**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 228 OF 2017**

**ALI BAKARI MASAI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An appeal from the original conviction and sentence by M. Rabera, SRM,**

**in Mombasa Chief Magistrate's Court Criminal Case No. 882 of 2016).**

**JUDGMENT**

1. The appellant, Ali Bakari Masai, was sentenced to suffer death for the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the charge were that on the 16th day of March, 2016 at Check Point area in Likoni Sub-County, within Mombasa County, jointly with others not before court, being armed with an offensive weapon namely wooden bar, robbed Hussein Yusuf Hussein of one mobile phone make Tecno valued at Kshs. 3,500/=, clothes mainly vests and caps valued at Kshs. 5,000/= and cash money Kshs. 5,000/= (sic) and at the time of such robbery used actual violence to (sic) the said Hussein Yusuf Hussein thereby occasioning him actual bodily harm.

2. The appellant on 28th December, 2017 filed a petition and grounds of appeal. On 13th March, 2019, the appellant filed amended grounds of appeal, with leave of the court. He raised the following grounds of appeal:-

(i) That the Learned Trial Magistrate erred in law and fact by failing to warn himself of the dangers of convicting him on the evidence of only a single identifying witness, PW1, without proper finding that the same was flawed when given other facts that: -

(a) There were no names and or even a description given to the person who received the initial report made to the Police; and

(b) The testimony of PW1 and PW2 was uncorroborated.

(ii) That the Learned Trial Magistrate erred in law and fact in convicting him without a proper finding that a key and crucial witness who was in the company of PW1 when the robbery took place was not called to testify to corroborate the complainant's evidence;

(iii) That the Learned Trial Magistrate erred in law and fact by merely dismissing his defence out of hand which amounted to a serious error on the part of the Trial court;

(iv) That the Learned Trial Magistrate erred in law and fact by sentencing him to suffer death without a proper finding that it was declared unconstitutional by the Supreme Court of Kenya; and

(v) That the Learned Trial Magistrate erred in law and fact by failing to consider the provisions of Section 333(2) of the Criminal Procedure Code which stipulates that where a person has been in custody prior to being sentenced, the court shall take into account of the period spent in custody.

3. In his written submissions, the appellant argued that the evidence of PW1 was un-corroborated and therefore the charge was not proved beyond reasonable doubt. He submitted that the complainant (PW1) who claimed to have known the appellant before the date of the alleged offence never told the Police the name of his assailant in the first report. He relied on the decisions in **Moses Munyua Mucheru vs Republic**, Court of Appeal Criminal Appeal No. 63 of 1993 and **Maitanyi vs Republic** (1986) KLR 198 on the importance of putting to test the evidence of the first report and the need to test with care the evidence of an identifying witness, respectively.

4. The appellant indicated that PW1 did not know his name yet he claimed that he knew his assailant as his customer. Further the appellant stated that in the first report to the Police, PW1 did not give a description of his assailant. On the issue of PW1 not having given the appellant's name to the Police, he relied on the case of **George Odoyo Omollo & another vs Republic**, Mombasa High Court Criminal Appeal No. 228 of 2008.

5. The appellant also challenged the failure by the prosecution to call one Kassim who was allegedly in the company of PW1 at the time of the robbery. He pointed out some inconsistences in the evidence of PW1 and PW2. He also claimed that his defence was not considered by the Trial court.

6. With regard to the sentence imposed against him, the appellant submitted that the Supreme Court had held that the death sentence was unconstitutional. He prayed for his appeal to be allowed.

7. The Office of the Director of Public Prosecutions through Ms Ogweno, Principal Prosecution Counsel, filed submissions on 19th March, 2019. She was of the view that the appellant was positively identified as the incident took place during day time. She submitted that the circumstances were favourable for positive identification and that the appellant was known to PW1 before the incident. It was also submitted that the appellant spent a considerable amount of time selecting clothes to buy from PW1. She indicated that there was sufficient proof that the appellant was among the people who attacked PW1.

8. The Prosecution Counsel urged this court to substitute the offence of robbery with violence with that of assault causing actual bodily harm. She submitted that the offence of robbery with violence was not proved beyond reasonable doubt. It was her view that the offence of assault which was a cognate offence to that of robbery with violence had been proved. She urged this court to invoke the provisions of Section 179 of the Criminal Procedure Code (CPC) to substitute the charge. Ms Ogweno submitted that PW1, PW2 and PW3 proved that there was assault occasioned on PW1 by the appellant.

**ANALYSIS AND DETERMINATION**

9. The duty of the first appellate court is to analyze and re-evaluate the evidence adduced before the lower court and come to its own independent decision while bearing in mind that it has neither seen nor heard the witnesses testify. In **David Njuguna Wairimu vs. Republic** [2010] eKLR, the Court of Appeal reiterated this duty as follows:-

***"The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."***

10. In this appeal, the issues for determination are:-

(i) If the appellant was positively identified; and

(ii) If the prosecution proved its case beyond reasonable doubt.

11. The only evidence adduced of the robbery with violence was by PW1, Hussein Yusuf Hussein, the complainant. He testified that on 16th March, 2016 he was called through his phone by the appellant. He further stated that he had saved the appellant's number in his phone, for he was his customer. PW1 went to where the appellant was at Shika Adabu Check Point at 11.00 a.m. He found the appellant who was a boda boda rider seated with his colleagues. PW1 recounted that the appellant and the other boda boda riders selected items to purchase but they refused to pay. He got hold of one of them.

12. He stated that as they were struggling, he was hit with a wooden bar at his back by someone unknown to him. He claimed that the appellant also hit him. He further stated that as they were struggling, his assailants removed money from his pocket and took his phone. PW1 said that he was in the company of one Kassim who had accompanied him to the scene. PW1 further testified that he was bleeding from his face and the back of the head.

13. PW1 reported the incident to Inuka Police Station. He was advised to go to hospital first because he was bleeding. He was treated at Likoni Health Centre. He recorded a statement after 3 days and was given a P3 form which he took to hospital for filling. It was PW1's evidence that he led to the arrest of the appellant. As at the time he was testifying in court, he stated that he had not fully recovered.

14. When PW1 was cross-examined by the appellant herein, it emerged that he had reported a case of assault against the appellant and not robbery with violence. When probed by the appellant about the said report, he said that he was not in his right mental status when he reported the incident but at the time he recorded the statement, he was in his right senses.

15. The evidence of PW1 is of particular importance in this appeal as he was the only witness who testified as to how the offence occurred. He stated that he knew the appellant as his customer and that he had saved his cell phone number in his phone. On being cross-examined by the appellant, he said that he did not know the appellant's name. PW1 failed to explain how he was able to know that the phone call he received was from the appellant and not any other customer. Without the name of the appellant being known to him, PW1 was then under obligation to explain how he came to establish that the customer who was looking for him was the appellant.

16. PW2, the Investigating Officer's evidence was a repetition of what he had been informed by PW1. He admitted that PW1 at the first instance made a report of assault.

17. I do agree with the appellant that in the circumstances of this case, it was incumbent on PW1 when making his first report to the Police to give a description of his assailant which would have enabled them to verify that indeed the person whose arrest PW1 was instrumental in, was indeed the one who had committed the offence of robbery with violence against him.

18. Another interesting aspect of this case is that PW1 made a report assault causing actual bodily harm. 3 days later when he went to the Police Station to record his statement, the assault case had metamorphosed into a robbery with violence case. Although PW1 stated that he was not in his right mental state when he made a report to the Police, he agreed that in accordance with the report made in the Occurrence Book (OB), the appellant was to be charged with the offence of assault.

19. It is apparent from the evidence on record, from cross-examination and on close scrutiny by this court of PW1's evidence, that he was not a witness of truth. After PW1 was treated in hospital and as he was writing his statement 3 days later, he changed the narrative from one of assault to one of robbery with violence. Such evidence is untenable and cannot be regarded as credible.

20. The excuse given by PW1 that he was not in his right state of mind when he made his first report at the Police Station is incredulous. Having been robbed of his wares for business, cash and phone, PW1 could not have forgotten the same within a few hours of the alleged robbery.

21. I have considered the proposal made by the Prosecution Counsel to substitute the charge against the appellant from one of robbery with violence to assault. There is no doubt that the PW1 was assaulted as the P3 form produced by PW3 proved that fact. The circumstances surrounding the assault are however not clear. It is however my finding that the evidence that was adduced in the lower court cannot even hold a charge of assault. In that regard, I am in agreement with the appellant that he should have been given the benefit of the doubt by the Trial court. I hereby quash the conviction for the offence of robbery with violence and set aside the sentence imposed against the appellant. He shall be set at liberty forthwith unless otherwise lawfully held.

**DELIVERED**, **DATED** and **SIGNED** at **MOMBASA** on this **27th** day of **September, 2019**.

**NJOKI MWANGI**

**JUDGE**

**In the presence of: -**

Appellant present in person

Mr. Muthomi Prosecution Counsel - for the DPP

Ms Peris Maina - Court Assistant