REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 43 OF 2014

ABDIKADIR HUSSEIN MBERWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An Appeal from the original conviction and sentence on 5th June 2014 in Criminal Case no. 1294 of 2013 of the Chief Magistrate's Court at Garissa (Hon. B.J. Ndeda, SPM)]

JUDGMENT

INTRODUCTION

1. The appellant was convicted of the offence of robbery contrary to section 296 (1) of the Penal Code on the 5th June 2014 in Criminal Case no. 1294 of 2013 by the Chief Magistrate's Court at Garissa (Hon. B.J. Ndeda, SPM). He was, however, sentenced to death, which is the sentence prescribed for the offence of robbery with violence under section 296(2) of the Penal Code. The appeal therefore raises, in addition to the appeal on the merits, the question of law whether a trial court can lawfully sentence a person convicted for the offence of simple robbery to death.

A Question of Law

2. At the outset, the question whether the court has power to pass a sentence of death prescribed for the offence of robbery with violence contrary to section 296(2) of the Penal Code on a conviction for simple robbery under section 296 (1) of the Penal Code may be considered. The simple answer for this query is that, in accordance with the principle of *nulla poena sine lege* ("no punishment without a law authorizing it –see ***Black's Law Dictionary*** 7th ed. (1999)) in the Latin maxim ***nullum crimen sine lege nulla poena sine lege,*** there can be no authority to sentence for a penalty which is not prescribed by law for the offence in question.

3. Section 296 (1) of the Penal Code prescribes only for a maximum sentence of imprisonment for fourteen (14) years. It is section 296 (2) of the Penal Code on robbery with violence that provides for the death sentence. Section 296 of the Penal Code is set out in full below:

> ***"296. Punishment of robbery***
>
> *(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.*

*(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with 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 any other personal violence to any person, he shall be sentenced to death.***"**

4. Accordingly, upon conviction for the offence charged, which was robbery contrary to section 296 (1) of the Penal Code, the appellant could only have been sentenced to a maximum of 14 years. The sentence of death imposed by the trial is, therefore, illegal and it must be set aside. See ***Kasongo v. R*** (1985) KLR 465 that a sentence above the maximum prescribed for an offence is unlawful.

MERITS OF THE APPEAL

5. The charge and particulars of the offence were stated in the charge as follows:

"Charge: Robbery contrary to Section 296(1) of the Penal Code.

Particulars of Offence: ***Abdikadir Hussein Mberwa*** *– On the 24th day of September, 2013 at Dagahaley Refugee Camp in Dadaab District within Garissa County robbed Abdifatah Ahmed Lorian of his Nokia X-2 Phone valued at Kshs. 8,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Abdifatah Ahmed Lorian."*

The Prosecution's Case

6. The case for the prosecution was simply that on 24th September 2013 at 7.30pm at the United Nations High Commission for Refugees (UNHCR) Dagahaley Refugee camp in Daadab, Garissa County, the complainant (PW1) a student at Tawakal Secondary School was going home when he suddenly met with a person who was carrying a torch and armed with a panga. The attacker slapped the complainant with the blunt side of the panga and demanded that the complainant gives him his mobile phone. The complainant gave the attacker the phone and in fear started screaming, whereupon the attacker ran away. As he ran, the attacker fell down. The attacker rose up and continued running but dropped his identification documents, namely, a UNHCR refugee camp's ration card and Proof of Registration Manifest. The complainant recovered the documents and on examination found them to belong to the appellant.

7. When the appellant reported the incident to the police, he learnt that the appellant had, ahead of him, gone to the police station and reported that some people had wanted to rob him, taking his identification documents and in the process dropping a phone which he gave to the police.

8. The complainant identified the phone as his Nokia X2. The appellant was subsequently arrested by the complainant assisted by his brother and cousins using the photographs on the appellant's documents recovered from the scene of crime. The Investigation Officer, PW2 said that the appellant had taken the mobile phone to the Police Station without its sim card, which on the arrest of the appellant was found in his pocket and that upon investigations he had realized that the appellant had gone to give the report so as to protect himself because he knew he had lost his identification documents.

The Defence case

9. When put on his defence, the appellant gave sworn evidence and stated as follows:

"In the month of September on a certain day I had come from work. I was going to bath. I was carrying water. I saw someone standing by the door. I saw him. He attempted to ran away. I followed him. He ran away. I picked a phone on the road he had passed. I picked the phone, I went to the house, kept the phone and slept upto 7.00 am. In the morning, the owner came. We talked, went to police station and I told police the same. In the morning I realized I did not even have my ration card or ID card. I returned to the police station and told them. They gave me a note. I went to UN quarter. I was advised to go home. When I went home while returning I met

some boys. On the way they demanded for their phone. I told them we go to police station. We went to police station and told police who recorded my statement. The boys said they can identify their phones, the phone was shown to the boys by the police. They positively identified their phones and police inquired whether they needed the phone. They said they be given the phone. The investigating officer came, put me in custody and charged me. I did not snatch the complainant's phone."

10. In convicting the appellant the trial court found as follows:

"That in fact PW1 sim card was found on the accused person that accused reported a lie to cover up after realizing that his identification documents had dropped and his photo was on it. PW2 produced the manifesto Exhibit 1, ration card Exhibit 2, Nokia Phone CX, PW1 phone Exhibit 3 and sim card recovered on the accused person as Exhibit 4.

I have also considered the accused person defence which is that some day he was going to bath while carrying water when he saw someone by the door then the person attempted to ran away but accused followed him. The person dropped a phone and the accused picked it and took it to the police station. After sleeping overnight and realizing that he does not even have his identification documents. First and foremost the defence is different from the report the accused gave the police, the defence is material different. Most important is that the prosecution case speaks for itself. PW1 testimony to me is credible. It's not controverted not even during cross-examination. In fact PW1, the investigating officer confirmed that he told court he found PW1's sim card with the accused person. I have no doubt in my mind that it was the accused person who violently while armed with a panga robbed PW1 his phone. PW1 recognized the accused by aid of torch light, picked his identification document having the accused person photo. Most important is that prosecution case is proved beyond any reasonable doubt with regard to the charges. I consequently find the accused person guilty as charged and convict him accordingly."

11. The appellant challenged the decision of the trial court upon several grounds in his 'Amended Petition Grounds of Appeal' that -

1. "That the pundit trial magistrate erred in law and fact to convict me without considering that the ingredients of robbery were not established as required by the law hence the charge was defective.

2. That the pundit trial magistrate erred in law and fact to convict me without considering that the PW1's allegations were not neither corroborated nor proved during the trial.

3. That the pundit trial magistrate erred in law and fact to impose upon me a very severe sentence and excessively harsh compared with the charge I was facing.

4. That the pundit trial magistrate erred in law and fact to convict me without considering that there was no prove of any weapon used at the scene of crime.

5. That pundit trial magistrate erred in law and fact to convict me without considering that the alleged robbery was committed at night and identification was difficult.

6. That the pundit trial magistrate erred in law and fact to hold the allegations that my ratio cards were recovered from the scene whereas he failed to consider that we are all refugees and do stay in the same area and the ration cards can be misplaced and be obtained from anywhere within the designated area.

7. That the pundit trial magistrate erred in law and fact in denying me the benefit of doubts in execution of his judgment."

12. The Appellant also filed written submissions and at the hearing of the appeal Counsel for the DPP, Mr. Okemwa, made oral submissions and the Appellant responded orally and judgment was reserved.

13. The primary contention of the appellant was that the charge of robbery had not been proved and that the trial court could not tell which between the prosecution story and his defence was truthful as there were no independent witnesses to the alleged offence. In his submissions, the appellant wrote:

> *"It is evident that no other person was at the scene of crime, there is not other supportive witness, it was at night, the police or the trial magistrate were not at the scene of crime, the investigation of officer did not took the necessity of inquiring from any other source the truth of the PW1's allegations. He did not visit the scene of crime, how could they make conclusion that the complainant was telling the truth whereas his evidence was contradicting with my defence? What made them to believe the complainant and fail to believe me? I was not arrested by anybody. I took myself to police station (Utumishi kwa Wote) to report my case but they opted to put me in custody and spare the complainant. If the complainant held my property and if I held his property who could tell the truth, How PW1's property came in my possession and how did my property be in the PW1's possession? It needed other independent evidence to prove this allegation beyond reasonable doubts or to put a distinction between me and PW1. Upon evaluation of the whole evidence adduced by PW1, there is no proof of the alleged panga or the use of any violence or threat. It is also not evident whether the alleged incident occurred as framed by the prosecutions."*

14. The Counsel for the DPP countered that the prosecution had proved the offence of robbery under section 295 of the Penal Code but conceded that the sentence imposed was not authorized by the law as the appropriate sentence was 14 years imprisonment prescribed under section 296 (1) of the Penal Code. Counsel, consequently, urged the court to uphold the conviction but to alter the sentence of death and impose the correct sentence for the offence.

ISSUES FOR DETERMINATION

15. The questions for determination by the appellate court in accordance with its duty, as set out in ***Okeno v. R.*** (1972) EA 32, to review the evidence presented before the trial court are two-fold - whether the offence of robbery was proved to have been committed and, if so, whether the appellant was shown to have been the person involved in the robbery.

DETERMINATION

16. The Court must, consistently with its duty as a first appellate court evaluate the evidence, weigh the evidence presented by the prosecution and the defence as a whole to determine whether the offence and involvement of the appellant in the offence have been proved. Although it is not the duty of an accused to prove his innocence, the evidence that he gives in court must be used to evaluate the case for the prosecution and determine whether the charge facing the accused has been proved to the required standard of beyond reasonable doubt. In weighing of the evidence presented by the prosecution and the defence, the court may find the charged proved, or, by the accused's evidence, have a doubt as to his guilt raised.

17. In accordance with the guidance of the Court of Appeal in ***Nguku v. R*** (1985) KLR 412 (Hancox, JA, Platt & Gachuhi, Ag. JJA) -

> *'When analyzing the facts and the opposing evidence in a judgment, the individual facts and the relative credibility of the witness thereon comes first. The trial magistrate or judge should consider the evidence in its respective stages and then arrive at a general conclusion on the totality of the evidence.'*

18. Again in ***Ouma v. R*** (1986) KLR 619, the Court (Madan, Ag. CJ, Nyarangi, JA and Gachuhi, Ag. JA) said:

> *"At the time of evaluating the Prosecution's evidence, the court must have in mind the accused person's defence and must satisfy itself that the prosecution had by its evidence left no reasonable possibility of that defence being true. If there is doubt, the benefit of that doubt always goes to the*

accused person."

Evaluation of the evidence

19. The prosecution evidence is consistently and coherently adduced by the PW1 and PW2 to the effect that the complainant was attacked by a person whom the complainant could see from the light of the torch he carried was armed with a panga and with which he slapped him demanding to be given his mobile phone, and in running away the attacker fell down and dropped his identification documents leading to his arrest.

20. The sworn evidence of the defence is disjointed, incoherent, muddled and incapable of raising a reasonable doubt. While the appellant said he had seen someone come to his door while he was going to the bathroom and dropping his phone while running away, the said person is said to have come back the following day and the two went to the police station, only for the appellant to be confronted by some boys who demanded their phones from him leading to his arrest.

