IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KARANJA & MAKHANDIA, JJ.A)

NYERI CRIMINAL APPEAL NO. 99 OF 2014

BETWEEN

JAMES NYAGA NJUE...APPELLANT

AND

REPUBLIC..RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Embu (H. M. Okwengu & J. Khaminwa, JJ.) delivered on 15th August, 2013

in

H.C.CR.A. No. 248 of 2006)

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JUDGMENT OF THE COURT

1. The facts surrounding this matter are rather interesting. **James Nyaga Njue** (the appellant) was a remand prisoner at Embu G. K. Prison on 21st August, 2003. On the said date, he and several others were escorted from remand prison to court to answer various charges that faced them. The appellant was given his Ksh. 800/= and his other personal belongings which had been deposited with the prisons authority as is the procedure.

2. As is the practice, the appellant and other prisoners were kept in the remand cells within the court premises to await their matters to be dealt with. In the same remand cells were persons who had been taken to court for plea that morning and who were waiting processing; either for plea to be taken or for payment of fine after plea; or simply to await return to the prison.

3. Among them was Shadrack Mwiti, (the complainant) who had gone to court to answer to a charge of careless driving under the Traffic Act. He pleaded not guilty to the charge and was granted bail. He was escorted to the holding cells to await processing of his bond. Unfortunately for him, he was not processed in good time and so he remained in the holding cells for some time.

4. Apparently some of the matters were not called out and the magistrate directed that the suspects be returned to prison remand. This did not settle well with the remandees whose matters were not mentioned and they caused a raucous in the cells. As a result, the complainant and others like him who were waiting processing were bundled into the prison truck along with convicts and other remandees like the appellant. In the ensuing commotion, the prisoners set upon the complainant, frisked him and stole from him Ksh. 4,600/= a wallet and a Motorola T190 mobile phone.

5. On arrival at the Embu Prison, the complainant narrated his story to the prisons officers who immediately carried out a body search on the prisoners in the police van. The complaint's phone was recovered from one of the prisoners who was later charged with handling stolen property and appeared in the charge sheet as accused No.7. Initial investigations disclosed that after the cell phone was removed from the complainant's pocket, it was passed on from one prisoner to another before ending up with PW7 from whom it was recovered.

6. According to the complainant, while being robbed, he was manhandled and roughed up by a group of the prisoners, and he could not tell who had taken what. It was on that basis that the appellant and four others were arrested as and charged as indicated in the charge sheet. The complainant said that he was not called to identify his other assailants and eventually, the others were acquitted of the charges facing them but the appellant and PW7 were not that lucky. The appellant was found guilty as charged for robbing the complainant and he was sentenced to death as provided by law then. PW7 is not a party in this appeal and so we will not delve into his case.

7. Being aggrieved, the appellant filed an appeal before the High Court against conviction and sentence. His appeal to the High Court (Okwengu, J (as she then was) and Khaminwa, J) was not successful and the conviction and sentence were confirmed. The appellant now comes before this Court on second and possibly final appeal. In the supplementary Memorandum of Appeal filed by Mr. Morris Njage, learned counsel for the appellant, the learned Judges are faulted for failing to exhaustively re-evaluate the evidence; that the evidence adduced was insufficient to support a conviction on a charge of robbery with violence; failing to find that there were inconsistencies, gaps and doubts in regard to PW1's evidence; identification and that his evidence was not considered. The appellant has also challenged the death sentence. Mr. Njage filed written submissions as well as lists of authorities. Learned counsel for the State, Mr. Ondimu filed written submissions in opposition to the appeal. The appeal proceeded via video link in presence of the appellant and counsel. Both learned counsel relied on their written submissions and waived their right to highlight the same.

8. We have considered the entire record along with the said submissions. This being a second appeal, we are bound to pay homage to **Section 361(1) a** of the Criminal Procedure Code which provides as follows:-

> **"A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section—**
>
> **(a) on a matter of fact, and severity of sentence is a matter of fact;**

The provision has been followed religiously by this Court as can be seen from a litany of its decisions. For instance, in **Karani vs R. [2010] 1 KLR 73**, the court pronounced itself as follows:-

> **"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."**
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> See also **John Kariuki Gikonyo v Republic [2019] eKLR**.

Having considered the entire record along with the submissions by the parties and the applicable law, we narrow down the points of determination to two, namely:-

> **(i) Whether the offence of robbery with violence was established against the appellant.**
>
> **(ii) Whether the High Court properly revaluated the evidence before it before arriving at its decision.**

9. On the first issue, the two courts below made concurrent findings of fact to the effect that the incident described by the witnesses, in which the complainant lost his phone and money and other items did occur. We have no reason to interfere with those concurrent findings. It was in the process of the disturbance and confusion in the van that the complainant was frisked and the items removed from his pockets. Did this amount to robbery with violence? As held in the oft cited case of **Johanna Ndung'u vs R [1996] eKLR** robbery with violence is established when the following ingredients are established:

> *a) if the offender is armed with any dangerous or offensive weapon or instrument, or;*
>
> *b) if he is in the company with one or more other person or persons, or;*
>
> *c) if at or immediately after the time of the robbery he wounds, beats, strikes or uses any other violence to any person.*

It was reiterated in the same decision that proof of any one of the above ingredients is enough to sustain a conviction. The aspect of theft was proved beyond reasonable doubt. On whether the offender was armed with an offensive weapon, there was no evidence whatsoever that any of the assailants was armed with any weapons. There was no evidence that other than being terrified and possibly traumatised by the situation the complainant found himself in, there were any injuries sustained or violence visited upon him.

10. We have gone through the judgment of the trial court. Nowhere has the learned magistrate discussed the ingredients or components of the offence of robbery with violence under **Section 296(2)** of the Penal Code. The learned magistrate did not also state which of the ingredients had been proved. He appeared to have purely relied on the fact that there was theft of the phone and other items and the recovery.

11. On its part, the High Court when analysing the case against the appellant stated as follows:-

> **"As regards the 1st appellant, the fact that he was the one who passed over the mobile phone to the 2nd appellant immediately after the vehicle arrived at the prisons leads to the irresistible conclusion that the 1st appellant was one of those who robbed the complainant of his mobile phone."**

There was also no proper re-evaluation of the evidence adduced before the trial court to establish which components of a charge of robbery with violence have been established and why the appellant was convicted for capital robbery and not stealing from the person, or even simple robbery contrary to **Section 296(1)** of the Penal Code.

12. The above analysis answers both issues in the negative. On the first issue, we are not persuaded that the circumstances of this case disclosed an offence of robbery with violence contrary to **Section 296(2)** of the Penal Code. The fact that there was more than one person in the prison van when the offence was committed does not mean that the other persons in the van had accompanied the appellant for purposes of committing the offence. The fact that his co-accused persons are said to have passed on the cell phone from one to the other does not demonstrate commonality of purpose. We think the act was just spontaneous and the phone was passed to whoever was closest.

13. We hold the view that although the items were stolen from the complainant, this was more of an act of stealing from person and not robbery with violence. Had the High Court re-evaluated the evidence adduced before the trial court critically, it would have found that the charge of robbery with violence had not been proved beyond reasonable doubt and invoked **Section 179(2)** of the Criminal Procedure Code to set aside the conviction and sentence and substitute the same for conviction on a lesser charge of stealing from person contrary to section **279(a)** of the Penal Code which carries a maximum of 14 years imprisonment on conviction.

14. Accordingly, we find merit in this appeal. We invoke **Section 179(2**) of the Criminal Procedure Code and set aside the conviction for robbery with violence contrary to **Section 296(2)** of the Penal Code and substitute therefor a conviction for stealing from the person contrary to **Section 279(a)** of the penal code and reduce the sentence to the term already served.

Dated and delivered at Nairobi this 4th day of December, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

ASIKE – MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

Signed

DEPUTY REGISTRAR