IN THE COURT OF APPEAL

AT KISUMU

CORAM: KARANJA, MURGOR & SICHALE, J.JA)

CRIMINAL APPEAL NO. 182 OF 2014

BETWEEN

WILLIAM MICA AMASA.....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Being an appeal from the conviction and sentence of the High Court of Kenya at Kakamega,

(Muchemi & Chitembwe, JJ.) delivered on 8th June, 2010

in

Nairobi High Court Criminal Appeal No. 66 of 2006

****

JUDGMENT OF THE COURT

William Mica Amasa, ***the appellant***, was charged with the offence of robbery with violence contrary to ***section 296(2)*** of the ***Penal Code***. The particulars of the offence are that on the 20th day of August, 2005 at Ebusakami Village, Ebusakami Sub Location, South Bunyore Location in the Vihiga District of Eastern while armed with an offensive weapon namely, a panga, robbed ***Daisy Wasitia, PW 1 (Daisy),*** of a mobile phone make Nokia 1100 valued at Kshs 7,000/=, and immediately before or immediately after the time of such robbery, used actual force to Daisy Wasitia.

An alternative charge was also preferred against him of handling stolen goods contrary to ***section 322 (2)*** of the ***Penal Code***.

The particulars were that at Enyaita Village, Ebusakami Sub location, South Bunyore Location in the Vihiga District of the then Western Province otherwise than in the course of stealing, dishonestly received or retained one mobile phone make Nokia 1100 knowing or having reason to believe it to be stolen.

The brief facts are that on the 20th day of August, 2005, Daisy Wasitia, a student at St. Philips Theological College had gone out of her house to call her friend as she was experiencing problems with the network in the house. While on the call, she saw the appellant walking towards her while armed with a panga. On reaching her, he ordered her to hand over the mobile phone. When she refused, he cut her left hand. A struggle ensued and he slapped her with a panga, causing her to scream and throw the phone on the ground. ***Joram Oyando PW3*** *(Joram)* and ***Oliver Nyabinda PW4 (****Oliver)* heard her screams and ran to find out what had happened. They saw the appellant assaulting Daisy and ran off with her phone. Daisy ran to ***Auther James Otenyo's PW2's*** *(Auther)* house, while Oliver and Joram chased after the appellant, but were unable to apprehend him. But they stated that they had been able to identify him as someone who was known to them.

Daisy was taken to Highway clinic and later treated by ***Fred Wekesa,*** a clinical officer at Kima Mission Hospital. She was thereafter issued with a P3 form which stated that she had injuries inflicted by both a blunt and sharp object. Her injuries were classified as bodily harm. She thereafter reported the theft at Luanda police station, where she gave a description to the police of the person who attacked her, and gave her attacker's name as Jamin Amasa, a neighbor. Later that evening, her phone was recovered and handed over to police.

When the appellant was arrested on 9th November, 2005 Daisy went to the police station to identify him.

Auther had just received a phone call from Daisy when the call was disconnected. There was no response when he tried to call her back. Shortly thereafter, Daisy came running into his house without shoes. She was bleeding from her hand and face. He took her to hospital where she was treated, and then he rushed back to his home where he met Joram and Oliver who had witnessed the assault. They went to the appellant's home at 10.00 p.m. but did not find him there. They laid an ambush, and after about an hour, they saw a person walking suspiciously, and tried to apprehend him, but he slipped out of the jacket the was wearing that they had grasped and escaped. He also dropped a black paper bag in which they found the stolen mobile phone and two marvin caps. A report was made at the police station, but it was not until 9th November, 2005 that the appellant was arrested and charged with the offence.

On cross examination, Oliver stated that he told the police that he had used a spotlight to see who was assaulting Daisy; that he had told them that the attacker was Jamin and was wearing a black jacket, and a black marvin.

The appellant elected not to adduce any evidence.

After hearing the evidence and the parties' submissions, the trial magistrate convicted and sentenced the appellant to death as by law then prescribed upon finding that the offence was proved to the required standard. The appellant was dissatisfied with the decision, and appealed to the High Court (*Muchemi & Chitembwe, JJ.),* which upheld the conviction and sentence. The appellant was aggrieved by the High Court's decision, and appealed to this Court on the grounds that the prosecution had failed to prove its case beyond reasonable doubt; that the learned judge failed to find that the conviction was unsafe, and shifted the burden of proof to the appellant; that the learned judges failed to consider the appellant's mitigation.

Learned counsel for the appellant, ***Prof. Nandwa*** filed written submissions which were highlighted on a virtual internet platform owing to the relentlessly spreading Covid- 19 pandemic. Counsel stated that both courts below failed to appreciate that the case was not proved beyond reasonable doubt since, neither Daisy nor Auther had seen nor identified the appellant or mentioned his name to the police; that with respect to Joram and Oliver, though they may have witnessed the assault, neither of them was able to identify the appellant at the scene before he ran away; that instead, they went to his house to try and find him, yet the record showed that he was staying at his father's house. Counsel further argued that the clothes and phone that were found in the black bag had nothing to do with the assault on Daisy, particularly since no DNA or fingerprints were lifted from any of the items.

Turning to the recovery of the phone and the application of the doctrine of recent possession, counsel asserted that in the absence of the prosecution's ability to link the phone to the appellant, the alleged recovery of the phone from him becomes inapplicable to the circumstances of the case.

On the sentence, counsel submitted that by virtue of the Supreme Court's decision in ***Francis Karioko Muruatetu & Another vs Republic, SC Pet. No. 15 of 2015***, in the event the court was not minded to quash the conviction, then it should consider substituting the death sentence with a custodial sentence.

Learned counsel for the State ***Mr. Kakoi*** also filed written submissions which were highlighted. Counsel opposed the appeal and stated that on the question of identification, the appellant was properly identified by Daisy who knew the appellant as a neighbor, and Joram and Oliver who witnessed the assault recognized the appellant as someone they knew; that they waited at the appellant's home, and when they saw him later that evening they tried to apprehend him but he slipped out of the jacket he was wearing, and ran off having also dropped a black bag that he had been carrying which had Daisy's phone.

On the doctrine of recent possession, it was submitted that Oliver and Joram saw the appellant snatch the phone from Daisy during the assault, and when they ambushed him later, they saw him drop the bag which had the phone in it. The appellant did not explain how the phone came to be in his possession. Counsel asserted that the prosecution proved its case beyond reasonable doubt as all the evidence pointed to the appellant as the person who robbed Daisy of the phone.

On the issue of the sentence, counsel submitted that he had no objection to application of the decision in ***Francis Karioko Muruatetu (supra)*** for resentencing.

This is a second appeal which, by the provisions of ***section 361(1)*** of the ***Criminal Procedure Code*** ought to present only issues of law. Where the two courts below have made concurrent findings of fact, the Court would respect those findings, unless the conclusions upon which they are premised are not supported by the evidence or are based on a misapplication of the evidence. See: ***M'Riungu vs Republic, (1983) KLR 455***.

Having regard to these principles, we consider that the issues for consideration are whether the trial court and the High Court wrongly concluded that the prosecution had proved its case beyond reasonable doubt; whether the appellant was properly identified; whether the prosecution shifted the burden of proof to the appellant, and whether in sentencing the appellant, the trial court failed to take into account the appellant's mitigation.

We begin with whether the appellant was properly identified. The trial court found that though Daisy was unable to identify the appellant, it was satisfied that, Joram and Oliver who witnessed the assault saw and identified him, as a result of which they went to his home to look for him. After they saw him walking home, they tried again to apprehend him but on grasping his jacket, he slipped out of it and also dropped a bag he was carrying at the time which contained Daisy's phone.

On its part the High Court had this to say;

> ***"…we are satisfied that the appellant was properly identified. The incident occurred at 7.30 p.m. PW1 saw the assailant who told her to hand over the phone. She struggled with the assailant and saw what he was wearing. She gave description of the assault to PW2 and to those who came to rescue her. PW1 knew the appellant before the robbery incident. PW3 saw the appellant***

struggling with PW1. PW4 gave the appellant's name to the police."

We cannot fault the above conclusions reached on identification. In addition to this, the High Court further stated;

> ***"…PW2, PW3 and PW4 went to the appellant's home that night. They waited for him and when he came at night he ran away on seeing them. The appellant dropped a paper bag that contained PW1's phone..."***

The court concluded that;

> ***"The prosecution evidence establishes the fact that PW3 and PW4 came to the scene and saw the appellant before he ran away. The circumstances as to how the stolen phone was recovered leaves no doubt that it was the appellant who had it in the paper bag."***

Our reanalysis of the evidence leads us to conclude that, not only was the appellant identified at the scene of the robbery, he was also found in recent possession of the stolen phone.

A person found in possession of recently stolen goods and does not account for how they came to be in his possession raises a presumption of fact that he is either the thief or a receiver – (see ***Andrea Obonyo vs R [1962] E.A. 542.)***

We are satisfied that Daisy, Joram and Oliver identified the appellant at the scene of the robbery, when he snatched Daisy's phone. And it is the same phone that was found in his possession later that evening when Auther, Joram and Oliver tried to apprehend him near his home, and he slipped out of his jacket and dropped a paper bag in which he was carrying the stolen phone. The appellant did not proffer any explanation as to how it came to be in his possession. When his having been identified at the scene of the robbery is coupled with his having been found in recent possession of the phone, the only conclusion that can be reached is that he was the thief who stole Daisy's phone.

Turning to whether the prosecution proved the offence of robbery with violence beyond reasonable doubt, in the case of ***Johana Ndungu vs Republic Criminal Appeal No. 116 of 1995 (unreported)*** the requirements for the offence were set out as follows;

> ***"(i) Therefore, the existence of the afore described ingredients constituting robbery are pre-supposed in three sets of circumstances prescribed in section 296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section.***
>
> ***(1) If the offender is armed with any dangerous or offensive weapon or instrument, or***
>
> ***(2) If he is in 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."***

The Court is not required to look for the presence of all three ingredients, as proof of one of the ingredients would suffice to secure a conviction. Both the trial court and High Court, found that the appellant attacked and injured Daisy with a panga. Fred Wekesa a clinical officer who examined her saw that she had sustained injuries and classified them as bodily harm. The evidence is also clear that whilst violently attacking her, the appellant robbed Daisy of her phone. The High Court evaluated the prosecution evidence, and was satisfied that the offence was proved to the required standard. Our reevaluation of the evidence has brought us to the same conclusion that the appellant was responsible for violently robbing Daisy. We would add that, contrary to the allegation that the High Court shifted the burden of proof to the appellant, we can find nothing in the judgment that would lead us to that conclusion.

The final issue is on whether the trial court failed to take into account the appellant's mitigation. In this regard, the trial court sentenced the appellant to death as by law prescribed. By the time of that pronouncement, the trial court was duty-bound to impose the death penalty, notwithstanding that the appellant had mitigated.

But since then, the Supreme Court's decision in ***Francis Karioko Muruatetu (supra),*** held that the mandatory death sentence prescribed for the offence of murder was unconstitutional, which decision would similarly apply to the mandatory death sentence imposed for the offence of robbery with violence. As such, the appellant having mitigated that he was a young man and a first offender, and an only son of his parents, stated that he was remorseful and prayed for leniency. In view of his mitigation, and taking into account that the mobile phone was recovered soon after the assault, we consider it appropriate to interfere with the sentence.

For the reasons aforestated, the appeal against conviction is dismissed, but we set aside the death sentence and substitute it therefor with a sentence of twenty years' imprisonment from the date of conviction.

It is so ordered

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

W. KARANJA

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JUDGE OF APPEAL

A.K. MURGOR

…….....

JUDGE OF APPEAL

F. SICHALE

…….....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR