



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & OTIENO-ODEK JJA)

CRIMINAL APPEAL No. 39 Of 2016

BETWEEN

IRENE BOSIBORI SAMWEL.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against the judgment of the High Court of Kenya at Nyamira, (Wakiaga & Nangilla, JJ) delivered on 11th December 2015

in

HCCr. Appeal No. 10 of 2012)

JUDGMENT OF THE COURT

1. The appellant as the 1st accused before (together with a one Josephat Onguso Moreka, 2nd accused) was charged with the offence of robbery with violence contrary to **Section 296 (2) of the Penal Code, Chapter 63 of the Laws of Kenya**. The particulars were that on the 19th day of February 2012 at Keroka Township in Masaba District in Nyanza Province jointly with another not before court armed with dangerous weapons namely panga robbed Jonathan Nkuti 2 mobile phones make Nokia 2310 and Matrix M all valued at Ksh. 8,500/= and immediately before and immediately after the time of such robbery used actual violence to the said Jonathan Nkuti.
2. The appellant faced an alternative charge of handling stolen property contrary to **Section 322 (1) of the Penal Code**. The particulars were that on the 20th day of February 2012 at Keroka Township in Masaba District within Nyanza Province otherwise that in the course of stealing retained a mobile phone make Mamix M the property of Jonathan Nkuti knowing or having reason to believe the same to be stolen goods or unlawfully obtained.
3. The prosecution case was founded on the testimony of PW1 Jonathan Nkuti who testified as follows:

I am Jonathan Nkuti. I am a teacher. I stay in Transmara. I know the accused persons. I did not know the accused persons before this offence. On 19th February 2012, I was at Keroka having been called by the 1st accused (Irene Bosibori). I had met the 1st accused person before this offence and she told me that she wanted some work. We exchanged numbers. Then on 18th February 2012, she called me and told me to go to Keroka and she was ready to work. We met at the stage. She told me that we should go to her house to collect a card. She told me to enter her house which I did. Then I heard somebody knocking the door. A person entered and was armed with a panga. That person wanted to cut me. He told me to sit down. The person told me to give him all I had. He searched me. That person is the 2nd accused person. He asked for my phone and I gave him. He went with my two phones and identity card. The two phones are before this court. They are Nokia 2310 and Matrix Phone. I had Ksh. 10,000/= in my phone. The phone had Ksh. 10,000/= in Mpesa account. I had about Ksh. 500/= in cash. The 2nd accused cut me on the left hand with a panga. I reported the matter to Keroka Police Station.

The 1st accused told me to wait for the 2nd accused as he will be coming back. Later, another person who I met in the house came and gave me back my identity card. The person told me to go the petrol station and look for the 2nd accused. I wanted my phones back. I reported the matter to the police station. I was sent to Masimba Hospital for treatment. I went near to the stage and I met another friend of mine who is a community policing officer (PW2). We went back to the house where I was attacked..... We went

into the house and found the 2nd accused. He was arrested. We searched him and we found my Nokia phone in the house. It was hidden under the bed. The 2nd accused said that the other phone was with the 1st accused person. We went to search for the 1st accused but that day we did not find her. The following day, the 1st accused was arrested and found with the other phone Matrix make. All the money Ksh. 10,000/= had been withdrawn from my account. The sim card was also missing. I had not known the 2nd accused before this. We found him in this house that day. The two accused persons are before this court.

4. PW2, Wilfred Nyajoe Joel, testified as follows:

I am a community policing officer. I know both accused persons. I know them well. On 19th February 2012, I recall I was at the stage area when I met one person who introduced himself as Jonathan (PW1). He said he had a problem. That he had been attacked and robbed inside a house after being lured by a lady whom he was trying to help get a job. I started my investigations and I told PW1 to take me to the house where he had been attacked. We went there but we only met some children who identified the name of the 2nd accused as the person who attacked PW1. The kids also said that their mother attacked PW1. We met the 2nd accused person. He told us he had hidden the phone and we went and found one phone inside the house. The other phone was with the 1st accused person. The complainant positively identified the two phones as his i.e. Nokia and Matrix phones. We searched for the 1st accused person but we did not find her. The 2nd accused escaped. The next day we searched and arrested the 1st accused. We found the matrix phone from her. It is this one in court. The phone she had taken for charging and she led us to where it was. After two weeks the 2nd accused resurfaced and I arrested him on the stage. The two accused are before this court. The panga was not recovered.

5. PW3 Joel Oyaro, a clinical officer at Kijauri Hospital, testified that on 20th February 2012, he examined the complainant who alleged that his thumb finger of the left hand had been cut. Upon examination, he established that the complainant PW1 had a cut on the thumb. The injury was one-day old.

6. PW4, Police Corporal, Jane Gikenya Kijamanga, No. 79399 testified that she was at the Police Station on the night of 20th February 2012 when she received a report from a community policing officer (PW2) who had brought the co-accused with the offence of having stolen the complainant's phones. PW4 received the recovered two mobile phones and produced the same in court as exhibits. In cross-examination, PW4 testified that the appellant was handed over to her by PW2 and that the complainant was not a friend to the appellant.

7. The appellant was put on her defence. She testified that the complainant (PW1) was her friend who visited her at her house around 11.00 am on 19th February 2011. That they took lunch together at around 6.30 pm when he left for town. That he gave her his telephone number and said he would return in the evening. That she waited for him and he did not return. That on the next day, she was arrested.

8. The 2nd accused, Josephat Onguso, testified denied the offence as charged stating that PW2, the community policing officer had a grudge with him.

9. Upon evaluating the evidence on record, the trial magistrate convicted the appellant and her co-accused. The magistrate stated:

PW2 who is a community policing officer informed the court how the complainant made a report to him on how he was attacked and robbed two phones. Immediately they went to the house where the attack had occurred and arrested the 2nd accused person. They recovered a Nokia phone which the complainant positively identified as his. The 2nd accused said that the other phone was with the 1st accused person. After one day she was also arrested and the other phone recovered. The complainant positively identified the phone as his. Indeed, the 1st accused does not deny meeting the complainant at her house. According to her, the complainant was her friend. The two phones which belong to the complainant was recovered from the accused persons.... It is strange how the 1st accused could just be arrested after the complainant left they you were friends.... I find that the prosecution has proved its case beyond any reasonable doubt and the two accused persons are hereby convicted under Section 215 of the Criminal Procedure Code for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. I make no finding on the alternative count.

10. Upon convicting the appellant and the co-accused, the trial magistrate on 19th September 2012 sentenced each of them to serve a period of ten (10) years imprisonment.

11. Aggrieved by the conviction and sentence, the appellant and the co-accused lodged an appeal to the High Court. Their appeal against conviction was dismissed. The sentence of ten (10) year imprisonment was enhanced to death sentence.

12. In upholding the conviction and declaring the sentence of ten-years imprisonment as illegal, the learned judges expressed as follows:

... In addition to this, both appellants were found in possession of stolen items i.e. the 2nd appellant was traced the same day by PW2 and he actually told them where to find one of the phones while the other phone was actually found in possession of the 1st appellant.

.....the 1st appellant's contention that they were lovers with the complainant is also dispelled by the fact that the moment after the complainant was robbed she disappeared and was only traced the following day in possession of the phone that the complainant had lost....

The trial magistrate in our view correctly convicted the appellants for the offence of robbery with violence. However, he sentenced them to serve 10 years in prison which is an illegal sentence.

Section 296 (2) of the Penal Code clearly stipulates a mandatory sentence for anyone found guilty for the offence of robbery with violence which is death.

13. In enhancing the sentence, the learned justices further expressed as follows:

The appellants were given a warning at the beginning of this appeal by the State that should they wish to continue with the appeal and should the appeal be dismissed; the State would be urging the court to enhance their sentence from ten years' imprisonment to the death sentence.

The appellants in their own wisdom or lack of it decided to proceed with the appeal and as we have demonstrated above, indeed the offence of robbery with violence was proved by the prosecution beyond reasonable doubt and the trial court correctly convicted both appellants for the same but simply misdirected himself when he sentenced the appellants to a 10-year sentence as opposed to the death sentence.

In the instant case, although there was no cross-appeal by the State, the appellants as I have indicated above had been warned by the State before the commencement of the appeal that should their appeal fail, the State would urge this court to enhance their 10-year sentence to death.

After analyzing the above evidence, we have come to the conclusion that the above appeal by the appellants lacks merit and we hereby dismiss the same. This court in exercising its powers in accordance with Section 354 of the Criminal Procedure Code enhances the 10 years' sentence meted out to each of the appellants by the lower court to the mandatory death sentence in accordance with Section 296 (2) of the Penal Code. It is so ordered.

14. Aggrieved by the judgment of the High Court, the appellant has lodged the instant second appeal urging the following grounds:

- (i) That the learned judges erred in failing in their duty to re-evaluate the evidence independently and arrive at their own conclusions.
- (ii) That the two courts below did not consider the serious and weighty contradictions and discrepancies in the evidence of PW1.
- (iii) That the circumstantial evidence set out by the prosecution was capable of several hypotheses.
- (iv) That the defence testimony was not considered by the two courts below.
- (v) That the trial court relied on inadmissible evidence to convict the appellant.
- (vi) That the learned judges did not interrogate the reliability of the complainant as a witness.
- (vii) That the prosecution did not prove the case beyond reasonable doubt.
- (viii) That the learned judges misdirected themselves in enhancing the sentence meted upon the appellant and that the death sentence meted was harsh and excessive in the circumstances of the case.

15. At the hearing of the instant appeal, learned counsel Mr. Okoyo Omondi holding brief for Ms Onsongo appeared for the appellant. The State was represented by the Prosecution Counsel I Mr. Peter Muia. Both parties filed written submissions in the appeal and cited judicial authorities.

APPELLANT'S SUBMISSIONS

16. In faulting the learned judges, the appellant submitted that the complainant (PW1) alleged to have made two initial reports to the police station regarding the incident. However, that the reports are not reflected in the investigators diary and there was no Occurrence Book (OB) number. That the only person who kicked off the investigation, arrested and charged the appellant was PW2, a community policing officer, who had no mandate or authority or power to do so. That pursuant to **Section 41 of the National Police Service Act**, a community policing officer has no power to conduct a search or arrest any person or to collect any evidence. That the prosecution failed to avail receipts proving ownership of any of the mobile phones that were recovered. That the phones in question were not properly identified. That no Mpesa statement was tendered in evidence to prove that the Ksh. 10,000/= that was in the mobile phone was withdrawn.

17. It was further submitted that PW2 testified that when they went to the appellant's house, two children were at the scene of crime and that the said children witnessed the crime being committed. That on his part, PW1 never stated that there were children at the scene of crime. That from this evidence, there is contradiction in the prosecution case which does not add up. In support of this submission, counsel cited the cases of **Paul Kanja Gitari – v R, [2016] eKLR** and the comparative case of **Mocumi – v- The State (323)/2015) ZASCA 201 (2 December 2015)**.

RESPONDENT'S SUBMISSIONS

18. The State in opposing the instant appeal stated that this was a second appeal that must be confined to matters of law. That all the ingredients for the offence of robbery with violence were proved. That PW1 in his testimony was emphatic that he was lured into the

appellant's house by the appellant herein; that the appellant was involved in the robbery; that PW1 was assaulted using a panga; that PW1 was robbed two mobile phones and the appellant was found in possession of one of them.

19. From the foregoing items of evidence, the State submitted that there was clear and uncontroverted evidence that it was the appellant who lured the complainant to her house where the offence was committed. That there was no mistaken identity of the appellant as one of the persons who committed the offence.

20. On the issue of sentence, it was submitted that the appellant and her co-accused were given adequate notice of possible enhancement of the sentence of ten-year imprisonment meted upon them. That despite the notice, the appellant opted to continue with the appeal before the High Court. Counsel urged us to take into account the decision of the Supreme Court in the case of **Francis Karioko Muruatetu & another -v- Republic, SC Petition Nos. 15 & 16 of 2015**, in revisit the issue of the death sentence meted upon the appellant.

ANALYSIS and DETERMINATION

21. This is a second appeal *and our jurisdiction is confined to matters of law*. This was well explained in **Karani vs. R, [2010] 1 KLR 73** where it was stated:

*“This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.” See also **Karingo -vs- R, (1982) KLR 213***

22. In the instant appeal, it is contended the learned judges erred in their re-evaluation of the evidence on record; that there was inconsistency and contradiction in the evidence of PW1; that PW2, a community policing officer who arrested the appellant had no powers to do so and that the prosecution did not prove its case beyond reasonable doubt. It was finally urged that the death sentence meted upon the appellant by the learned judges was harsh and excessive in the circumstances.

23. We have considered the ground that the judges erred in their re-evaluation of the evidence on record. The appellant was charged with the offence of robbery with violence. The ingredients of the offence of robbery with violence were clearly set out by this Court in the case of **Oluoch -vs- Republic, [1985] KLR** where it was held:

“Robbery with violence is committed in any of the following circumstances.

(i) The offender is armed with any dangerous and offensive weapon or instrument; or

(ii) The offender is in company with one or more person or persons; or

(iii) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person”

24. The appellant, having been charged with the offence of robbery with violence, the prosecution was duty bound to prove that the appellant was in the company of at least one or more person. In this matter, the prosecution through the testimony of PW1 led evidence that at the time of the offence, the appellant was in the company of a one Josephat Onguso Moreka. Thus one of the ingredients of the offence of robbery with violence was proved. The second ingredient for the offence of robbery with violence is proof that the accused person was armed with a dangerous weapon. The evidence on record from the testimony of PW1 shows that the said Josephat Onguso Moreka, who was in the company of the appellant, was armed with a panga. As regards use of violence immediately before, at or after the robbery, there is medical evidence on record that the complainant was assaulted and his finger cut. The medical evidence corroborates the injury as stated by PW1. We thus find that there is evidence on record that proves all the three essential ingredients for the offence of robbery with violence.

25. The last ingredient that need be proved is that the appellant was the person who committed the offence. This perforce requires conclusive evidence on identification of the appellant.

26. On identification of the appellant as one of the persons who committed the offence, PW1 was categorical and the appellant was the one who lured her into her house where the offence was committed. Another item of evidence that links the appellant to the crime is the recovery of the Manix mobile phone from her. The testimony of PW1 coupled with the recovery of the mobile phone positively identifies the appellant as one of the persons who committed the offence of robbery with violence as charged. We find the two courts below did not err in their re-evaluation of the evidence on record. We are thus satisfied that the two courts below did not err in finding that the prosecution had proved all the ingredients of the offence of robbery with violence.

27. We further note that the two courts below considered the evidence of the appellant and correctly found that the defence evidence neither shook nor dislodged the prosecution case that had been proved to the requisite standard. The complainant emphatically stated that the appellant was not his friend. The conduct of the appellant in disappearing from the scene of crime immediately after the complainant was robbed is a tale tell conduct of complicity in the crime. We are satisfied that the appellants defence was considered by the two courts below and discounted.

28. On the alleged contradictions in the evidence of PW1, we find this ground of appeal has no merit. The alleged contradictions are not material and do not go towards proving or disproving the essential ingredients and the particulars of the offence of robbery with violence as

charged. The alleged contradictions neither dent, dislodge nor cast doubt on the prosecution case. In arriving at our decision, we are persuaded and guided by the decision of this Court in **John Nyaga Njuki & 4 others –v-R, [2002] eKLR** where it was stated:

“But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused.”

29. On the contestation that PW2 had no power to arrest the appellant, even if this were so, the appellant has not demonstrated to our satisfaction that she was prejudiced by the arrest and recovery of the mobile phone from her. We find that PW2’s arrest of the appellant did not occasion unfair trial or miscarriage of justice. The trial before the magistrate court as well as the entire proceedings before the High Court met the constitutional threshold for a fair trial and fair hearing. In any event, the appellant was handed over to PW4 Police Corporal Jane Gikenya Kijamanga who re-arrested her.

30. The appellant further contended that the learned judges erred in failing to interrogate the reliability of PW1 as witnesses. The appellant’s contestation questions the credibility of PW1. It is settled law that the credibility and reliability of a witness is primarily determined by the trial court that has the benefit of observing the demeanour of a witness. An appeal founded on credibility of a witness would rarely succeed. In the instant matter, the appellant has not demonstrated to our satisfaction any evidence on record that dents the reliability and credibility of the testimony of PW1. This ground of appeal has no merit.

31. The appellant further urged that the two mobile phones recovered were not positively identified. That no receipt of purchase or ownership was produced in evidence. We have considered this ground of appeal and find it has no merit. The complainant positively identified in court the two mobile phones that were recovered. When PW2 confronted the appellant’s co-accused, the said co-accused never hesitated and knew the two mobile phones that were being sought. Indeed, the co-accused correctly stated that the Manix mobile phone was with the appellant. Likewise, when the appellant was asked for the Manix mobile phone, she never hesitated. She knew the particular phone that was being sought and led PW2 to where the mobile phone was being charged and from where it was recovered. From these items of evidence, we are satisfied the two mobile phones robbed from the complainant were positively identified and there was no need for a purchase receipt to prove ownership.

32. As regards the contention that the two courts below relied on inadmissible evidence, the appellant has not pointed to us the specific inadmissible evidence that was allegedly considered by the two courts below.

33. On enhancement to death of the sentence of ten-year imprisonment meted upon the appellant, we are satisfied that the State had given notice to the appellant on the possibility of enhancement of the sentence. In enhancing the sentence, the learned judges stated that the only legal and mandatory sentence for robbery with violence contrary to **Section 296 (2) of the Penal Code** was the death penalty.

34. In this appeal, the appellant has urged us to revisit the death sentence on the ground that it is harsh and excessive in the individualized circumstances of this case.

35. The law on the power and jurisdiction of an appellate court to interfere with a sentence passed by a trial court was correctly expressed in the case of **Ogalo s/o Owuora, 1954 24 EACA 70** to wit that an appellate court has power to interfere with any sentence imposed by a trial court if it is evident that the trial court acted on wrong principles or over looked some material factor or that the sentence is illegal or manifestly excessive as to amount to a miscarriage of justice.

36. Comparatively, the general principles that an appellate court adopts in an appeal relating to sentence was stated by **Nicholas J** in the South Africa case of **R - v – Rabie, {1975} (4) SA 855 (A) at 857D-F** as follows: -

1. *“In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal-*

(a) should be guided by the principle that punishment is “pre- eminently a matter for the discretion of the trial Court”; and

(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been “judicially and properly exercised

2. *The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.”*

37. Further, in the case of **Alister Anthony Pareira –v- State of Maharashtra, {2012}2 S.C.C 648 para 69**, the Indian Supreme Court held that: -

“Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the of the offence and all other attendant circumstances”

38. In Kenya, the Supreme Court in the case of **Francis Karioko Muruatetu & another – v- Republic, SC Petition Nos. 15 & 16 of 2015** held that a mandatory death sentence is unconstitutional as it takes away judicial discretion to determine an appropriate sentence in each particular case. This Court has adopted and applied the Supreme Court decision in **Christopher Ochieng –v- R, [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011** and in **Jared Koita Injiri – v- R, Kisumu Criminal Appeal No. 93 of 2014** to the effect that mandatory

sentences take away the judicial discretion to impose a sentence commensurate with the circumstances of a particular case.

39. When the notice of possibility of enhancement of the sentence of ten-year imprisonment was given to the appellant, the learned judges were giving weight and consideration to the mandatory nature of the death penalty under **Section 296 (2) of the Penal Code**. The illegality of the ten-year term of imprisonment was informed by the mandatory nature of the death sentence. As already stated, the Supreme Court in **Francis Karioko Muruatetu & another –v- Republic, SC Petition Nos. 15 & 16 of 2015**, declared the mandatory nature of a death sentence not only to be illegal but unconstitutional. Persuaded by the merits of the Supreme Court decision in the case of **Francis Karioko Muruatetu & another –v- Republic, (supra)** we are inclined to intervene on the death sentence meted upon the appellant. We have considered the peculiar circumstance of how the appellant lured the complainant into her house. There is no evidence on record that the appellant used violence on the complainant. Considering the totality of the circumstances disclosed by the evidence on record, we hereby set aside the enhanced death sentence meted upon the appellant by the High Court. In its place, we reinstate the sentence of ten (10) year imprisonment meted by the trial magistrate. The imprisonment term is with effect from 19th September 2012 when the trial magistrate passed sentence.

40. This judgment is delivered pursuant to rule 32 (2) of the Court of Appeal rules as Odek, J.A passed on before the judgment could be delivered.

Dated and delivered at Kisumu this 31st day of January, 2020.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.