REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 3 OF 2014

Appeal from the original conviction and sentence by the Acting Senior Principal Magistrate at Mandera (C.A.S Mutai) in Criminal Case No. 284 of 2013.

MOHAMED ADAN HUSSEIN……APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

JUDGEMENT

Mohamed Adan Hussein, the appellant, was convicted and sentenced to death by the lower court for the offence of robbery with violence contrary to section 296 (2) of the Penal Code. It was alleged in the particulars of the charge that on 14th September 2013 at Mandera Township in Mandera East District within Mandera County, jointly with others not before court, being armed with a dangerous weapon namely a Somali Sword, robbed Abdiaziz Mohamed Adan of his mobile phone make Nokia 1280 valued at Kshs 2,000 and immediately after the time of the said robbery stabbed the said Abdiaziz Mohamed Adan.

The facts of the case are that on 14th September 2013 Abdiaziz Mohamed Adan, PW2, who is the complainant, was attacked as he was going to Soko Miraa in Mandera. Someone called him and when he turned to see who it was the person identified as the appellant in this case removed a dagger and demanded that the complainant hands over his mobile phone, a Nokia 1280. The complainant refused to give the appellant the phone and the appellant stabbed him on the right side of his face and took the phone by force. The complainant raised alarm attracting members of the public but the appellant escaped. The complainant was assisted to the hospital where he was treated. He reported the robbery to the police.

The appellant was arrested four days later on 17th September 2013 by Hussein Mohamed Idris, PW5, a Police Reservist Officer who escorted him to Mandera Police Station.

The trial court at Mandera received evidence from six prosecution witnesses after which the appellant was put on his defence. The appellant opted to remain silent. The trial court considered the evidence before it and found the charge proved. It convicted and sentenced the appellant to death. The appellant is aggrieved by that conviction and sentence and has come to this court on appeal. He is represented in this appeal by Mr. Kinyanjui, advocate.

The appellant has filed self-made petition and grounds of appeal in which he is mainly challenging prosecution evidence terming it as insufficient. He is also challenging the fact that there were no exhibits recovered from him and that the sentence is oppressive.

Mr. Kinyanjui filed amended petition of appeal with leave of this court. He has listed seven grounds of appeal that:

(i) The honourable magistrate erred both in law and in fact by convicting the appellant on evidence that was riddled with contradictions and discrepancies.

(ii) The honourable magistrate erred both in law and in fact by relying on evidence not sufficient to warrant a conviction.

(iii) The honourable magistrate erred both in law and in fact in failing to find that the prosecution had not proved its case beyond reasonable doubt.

(iv) The honourable magistrate erred both in law and in fact by relying on fabricated and uncorroborated evidence.

(v) The honourable magistrate erred both in law and in fact by imposing a theory in his findings not based on actual evidence.

(vi) The honourable magistrate erred both in law and in fact by disregarding the fact that nothing was recovered from the scene or from the complainant.

(vii) The honourable magistrate erred both in law and in fact in convicting the appellant on evidence that did not warrant conviction for the offence charged.

Mr. Kinyanjui made oral submissions in support of the grounds of appeal. He submitted that there are contradictions and discrepancies in the prosecution evidence. He pointed out that PW1 testified that he is the one who authorized and supervised the stitching of the appellant when evidence shows that the appellant was treated at Msehe Nursing Home yet PW1 told the court that he was attached to Mandera District Hospital; that the P3 Form produced by PW1 showed bruises and cuts on the complainant's forearm yet there is no evidence to support that the complainant was injured in any other place other than the right cheek; that it is not possible for the appellant to put his right hand inside the complainant's trouser pocket and at the same time use the same hand to stab the complainant and that the complainant said he was attacked by people unknown to him yet the P3 Form shows that the complainant reported that he was attacked by people who were known to him.

Learned counsel further submitted that PW3 testified that the assailant was arrested at the scene while PW5 told the court that he arrested the appellant on 17th September 2013; that the complainant said he was told one Mohamed Noor Sheikh has stabbed him; that PW4 told the court that she was at the scene of the robbery when in cross-examined she said that she was not at the scene; that evidence shows that the assailant threw the knife away and PW6 said the knife was not recovered which leads to a conclusion that no knife existed and that the ownership of the phone was not established beyond reasonable doubt.

Learned counsel criticized the trial magistrate in the manner in which he conducted the trial stating that the trial magistrate was not keen on the way he conducted the proceedings; that the record does not show the language used during trial; that the trial magistrate stated in the judgment that the prosecution called four witnesses when the record shows six witnesses testified. Learned counsel relied on **Anthony Irungu Warui vs. Republic Nairobi Criminal Appeal No. 268 of 2001** to support his point that the alleged offence took a short time. In this case the conviction was quashed and sentence set aside after the High Court sitting on appeal found that the events in that case took place very fast. Counsel also relied on **Chongo vs. Republic Mombasa Criminal Appeal No. 220 of 1991** in which the court quash the conviction and set aside the sentence due to contradictions in evidence. Learned counsel further submitted that **in Richard Kungu Kinyanjui vs. Republic Nairobi Criminal Appeal No. 711 of 1999** the court substituted a charge of robbery with violence with simple robbery. Learned counsel did not clearly submit whether he was asking this court to substitute the offence of robbery with violence with simple robbery under section 296 (1) of the Penal Code. Learned counsel asked this court to allow the appeal, quash the conviction, set aside the sentence and set free the appellant.

Mr. Mulama, learned state counsel represented the respondent. He opposed the appeal and submitted that the complainant made the first report to the police according to the evidence of PW6 the investigating officer; that the complainant told PW6 that he knew the assailants by physical appearance and that he had been stabbed on the right cheek and his phone was stolen; that the first report is always relied on; that the record of the court shows that Mohamed Noor Sheikh was PW3 and the judgement refers to this witness as PW3, the evidence that Mohamed Noor Sheikh was the person who had stabbed the complainant cannot be true and that this must be an error that can be cured by section 382 of the Criminal Procedure Code.

Learned state counsel submitted that the gist of this appeal is whether an offence under section 296 (2) Penal Code has been proved and that the prosecution does not have to prove all the ingredients of the offence; that sections 295 read with 296 (2) Penal Code constitute the offence of robbery with violence and that even if the dagger or knife was not recovered, evidence of PW2 shows that the appellant was in company of two others. Learned state counsel relied on the case of **Fanuel Otieno Omido vs. Republic Mombasa Criminal Appeal No. 98 of 2009** to emphasize that point.

It was submitted further that the case relies on dock identification; that PW2, PW3 and PW4 were able to identify the appellant well since the offence was committed at 10.30am and the conditions were conducive for positive identification. Learned state counsel cited the case of **Patrick Ngunjiri Kariuki vs. Republic Nyeri Criminal Appeal No. 273 of 2008** on the issue of dock identification and submitted that PW2 led PW6 to arrest the appellant and identified him; that the appellant was injured during the robbery and that even though the phone was not recovered this should not be used as weakening the prosecution case.

Learned state counsel took issue with the manner the judgement was written and submitted that these errors are curable under section 382 CPC; that the only contradiction is on the arrest of the appellant; that the authorities cited by the appellant are not relevant to this case as they dealt in different issues. Learned state counsel urged this court to dismiss the appeal for lack of merit.

Determination

This is a first appeal and this court is alive to the duty placed on it as stated by the Court of Appeal in following the principle set out in ***Okeno vs R [1972] E.A. 32:***

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination … and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions…. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses…."**

It is with the above principle in mind that we now subject all the evidence to fresh scrutiny. The way we understand the petition of appeal is that the appellant is challenging the evidence adduced in the lower court for being contradictory and inconsistent and for being inadequate to base a conviction on. This is the main gist of this appeal. In addition, the appellant is critical of the trial magistrate for casually handling the case and to some extent for imposing opinions not supported by evidence in the judgment.

Before looking at the evidence we wish to consider the manner in which the trial magistrate handled the evidence. We have considered the submission by learned counsel that the trial court did not indicate the language used in court on the day the appellant was put on his defence. Our considered view is that the language of the court was indicated at the beginning of the proceedings as English, Kisomali and Kiswahili. While it is true that the trial court did not indicate in every

coram that these are the languages used in court, we have no reason to doubt that the proceedings were interpreted to the appellant into Somali language which he understood. The record shows that one Alikher was the court clerk all through the entire proceedings; it shows that the appellant cross examined all the witnesses in a manner to indicate that he understood the proceedings. The fact that the appellant opted to remain silent after section 211 CPC was explained to him does not, in our view, mean that he did not understand the language. We find this claim without basis.

On the manner the judgement is written, we agree with the appellant that the trial magistrate did not give the evidence careful analysis and scrutiny. After narrating what each witness said, the trial court concluded that the case had been proved without analyzing the legal principles and addressing the obvious contradictions to arrive at his conclusions. The saving factor is that this is a first appeal and we have a duty to freshly analyze all the evidence independently.

We have found contradictions. PW1, the clinical officer who filled the P3 Form and produced it in evidence, said he requested that the appellant's wounds be stitched. PW1 was based at Mandera District Hospital while the appellant told the court that he was taken to Msehe Nursing Home where he was treated and discharged. Obviously these are two distinct hospitals and PW1 did not state whether he works both at Msehe Nursing Home and Mandera District Hospital.

PW2, who is the complainant, told the court that he did not know the appellant or the other two people with him before the date of the robbery. Counsel for the appellant has raised the issue that the P3 Form indicates that the appellant knew the assailants. This is true but it should be noted that it is not the appellant who filled the form. It is our view that the complainant did not know the appellant and his accomplices, if they can be referred to as such since there is no evidence to show they were involved in the robbery.

PW2 told the court that the appellant fled from the scene after taking the phone. This would explain his arrest by PW5 later on 17th September 2013. There is contradiction in the evidence of PW3, Mohamed Noor Sheik who testified that when he reached the scene he saw the appellant who had a dagger and who had been arrested and that the appellant threw the knife away and ran away. PW3 said the appellant was known to him before as a customer who had bought miraa from him before.

PW4, Shaley Hussein said she found the appellant aiming a dagger at the complainant but the appellant started to run away. Both PW3 and PW4 said they saw the appellant during the time of the robbery.

We have carefully considered these contradictions in view of the Chongo case relied on by the appellant. We wish to distinguish the two cases in that in the Chongo case, the prosecution and the appellant gave their respective versions of evidence which could as well be true and because of that the appellate court doubted the version given by the prosecution side. In this case we have one version of the case only, that given by the prosecution side.

Our view is that the appellant must have escaped from the scene only to be arrested later on 17th September 2013 by PW5 in company of the complainant. We view these contradictions as not fatal to the prosecution case because they do not go to the root of the case that the complainant was attacked, robbed and injured on his right cheek. All evidence agrees on this aspect and we have no reason to reject it. When the complainant went to report the matter to the police, he was already treated and stitched. We agree that PW1's evidence is confusing as to where he treated the complainant, whether at the Msehe Nursing Home or at Mandera District Hospital but one thing is clear the P3 Form was completed at the Mandera District Hospital.

We have considered the evidence that the complainant did not know the appellant before but we have no reason to reject the evidence that he was seen at the scene by three witnesses: the complainant, PW3 and PW4. PW3 knew him before this date. We take note of the fact that it was during the day and even though evidence shows that the robbery took few minutes we cannot

ignore evidence of three witnesses who state that they saw the appellant at the scene.

We note that nothing was recovered from him but then this does not mean that the robbery did not take place especially when there is evidence that the appellant was seen at the scene. Besides there is evidence that he threw the knife away.

We have considered that the appellant was in company of two other people. Even if we were to find that these two people did not participate in the robbery for lack of evidence to that fact, we cannot ignore the fact that the appellant was armed with a knife. Whether this is referred to as a dagger or Somali sword, we find these are just semantics and all refer to the same thing and either of them is a dangerous weapon. We find that the appellant was positively identified as the person who injured the complainant and took his phone.

Counsel for the appellant raised the issue that the appellant could not have used the right hand to both stab the complainant and remove the phone from his pocket. We have considered this and find no evidence to show that both actions took place simultaneously. We find no basis in this argument.

In conclusion we find that robbery with violence was committed by the appellant. We disagree with counsel for the appellant that the evidence is insufficient to base a conviction on. We have analyzed it and explained our reasons why we think the offence has been proved beyond reasonable doubt. We find the evidence corroborated on the injuries sustained by the complainant and the identity of the appellant. We therefore find that this appeal has no merit and dismiss the same.

Dated and signed this 11th day of September 2014.

F.N. Muchemi **S.N.Mutuku**

JUDGE **JUDGE**

Delivered this 18th day of September 2014 by Justice Stella Mutuku