



IN THE COURT OF APPEAL

AT ELDORET-

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, J.J.A)

CRIMINAL APPEAL NO 84 OF 2017

BETWEEN

VICTOR HOSEA MASAI ALIAS ROBERT MASAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the judgment and order of the High Court of Kenya

at Eldoret (Kimondo & Ngenye, JJ.) dated 2nd April 2014

in

H.C.Cr. A No 45 of 2010)

JUDGMENT OF THE COURT

1. The appellant, **Victor Hosea Masai** alias **Robert Masai**, was charged and convicted of the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were that on the night of 29th August 2009, at Kapsoya Gardens, Eldoret Town in the then Uasin Gishu District, within the then Rift Valley Province, jointly with others not before the court, while armed with *pangas* and *rungus*, he robbed **Rohit Keshauji Shah** of cash Kshs 20,000.00 and two Nokia mobile phones valued at Kshs 16,000.00, all stolen goods valued at Kshs 36,000.00, and at or immediately before the time of such robbery threatened to use actual violence to the said **Rohit Keshauji Shah**.

2. It was **Rohit's** evidence that he was a shopkeeper at Eldoret Town and on the night of 29th August, 2009, he and his family were asleep. At about 2.00 am he heard some noise and woke up and saw some spot lights. He realized that intruders had broken into their home. The intruders stormed into his bedroom. There were electric lights. The intruders were carrying clubs, pangas and torches. **Rohit** called his brother, **Rajesh Shah (Rajesh)** and alerted him that intruders were inside their compound. Rajesh telephoned KK Security Guards. **Rohit** saw two intruders who wore jackets. The intruders ordered Rohit and his family members to surrender money. Rohit and his brother both gave the robbers Kshs. 10,000/= The robbers took **Rohit's** Nokia mobile phone and ordered Rohit and his family members to enter into **Rohit's** father in law's bedroom where the robbers threatened to kill them if they raised alarm. The robbers took a further sum of Kshs. 7,000/= from Rohit's father in law and locked **Rohit** and his family in **Rohit's** father in law's bedroom. The KK Security Guards arrived at Rohit's residence. Upon conducting a search, the appellant was found in **Rohit's** bedroom hiding under the bed. The appellant was the intruder who robbed **Rohit** of his mobile phone and cash. The robbers did not injure **Rohit** and his family but they threatened to kill them if they did not co-operate. In cross-examination by the appellant, **Rohit** testified that the appellant had no shoes at the time of his arrest.

3. **Nisha** confirmed **Rohit's** evidence in all material aspects. **Nisha** testified that on the material night at about 2.00 am intruders broke into their home, armed with pangas and clubs. The intruders threatened to kill Rohit and his family and demanded money. **Rohit** gave the robbers Kshs. 10,000/= and they threatened to harm **Rohit** if Nisha did not give them money whereupon she gave the robbers her handbag. The robbers took money and mobile phones and ordered **Rohit** and his family members to sit on the floor. KK Security guards came into the house and checked all the rooms and found the appellant under the bed in Nisha's bedroom. Nisha identified the appellant as the robber who had robbed them of their money and property. The lights in her bedroom were switched on and she clearly saw the appellant in her bedroom. Subsequently the police officers arrested the appellant.

4. **PC Francis Gichuki (PC Gichuki)** attached to Eldoret Police Station was the Investigating Officer. **PC Gichuki** testified that on the

material night he was on duty with **IP Bitok** and **PC Ruto** when they received a report from KK Security Guards that the **Rohit** had been robbed. They rushed to **Rohit's** residence and found KK Security Guards already at the scene. On arrival at the house, **PC Gichuki** found the complainants and a guard had been tied with ropes. **PC Gichuki** entered **Rohit's** residence and found the appellant being flushed out from under **Rohit's** bed by **Rohit** and the KK Security Guards. The complainants claimed to have been robbed of money and mobile phones by the robbers. **PC Gichuki** conducted a search on the property and established that the robbers had gained entry into **Rohit's** house by cutting the window grills with a metal cutter, which he recovered from the scene. He also recovered three pairs of shoes and a sisal rope that did not belong to anyone at the scene.

5. The appellant's defence was that on 29th August, 2009, he left Eldoret Town at 10.00pm. in the company of a friend; that they met a group of people who attacked them; that he was hit on the head, kicked in the ribs and robbed of a mobile phone; that a vehicle belonging to KK Security Guards appeared at the scene and claimed that the appellant and his companion were thieves; that the appellant was ordered to board that vehicle; that the security guards tied his hands and called the police and informed them that the appellant had been picked up loitering, and that the police took him to the police station.

6. The trial court found that the prosecution had proved the essential ingredients of the offence of robbery with violence and that it had discharged its burden of proof against the appellant beyond any reasonable doubt. Accordingly, the trial court convicted the appellant of the offence of robbery with violence and sentenced him to death.

