



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MAKHANDIA, KIAGE & ODEK, JJA)

CRIMINAL APPEAL NO. 16 OF 2015

BETWEEN

BENSON MASAKHWE.....APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal against the judgment of the High Court of Kenya at Kakamega (S. J. Chitembwe and G. Dulu JJ) delivered on 14th October 2014 in H. CR. APP. No. 229 of 2012)

JUDGMENT OF THE COURT

1. The appellant was charged with robbery with violence contrary to **Section 295** as read with **Section 296 (2)** of the Penal Code. The particulars were that on the night of 22nd February 2012 at Bulanda Village in Butere District within Kakamega County, jointly with others not before the court while armed with dangerous weapons namely *rungus* robbed James Okaliyo Shishamba a motorcycle registration No. KMCR 815G Engine No. 5D81667573 Frame No. MD 625 EF BID 30203 Model TVS star, red in colour valued at Kshs. 93,000/= and at the time of such robbery used actual violence against the said **James Okaliyo Shisamba**.

2. The prosecution relied *inter alia* on the testimony of **James Okalio Shitsamba** (PW1) He testified as follows:

“I am James Okalio Shisamba..... I used to be a boda boda motorcyclist. I had been employed to work on it by Wilson Nyengure Muniafu. The motor cycle was registration No. KMCR 815 G. It was a red TVS star. I know the accused by appearance. I got to know him on the date of the incident. I recall on 22nd February 2012 at about 6.00 pm, it was a market day at Sabatia. It was a Wednesday. I was at Buruburu stage. It was approaching 7.00 pm. A certain man came and asked to be ferried to Bulanda where he was to pick his girlfriend then we return to Sabatia. I asked him where he was from as I had not seen him before. He told me he was a relative of my neighbour at Mushitesheni. I told him I was from the same area and I wanted to know how they are related. He mentioned a few names of the relatives of my neighbor some of whom were deceased. The customer is in court. I persisted to know more about him as I did not trust him. He told me he was Ben from Maraba. I called a colleague who is Patrick Hosea. He has lived in the area for long. I asked him if he knew the accused. Patrick asked him a few questions then he told me he does not know the accused.

However, since he mentioned some people I knew, I decided to ferry him. We did not agree on the charges as I did not know how long we would take at the place we were to take the girl from. When we were conversing, I noticed the accused had a scar on his lip and one of his teeth looked broken. When we got to Inyesi junction, he told me to take the route to Bulanda. We passed Bulanda Primary School then he told me to take a left turn. By this time, darkness had set in. We moved a head through some bushy area then we got to a junction where he told me to stop. When I stopped, he got down and asked for my phone so that he could call the girl. I refused to give him the phone.

Shortly, another customer called me. I removed my phone from my jacket and spoke with my customer. When I was done, the accused told me again to give him the phone so that he could call the girl and tell her to hurry up. I refused to give it to him. He then gave me three numbers to call. I did. The 1st number had been switched off, the second one was no longer in use and the 3rd was an incomplete number. I then told him I was not going to wait any longer.... Shortly, another man passed us. He was dressed in a short and a vest. The accused followed him and they spoke for a while.... A short while, two young men passed by. The motor cycle was still on. I moved ahead a little then the accused told me it would be wrong to leave him at that place. After a short while when I had stopped, a certain man came. He was wearing a woolen knitted cap with Rasta

colors. I did not see his face clearly but he was carrying a club. He passed us then from behind me the accused held me by the neck and pulled me off the motor cycle. He threw me down and started to beat me while I was on the ground. The other man with the Rasta cap jumped on the motor cycle. I tried to struggle with the accused. He was trying to break my neck. I knew if I resisted, he would break my neck. I became cooperative and when he loosened his grip, I slipped from him and passed between his legs and then I started to scream. The accused left me and jumped on the motor cycle and they sped off towards the tarmac road. They had switched off the motor cycle lights..... I then called Patrick my fellow boda boda motor cyclist and told him what had happened. He informed the others.....They came and collected me from Ekeru then we went and reported the matter at Ibokolo AP Camp..... The next day I informed my employer about the incident. Later, my brother told me we should go and look for Ben at the home of a relative he had mentioned when we spoke at Musanda. We went to the home of that relative and made inquiries. We did not mention the incident to them. They told us that they knew Ben and that he had travelled to Uganda.... After a few days, we went to check on him at the said home. It was a Sunday. We found him having come back and we were told that he was at the next home. We went there and we were told that he had gone to Musanda market. We went to Musanda and we were told that he had just gone back home with his wife...