21. Of significance is the testimony of the Investigating Officer (PW2) that when the appellant went to report his alleged attack at the Police Station, he gave in a Mobile phone without its sim card, which was, subsequently, upon the arrest of appellant recovered from his pocket. The complaint was able to operate phone with the sim card using the sim card's password. The appellant did not cross-examine the witness on this aspect of his testimony, and the court must take it to be true. The recovery of the complainant's mobile phone sim card is corroborative of the complainant's evidence because if the appellant had merely found the phone after the alleged attacker took his identification documents, there would have been no need to remove the phone's sim card before handing it over to the police while making his report.

22. On proof of the offence, the complainant not only saw - using the light from the appellant's torch - the panga which appellant was armed with, but also had slaps of the panga on his back as the appellant demanded for the mobile phone. He could, therefore, tell that the appellant was armed with a panga during the attack.

23. As regards the appellant's identification, the complainant did not purport to identify him from having seen him at the scene of the attack; his identification was based upon the recovery of documents following the attack. The question could only be how his identification documents were found at the scene of the attack when according to the evidence of the Investigating Officer it is the complainant who lived just 50 metres from the scene of attack, which is consistent with his evidence that he was attacked while returning home. In the testimony of the Investigating Officer-

> *"At the scene we discovered that it's by the roadside, and the accused stays far away from the scene, it's the complainant who stays near there about 50 metres away."*

24. The court finds that the complainant was robbed of his mobile phone by the appellant while armed with a panga with which the appellant slapped the complainant on the back while demanding the mobile phone. Robbery is defined in section 295 of the Penal Code as follows:

> *"**295. Definition of robbery***
>
> *Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery."*

25. The appellant, in using the panga to slap the complainant on the back, not only used actual violence - never mind that it was not aggravated in nature - but also implicitly threatened to cut the complainant with the panga should he not comply with the demand to give out his mobile phone. The ingredients of the offence of robbery under section 295 of the Penal Code were thus proved. Although, the definitive section of the offence of robbery, that is section 295 of the Penal Code, was not cited in the Charge Sheet,

no prejudice within the meaning of section 382 of the Criminal Procedure Code was shown to have been suffered by the omission as the particulars of the Offence were clear that the charge, under section 296 (1) of the Penal Code, was that of simple robbery, as defined in section 295 of the Penal Code.

26. We, accordingly, find the charge of robbery under section 296 (1) of the Penal Code proved as against the appellant herein and the appeal against his conviction is, therefore, rejected.

CONCLUSION

27. The appellant was properly convicted for the offence of robbery based on identification. He was, however, wrongly sentenced to death for offence of the simple robbery for which he was charged. To right this wrong the Court dismisses the appeal against the conviction for robbery under section 296 (1) of the Penal Code but sets aside the sentence of death imposed on the appellant.

28. As the accused is a first offender, due allowance in accordance with the authority of ***Josephine Arissol v R*** [1957] EA 447 will be given. As observed in ***Otieno v. R*** (1983) KLR 295 by Porter, Ag. J. (citing *Josephine Arissol v R*, supra) *'the general rule is that a maximum sentence should not be imposed on a first offender [and] it is wrong to depart from this rule even if on the evidence, the accused person might have been convicted of a graver offence.'* We think that an imprisonment for a term of seven (7) years, that is half the maximum prescribed for offence robbery, will meet the justice of the case having regard to the circumstance of the case including the mitigation of the appellant.

ORDERS

29. Accordingly, for the reasons set out above, in exercise of powers granted in section 354 (3) (a) (iii) of the Criminal Procedure Code, the Court sets aside the sentence of death passed on the appellant by the trial court and substitutes therefor a sentence of imprisonment for 7 years for the offence of robbery under section 296 (1) of the Penal Code. The sentence will run from 5th June 2014, the date of Judgment and sentence in the trial Court.

DATED AND DELIVERED THIS 1st OF MARCH 2016.

GEORGE DULU

JUDGE

EDWARD M. MURIITHI

JUDGE

In the presence of:-

Appellant present in person.

Mr. Okemwa - for the Respondent.

Martin – Court Assistant