



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

(CORAM: R. MWONGO, J)

COURT CRIMINAL APPEAL NO. 8 OF 2019

STEPHEN MUIRURI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence from the judgment of

Hon. E Kimilu, PM, dated 4/3/2019 in CMCRC No 1013 of 2016,

Naivasha)

JUDGMENT

1. Stephen Muiruri was charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The particulars of the charge were that: the appellant, on 27th November 2016 at Kabati estate in Naivasha Sub-County, while armed with an offensive weapon namely a piece of wood, robbed Mary Wangari Mwai of a mobile telephone make Tecno valued at Kshs. 3,000/- and cash of Kshs. 7,470/- the property of the said Mary Wangari Mwai; and at the time of such robbery, used actual violence to the said Mary Wangari Mwai.

2. After hearing five (5) prosecution witnesses and the unsworn evidence of the accused without witnesses, the trial court convicted and sentenced the accused, Stephen Muiruri, to death.

3. Aggrieved by the trial court's decision, he has appealed against conviction and sentence on the following grounds:

- i. That the death sentence imposed was a discretionary sentence and that the trial magistrate did not consider mitigating circumstances*
- ii. That the learned trial magistrate erred in points of law and in fact by passing this conviction and sentence on evidence of identification by recognition where there had been no advance first report of such recognition made to the police.*
- iii. That the learned trial magistrate erred in law awarding a conviction sentence on a single identifying witness when circumstances for identification were difficult.*
- iv. That the trial magistrate in law and fact by convicting the appellant on the prosecution case which was not well investigated, not corroborated and with glaring contradictions thus insufficient evidence was used to pass a sentence and conviction*
- v. That the trial magistrate erred in law and fact in the burden of proof and by failing to analyse the appellant's defence and give reasons as to whether it was accepted or not.*

4. This court's role as the first appellate court is to re-evaluate and analyse all the evidence availed in the lower court and to come to its own conclusions being careful to note that this court did not hear the evidence first hand or see the demeanour of the witnesses. (**Okeno v R 1972 EA 32**)

5. The brief facts are that on 27th November, 2016 the complainant had just closed her hotel at about 10.30pm, and was headed home carrying a bucketful of hot water for a shower. As she walked home near Kabati Primary School, she came across one, and then a second,

man. She said she recognized the second one as Gatua, whose face she saw in the light emanating from the security lights in the plot. Gatua told her that he was afraid as to how she would get home as there were robbers at the corner; that he had only managed to pass the corner because he was armed with the piece of timber he had under his armpit.

6. According to her they spoke for about ten minutes, although she did not say what other things they talked about. Then as she was turned at the next gate, she was hit twice on the head with a piece of timber by Gatua. She lost consciousness, and regained it in Naivasha District hospital where she was admitted. She discovered that a nail had pierced her cheek, two of her teeth had been removed and her right middle finger and thumb were injured. She was in hospital for one month.

7. Whilst in hospital, the doctor – who recognized her – called a lady who in turn called her brother, Gitonga. The doctor directed her brother, Gitonga, and he went to the scene where he collected a piece of wood that he took to Naivasha Police station when he went to report the incident.

8. When recalled for further cross examination, PW1 reiterated her evidence. She stated that the accused was known as Gatua, and was using his brother's name Muiruri whilst she knew that Muiruri was the accused's brother who had previously been lynched. She stated that she saw the accused on the material night by the light of the electric security lights in the plot, and that they had spoken to each other before the attack, and that he was well known to her.

9. She said she was robbed of cash kshs 6,000/- and her mobile phone Techno make worth 3,000/-.

10. In further re-examination, the witness stated that there was not only the security light from the neighbouring plot, but that there was a security light pillar normally known as "mulika mwizi" in the vicinity. In addition, PW1 stated that she knew the accused well; that his parents lived in Mithuri and that she has known him since birth, and knew he had been in prison before. It was therefore easy for her to tell her brother who was involved in her attack.

11. PW2 Patrick Gitonga, the complainant's brother testified that he was called at 2.00am by his son Joseph Kingori who told him his sister had been attacked by thugs. He immediately took a motor cycle and rushed to Naivasha District hospital where the complainant had been rushed. He escorted her after she had been x-rayed. Based on information he received from a good Samaritan, he went to the scene where he found a piece of timber with a nail and blood stains on it and a jerry-can of water. He took the piece of timber to the police station. He also went to get a receipt for the complainant's mobile phone which had been stolen and handed it over to the police.

12. On recall, PW2 stated he handed over the receipt and the box for the phone. In cross examination he confirmed that he went to the hospital the same night of the attack and also reported to the police the same night. He testified that the complainant mentioned the accused's name to him. He said he was told by police officers that the accused was arrested thereafter.

