REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 26 OF 2015

CYRUS SILA MUTHINI ……...……..…APPELLANT

VERSUS

REPUBLIC....……..……..……RESPONDENT

(An appeal arising out of the judgment and sentence of Hon. I. Kahuya SRM in Criminal Case No. 960 of 2014, delivered on 20th February 2015 at the Chief Magistrate's Court at Machakos)

JUDGMENT

The Appellant was charged in the original trial Court with the offence 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 14th day of February 2014 at Masii market in Mwala sub-county within Machakos county, jointly with another not before court, the Appellant robbed Joel Muthini Kitavi of one motor cycle reg. No. KMDFO16F make Boxer valued at Kshs. 106,500/=, and at or immediately before or immediately after the time of such robbery used actual violence on the said Joel Muthini Kitavi.

The Appellant was arraigned in the trial court on 10th June 2014 where he pleaded not guilty to the charge. He was tried, convicted of the offence and sentenced to death. The Appellant being aggrieved by the judgment of the trial magistrate, has preferred this appeal against the conviction and sentence. The main grounds of appeal are stated in the Appellant's Petition and Memorandum of Appeal filed in Court on 25th February 2015 and Amended Grounds of Appeal the Appellant availed to this Court.

These grounds of appeal are that the trial magistrate erred in law and fact by:- framing issues that were not relevant to the circumstances of the case; convicting the Appellant on the basis of opinion and not facts; convicting and sentencing the Appellant when the ingredients of the charge were not proven beyond reasonable doubt; relying on PW1's evidence which was inconsistent, contradictory and uncorroborated; relying on insufficient identification evidence; allowing the trial to be presided over by an unqualified prosecutor; and not finding that no incident occurred on 14/02/2014 as it was never recorded in the Occurrence Book as required by law.

The Appellant availed written submissions to the Court wherein he argued that identification must be absolutely water tight to justify a conviction, and that it was difficult to commit an offence in an area where one is known as was his case. He relied on the case of **Earia Sebwato vs Rep, (1966) E.A 174.** The Appellant submitted that PW1 did not state in his first report that he is the one who robbed him. It was further submitted that PW2 did not identify him, and reliance was placed on the decision of **Moses Munyua Mucheru vs R, C.A Appeal No. 63 of 1989** in this regard.

It was contended that the prosecutor at trial was a Cpl Gatimu, a police constable whose rank was below the requirements stated in section 85(1) of the Criminal Procedure Code. The Appellant cited the decisions in **Eliremah & Anor vs R, (2003) KLR 537** and **Robert Maina Muchai vs R, Criminal Appeal No. 283 of 2004 at Nakuru** for this position. Furthermore, that there no evidence that PW1 was robbed on 14.2.2014 since it was not recorded in the police occurrence book, and reliance was placed on the case of **Tekerali Sio Kirongozi and Others vs R (1952) Vol. 19 page 259**.

Lastly, the Appellant submitted that there was insufficient evidence to warrant his conviction, and he relied in this regard on the holdings in **Okoth Okate vs R, (1965) E.A 55** and in **Ndege Maragua vs R, (1964) EACA 156.**

The Prosecution counsel did not file any submissions in response to the Appellant's appeal despite being given ample opportunity to do so.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

In this regard after going through the evidence of the three prosecution witnesses and that of the Defence, I note that the issues being raised by the Appellant as to the entries in the occurrence book on 14th February 2014 and the qualifications of the prosecutor are matters that were not raised in the trial court, and cannot be raised at appeal as this is new evidence that cannot be subjected to the process of examination at the appeal stage.

Of the three prosecution witnesses, the complainant Joel Muthini Kitavi (PW1), testified as to the events of the night of 14th February 2014 when his motor cycle registration No. KMDF 016F was stolen. PW2 was Wycliff Ndolo who testified as to witnessing the said theft on the night of 14th February 2014 as he e was riding to Masii. PW3 was PC Musyoki, the investigating officer in the case. None of the said witnesses testified or were cross-examined on the qualifications of the prosecutor neither did the Appellant raise it as an issue with the Court for the same to be verified.

The issue of the Occurrence Book was only referred to by PW1 and PW3 during cross-examination on the report made of the robbery, and PW3 stated that he did not bring a copy of the same to Court. The Appellant had ample opportunity at the time to request for the entries in the Occurrence Book and cross examine on the same, which he did not.

The two outstanding issues raised by the Appellant's grounds of appeal and submissions are firstly, whether there was proper identification of the Appellant; and secondly, whether the Appellant's conviction for the offence of robbery with violence was based on consistent and sufficient evidence.

On the issue of identification, it was urged by the Appellant that there was insufficient light for PW1 to identify his attackers, and that PW1 was not sure which of the two attackers robbed him of his motorbike. Further, that PW2 did not identify the attackers. Pw1 testified in this regard that he is a motor cycle operator, and that on 14th February 2014 at 8 pm he was at Masii working when a customer approached him and requested to be taken to Kilomene.

Further, that on the way they picked another person at Tawa, who was the Appellant, and that on arrival at the destination the two passengers were reluctant to alight. On sensing danger PW1 then sped off, and one of his passengers stood up and pulled out the ignition key of the motorcycle and they fell down with the motorcycle. It was PW1's testimony that the other man then strangled him briefly before the two attackers rode off with PW1's motorcycle, leaving PW1 behind.

PW1 stated that he had known the Appellant from before when he used to be a motor cycle operator, and that he was able to identify the Appellant through the street light that was on at Tawa. He further testified that he later saw the Appellant on 9.6.14 boarding a *matatu* (public transport van), and that is when he

mobilised his fellow motorcycle operators who gave chase and pulled the Appellant from the said *matatu*, and he was then arrested.

In the present appeal it is only PW1 who gave evidence as to the identity of the Appellant. PW2 specifically stated in his testimony that he did not know the identities of the two men that he witnessed fleeing with PW1's motorcycle.

I*n* ***Maitanyi vs Republic*** **, *(1986) KLR 196* the** Court set out what constitutes favourable conditions for a correct identification by a sole testifying witness as follows:

> **"Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error".**

In the circumstances of the present appeal PW1 testified that there were street lights that were on, at the place where he picked the Appellant and at the place of the robbery. PW1 in addition testified that the Appellant was previously known to him as a motorcycle operator, which evidence was corroborated by the Appellant's own testimony that he used to be a motor cycle business.

I am in this regard persuaded by the holding in the case of ***Wamunga vs. Republic, (1989) KLR 424*** in which it held *inter alia* as follows:-

> ***"1. Where the only evidence against a defendant is evidence of identification, or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.***
>
> ***2. Recognition may be more reliable than identification of a stranger but mistakes in recognition of close relatives and friends are sometimes made."***

In addition it has been stated by the Court of Appeal in **Anjononi and Others vs Republic, (1976-1980) KLR 1566** that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.

It is thus my finding that considering the prevailing conditions of identification and the recognition of the Appellant by PW1, it was safe to convict the Appellant on the basis of PW1's sole evidence of identification.

On the issue of whether there was sufficient evidence to convict the Appellant for the offence of robbery with violence, section 296 (2) of the Penal Code provides as follows:

> **"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."**

The prosecution must prove theft as **a central element of the offence of robbery with violence, as the offence is basically an aggravated form of theft. The** other elements of the offence of robbery with violence were elaborated by the Court of Appeal in ***Ganzi & 2 Others v Republic*** **[2005] 1 KLR and** in **Johanna Ndungu Vs Republic, Cr. App No. 116 of 2005 (unreported)** as follows:

1. If the offender is armed with any dangerous or offensive weapon or instrument, or

2. If he is in the company with one or more other person or persons, or

3. If at or immediately before or immediately after the time of the robbery, he wounds, beats strikes or uses any other violence to any person.

I am alive in this regard to the requirement that proof of any one of the ingredients of robbery with violence is enough to base a conviction of robbery with violence under section 296 (2) of the Penal Code as was held in **Oluoch vs Republic, (1985) KLR 549**.

In the present appeal the theft of PW1's motorcycle was witnessed by both PW1 and PW2, and PW1 produced a receipt of purchase of the said motor cycle as an exhibit. The said motor cycle was not recovered. However, this fact notwithstanding, this Court has already found that the Appellant was positively identified by PW1 as one of the robbers. The only element that raises a charge of robbery with violence that was present in this appeal was that the Appellant was in the company of another person at the time of the alleged robbery. This evidence by PW1 was corroborated by PW2 who saw three men at the time of the robbery, one of whom was the PW1. No offensive or dangerous weapon used by the Appellant in the robbery was brought in evidence, neither was there any evidence of any injury or harm caused to the PW1 by the Appellant .

In order to interrogate if this evidence was sufficient to convict for the charge of robbery with violence, the rationale for the requirement of more than one person during the robbery must be appreciated. This requirement is to illustrate that there was some overwhelming force used or meted on the victim of the robbery, so that even in the absence of an offensive weapon or injury, and such force will qualify as violence.

The evidence of PW1 in this regard was that the second robber pulled the key of the motorcycle from the ignition upon which they all fell down, whereupon the Appellant strangled him "briefly" while he was on the ground, while the second attacker picked up the motorcycle before he rode away with the Appellant. PW2 however testified that he saw one man holding another man by the collar while the third man picked up the motor cycle. When he turned back he found two of the men riding away with the motorcycle.

This contradictory evidence in my view should be construed in favour of the Appellant, particularly on the issue as to whether there was force used by more than one person on PW1, and I find it insufficient to sustain a charge of robbery with violence as against the Appellant. I accordingly find that the evidence before the trial Court disclosed a lesser cognate offence of simple robbery contrary to section 296(1) of the Penal Code, which offence carries a maximum sentence of 14 years imprisonment.

Pursuant to the provisions of section 179(2) of the Penal Code, I hereby quash the conviction of the Appellant of the offence of robbery with violence, and substitute it with the conviction of the Appellant for the offence of simple robbery. I also substitute the death sentence with a sentence of five (5) years imprisonment for simple robbery, which sentence is to run from the date of conviction by the trial Court.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 5TH DAY OF JULY 2016.

P. NYAMWEYA

JUDGE