After a few days, my employer was called by the Assistant Chief of Musanda and informed that the accused had been arrested over another case in Teso and that he had been taken to Bungoma Court.... I went to give information to the police at Butere. They advised us to go and confirm if he was the one. We went and saw his name on the notice board. We confirmed to the police he was the one. The police then went to Bungoma and brought him.

Later we were informed that the motor cycle had been recovered in Teso District. My employer went to get it with the officers from Butere Police Station. I saw the motor cycle at the station. It still had its number plate. I had written the word struggler on a plate on it.”

3. **Wilson Nyangure Munyafu** (PW3) testified that he was the owner of motor cycle registration No. MKCRR 815 G which he bought for Ksh. 93,000/=; that he employed **James Okanio Shitsama** (PW) to do boda boda business for him with the motor cycle; that on 22nd February 2012, PW 1 called him around 8.00 pm and told him he had been robbed of the motor cycle; that they reported the incident at Butere Police Station; that on 6th April 2012 he was called by an AP officer from Lukolis AP camp and informed that the motor cycle had been recovered; that he did not know how it was recovered and whom it was found with.

4. Police Constable **Kennedy Lubembe** (PW4) testified that sometime in February 2012 he received information that a suspect had been arrested in Teso District; after learning of the arrest, he liaised with officers from Malaba who gave him particulars of the instant case; the suspect (appellant) had been arrested in Teso and he was in prison over the case for which he had been arrested. **PW4** sought a production order and the appellant was produced in Butere police station where an identification parade was conducted; that PW1 identified the appellant as the person who robbed him; that later he received information that the motor cycle had been recovered. No one was arrested in possession of the motor cycle.

5. In his defence, the appellant in his unsworn statement denied committing the offence as charged. He stated he was arrested by members of the public who beat him up and broke his upper tooth and cut his lip; that he was also injured on the chest; that he was thereafter taken to the AP camp and charged with the offence; that he does not know how he was connected with the offence.

6. Upon hearing and analyzing the prosecution and defence case, the trial magistrate convicted the appellant for the offence of robbery with violence and sentenced to death. In sentencing the appellant, the learned magistrate expressed himself thus:

“I have considered the mitigation by the accused. However, there is only one punishment prescribed in law for the offence which the accused has been convicted and that is the death penalty. I therefore sentence the accused to death.”

In his mitigation, the appellant stated he had many problems at home and he sought pardon.

7. Aggrieved by his conviction and sentence, the appellant lodged a first appeal to the High Court. The appeal was dismissed. In dismissing the appeal, the learned judges were satisfied that the complainant PW1 was robbed of a motor cycle on 22nd February 2012 and that the motor cycle was recovered on 6th April 2012. The learned judges were further satisfied that the appellant was positively identified; that it was not by coincidence that the appellant had a cut on his lip and a broken upper tooth; that these features were well noted by PW1 and the trial court properly evaluated this item of evidence. In upholding the conviction, the judges were satisfied that the broken tooth and cut on the lip were not inflicted by members of the public as the same features had already been noted and stated by the complainant to the Police.

8. Further aggrieved, the appellant has lodged the instant appeal to this Court. Two grounds were urged in this appeal namely that the judges erred in evaluating and analyzing the evidence on record and that the sentence meted on the appellant was harsh given the circumstances of the case.

9. During hearing, learned counsel Ms. Susan Nabifo held brief for Gerald O. Kimanga who appeared for the appellant. The State was represented by Mr. Kakoi, the Principal Prosecution Counsel. Both parties filed written submissions.

APPELLANT’S SUBMISSIONS

10. The appellant emphasized on the issue of erroneous identification and the harsh sentence. Counsel submitted that the learned judges erred in failing to appreciate that the complainant had a chance to see the appellant at Bungoma before an identification parade was conducted; that the police at Butere sent the complainant to the Bungoma court to find out if the appellant was the same person who had been arrested at Teso concerning another matter; that there was all likelihood that PW1 after seeing the appellant at Bungoma was able to come up with the features and description of the appellant as having a cut on his lip and a broken tooth.