13. PW3 Cpl Danson Ngari from Kabati AP Post testified that on 14th December, 2016 the complainant came to the Post with a note issued by PC Barasa of Naivasha Police station for the arrest of a suspect nicknamed Ngatwa. The name was well known to him as he was a resident of Kabati. In cross examination he said he arrested the accused on 19th December 2016. Nothing was recovered from the accused. He had arrested him previously in 2013 for house breaking and stealing.

14. PW4 Mesa Silvester is a Clinical Officer from Naivasha Hospital who examined the complainant. He stated she was injured on the head right hand and mouth. Her neck also had injuries. Her scalp had a scar of about 10cm, her ails hands and fingers were swollen. The degree of injury was harm.

15. The investigating Officer was PC Frederick Oduor, PW5. He said he took over from PC Barasa who had been transferred. He said a report had been filed by Patrick Gitonga PW3 on 27th November, 2016 that his sister, the complainant had been attacked on 26/11/2016. He found out that she was admitted at Naivasha hospital. That PC Barasa later got the complainant's statement. He reiterated the information she gave; that PC Barasa had arrested the accused.

16. PW5 testified that due to the issue of the name of the accused, he obtained a court order to get the accused's fingerprints. He sent these to the Registrar of Persons and they returned a report confirming the fingerprints in the name of Stephen Muiruri could not be traced. He produced the report as P. Exhibit 3. Thus, he said the accused had no identity card.

17. In his unsworn defence, the accused stated that he worked as a pool attendant at Shabah building in Kabati; that on 19/12/2016 he reported to work at as usual. At about 6.30pm, he was arrested whilst at work by police officers, one of whom he knew as APC Ngare, on grounds that a lady had been assaulted. On arrival at the police station, he did not find the complainant. He was then taken to Naivasha Police station. He denied assaulting anyone. He said he had been arrested before and had completed his sentence two months previously. He alleged that APC Ngare had fixed him with this case.

18. Later he was taken for fingerprints. He said that he had taken an Identity Card in 2004 but could not trace it; that he had never seen the complainant until he came to court; that the complainant never mentioned him in the first report which he produced as D. Exhibit 1, despite stating that she knew him very well; that the first report indicates the offence was committed by a young man and he was not a young man; he denied committing the offence.

19. The issues that arise for determination are:

a. Whether Have the ingredients for robbery with violence been satisfied?

b. Whether there was proper identification.

c. Whether the sentence meted was proper.

20. On the issue of proof of the ingredients of robbery with violence, the respondent correctly cited the Court of Appeal case of **Oluoch v. Republic [1985] KLR** where it was held:

“Robbery with violence is committed in any of the following circumstances:

a. The offender is armed with any dangerous and offensive weapon or instrument; or

b. The offender is in company with one or more person or persons; or

c. At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person”

Clearly therefore, proof of *any one* of the above ingredients is sufficient to establish an offence under **section 296 (2)** of the **Penal Code**.

21. In this case, the complainant testified that she was accosted by the appellant immediately after conversing with the appellant. That the accused was armed with a piece of wood with which he used to strike the complainant. This fulfils ingredients (a) and (c): being armed with an offensive weapon and wounding or beating or using violence during the act. Two ingredients of Robbery with Violence under **section 296(2)** have been shown to have existed and that is sufficient to prove the offence.

22. The question that remains is whether it was indeed the appellant who struck the complainant. That brings me to the issue of identification.

23. In this case, only one person, the complainant allegedly identified the Appellant. The complainant stated that she had had a conversation with the appellant on her way to have a bath and that as she turned to head towards a gate she was struck on the back of the head. She said there was light and that she recognized the accused.

24. In *Kariuki Njiru & 7 Others v Republic*, the court held *inter alia* that the

“the law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error.” (Emphasis added)

25. The obvious rationale for the need for great care to be taken on the issue of identification is because the memory is a fragile and malleable instrument which can produce unreliable yet convincing evidence. Because mistaken witnesses can be both honest and compelling, the risk of wrongful conviction in eyewitness identification cases is high, and can result in miscarriages of justice.

26. The trial court discussed the issue of identification in fair detail. In assessing the demeanour of a witness the court is expected to make a finding as to the integrity, honesty and truthfulness of such witnesses not his or her boldness or firmness. Here, the court stated that it was satisfied by the complainant’s evidence.

27. Visual identification in criminal cases can cause miscarriage of justice and should be carefully tested. The court in **Wamunga v. Republic (1989) KLR 424** at 426 had this to say:

“Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”

28. In **Nzaro v. Republic (1991) KAR 212**, the Court of Appeal held that evidence of identification by recognition at night must be absolutely watertight to justify conviction. This court is therefore duty bound to interrogate whether or not the circumstances in the case at hand were favourable for positive identification.

29. As earlier noted, the complainant stated that there was light from the *Mulika Mwizi*, light erected in the neighborhood for visibility and to deter crime. There were also electric lights light from the neighbouring plot. She stated that she clearly saw the appellant under the light; that she and the appellant had spent 10 minutes talking. Such time is enough to retain memory of whom one was with at night. What is crucial is that according to PW1 also said she knew the accused from long before.

30. In **Oluoch v Republic (1985) KLR 549**, the court noted that a fact may be proved by a single witness. Here, the complainant is the only one who allegedly saw the appellant that night as she made her way to the bathroom. In the **Oluoch case** it was emphasized that an identification that is supported by a single witness must be treated with the greatest care. Thus in a single witness identifier the test must be rigorous to ascertain whether the surrounding circumstances were favourable to facilitate proper identification. These in my view include light, time spent with the assailant, clothes or any item that the witness may positively identify and whether the accused was known to the complainant. Such evidence may be reinforced by sufficient collaboration and where there is no collaboration the court needs to treat it with caution. Thus, in evaluating the accuracy of identification testimony, the court should also consider such factors as:-

a. *What were the lighting conditions under which the witness made her observation?*

- b. What was the distance between the witness and the perpetrator?
- c. Did the witness have an unobstructed view of the perpetrator?
- d. Did the witness have an opportunity to see and remember the facial features, body size, hair, skin, color, and clothing of the perpetrator?
- e. For what period of time did the witness actually observe the perpetrator?
- f. During that time, in what direction were the witness and the perpetrator facing, and where was the witness's attention directed?
- g. Did the witness have a particular reason to look at and remember the perpetrator?
- h. Did the perpetrator have distinctive features that a witness would be likely to notice
- i. and remember?
- j. Did the witness have an opportunity to give a description of the perpetrator? If so, to what extent did it match or not match the accused, as the court finds the accused's appearance to have been on the day in question?
- k. What was the mental, physical, and emotional state of the witness before, during, and after the observation?
- l. To what extent, if any, did that condition affect the witness's ability to observe and accurately remember the perpetrator?

31. The appellant has argued that the complainant did not state his name in her first report D. Exhibit. Clearly, the report in the OB was made by PW2 Gitonga on 27th October, 2016 and not by her. On that day she was in hospital so one would not expect the report to have the accused's name.

32. From the evidence on record, I have no difficulty in concluding that the complainant identified the accused through recognition. Accordingly, the appeal on this ground fails.

33. On the question whether the sentence meted was proper, the Penal Code provides for a mandatory sentence of death. The appellant stated that following the **Muruatetu case**, the trial court did not exercise discretion to mete a more lenient sentence.

34. The respondent sought that the court should uphold the sentence on the ground that the appellant was a repeat offender.

35. The rule is that the maximum sentence, viz. the death sentence in this particular instance, should not be imposed on a first offender unless there are aggravating circumstances. See **Arissol v Republic [1957] EA 447**; **Charo Ngumbao Gugudu v Republic Court of Appeal at Mombasa Criminal Appeal No.358 of 2008**; **James Ng'ang'a Njau v Republic Court of Appeal at Nairobi Criminal Appeal No. 28 of 2015** all of which buttress this position. Paragraph 23.7 of the Sentencing Policy Guidelines also sets out a non-exhaustive list of aggravating circumstances. Being a repeat offender is however an aggravating circumstance.

36. Here, the trial court was provided with the information as to the repeat offence which was robbery with violence with an alternative of handling stolen property. The trial court did not, however, make any specific comment on that previous offence when sentencing the appellant. All she said was that:

"I have considered the nature of the offence and all issues raised Accused is convicted of a capital offence with a mandatory sentence. Accused is sentenced to suffer death..." (Emphasis added)

37. In my view the trial court acted appropriately in stating that she had considered all issues raised. The Supreme Court in the **Muruatetu case** did not outlaw the death sentence. All that it did was to direct that where the death sentence is a mandatory provision, the accused is entitled to a hearing on mitigation and the trial court must exercise its discretion based on the mitigating issues.

38. I see no basis for interfering with the sentence in his particular case.

39. Accordingly, the appeal is dismissed in its entirety and the conviction and sentence upheld.

Administrative directions

40. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

41. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

42. Orders accordingly.

DATED AND DELIVERED IN NAIVASHA BY TELECONFERENCE THIS 26TH DAY OF APRIL, 2021.

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R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Ms Maingi for the State
2. Stephen Muiruri - Appellant in person in Naivasha Maximum Prison
3. Court Assistant – Quinter Ogutu