IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ. A)

CRIMINAL APPEAL NO. 237 OF 2012

BETWEEN

HASSAN MOHAMMED NAMWIBA ..... APPELLANT

AND

REPUBLIC …..RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at

Kakamega,(Chitembwe & B. Thuranira, JJ) dated 7th June, 2013

in

HCCRA NO. 43 OF 2011)

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JUDGEMENT OF THE COURT

The appellant, Hassan Mohammed Namwiba, has filed this second appeal against the conviction and sentence of death by the Chief Magistrate (R. Nyakundi) on a charge of robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of the charge were that on the 19th day of October, 2009 at Lusumu sub-location, Bunyala West Location in Central Kakamega District of Western Province, jointly with another at large, while armed with a panga and a knife, robbed Constant Sifuna Kuloba of one unregistered motor cycle make TVS valued at Kshs. 90,000/= and that immediately before the time of such robbery used actual violence to the said complainant. The first appeal was heard by the High Court (Said J. Chitembwe and B. Thuranira Jaden, JJ) who found no merit in it and disallowed it. The appellant was dissatisfied with that findings and filed this appeal through the Memorandum of Appeal filed by his counsel M/s Ashioya & Company Advocates.

Being a second appeal we can only consider issues of law but not matters of fact that have been considered by the two courts below and on which findings were made – Section 361 (1) (a) Criminal Procedure Code.

The prosecution case through the evidence of four prosecution witnesses, was that Constant Sifuna

Kuloba (PW1) who was employed as a motor cycle rider by Martin Wekesa Wamalwa (PW2), was on 19th October, 2009 allegedly approached by the appellant while in Bungoma town when a deal was struck where PW1 was to ferry the appellant on the motor cycle to Malaha Primary School along Mumias /Kakamega road to visit the appellants' child. They commenced their journey and stopped to fuel twice. They were allegedly using short cuts on the way as directed by the appellant because PW1 did not know the stated destination. They reached a wooden bridge on Lusumu River where the appellant had to alight as care was required to cross the bridge. When PW1 was in the process of crossing the bridge while pushing the motor cycle, a man allegedly appeared and attacked him with a panga while strangling him. In the course of the struggle the unidentified man pushed PW1 into a trench full of water. PW1 held on to the motor cycle keys but the appellant joined the struggle while armed with a knife which he used to threaten PW1 who was thus forced to let go of the keys which were taken by the appellant who boarded the motor cycle and drove away while the third unidentified person melted away into a cane plantation. PW1 who was injured in the struggle was unable to get assistance to pursue his attackers. He reported the matter to an Administration Police Camp at Shianda and also telephoned PW2.

On 22nd October 2009 PW1 and PW2 received information that the stolen motor cycle had been spotted at Shikoti Police Station. They went there but on the way they allegedly met the appellant who was riding a different motor cycle. They raised the alarm and members of the public gave chase and were able to apprehend the appellant who they beat up and they surrendered him to the police. PW1 stated that he recognized the appellant because **"...one of his eyes was not very normal..."** and that the appellant was still wearing the jacket he had on the day of the incident.

PW2 testified that he purchased the motor cycle which he handed to PW1 to use as a taxi.

Vincent Osore (PW3), a Clinical Officer, examined PW1 four days after the incident and found injuries on him which he classified as "harm". He completed a P3 Form which he tendered as evidence in court.

No. 70140 PC Alexanda Sulo (PW4) was the investigations officer. He received the report that had been made to the administration police and re-arrested the appellant. That was the case for the prosecution which the trial court found the appellant should answer.

In a sworn statement the appellant testified that he travelled to Nairobi on 18th October, 2009 to purchase goods for his business, arriving there the following day. He returned home to Butere on 20th October, 2009. On 23rd October, 2009 while en route to a funeral he and others were involved in an accident. They were attacked by a mob of people for unexplained reasons and he became unconscious regaining consciousness when he found himself at a police station in custody. Upon inquiry was to what was the matter and why he was incarcerated no explanation was offered and he was later charged in court. He denied committing the offence.

