



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 64 OF 2020

ROBERT NG'ANG'A.....APPELLANT

VS.

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of the Chief Magistrate's Court at Kiambu, J. Kituku, PM in the Criminal Case No. 387 of 2016 dated 28th May 2015)

JUDGMENT

1. **ROBERT NGANGA MUNGAI** was convicted before the Kiambu Chief Magistrate's Court on 16th February, 2017 for the offence of robbery with violence. The trial court sentenced him to suffer death as provided under the law. He has filed this appeal against conviction and sentence.

2. The complainant, **MONICA WANGUI** (complainant) had on 2nd February, 2016 attended a funeral at Subukia. She was dropped by her friends at her residence at 2.00 a.m. On reaching her home, she noticed the door was opened. On entering into the house and calling out her daughter **Waithera**, a group of armed men came out of her house with torches. Although they told her not to scream, she said she did scream out of panic. One of those men, the appellant kicked her and hit her with a club (*rungu*) on the head. The security lights were on and she noted the appellant was wearing a 'muffin' and a long coat. He also took her bag. The appellant wanted to access her house and he instructed her to call out to her children. Her children began to scream and because the appellant was holding an axe threatening to cut the complainant, the complainant persuaded her children to stop screaming and to open the door. When the door was opened the complainant switched on the sitting room and corridor lights. This is what the complainant stated:-

“My daughter, one Wangui came out and I put on lights for the sitting room and corridor – the man (the appellant) was facing me while holding the axe – the daughter opened the bedroom.”

3. Thereafter, the other robbers took the complainant's television, deck, and decoder. The robbers were scared off and ran away when the complainant's neighbour set off the alarm.

4. The complainant said that she was summoned at Kiambu Police Station where she participated in an identification parade and where she identified the appellant as one of the men who carried out the robbery. The complainant had noted, when the robbery proceeded, that the appellant had a scar on the face and on the upper lip and that he was tall and slim.

5. The complainant's daughter confirmed that her mother attended a funeral at Subukia. She stated she was asleep and at around 2.30 am she heard her mother scream. She screamed but stopped when her mother asked her to stop. She switched on the lights at the sitting room and that the balcony security lights were on. She confirmed she saw the man who held a *rungu* and axe while accompanying her mother. That man she recognized as the appellant. She stated:-

“The man (appellant) entered the house – he had worn muffins but I saw scars on the face. The muffins were green. He also wore a long coat and black shoes similar to the ones worn by police.”

6. This witness also noted that appellant was tall, slim and of black colour.

7. **John Chege**, a Clinical Officer based in Kiambu District Hospital stated the complainant was attended to at the hospital and that he filled a P3 Form on 15th February, 2016.

8. Appellant offered an unsworn statement in his defence.

9. In that defence, he stated that on 14th February, 2016, a Sunday, he was from a barber. It was 11.00 am. He was on his way home. He met a police officer who 'demanded' his identity card. He was arrested and taken to the police post because he was unable to raise the money the police officer demanded as a bribe. The police officer escorted him to this house where the police did not recovery anything. He stated:-

“The parade was improperly conducted as no parade member had facial masks like me.”

10. How the first appellat court should approach an appeal was discussed in the case of **OKENO V. REPUBLIC (1972) EA 32**. as follows:

“It is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld.”

11. Appellant was charged before the trial court with the offence of robbery with violence contrary to **Section 296(2)** of the Penal Code. What constitutes an offence under that Section was considered by the Court of Appeal in the case **SIMON NDUNGU KINUTHIA VS. REPUBLIC (2016) eKLR** thus:-

“The Court of Appeal in MNENI NGUMBAO MANGI V REPUBLIC 141 of 2005, considered what constitutes an offence of robbery with violence when it said:-

‘As already stated, there are three ingredients, any of which is sufficient to constitute the offence of robbery with violence under section 296(2) of the Penal Code. If the offender is armed with any dangerous or offensive weapon or instrument, that would be sufficient to constitute an offence. Secondly, if one is in company with more than one or more other person or persons that would be evidence of the offence too. And lastly, if at or immediately before or immediately after the time of the robbery he wounds, beats, strikes or uses any other violence to any person, that would be yet another set to constitute the offence...’

The prosecution only needed to prove existence of one of the ingredients.”

12. The prosecution did indeed prove all the three circumstances that constitute the offence of robbery with violence. The prosecution proved that the robbers were armed with dangerous weapons. It was proved that the robbers were more than one person. And indeed, those robbers immediately before and after the robbery, used violence against the complainant.

13. The one issue that I needs a resolve and is raised by the appellant is whether the appellant was one of the robbers. Indeed, the grounds of the appellant’s appeal call upon this Court to interrogate the following issues:-

(a) Did the identification parade meet the required legal standards?

(b) Was the identification of the appellant at the identification parade marred by failure of the complainant to record the appellant’s description before the identification parade?

(c) When was the complainant’s statement recorded?

14. In respect to the first issue (a) above, the appellant submitted that, no one else in the identification parade but him had scars. In his unsworn defence, he stated:-

“The parade was improperly conducted as no parade member had facial marks like me.”

15. The evidence of how the identification parade was conducted was given by **Inspector Charles Juma**. At the time he was the Officer Commanding Station (OCS) of Kiambu Police station. He stated that the appellant chose where to stand in the parade line. He also confirmed that other members of the parade did not have “marks on the face.”

16. The complainant had this to say as her identification evidence during the parade:-

“I found nine (9) members of the parade. I pointed accused (appellant) due to the mark on the forehead and upper lip. I also identified him due to his physical appearance (tall and black).”

17. It will recalled that the complainant described the appellant’s appearance during the robbery as:-

“tall and slim. He had a scar on the face and upper lip.”

18. The appellant was also picked out by complainant’s daughter at the identification parade.

19. It is important to note that the complainant on being asked about the appearance of those who took part in the identification parade said:-

“The parade members were not similar but almost identical in appearance.”

20. It would seem that appellant's complaint is that other members of the parade did not have scars as he did. Otherwise the appellant was not concerned with the other appearance, since they were all tall and slim.

21. My view is that, that fact alone cannot invalidate the identification parade. Accordingly, in regard to the first issue, I respond that the identification parade did meet the required standards. I am satisfied that the parade was conducted fairly.

22. On the second issue, the appellant submitted that the complainant did not give description of the robbers before his arrest and before being placed in an identification parade.

23. The investigating officer, who was also the one who arrested the appellant stated that he was given appellant's description by the complainant and her daughter on 3rd February, 2016. The complainant's daughter in her evidence confirmed that she informed the police the appellant's description when they arrived at their home on the night of the robbery. Indeed, it was because of the appellant's features as told by the daughter of the complainant that the Investigating Officer was able to identify and arrest the appellant on 14th February, 2016. No items of complainant's property was recovered from the appellant on his arrest.

24. Since appellant's appeal centred on his identification which he termed faulty, I will also look at other evidence which points to his identification.

25. Granted that the robbery took place in the dead of the night. It was between 2.00 and 2.30 a.m.

26. When the complainant arrived at her home and on finding her front door opened she stated it was the appellant who came up to her and kicked her. On her falling down the appellant hit her with a 'rundu' on the head. The complainant stated in her evidence:-

"The light was few meters from where we were struggling and I saw you clearly."

27. To cap it all up, if there is doubt on the visual of the appellant by the complainant then what was said by the other robber will assist to deflate that doubt. The complainant stated in evidence:-

"The man (appellant) asked for money. I told him it was in the bag he had taken. He was demanding laptop and meko. The one outside asked him why he was talking while the lights were on." (underlining added)

28. The appellant's reaction to that caution by the other robber was to hit the light, which was giving light with the axe and thereby put out the light. It is clear throughout the evidence that the appellant played a major role in the robbery and his interaction with the complainant and her daughter was not periphery. He was obviously very visible hence the caution by his co-robbers.

29. On the last issue identified above, the appellant submitted that the complainant recorded her statement after taking part in identifying the appellant at the identification parade.

30. The learned trial magistrate found that the complainant and her daughter confirmed that they recorded further statement after identifying appellant at the identification parade. The learned magistrate in his considered judgment stated:-

"I agree with the accused that the description cannot be reduced into writing after an identification parade."

31. The Investigating Officer in as far as I can make it out from this evidence, stated that the complainant and her daughter recorded their statements the morning after the incident. That they also gave the Investigating Officer description of the robber that same morning. The Investigating Officer also stated that he recorded a further statement on 15th February, 2016. This was the same day the complainant and her daughter identified the appellant at the identification parade.

32. It is not clear to me what was the content of the further statement of the complainant, but the Investigating Officer did state that the statement of 3rd February, 2016 contained the appellant's description.

33. In response to the third (c) issue above, therefore, I find that the complainant recorded a statement on 3rd February, 2016 and a further one on 15th February, 2016. It would seem that it was the one of 3rd February, 2016 that had the appellant's description. It was error, therefore, to state that the further statement, made after the identification parade, was the one with appellant's description.

CONCLUSION

34. It is my view of my analysis of the issues identified above that the appellant's conviction was safe and without error. The appeal against conviction is therefore dismissed. However, appreciating the holding of the Supreme Court in the case **FRANCIS KARIOKO MURUATETU & ANOTHER VS. REPUBLIC (2017) eKLR**, I will interfere with the trial court's sentence of death. The trial court's sentence is hereby set aside and is substituted with a sentence of 15 years imprisonment. This 15 years will commence from 16th February, 2016.

JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 20TH DAY OF MAY, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant:Ndege

Appellant:Present

Respondent:Miss Kathambi

COURT

Judgment delivered virtually.

MARY KASANGO

JUDGE