REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HIGH COURT CRIMINAL APPEAL NO. 20 OF 2017

STANSLOUS WAMBUA NZIOKA …..... APPELLANT

-VERSUS-

REPUBLIC ……....RESPONDENT

JUDGEMENT

INTRODUCTION

1. The Appellant was charged with offence of **Robbery Contrary to Section 296(2) Penal Code** particulars being that on **25/03/2013 at 8:00 p.m**. at Wote Township Makueni County jointly with others not before court while armed with dangerous weapon namely a pistol, robbed **Geoffrey Mwendwa Nganga** of his Motor vehicle registration number **KBK Toyota Fielder, a Techno mobile phone and a pair of Safari Boot shoe**s all valued at **Kshs.1,204,500** and at the time of such robbery used violence against the said Geoffrey Mwendwa Nganga.

GROUNDS OF APPEAL

2. The Appellant pleaded not guilty of the charge and the matter proceeded to full trial.

3. The trial court found Appellant guilty and convicted him to suffer death.

4. Being aggrieved by the aforesaid decision, the Appellant lodged the instant appeal and set out seven grounds of appeal namely:-

i. The Learned Magistrate erred in law and fact by delivering a judgment which was not reflective of the facts presented by the parties.

ii. The Learned Magistrate erred in law and fact by failing to appreciate the law as it relates to burden of proof required in proof of criminal cases.

iii. The Learned Magistrate erred in law and fact by failing to find a doubt in favour of the Appellant on the face of glaring contradictions of prosecution witnesses.

iv. The Learned Magistrate erred in law and fact by failing to appreciate the lack of evidence in regard to the identification by a single witness against the Appellant.

v. The Learned Magistrate erred in law and fact by failing to appreciate that the offence of robbery with violence had not been proved beyond reasonable doubt against the Appellant.

vi. The Learned Magistrate erred in law and fact by failing to consider the Appellant's defence.

vii. The Learned Magistrate erred in law by shifting the burden of proof to the Appellant.

5. The parties agreed to canvass appeal by way of written submissions. The Appellant filed and served the same but the Respondent opted to tender oral submissions.

6. In reaching its decision, the court has bear in mind the fact that it did not have an opportunity of seeing the witnesses as they testified and therefore is not expected to make any findings as to the demeanor of the said witnesses.

7. Finally, this court is expected and mandated to consider the grounds of appeal put forward by the Appellant in reaching its judgment. See **KINYANJUI –VS- R (2004) 2KLR P.364.**

BACKGROUND

8. The background of the case is traced in the brief evidence of the witnesses. PW2 employee of PW1 was employed as taxi driver of PW1 **motor vehicle KBK 548T**. On **25/03/2013,** at **8.00 p.m.** at **Wote Township** he was approached by an elderly man who sought service of a taxi to take him to Mavindini to pick a patient.

9. This being the first Appellate court, it is enjoined to look at the evidence before the trial court afresh, re-evaluate and examine the same and reach its own conclusion whether or not to uphold the conviction of the Appellant.

10. The charges agreed were **Kshs.1, 500/=**. After a short drive to about 100 metres the customer told him that there was an offer of **Kshs.1, 200/=** by somebody else to transport him to the same place. PW2 packed the car as the passenger pleaded with him.

11. As they bargained two people emerged one from driver's side and another on passenger's side, entered the car and sandwiched the PW2. One of them had a pistol. The PW2 was pushed to the back seats. They drove for a distance and he was removed from the car and he was tied both hands and legs and returned in the car and made to lie downward at the foot rest across back seats.

12. In the course of the night the car had exhausted fuel and the same was sourced via a boda boda/ motor cycle. He had to be removed out of the car where it had stalled. After motor vehicle was fueled one of the attacker who was guarding him took him back to the car.

13. While being taken back to the car he noticed somebody checking car's dashboard whom he recognized as the Appellant whom he knew as Wambua Kilingwa.

14. PW2 used to see Appellant within Wote Township. When the Appellant realized that he was recognized by PW2, he told his colleagues that they kill PW2 as he had recognized him.

15. PW2 pleaded with them swearing that he had not recognized Appellant and that he did not know him. The old member of the gang told other gang members that PW2 was a good person and his life should be spared. PW2 was placed back in the car.

16. The PW2 said that the car was illuminated by a roof light powered by a 12 volt battery. Its brightness enabled him to see and identify the Appellant. The car had tinted glass window but the driver's door glass window was completely lowered down. He recognized the Appellant while being pushed back to the car.

17. In the cross examination, PW2 stated that he could identify the old man who approached him for taxi services in the material night. Further, he told court that Appellant was the person who approached his car from driver's side and later took control of the car. He denied ever meeting Appellant at Choma Base Club in 2013 January and fought over a woman and that he ever threatened Appellant over a woman.

18. PW2 further testified that the Appellant and his brother threatened him and dissuaded him from testifying against the Appellant in court.

19. The persistent threat by the duo made him to relocate to Moyale.

20. The PW2 confirmed that when he made report to the police, he gave the names of the Appellant as the person he recognized as one of the robbers.

21. PW3 and 4 who saw the stolen car did not recognize or identify the robbers when the same was being fueled at the petrol station where they were working the material night.

22. PW1 testified that she had employed PW2 as the taxi driver and she got report from PW2 that the motor vehicle was stolen and that he identified one of the robbers.

23. PW5 was called by PW2 and informed of the robbery and with his colleagues proceeded to the scene where PW2 had been tied and collected exhibits. He said he had known Appellant but they arrested him after one year after the incident.

24. This was because the Appellant went into hiding after the robbery. PW6 took over investigation and produced exhibits.

25. When the prosecution closed its case, the court found appellant had case to answer and the Appellant was put on his defence.

DEFENCE

26. His defence was that there was grudge between him and the PW2 over the fight they had over a woman who he later married. They had fought over her at Choma Base Club.

27. He also disputed motor vehicle ownership and produced search records which showed it was owned by a deceased person. He denied the offence and involvement in the incident. He said he was arrested at a club area court on 26/03/2014. He claimed that he was framed. He did not call any witness and he gave sworn evidence.

28. The trial court based its conviction/ verdict on identification evidence by a single witness after warning itself as required by the law.

29. On submissions, the Appellant via his advocate Mr. Nzioki submitted that there was no sufficient evidence to support the element of identification. This is because the PW2 single identifying witness told the court that he **"recognized one Wambua Kilingwa whom he used to see at Wote Town. He was one driving the car ……."**

30. The advocate submitted that it is not clear how he identified him in difficulty circumstances at night. He relied on the case of **JOHN MURITHI NYAGA –VS- REPUBLIC (2014) EKLR** which cited **MAITANYI –VS- REPUBLIC (1980) KLR** on reliance of single identifying witness evidence and submitted that it was unsafe to convict Appellant on same evidence.

31. He also cited the contradictory evidence of P3 and P4 on the evidence of fueling of the robber's car. However both never identified robbers.

32. Finally, the advocate submitted that the Appellant defence was not considered, and relied on **JOSHUA THURANIRA –VS- REPUBLIC (2014) ELR**.

33. Mr. Orinda assistant Deputy Public Prosecutor in opposition to the appeal submitted that:-

- The PW2 identified the Appellant whom he recognized. The circumstances of identification

were conducive as narrated by PW2. The Appellant was known by PW2.

34. On ownership of the motor vehicle the same was a non-issue. The PW2 was special owner as one in possession of the car at the time of the robbery. The contradictions of PW3 and PW4 were irrelevant as they do not undermine the PW2 evidence on identification.

35. The defence by the Appellant was an afterthought which the court noted and found it had no merit.

36. After going through the evidence on record and the submissions by the parties, I find that the emerging issues are:-

1. Whether the identification evidence was safe to warrant conviction?

2. Whether prosecution proved its case beyond reasonable doubt?

3. Whether Appellant defence was considered?

37. Section 295 Penal Code defines offence of robbery as follows:-

Any person who steals anything and at or immediately before or immediately after the time of the stealing it uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or prevent or overcome resistance to its being stolen or retained, is guilty of a felony termed as robbery.

38. Section 296(2) Penal code provides that:-

"If the offender is armed with any dangerous weapon or offensive weapon or instrument, or is in company of one or more other person or persons or if at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes, or uses other personal violence to any person, he shall be sentenced to death."

39. It is not disputed that the motor vehicle was stolen and the robbers were armed with a pistol which was by any standard a dangerous weapon.

40. The core of the case is on whether the accused was properly identified. In this case, the evidence turns on the recognition.

41. PW2 testified that he saw Appellant through the driver's window which was completely lowered; at the time the Appellant was checking the dashboard of the car. The motor vehicle was illuminated by roof light of the car powered by 12 volt battery. PW2 was next to motor vehicle being pushed to enter the car.

42. PW2 had known the Appellant since 2010 as he was always at Mwaani stage within the bus park. PW2 used to see him attending crew Maruti Matatus. Appellant brother owned a Maruti Matatu plying between Wote and Mwaani.

43. In MAITANYI case the court held that:-

"***Many sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in day light. It is at least essential to ascertain the nature of the light available. What sort of light its size and its position relative to the suspect are all important matters helping to test the evidence with the greatest care.***

It is not a careful test if none of these matters are known because they were not inquired into. ……..".

44. The trial court noted that the light of the car was enough to enable PW2 to recognize the Appellant.

The Appellant was caught off guard by PW2 and thus wanted to have him decimated for recognizing him. He was saved by the old man member of the gang.

45. Even after arrest the Appellant realized the only evidence against him was of PW2 and thus he and his brother tried to stop PW2 from testifying in court. Due to their threats to PW2, he had to relocate from Wote to Moyale.

46. The court notes that the evidence in the instant case was of recognition of the Appellant which is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in one form or the other. See **ANJONI –VS- REPUBLIC (1980) IKLR 1566.**

47. I agree with the trial court that the evidence on recognition was impeccable and reliable.

48. On prove of the offence, the court having admitted the recognition of the Appellant as reliable and the demeanor of witness forth right and truthful, the prove beyond reasonable doubt that Appellant was one of the robbers burden was discharged.

49. The defence of the Appellant was mere denial and a clear case of an afterthought. He never called any witness including the woman he married to confirm the source of his alleged grudge with PW2. It never raised any element of doubt to supplant the prosecution case.

50. The alleged contradiction of PW3 and PW4 had no bearing on the identification of the Appellant by PW2 which was the core issue in the matter.

51. The court therefore finds no merit in the appeal and dismisses the same. The conviction is affirmed and sentence confirmed.

SIGNED, DATED AND DELIVERED THIS 8TH DAY OF JUNE, 2017.

C. KARIUKI

JUDGE

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