Eight grounds are taken by the appellant in the Memorandum of Appeal filed in this court. They range from a complaint that the first appellate court did not analyse the evidence as it was its duty to do; that the first appellate court failed to fault the trial magistrate who it is said did not state issues for determination and findings on such issues; that the appellants alibi defence was not interrogated; that the appellant could not have been arrested as alleged by the prosecution because he was already in police custody; that the trial magistrate treated the appellants testimony as unsworn when it was sworn evidence; that the first appellate could should have faulted the trial court for relying on only one identifying witnesses; that the first appellate court should have found that ownership of the stolen motor vehicle was not proved and that the death sentence imposed was unconstitutional.

The appeal came up for hearing before us on 19th November, 2013 and was urged by learned counsel Mr. P. J. Ipapu while the learned Assistant Director of Public Prosecutions Mr. C. A. Abele appeared for the State. Learned counsel for the appellant submitted that the charge sheet was defective because it omitted the words **"armed with a dangerous weapon"** in the particulars of the charge given. Counsel cited this courts decision in the case of **Daniel Morara Mose v Republic (Mombasa) Criminal**

Appeal No. 86 of 2000 (ur) in support of the proposition that omitting the said words embarrassed the appellant and was prejudicial to the charge. Counsel submitted further that the charge sheet was defective because it did not give full particulars of the stolen motor cycle. On identification, learned counsel submitted that it was wrong for the trial court and the first appellate court to rely on a facial feature of the appellant when there was no other evidence to that effect. Counsel also cited **Benson M. Mwangi v Republic (Nyeri) Criminal Appeal No. 238 of 2008** for the submission that it was dangerous to rely on the evidence of one identifying witness.

Learned counsel for the State in opposing the appeal submitted that the charge sheet was not defective because the law required proof of one or more of the ingredients forming the offence under Section 296 (2) of the Penal Code but not all of the ingredients had to be proved. Counsel submitted that there was proof that the complainant was wounded thus satisfying one of the ingredients of the offence. He furtehr distinguished the **Daniel Morara Mose (supra)** decision arguing that the appellant in that case was alone while the appellant in this appeal was with another. On description of the stolen motor cycle counsel submitted that its colour was given and although it was not registered, its insurance documents were produced to show that there was an insurable interest and engine number was shown in a receipt tendered in evidence. On identification, counsel submitted that PW1 was able to recognize and identify the appellant because of the length of time taken to negotiate for transport from Bungoma town, stopping to re-fuel and the time the attack took all done during the day.

In the course of the judgement the first appellate court on the issue of identification stated that:-

> **"... Given the evidence on record we are satisfied that the identification of the appellant was proper. PW1 had ample time to see the appellant from the time they negotiated about the journey. According to PW1 when they reached Malaha he refuelled the motor cycle and this also gave PW1 enough time to see the appellant. Further it is PW1's evidence that on the 22nd October, 2009 when he saw the appellant riding a motor cycle he identified him.**
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> **The robbery incident according to PW1 took about twenty minutes and this was at an isolated place, therefore the absence of an eye witness does not discredit the evidence of PW1....."**

Dealing with the case of identification by a single witness, this Court held in he case of **Benson M. Mwangi (supra):**

> **"...The law is clear, that a conviction can be based on the evidence of a single witness. Indeed Section 143 of the Evidence Act provides that a matter can be proved by any number of witnesses, unless the law under which one is being tried sets out the number of witnesses required to prove it. That legal principle, spelt out in several cases including the cases of Abdallah Bin Wendo & Another vs. Regina (1953) 20 EACA, 166 and Roria vs. Republic (1967) EA 583, carries a rider as regards identification of an accused person. That rider is that in all such cases where one witness's evidence is to be relied upon to convict an accused person, the Court has to exercise greatest care and ascertain beyond any doubt that the witness is reliable. If the conditions under which such identification is to be done are difficult, then the standard of care required before the court can convict on such evidence of a single witness is even higher. In the case of Abdallah Bin Wendo and another vs. Regina (supra), the predecessor to this Court had this to say:-**
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> **"subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a judge or jury can reasonably conclude that the evidence**

of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

Thus on the issue of identification, provided the trial court test the evidence of a single witness with the greatest care, a conviction can be based on the evidence of a single witness. What then is meant by the clause "testing the evidence of a single witness with the greatest care"? In our view the first consideration in testing the evidence of a single witness is to consider as to whether the witness is honest and reliable. The integrity of the witness is of paramount importance before a court directs its mind to his evidence. If the witness gives the impression at the time he is testifying that he is not an honest witness or is a witness of doubtful integrity, then, without much a do, the court cannot rely on his evidence to convict. This Court had been faced with such a situation in the case of Ndungu Kimanyi vs. Republic, (1979) KLR 282. It laid down the minimum standards of a witness upon whose evidence the court can rely to enter a conviction as follows:-

"We lay down the minimum standard as follows. The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his evidence."

The learned trial magistrate and the first appellate court were satisfied that PW1 was a witness of truth who was with the appellant for long periods of time and was able to recognize him four days after the robbery incident.

On the submission by learned counsel for the appellant that the charge sheet was defective for omitting some words we have perused the charge sheet. It is framed as follows:-

"ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE

PARTICULARS OF OFFENCE (See Second Schedule of C.P.C.) **HASSAN MOHAMMED NAMWIBA: ON the 19th day of October 2009 at Lusumu sub-location, Bunyala West Location in Central Kakamega District within Western Province, jointly with another at large while armed with a panga and a knife robbed CONSTANT SIFUNA KULOBA off one motor cycle unregistered valued at Kshs. 90,000/= (ninety thousand) only make TVS and immediately before the time of such robbery used actual violence to the said CONSTANT SIFUNA.**

2/11/09

If Accused Arrested	Date of Arrest	Without or with warrant	Date for Summons to Issue	Bond or Bail and Amount As Application made
		Apprehension		

Report to Court

YES	**23/10/09**	**w/o**	**2/11/09**	**in CUSTODY**

….....

Complainant

and Address CONSTANT SIFUNA KULOBA C/o NAMUTOKOLE VILLA KANDUYI, LOCATION

Witness 1 COMPLAINANT AND 6
….....

2. OTHERS TO BE STATED 7
….....

3. …..... 8
….....

4 …..... 9
….....

5 …..... 10
….....

Sentence ..

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Court and
….....

date …..If fine paid.....

….....

Officer in Charge KAKAMEGA Police Station."

There are three ingredients forming the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. These are:

I. **that the offender is armed with a dangerous or offensive weapon or instrument; or**
II. **that the offender is in the company of one or more persons; or**
III. **that at the time of robbery he or they visit violence on any person.**

There is no duty on the part of the prosecution to prove beyond reasonable doubt all the three ingredients as the offence is proved to the required standard if one of those ingredients of the offence of robbery with violence is proved.

This issue has been considered in various decisions of this court such as **Benson Ouma Amukawa & Anor v R (Nakuru) Criminal Appeal No. 468 of 2007 (ur).**

The prosecution proved through the evidence of the witnesses that the appellant was with another when they attacked the appellant; they were armed with a panga and a knife and they inflicted injuries upon the complainant.

The defence of alibi was properly displaced by the evidence by the prosecution in court and which had led to the arrest of the appellant.

The appellant has further complained in this appeal that the sentence of death imposed by the trial court was illegal as it was unconstitutional.

As already observed the appellant was charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. He was tried, convicted and sentenced to death. He was charged in court on 2nd November, 2009 (during the regime of the retired constitution) and convicted on 8th March, 2011 (when the new Constitution, 2010 applied).

The issue of the constitutionality of the death sentence was considered by this Court in **Geofrey Ngotho Mutiso v R [2010] eKLR Criminal Appeal No. 17 of 2008.**

Both the retired Constitution and the Constitution of Kenya, 2010 envisage that the right to life is not absolute. This issue was considered by a five (5) judge bench of this court differently constituted in **Joseph Njuguna Mwaura & 2 others v R Criminal Appeal No. 5 of 2008** where it was held on the constitutionality of the death sentence that since both the retired and the current constitution recognized that the right to life was not absolute the State could limit that right through statute such as the Penal Code. That court examined international instruments such as the International Covenant on Civil and Political Rights which envisaged situations where the right to life could be curtailed in furtherance of a sentence imposed by court of law. The sentence awarded to the appellant was neither illegal nor was it unconstitutional.

We have considered the grounds of appeal, the submissions by counsel and the law and can find no merit in this appeal which we accordingly dismiss.

Dated and Delivered at Kisumu this 24th day of January, 2014

J. W. ONYANGO OTIENO

….....

JUDGE OF APPEAL

F. AZANGALALA

.....

JUDGE OF APPEAL

S. ole KANTAI

….....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR