, PW2 stated:

> ***"During the confusion the mechanic slipped away".***

Ms. Wafula, learned counsel for the state confirmed that accused was arrested on the basis of the evidence by PW1 and PW2 and that the prosecution did not call the mechanic that implicated the appellant to testify.

In ***Nguku v Republic* [1985] KLR 412**, the Court of Appeal observed:_

> "***….where a party fails to produce certain evidence, a presumption arises that the evidence produced, would be unfavorable to that party."***

I have considered the evidence by PW2 and PW3 and it is obvious that their evidence was based on what they were told by the mechanic. The question that begs an answer is whether the mechanic could have stolen the motorcycle. In the absence of evidence by the mechanic; this court finds that the evidence by PW2 and PW3 implicating the appellant is hearsay and inadmissible. I therefore find that the lower court erred in law in failing to treat as hearsay and reject the allegation that a mechanic told PW2 and PW3 that the motor cycle belonged to the appellant.

f. Defence statement

In his defence, appellant said he went into a garage to give way to a convoy of motor cycle riders. That the riders went to the same garage and claimed that a motor cycle that was at the garage was stolen. That he was arrested and charged with an offence he did not commit.

In rejecting the appellant's defence, the learned trial magistrate state:-

> ***"The accused in his defence denied the allegations and stated that his business was of making beds and selling them. He however was not able to proof that fact and more so how he found himself at the garage where he was arrested".***

The explanation by the appellant as stated herein above should have been accepted as sufficient to justify his presence at the garage unless the prosecution adduced evidence to rebut the same. No evidence was adduced to rebut the said explanation. In the circumstances, I find that the appellant's explanation was good enough and exonerated him from the offence. Further to the foregoing and with due respect to the learned trial magistrate; the appellant was under no obligation to prove that he makes and sells beds because that was not an issue for determination by the trial court.

For the reasons I have stated, I am afraid the evidence presented by the prosecution is not watertight. I find that the conviction and sentence entered against the appellant was not safe and should not be allowed to stand. I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant should be set be at liberty unless he is otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 3rd DAY OF April 2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Clerk

Appellant

For the State