REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO 158 OF 2019

ISAIAH SAWALA ALIAS SHADY ……………….......………………. APPELLANT

VERSUS

REPUBLIC …………………………………………………………… RESPONDENT

JUDGMENT

1. **ISAIAH SAWALA ALIAS SHAADY (the appellant)** was charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code, the particulars being that on 9th of March 2015 at **KISAGEME village, KONGONI location in LIKUYANI District within KAKAMEGA County,** jointly with others not before court, while armed with dangerous weapons, namely rungus, robbed **DANIEL WANJALA** of a motor-cycle registration **KMDC 039V**, make tvs Star, red I colour, engine number 0f5fd1780960 frame No MD62GF54D1F12457 valued at Kshs 86,000/-,nd immediately before the time of such robbery used actual violence to the said **DANIEL WANJALA**. He denied the judge, and after a trial in which 6 witnesses testified on behalf of the prosecution, and the appellant was the only defence witness, he was convicted and sentenced to serve life imprisonment

2. **DANIEL WANJALA (PW5)** a, then boda boda taxi operator was in the company of his fellow boda boda riders, namely **MARTIN SIMIYU (PW2) and JOSEPH WANYAMA (PW1)**, parked their motor cycles outside **ORENGO'S hotel** within **MATUNDA CENTRE**, then got inside to have their supper at around 9.00pm. He finished his meal ahead of his companions, and went outside to wash his hands, when he met the appellant (who was also a bodaboda operator known to him as **Shadrack Sawala**) in the company of another, and he could see them well as there were lights outside the hotel. The appellant requested PW1 to ferry them to a funeral at **KISAGAME** area, so PW5 called PW1 and PW2 who came out, and he informed them he was taking the pair to a funeral. The pair said they would wait for him to return, and PW5 used PW1's motor-cycle to ferry them.

3. The appellant sat immediately behind the rider (PW5), and his companion was at the rear end. They set off, and upon getting to a steep portion of the road, the appellant ordered PW5 to get off the motor cycle, and upon the latter refusing, the appellant got something out of his right pocket and hit him on the shoulder. The motor cycle's engine went off and stopped. The pair who were joined by other people who had emerged from the side of the road, begun beating PW5, some were using pangas, and PW5 lost consciousness. He woke up at **MATUNDA hospital** with loss of speech, and a weak right hand. The motor cycle was gone, never to be recovered

4. PW1 and PW2 confirmed that they saw PW5 ferrying the appellant (whom they both knew as a bodaboda operator) and another, using the motor cycle registration KMDC 039 V make TVS, with the authority of PW1. They waited for PW5's return, until the hotel closed, and gave up the wait at 11.00pm. They assumed that the complainant had decided to spend the night at the purported funeral.

5. On cross examination PW1 confirmed speaking to the appellant who told him they were going to a funeral.

6. An hour after the hotel closed, PW1 received a call from a neighbour name **DAN**, who informed him that the motor cycle had been stolen.

7. He immediately reported to the police, and rushed to inform the owner of the motor cycle, one **CAROLYNE** about the matter, but realised that she already had the information. He learnt that PW5 had been admitted at **MATUNDA** hospital, and he visited him there. This was the same version of events narrated by PW2.

8. **CAROLINE BARASA (PW3)** who owned he motor cycle produced the log book and receipt showing that she owned the said motor cycle. She confirmed that it had been in the possession of PW1, who told her that he had allowed PW3 to ride it, and both rider and machine never returned. When they visited PW5 in hospital, he was in such critical condition, and could not even talk.

9. **STANLEY SOITA (PW4)**, the clinical officer who examined PW5 confirmed that he had a swollen face with cut wounds on the head, tender chest, swollen right hand and a bruised leg. The injuries were inflicted using a sharp object, and he classified the degree of injury as harm.

10. **P.C. SAMUEL KIPKEMEI (PW6)** testified on behalf of the investigating officer **PC JOSEPH KORIR**, who by the time of hearing the matter, had passed on. He confirmed that the victim was able to identify his attacker as the appellant

11. In his sworn defence, the appellant that stated that on the 9/3/2015, he left his place of work at 6pm, and went back to **KIPKAREN**, where he lived, and on 11/03/ 2015, he visited his family in **Kongoni**, and remained there until the following day. He was arrested at 12.30pm when the police raided a wines and spirits shop he had entered. He was taken to the police station, where the investigating officer told him that he had been looking for him for a very long time, and would teach him a lesson. It was his evidence that he had differed with the investigating officer over a woman who was working at the wines and spirits shop, so there was some rivalry over her. He maintained that the charges were fabricated, as on the night in question, he was inside his house in **KIPKAREN**.

12. The trial magistrate upon evaluating and analysing the evidence, found that undoubtedly the evidence established the ingredients of robbery with violence, and confirmed that the victim was robbed of the motor cycle. He noted that the appellant was known not only to the victim, but also PW1 and PW2 who saw them leave together on the material night.