11. On the harsh sentence, it was submitted given the decision of the Supreme Court in **Francis Karioko Muruatetu & another -v- Republic SC Petition Nos. 15 & 16 of 2015**; the mandatory death sentence meted on the appellant was harsh. It was submitted that in the instant matter; the complainant did not sustain any injuries. The appellant urged this Court to be guided by the Supreme Court decision and set aside the harsh and unconstitutional mandatory death sentence meted upon him.

RESPONDENT'S SUBMISSIONS

12. The respondent in opposing the appeal stressed that this was a second appeal and was limited to matters of law only. It was submitted that the judges properly evaluated the evidence on record; that the judges appraised the defence case and succinctly set out the issues for determination. It was submitted the two courts below were satisfied that the prosecution had proved its case to the requisite standard; that all ingredients of the offence of robbery with violence were proved; that the complainant was attacked by the appellant who was in the company of another person; that force was used on the complainant; that the identification of the appellant was proper; that the complainant had opportunity before darkness to see the appellant and he clearly saw the appellant had a cut on his lip and a broken tooth; that there was no mistake in the identification of the appellant. The respondent urged us to uphold the conviction of the appellant.

13. On the issue of sentence, the respondent submitted that following the Supreme Court decision in **Francis Karioko Muruatetu & another -v- Republic (Supra)**, this Court has discretion to alter the death sentence meted upon the appellant; however, the respondent urged us not to interfere with the sentence because sentencing is the discretion of the trial court.

ANALYSIS and DETERMINATION

14. We have considered the appellant's two grounds of appeal as well as submissions made by both parties and the authorities cited. This is a second appeal against conviction and sentence. By dint of **Section 361** of the **Criminal Procedure Code**, a second appeal is confined to matters of law only. This Court restated as much in **Karungo -vs- R (1982) KLR 213** at p. 219;

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari C/O Karanja -vs- R (1956) 17 EACA 146)”

15. The appellant's case is centered on the issue of identification. It was submitted that the complainant had a prior opportunity at the Bungoma law courts to see the appellant and as such, the identification of the appellant by the complainant was not proper. The evidence on record reveals that on the material date, when the appellant approached the complainant at Buruburu stage seeking to be given a ride to Bulanda, it was not yet dark; it was around 6.00 pm. The evidence shows that the complainant spent some time conversing with and interrogating the appellant inquiring which village he came from and whom he knew in the village. The complainant even called his fellow boda boda motorcyclist **Patrick Ashibego Otuya (PW2)** to try and ascertain if he knew the appellant. Consideration of circumstances surrounding evidence of identification was well elucidated by the Court in **Robert Kariuki Wachiuri & another v Republic [2016] eKLR**.

“Some of the factors that a court of law should bear in mind when determining whether circumstances prevailing at the time and place of the incident favoured positive identification or otherwise of the assailant were set out by the court in the Maitanyi versus Republic[1986] KLR 198.A court of law ought to be conscious of the fact that many witnesses do not properly identify another person even in day light and it is therefore prudent for such a court to ascertain the nature of the light available, the type of light, its size and its position in relation to the suspect when dealing with the issue of identification.”

16. On the issue of identification through recollection of physical features and appearance, in the book **“The South African Law of Evidence by DT Zeffertt, AP Paizes, A St Q Skeen 2003 at pages 142-143”** under the heading Evidence of identity and the subheading Direct Evidence, and under the rubric Fallibility, the authors at the very outset sound a note of caution about the unreliability of identification evidence in this way:

“It is generally recognized that evidence of identification based upon a witness's recollections of a person's appearance is dangerously unreliable unless approached with due caution. The Appellate Division in S -v- Mthetwa 1972(3) SA 766 (A) laid down:

Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest. The reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities. (Emphasis supplied)

17. Comparatively, in the South African case of **R -v- Shekelele, 1953(1) SA 636 T at 638 H Dowling, J**, said:

“Witnesses should be asked by what features, marks or indications they identify the person whom they claim to recognize. Questions relating to height, build, complexion, what clothing he was wearing and so on should be put. A bald statement that the accused is the person who committed the crime is not enough. Such a statement unexplained, untested and uninvestigated, leaves the door wide open for possibilities of mistake.

18. In the instant appeal, we note that on the material day, the complainant had conversation and interrogation of the appellant when it was not dark; the complainant had ample opportunity to look at the appellant and see what physical features he had on his body. The record shows that even before the appellant was arrested, the complainant PW1 had described to the police that his attacker had a cut on the lip and a broken tooth. Based on the description and features given to the police, we are satisfied the appellant was properly identified by the complainant as one of the persons who robbed him. As correctly analyzed by the two courts below, we are convinced that it was not a coincidence that the appellant had features that the complainant stated the person who attacked him possessed. It is also not a coincidence the complainant stated the person who attacked him was Ben who hailed from a village where the complainant had relatives. It is not a coincidence that when the complainant and his brother went to the village to inquire the whereabouts of the appellant, indeed it was true the appellant hailed from that village.

19. This Court has often stated that it will not interfere with concurrent findings of fact by the court below unless such findings are not based on the evidence on record. In this matter, we are satisfied that the two courts below considered and evaluated the prosecution as well as the defence evidence. All the ingredients for the offence of robbery with violence were proved. (See Hussein Hamisi Mohammed & another -v- Republic [2015] eKLR.) That the appellant robbed PW1 of a motorcycle and used violence in the process. The issue of the use of personal violence on a victim was cited in Joseph Njuguna Mwaura & 2 others -v- Republic [2013] eKLR. The appellant has not demonstrated to our satisfaction any item of evidence that was either ignored or not considered and evaluated by the High Court. We observe that the High Court properly considered the appellants attempt to explain the cut on his lip and his broken tooth.

20. In re-evaluating the defence case, the learned judges correctly held that it is not by coincidence that the appellant had a cut on his lip and a broken tooth; that these features were noted by the trial court; that the appellants attempt to explain that the two features were inflicted upon him by members of the public was not true as the features had already been given to the police by the complaint. We note the appellant in his defence gave an unsworn statement. This Court in Amber May -v- Republic [1976- 80] 1 KLR 1118 stated that an unsworn statement made by an accused person in a criminal case is not evidence although it should be taken into consideration in relation to the whole of the evidence. (See also R -v- Frost, R -v- Hale (1964) 48 Cr App Rep 284). In this matter, we are satisfied the prosecution proved its case beyond a reasonable doubt.

21. On the death sentence meted out on the appellant, the judges upheld the conviction and affirmed the sentence. It is noteworthy that the impugned judgment was delivered on 14th October 2014 before the decision of the Supreme Court in the case of Francis Karioko Muruatetu & another -v- Republic (Supra). In the decision, the Supreme Court held that mandatory death sentence is unconstitutional as it takes away judicial discretion of the trial court to determine an appropriate sentence in each particular case.

22. Guided by the decision in Francis Karioko Muruatetu & another -v- Republic; this Court in several cases has set aside the death sentence meted upon appellants who were charged with the offence of robbery with violence. For instance, in Wycliffe Wangusi Mafura Eldoret Criminal Appeal No. 22 of 2015 [2018] eKLR, the death sentence for robbery with violence was set aside and substituted with a 20-year term of imprisonment. In Humphrey Wanyama -v- Republic, Eldoret Criminal Appeal No. 49 of 2017, the death sentence was set aside and the substituted with imprisonment for 20 years. (See also David Ochieng Akoko -v- Republic, Kisumu Criminal Appeal No. 185 of 2014; Paul Ouma Otieno -v- Republic, Kisumu Criminal Appeal No. 616 of 2010).

23. In this matter, we note the trial magistrate when sentencing the appellant stated that the death sentence was mandatory. This position is no longer the law in light of the Supreme Court decision in Francis Karioko Muruatetu & another -v- Republic.

24. There is mitigation by the appellant on record and we see no reason to remit this matter to the trial court for a rehearing on sentencing. For this reason, we find it appropriate to interfere with the death sentence affirmed by the first appellate court. We dismiss the appeal against conviction; we set aside the death sentence meted upon the appellant and substitute thereto a sentence of 20 years' imprisonment with effect from 2nd October, 2012 when the trial court passed sentence.

Dated and delivered at Kisumu this 3rd day of July, 2019.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR