



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL APPEAL NO.31 OF 2017

HARON KIPKEMOI LANGAT....APPELLANT

- V E R S U S -

REPUBLIC.....RESPONDENT

(Being an Appeal from the decision and sentence by Hon. B. R. Kipyegon (SRM) in KERICHO SRM Court Criminal Case No.4 of 2017 delivered on 11/9/2017)

JUDGMENT

1. The Appellant was sentenced to death for Robbery with Violence Contrary to Section 296(2) of the Penal Code.
2. The Particulars of the charge were that on 30/12/2016 at **KAPLAMBOI** Village in Londiani within Kericho County, the Appellant while armed with a knife and wood, robbed **WESLEY KOSGEY** of Cash Kshs.1,400/= and a phone all valued at Kshs.8,400/= and at the time of such robbery, wounded the victim..
3. The Prosecution evidence is brief was that on the material day of 10.30 p.m., the Complainant **WESLEY KOSGEY** was walking home when he saw the Appellant **HARON KIPKEMOI** emerge from his home and run towards him flashing his torch and he ordered the Complainant in Kipsigis Language to surrender all that he had.
4. The Complainant said he gave the Appellant his phone E3044 and his wallet which had Kshs.1,400/=. The Complainant said the Appellant then hit him with the wooden side of his Jembe on the head. He screamed but no one responded since the Appellant was a feared man in the neighbourhood.
5. The Complainant lost consciousness and when he regained his senses, he found that he had sustained a head fracture with cuts on the fingers.
6. **PW.2 RICHARD RONO**, a Nyumba Kumi Agent and a guard at Kaisugu said he was informed that the Complainant had been attacked. He went to the scene where he found the Complainant who had injuries on the head and hands. The Complainant said the Appellant had attacked him.
7. The Appellant was arrested at Kaisugu Taidy Restaurant on 31/1/2017 by members of the public who wanted to lynch him. **PW.3 CPL Kennedy Omondi** of Chepseon Police Station rescued the Appellant and took him for treatment and he was subsequently charged with this offence.
8. The Appellant said in his defence that he was at his home attending his sick/injured mother until the day he was arrested when his girlfriend told him to pass by her place at Kaisugu on his way to his place of work at Nakuru. At Kaisugu a lady hit him on the head and shouted "he is the one". He was accosted by members of the public and police rescued him. The Appellant admitted he had issues in the village but he had since apologized and become a responsible man with work at Nakuru.
9. The Trial Court found that the identity of the Appellant was based on recognition and made a finding that recognition is more assuring than identification of a stranger.
10. The Court found the Appellant guilty as charged and convicted him and sentenced him to death.
11. The Appellant has now appealed to this Court against both conviction and sentence on the following grounds:-

i. THAT the Trial Court erred in convicting the Appellant whereas there was no mens rea established and further there was no evidence to support the charge.

ii. THAT the Trial Court failed to appreciate and give weight to numerous material contradictions and discrepancies in the Prosecution evidence and admitted hearsay evidence adduced by PW.2 and PW.3 hence convicting the Appellant on inadmissible evidence.

iii. THAT the Trial Court relied on the testimony of a single witness which was not corroborated and the same was unreliable, doubtful and contradictory.

iv. THAT the rights of the Appellant were violated in that he was not accorded legal representation in contravention of Article 50 (2)(g) and (h) of the Constitution.

v. THAT the Prosecution did not call essential witnesses such as the Medical Officer and the Investigating Officer.

vi. THAT the death penalty meted by the Trial Court was Excessive, Manifestly harsh and unconstitutional.

vii. THAT the Trial Court failed to give sufficient cognizance of the Appellant's defence and further shifted the burden of proof to the Appellant.

12. The parties filed written submissions which I have duly considered. The Appellant submitted as follows:-

i. THAT the evidence adduced by the Complainant is that he lost consciousness at the Appellant's residence and he was taken to Hospital at 3.00 a.m. PW.2 said he rushed to the scene at 11 p.m. but did not find the Appellant at the scene and no weapon was recovered at the scene.

ii. THAT still on corroboration, the Investigating Officer said the Complainant was robbed of Kshs.1,000/= and a mobile phone worth Kshs.7,500/= and in Cross-Examination he said the Complainant was robbed of Kshs.1,400/= and a phone whose make he could not tell. The Appellant's Counsel submitted that the Prosecution evidence was full of contradictions.

iii. THAT it was further submitted that the Appellant was not accorded legal representation and the court did not find which language the Appellant understood and the trial must be declared a nullity as the provisions of the Criminal Procedure Code and the Constitution were not complied with.

13. The Respondent opposed the Appeal and submitted as follows:-

i. THAT the Complainant saw the Appellant emerge from his home and pounced on the Complainant and robbed him of his money and mobile phone before assaulting him with a Jembe.

ii. THAT the evidence of PW5 was corroborated by that of PW.2 who went to the scene where PW.1 told him he had been attacked by the Appellant.

iii. THAT the evidence of PW.2 and PW.3 was not hearsay as they were told by PW.1 that it was the Appellant who attacked him.

iv. THAT the Court did not rely on the testimony of a single witness as the testimony of PW.1 was corroborated by that of PW.2 and PW.3.

v. THAT although the Medical Officer did not come to Court, there is evidence that the Complainant was injured during the robbery.

vi. THAT the sentence meted was legal and further the Court should find that the conviction was safe and sentence the Appellant appropriating taking into account the decision in the Muruatetu case.

vii. THAT the Complainant recognized the voice of the Appellant and the identification was based on recognition and therefore it was reliable.

viii. THAT the Appellant had the opportunity to hire an Advocate but choose not to do so.

ix. It was also submitted that at no time did the burden shift to the defence and further, that the alibi defence was raised late in the trial as an afterthought and the same was considered by the Trial Court and found to be wanting.

14. This being a first appeal, the duty of the first Appellate Court is to re-evaluate the evidence adduced before the Trial Court and to arrive at its own independent conclusion.

15. In the case of **Okeno vs. Republic [1972] EA 32**, the Court of Appeal set out the duties of a first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). 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 finding and conclusion; 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, see Peters vs. Sunday Post [1958] E.A 424.”

16. The issues for determination in this appeal are as follows:-

- i. Whether the Prosecution established the guilt of the Appellant to the required standard.**
- ii. Whether the Appellant was properly identified.**
- iii. Whether the alibi defence by the Appellant was taken into account by the Trial Court.**
- iv. Whether the Trial Court shifted the burden of prove to the Appellant.**

17. On the issue of degree of prove, the Prosecution called three witnesses. The law does not specify the number of witnesses who may discharge the burden of proof. It is trite law that a fact may be proved by a single witness (*See KIRAGU -VS- R (195) eKLR*). The degree of prove in Criminal Cases is beyond reasonable doubt.

18. I find that the testimony of the Complainant was reliable. The Complainant was able to recognize the Appellant through his voice. He saw the Appellant emerge from his compound and he demanded that the Complainant gives him everything he had in Kipsigis Language.

19. I find that the Appellant was properly identified since this was a matter of recognition which is different from identification of a total stranger.

20. Although the circumstances were not conducive for proper identification, the Complainant knew the Appellant and was able to recognize him.

21. The Complainant told PW.2 that it was the Appellant who had robbed him. The incident also took place outside the Appellant’s compound.

22. I find that at no time did the burden of proof shift to the Appellant. The Trial Court found the testimony of PW.1 reliable and further, found that the Appellant stood at a fairly close approximating to the Complainant and spent reasonable time together and there was light from moonlight and the Appellant’s torch.

23. The Trial Court also found that apart from voice recognition, all the elements of robbery with violence Contrary to Section 296 (2) were proved as the Appellant was armed and he wounded the Complainant during the robbery.

24. The Trial Court also found that although the Medical Officer did not come to Court, there was evidence that the Appellant was armed and he struck the Complainant immediately after he robbed him.

25. I find that the Court gave consideration to the Appellant’s alibi defence on the last page of the Judgment where the Trial Court dwelt at length on the alibi defence and relied on the case of *VICTOR MWENDA MULINGE -VS- REPUBLIC [2014] eKLR* and found that the same did not dislodge the Prosecution case which the Trial Court found to be sincere and consistent.

26. The Respondent conceded that the court should take into account the holding in the Muruatetu Case and sentence the Appellant appropriately.

27. I accordingly uphold the conviction but taking into account the Muruatetu case I set aside the death sentence the Appellant is facing.

28. In sentencing the Appellant,I take into account the 2016 Judiciary of Kenya Sentencing Policy Guidelines which lists the objectives of sentencing at page 15, paragraph 4.1 as follows:

“Sentences are imposed to meet the following objectives:

- 1. Retribution: To punish the offender for his/her criminal conduct in a just manner.**
- 2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.**
- 3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.**
- 4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct**

ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.

5. Community protection: To protect the community by incapacitating the offender.

6. Denunciation: To communicate the community's condemnation of the criminal conduct.”

29. The conviction is accordingly upheld and the Appellant is sentenced to 3 years imprisonment.

30. The sentence will start running from 4/1/2017 when the Appellant was first arraigned in Court.

31. Since the Appellant has been in custody for more than three years, I direct that the Appellant be set free forthwith unless lawfully held for any other reason.

Delivered, signed and dated at Kericho this 22nd day of January, 2021.

A. N. ONGERI

JUDGE