13. The trial court found that the prosecution witnesses remained unshaken even under cross examination, and that there was nothing to suggest that the witnesses had any reason to frame the appellant up the appellant.

14. The appellant contested the outcome on grounds that:

a) The evidence was not sufficient to sustain a conviction

b) The trial court relied on the evidence of a single identifying witness

c) There were a lot of contradictions in the prosecution’s case

d) The investigating officer failed to attend court and testify

15. The appeal was canvassed through written submissions, although the appellant also made oral additions at the hearing. The appellant submitted that there was no robbery incident, and all that happened was that PW5 conspired with PW1 to sell the motor cycle then pretend that it was stolen. He faulted the evidence of PW1 and PW2 regarding identification, saying they did not give a description of his physical appearance. He maintained that the trial court only relied on the evidence of PW5 to convict him notwithstanding that the circumstances for identification were not favourable for positive identification as it was not established what the intensity of the light was either at the hotel, or at the scene of attack.

16. That in any event, the victim’s memory on identification may have been subjected to confusion due to his loss of consciousness after the attack, and that it was possible this was a case of an honest mistake.

17. Further, that a crucial witness (i.e. the investigating officer) was not called saying nothing was presented to confirm that the officer had died, and that the court was enjoined to examine very carefully his claims that the case was a fabrication arising out rivalry in a love triangle. To buttress his submissions on this point, the appellant referred to the case of **BUKENYA & ANOTHER V UGANDA (1972) EA 549**

18. The appellant also challenged the sentence meted out, saying that the life sentence was unconstitutional, excessive, harsh, ad amounted to degrading and inhuman treatment

19. In opposing the appeal, **Miss Okok** on behalf of ODPP argued that the ingredients proving the offence of robbery with violence were sufficiently established, as the evidence led confirmed a violent attack using crude weapons on the victim by more than one person, and the medical report confirmed the result of the violence in terms of injuries suffered by the appellant.

20. That there existed favourable opportunity for positive identification as there were security lights outside the hotel, and the appellant was well known to the victim as well as PW1 and PW2, and there was no possibility of a mistake, as this was identification by recognition.

21. The prosecutor poked holes at the alibi defence case, saying it was not strong enough to rebut the evidence presented by the prosecution witnesses who all saw him being ferried away by the complainant.

22. As for the defect in the charge sheet which cited the section of the offence as 296 (2) (2), prosecution argues that this was not a fatal error and is curable under section **382 of the Criminal Procedure Code,** as the particulars of the charge and the evidence did not change, and infact revealed the offence of robbery with violence, so the appellant was not prejudiced as to the nature of offence he was facing.

23. With regard to sentence, the prosecutor urged this court not to interfere with the sentence, pointing out that considering the circumstances under which the incident occurred, it was clear that the robbery was very cleverly planned and executed, resulting in the victim losing the use of his right hand. She implored this court to make sure that the appellant pays for his sins.

24. On the ingredients of what constitutes n offence of robbery with violence, I find that the trial magistrate painstakingly analysed each ingredient from the fact of how many persons were involved, the use of violence, and the theft, its ownership and how it ended up in PW5's possession. The definition of the offence of robbery with violence as created by section 296(2) of the Penal Code which provides as follows:

If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of such robbery, he wounds, beats, strikes or uses any other personal violence to any person,

Indeed, section **296 (2) (2)** is non-existent in out statutes, but did that occasion any injustice" Did it alter the nature of the charge and the particulars to the extent that the appellant had no clue or was confused as to the nature of the charge" I do not find any positive answer to the questions I have posed.

Section 382 of the Criminal Procedure Code provides

. **Finding or sentence when reversible by reason of error or omission in charge or other proceedings**

Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

I detect no such prejudice, and I find no incurable error occasioned.

25. As regards identification, it is instructive that encounter outside the hotel was first with the victim, and it was not a fleeting glance, but a close encounter where they had a short conversation as he sought to be taken to the purported destination. He was well known to PW5- a fact that the appellant did not deny. That encounter did not end with PEW1, but was confirmed by PW1 and PW2 again both of them knew and recognized the appellant as a fellow bodaboda rider and even knew his name. The witnesses were consistent that there was security light outside the hotel which enabled then to identify the appellant.

26. Whereas the intensity of the lights were not described, I think this would only have been fatal if the encounter had been a fleeting glance or under stressful circumstances. If that had been the case, then lack of description of the light intensity would have been critical. As it is, the encounter was under relaxed conditions. I am keenly aware of the considerations posed in the case of **Charles O Matiany 1986 eKLR** that a court ought to take into account as follows:

"…How long did the witness have with the Accused under observation" At what distance" In what light" Was the observation impeded in any was ..." Had the witness ever seen the accused before" How often" If only occasionally, had he any special reason for remembering the accused" How long elapsed between the original observation and the subsequent identification to the police" Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance...Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

Actually the present scenario positively answered to the **Maitanyi** questions, and the witnesses were very consistent as regards opportunity for identification. The trial magistrate considered the circumstances for identification and did not err in his findings that the same was favourable

Apart from the encounter outside the hotel, which confirmed that the appellant rode away with his companion and PW5 using the motor cycle, there was the actual attack which begun while the very two passengers who had hired PW5's services suddenly ordered him to stop and get off the motor cycle. When he resisted, the passenger who was seated next to him (being the appellant), drew out an object and struck him with it. At that point the passengers had not disembarked, and the question of mistaken identity does not arise

It is submitted that the prosecution has a duty in every criminal matter to make available all necessary witnesses for the purpose of establishing the truth. This duty is in no way affected even where such witnesses may bring evidence that will undermine the prosecution's case/narrative, and that failure to do so mandates the court to give the Accused Person the benefit of doubt.

The principles to consider in determining the issue of crucial witnesses was dealt with in the leading case of **Bukenya and Others Vs. Uganda 1972 EA 549LUTTA Ag. VICE PRESIDENT** held:

'***The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution…***

The prosecution's burden in regard to witnesses is to call witnesses who are sufficient to establish a fact. However it is not necessary to call all the people who know something about the case. The issue is whether those called are sufficient to aid the court establish the truth, whether the evidence is favourable to the prosecution or not."

It is submitted that the prosecution failed to call all the necessary witnesses that were needed to establish the truth.

The prosecution explained that the investigating officer had passed on- the appellant thinks this is a red herring being waved just so as to save the police officer from being confronted about the love triangle. Whereas it is true that no death certificate was presented to prove the claim about his death, the appellant did not suggest that the three witnesses namely PW1, PW2 and PW3 were known to the officer, and that they therefore conspired with him to develop a theory about the incident, including the encounter outside the hotel, and the eventual attack. I detect no prejudice in the failure to call the initial investigating officer.

The appellant raised an alibi defence, and the position i the burden of proof once an alibi defence is raised, the burden of proving to the contrary lies with the prosecution and cited extensively from past decisions such as. The Court of Appeal in **Victor Mwendwa Mulinge vs. Republic [2014] eKLR:**

"***It is trite law that the burden of proving falsity, if at all, of an accused's defence of alibi lies on the prosecution."***

This was also stated in ***"…in Ssentale vs. Uganda [1968] EA 365, 368 [Sir Udo Udoma CJ] …said that a prisoner who puts forwards an alibi as an answer to a charge does not thereby assume any burden of proving that answer; it is a misdirection to refer to any burden as resting on the prisoner in such a case; for the burden of proving his guilt remains throughout on the prosecution. We agree, we have ourselves said so on more than one occasion…The defence of alibi was put forward for the first time some four months after the robbery when the appellant made his unsworn statement in court. Even in such circumstances the prosecution or the police ought to check and test the alibi wherever possible."***

My understanding is that the alibi defence must be raised at the earliest opportunity available, so as to have it subjected to test through cross examination of the witnesses and an accused cannot keep it under wraps like some sort of secret weapon to be used and the tail end of the prosecution case. The record clearly absolves the trial court from any error – indeed the court analysed the evidence and the place of the burden of proof. I am persuaded that the same was properly rejected.

The upshot is that the conviction was safe and is upheld.

As regards sentence, I take into account the circumstances in which the incident took place, and in particular the residual health effects the complainant has suffered. Sentencing is a process of imposing a punishment on an accused person upon the court finding them guilty or upon the accused person pleading guilty. The principles underlying sentencing are set out in the judiciary sentencing policy guidelines to include-

Proportionality: The sentence meted out must be proportionate to the offending behaviour. The punishment must not be more or less than is merited in view of the gravity of the offence. Proportionality of the sentence to the offending behaviour is weighted in view of the actual, foreseeable and intended impact of the offence as well as the responsibility of the offender.

The rationale for imposing sentences include:

Retribution-eye for an eye principle you deserve to be punished (Sentence must be Proportionate to the Gravity of the offence)

• Deterrence- Prevent crime and reduce crime rate-based on the notion that everyone understands that certain conduct constitutes a crime which carries a severe penalty, and that because of this the public will desist from the targeted conduct. Does it restore public confidence"

• Rehabilitation

• Incapacitation

• Denunciation

• Restoration

The court is also required to take into account inter alia the following:

First offender, value of the item,

Manner in which the act was carried out- nature of the violence

Culpability- reckless, negligent, Knowingly-does he/she understand the consequences of the act.

Taking into account all these factors, I think the jurisprudence which is fast setting pace is that even life sentences ought to have a definite span. In this regard then I am persuaded that a 20year sentence which runs from the date of conviction is apt. I therefore set aside the life sentence and substitute it 20 years imprisonment, which shall run from date of conviction.

E-Delivered and dated this 3rd day of June 2021

H.A. OMONDI

JUDGE

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