7. Aggrieved by this decision, the appellant filed a first appeal to the High Court on the grounds that: the charge against him was not proved to the required standard; that the trial magistrate failed to consider that none of the witnesses gave sufficient evidence to link the appellant to the offence; that no medical expert was called or any P3 form produced to prove the alleged injuries by the complainant; that the exhibits produced at trial were recovered in a dubious manner; that the exhibits were planted on the appellant after he was booked for the offence; and that the trial court failed to consider the appellant's alibi.

8. The State opposed the appeal and maintained that all the ingredients of the offence of robbery with violence were proved beyond reasonable doubt; that the appellant was flushed out by guards from KK Security Company from under the bed in the complainant's house where he was hiding; that it was not fatal for the prosecution to fail to call the security guards from KK Security Guards as witnesses; that there was no defect in the charge sheet; and that even assuming that there was a flaw in the charge sheet, it amounted to a procedural slip curable by section 382 of the Criminal Procedure Code.

9. Upon re-evaluating the evidence, the first appellate court considered but rejected the appellant's defence finding that the appellant was caught red handed; that the evidence of the complainant corroborated the evidence of **Nisha** and **PC Gichuki**; that the appellant was one of the assailants who robbed the complainant; that he was identified by **Rohit** and **Nisha**; that there was electricity lighting in the house and that the appellant was apprehended at the scene barefooted hiding under the complainant's bed; that three (3) pairs of shoes were found below the window where the robbers had gained access by cutting the metal grills; and that the metal cutter was recovered and tendered in evidence.

10. The first appellate court concluded that all the ingredients of the offence of robbery with violence were proved beyond reasonable doubt.

11. Regarding sentence, the learned Judges of the first appellate court upheld the death sentence meted out by the trial court as it complied with the law.

12. The appellant is aggrieved by that decision and has filed this second appeal. In his grounds of appeal, he asserts that: the prosecution evidence did not prove beyond reasonable doubt that he committed the offence; that some witnesses were not called to testify; that the evidence adduced by the prosecution was full of discrepancies; and that his defence was not considered despite the fact that it would have displaced the prosecution evidence. The appellant further faulted the first appellate court for failing to take cognizance of the fact that the record of appeal presented to it had numerous interlineations inserted by pen, and there was therefore no guarantee that it was a proper record. The appellant also filed supplementary grounds of appeal through his counsel, **Ms Kipyego** in which he faulted the first appellate court for relying on circumstantial evidence that was not sufficient to prove his guilt; failing to note that there was no proper identification of the appellant; and failing to subject the entire evidence to fresh scrutiny and analysis.

13. These grounds of appeal and supplementary grounds of appeal were expounded on by **Ms Kipyego** during hearing of the appeal. She submitted that the evidence relied on to convict the appellant was circumstantial evidence, and that the evidence adduced did not lead to the irresistible conclusion that the appellant committed the offence for which he was charged as no identification parade was held. To buttress this argument, learned counsel relied on the decision of this court in **Sawe v Republic [2003] KLR 364** where it was held that circumstantial evidence can only be used as the basis for a conviction where there are no co-existing circumstances that would weaken the chain of circumstances that is relied on to establish guilt.

14. **Ms Kipyego's** further submission was that the prosecution evidence was weak and contradictory in that, although the complainant, **Rohit** and his wife **Nisha** testified that the appellant took money from them and that he was armed with a *panga*, neither the money nor a *panga* were recovered from the appellant who was arrested from the locus in quo. In counsel's view, this was an indication that the appellant was not the person who robbed the complainants on the material night; and that the metal cutter that was recovered from the scene was not dusted or subjected to any scrutiny to ascertain that it was used during the robbery.

15. **Ms Kipyego** further faulted the evidence of identification pointing out that **Rohit** and **Nisha**, who were in the same room, gave contradictory evidence. For instance, **Rohit** testified that there were electric lights at the scene, while **Nisha** testified that the lights had been switched off; and that it was impossible to tell how long the lights were on to allow for a proper identification of the appellant; that despite this contradictory evidence, there was no identification parade conducted to ascertain the identity of the appellant; and that the security guards who arrested the appellant did not corroborate the fact that they arrested the appellant after finding him hiding under the bed; that the appellant raised the defence of alibi, but this was not considered by the two courts below; that the first appellate court failed to properly analyse the evidence, or to subject it to a fresh scrutiny. Counsel urged that the appeal be allowed, conviction quashed and the sentence set aside.

16. The appeal was opposed by the State through **Mr Mulati**, Senior Prosecution Counsel who submitted that the court confirmed from the original file that the interlineations and corrections made in the record accorded with the original file. Counsel refuted the argument that the evidence adduced against the appellant was circumstantial. He maintained that the evidence against the appellant was direct and that there was no need for an identification parade as the appellant was arrested from the complainants' house where he was found under the complainants' bed; that the guards from KK Security Guards who arrested the appellant were not called as witnesses as they had been transferred to different locations, and that there was no need to call any additional witnesses as the evidence adduced by the prosecution was not displaced by the appellant's defence. Counsel submitted that the evidence adduced by the prosecution was properly evaluated by both the trial court and the first appellate court, and both courts were satisfied that the appellant committed the offence as charged. Counsel urged us to dismiss the appeal.

Determination

17. This is a second appeal and our jurisdiction is limited to consideration of matters of law only. In **Martin Oduor Lango & 2 others v Republic [2014] eKLR (Criminal Appeal 282 of 2012)** this Court stated:

“... [W]e must recall that this is a second appeal and it must therefore lie on issues of law only- see Section 361, Criminal Procedure Code. The concurrent findings of fact made by the two courts below shall be respected by this Court and shall not be disturbed unless they were not based on any evidence at all or were based on a perversion of the evidence on record or unless it can be shown demonstrably that there was an error in principle in making such findings.”

18. The first ground of appeal that arises for our consideration is that the record of appeal presented before the High Court did not match the original trial record as it had various corrections inserted by hand. We have considered this ground of appeal and perused the record of appeal. We note that the record of appeal that was used by the first appellate court did indeed have various interlineations. However, these were mere typographical errors which in our view, did not affect the integrity of the record. We are satisfied that the record of appeal that was used by the first appellate court did not differ in any material respects from the original record of the trial court. This ground of appeal therefore fails.

19. The second issue of law that has been raised is with respect to the identification of the appellant. Counsel for the appellant submitted that the evidence with regard to the identification of the appellant was inadequate as the circumstances were not conducive for a positive identification. Further, that the identification was not supported by a properly conducted identification parade. From the record, **Rohit** testified that when the appellant came into his bedroom and demanded money from him, the lights were on and that he clearly saw the appellant. **Rohit's** evidence was corroborated in all respects by his wife, **Nisha and PC Gichuki**. The first appellate court made note of this evidence and expressed itself as hereunder:

“Upon re-evaluating the evidence, we have reached the conclusion that the appellant was caught red handed. The evidence of PW1 was corroborated by PW2 and PW3. The appellant was one of the robbers who robbed the complainant. He was identified clearly by PW1 and PW2. There was electricity lighting in the house. The appellant was apprehended at the scene hiding under the complainant's bed and bare footed.”

20. There was direct evidence against the appellant that on the material night he, together with others, broke into the home of the complainant and demanded money from the complainant and his wife and other family members and that the appellant was found at the scene before he could escape. Accordingly, we reject the appellant's assertion that the evidence against him was circumstantial. The evidence against him was direct, and as was noted by the first appellate court, **“the appellant was positively identified and arrested at the locus in quo. All the ingredients of robbery with violence were thus present. When juxtaposed against the clear evidence of the prosecution, the defence of the appellant was feeble and unbelievable.”**

21. On the question whether the first appellate court failed in its duty to re-evaluate the evidence that was before the trial court; a reading of the judgment of the first appellate court indicates that that court considered the evidence led before the trial court in its entirety, and weighed it against the appellant's alibi defence and found that the key ingredients of the offence of robbery with violence were established and the appellant's alibi defence was found to be a red herring.

22. Having evaluated the evidence, we find that all the ingredients of the offence of robbery with violence were present. The appellant and his accomplices were armed with pangas and runguns; the appellant was in the company of one or more persons; during the robbery they threatened to kill the complainants.

23. Further, the appellant was found in the *locus in quo* in Rohit's bedroom under the bed, there was electricity light and the appellant was clearly seen and identified by the complainants and P.C. Gichuki, the Investigating Officer who arrested the appellant at the scene of the crime. The prosecution therefore proved its case beyond reasonable doubt.

24. Regarding sentence, in the recent Supreme Court decision in **Francis Kariako Muruatetu & Another vs Republic [2017] eKLR, Petition No. 15 of 2015, (Muruatetu decision)** the Supreme Court held that although the Constitution recognizes the death penalty as being lawful, the mandatory nature of the death sentence as provided under Section 204 of the Penal Code rendered the section unconstitutional as it took away the discretion of the court in determining the sentence that should be imposed.

25. Section 204 is similar to Section 296 (2) of the Penal Code that provides a mandatory death sentence. The **Muruatetu decision** has been applied to cases of robbery with violence under Section 296 (2). (**William Okungu Kittiny vs Republic**, Civil Appeal No. 56 of 2013 (unreported), where applying the **Muruatetu decision**, we held as follows:

“...the findings and holding of the Supreme Court particularly in paragraph 69 applies mutatis mutandis to section 296(2) and 297(2) of the Penal Code. Thus, the sentence of death under section 296(2) and 297(2) of the Penal Code is a

discretionary maximum punishment. To the extent that section 296 (2) and 297 (2) of the Penal Code provides for mandatory death sentence the sections are inconsistent with Constitution.”

26. For this reason, we find it appropriate to interfere with the death sentence imposed by the trial court. Given the circumstances of this case, in our view a sentence of twenty (20) years imprisonment would be appropriate.

27. For the foregoing reasons, the appeal against conviction is dismissed. However, the appeal against sentence is allowed. The sentence of death is set aside and in substitution therefore the appellant is sentenced to serve twenty (20) years imprisonment to take effect from 26th March, 2010 when he was sentenced.

28. Those shall be the orders of the Court.

Dated and delivered at Eldoret this 6th day of June, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR