REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MOMBASA

Criminal Appeal 46 of 2010

MWATA MWACHINGA MWAZIGE……....……..APPELLANT

VERSUS

REPUBLIC……..…RESPONDENT

JUDGEMENT

The Appellant was charged for robbery with violence contrary to section 296(2) of the Penal code the particulars being that on the 30th day of June 2008 at Mnaoni Village Voi township in Taita Taveta District within Coast Province, jointly with others not before court he robbed one Moses Mulilo Mbega of his mobile phone make Nokia 2600 valued at Kshs. 4,500/= and cash Kshs. 2,000 al valued at Kshs. 6,500/= and at or immediately before or immediately after the time of such robbery beat the said Moses Mulilo Mbega. The accused pleaded not guilty. He was tried at the Senior Resident Magistrate Court at Voi before P.N. Ndwiga who in a judgement delivered on 30th December 2009 found the Appellant guilty as charged and sentenced him to death. The Appellant was aggrieved and lodged the present appeal. In his petition of appeal the Appellant contended that:

1. The Learned Trial Magistrate erred in law and fact by failing to note there was no possibility of identification of the Appellant at the scene given the fact that:

    i. There was darkness

    ii. The position of identification was not disclosed

    iii. The duration of observation was not disclosed

2. The Learned Trial Magistrate erred in law and fact by relying on evidence of dock identification which he did not tell the investigating officer when making his report who attacked him.

3. The Learned Trial Magistrate erred in law and fact by not seeing that there was some contradictions between the witnesses especially PW1 and PW2.

4. The Learned Trial Magistrate erred in law and fact by not relying on what the investigation officer said that the complainant of this case did not give any names or descriptions of the said robbers who attacked him.

5. The Learned Trial Magistrate erred in law and fact by rejecting my defence which created doubt on the prosecution case.

The Appellant therefore prayed that his appeal be allowed, conviction be quashed and the sentence of death be set aside. Before the hearing of the appeal the Appellant sought and obtained leave to amend the grounds of appeal. The amended grounds of appeal were as follows:

1. That the Learned Trial Magistrate erred in law and fact in convicting the Appellant in reliance of a charge sheet which was fatal and incurably defective when given other facts-

i. The evidence tendered by PW1 did not reflect the sentiments of the charge sheet thus contravening section 134 of the Penal Code.(sic)

2. That the Learned Trial Magistrate erred in law and fact in convicting the Appellant in reliance of visual identification by recognition of PW1 and PW4 without properly finding the same was flawed when given that-

i. There is no indication as to who received initial report from PW1 and PW4 and what they said in that report thus contravening section 157 of the Indian Evidence Act.

ii. Even though PW1 purported to have identified and recognized the Appellant at the alleged scene of crime he did not reveal this to his cousin PW5

iii. PW1 gave contradictory accounts on the number of people he identified at the scene of crime thus contravening section 163(1) of the Evidence Act.

3. That the Trial Magistrate erred in law and fact in connecting the Appellant's arrest with the matter in question without proper finding the same was flawed when given other facts that-

i. The Appellant's arresters were left out of prosecution case thus contravening section 150 of the Criminal Procedure Code.

ii. The Appellant was not arrested with any incriminating thing to link him to the matter.

iii. The investigating officer never even visited the alleged scene of crime

4. The Learned Trial Magistrate erred in law and fact in rejecting the Appellant's defence statement which was not impaired by the shoddy fabricative prosecution case.

The Appellant filed written submissions and during the hearing of the appeal he relied on the written submissions and had nothing to add. In his written submissions he argued the grounds together. He contended that there was serious misdirection by the trial magistrate. This being a case of identification by recognition the trial magistrate did not consider that the basis of this case was not properly founded. He contended that PW1 contradicted himself. He told the court that he lost phone Nokia make 3100 while the charge sheet referred to 2600. That this contradiction violated section 134 of the Criminal Procedure Code. He referred to the decision in ***Alexander Nyachiro Marure and Marure v R,*** where it was held that there should be no material discrepancies between the evidence given to the police and the evidence given to court. The evidence of PW1 also touched on stick while the charge sheet did not mention him being beaten with a stick. The integrity of PW1 was thus in issue. On the question of recognition he contended that the trial magistrate was wrong on the finding of recognition. He contended that it was possible he was implicated by local speculation. That if PW1 was truthful, he would have given his name to the police. PW1's statement was silent on name of Appellant. He contended that the person who received the initial report was not called by the prosecution and this was a fatal breach of section 150 of the Criminal Procedure Code. He referred to the case of ***Olivia v Rep. (1965) EACA 144*** for the proposition that whenever the name of a person appears in an indictment then such person should be called as a witness. That the officers who arrested the Appellant were not called to give evidence and so it was a misdirection for the trial court to find that it was impossible for police to arrest the Appellant for obstruction and charge him with the present offence.

In reply state counsel for the Respondent supported the conviction and not the sentence. Counsel submitted that there was enough evidence on record to support the conviction. It was a case of recognition and not identification.

We have considered the submissions of both the Applicant and Respondent. It is the duty of this court to re-evaluate the evidence and satisfy itself that the conclusions reached by the trial magistrate were sound, of course giving allowance to the fact that this court does not have the benefit of having watched the witnesses testify and seen their demeanour.

The evidence of the complainant, PW1 was that he was in the company of John Mwansai. They were going to Gimba and used a short cut at Voi River that is when they met with four men. One man held him from behind and the other hit him on the head. They were Bakari and Mwata. He knew them before. Mwatata accused hit him with a stick and the other held him by the neck. He was hit on the head and bled on the right side of head and chest. He was beaten and fell on the ground. They then put heir hands in his pockets. They stole Nokia Phone 3100 and cash Kshs. 2,000. PW4 corroborated the evidence of PW1 by confirming that he was with PW1 on 30th June 2008 at about 6.00pm. He was the first to cross the river and left behind PW1 relieving himself. While ahead he heard noises and someone saying "Nammurder". He went back and saw four men. Two were standing by while one was holding the complainant by the neck. When they saw him they ran away. He was able to recognize the Appellant as among the 4 men as they used to go to the same school. PW3 confirmed the injuries suffered by the complainant and classified it as harm PW2 received the report of the complainant and recorded his statement and those of witnesses on 4/7/2008.

The trail magistrate evaluated the evidence and stated:

"All the foregoing testimonies confirmed that the accused was actually beaten by attackers. It therefore follows that actual violence was used on the complainant. Further the complainant stated that his phone and wallet containing Kshs. 2,000 and receipts were removed from his pocket during the attack. PW4 confirmed that the caused told him of the theft immediately after rescuing him. It is also clear from the complainant and PW2 that the stolen items were not recovered."

He considered the defence of the Appellant and discounted it as follows:

"I find no reason why the Police would frame a person who has obstructed their vehicle with a capital offence and later that person is well known and recognized as a participant in a robbery with violence. I therefore find that the defence does not create any doubt on the prosecution case."

This Court finds that the trial magistrate was justified in his conclusions. The Appellant did not question the fact that he went to Gimba Primary school. In his defence he did not raise any alibi as to his movements on 30/6/2008 at 6.00pm. He gave events of his arrest on 8/7/2008. He was at home which coincides with PW1 testimony that they found the Appellant hiding at home.

The fact that charge sheet had particulars of Nokia 2600 and not 3100 was not substantial to occasion a miscarriage of justice. It only shows that the complainant could have been mistaken as to make of his phone but is not evidence to support the assertion that he was not robbed of a phone. Either make of phone would still have supported the charge. The fact that the arresting officer was not called is also not of assistance to the Appellant. The provisions of section 150 of the Criminal Procedure Code empower the court to summon witnesses. It does not impose a burden on the prosecution to call an arresting officer. The question of the Appellant's name was not in issue. PW2 testified and gave names of officers who arrested him.

We do not agree with the Appellant that PW1 and PW2 were witnesses of questionable integrity. The inferences sought to be drawn by the Appellant are not justified from the evidence on record. Both of them recognized him as a former pupil they went to primary school together. He did not dent evidence during proceedings that he never attended Gumba primary school. Prosecution did not call evidence on age. Having not done so under Section 25 of the Penal Code, the Court should not have passed the death

sentence. He should have been held at the President's pleasure.

State Counsel submitted that the sentence was wrong as the Appellant was below 18 years at the time of committing the offence. In his defence the Appellant stated that he was 18 years old and the youngest in prison. He urged the court to consider his age too. The Appellant was below 18 years at the time of conviction. Prosecution did not call evidence on age. Having not done so under Section 25 of the Penal Code, the Court should not have passed the death sentence. He should have been held at the President's pleasure. Even though it has not been raised by the Appellant where the sentence is not sanctioned by law it is a nullity and this court has power to set it aside. It is clear that the Trial Magistrate did not consider the question of age of the Appellant in his sentencing. This amounts to misdirection. The upshot is that this appeal that the Appeal on conviction fails. The sentence of death is set aside and substituted with an order that the Appellant shall be held at the President's pleasure.

DATED AND SIGNED AT NAIROBI ON THIS 24TH DAY OF AUGUST 2012

M. K. IBRAHIM
JUDGE

DATED AND SIGNED AT MOMBASA ON THIS 7TH DAY OF SEPTEMBER 2012

M. ODERO
JUDGE

DATED AND DELIVERED AT MOMBASA ON THIS 7TH DAY OF SEPTEMBER 2012

JUDGE

In the presence of: Mr. Ongerio for State

Accused in person