



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU.**

**CRIMINAL APPEAL CASE NO. 16 OF 2018**

**JOHN WESONGA MUSUMBA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal from against both the conviction and the sentence of Principal Magistrate Hon. Mararo. delivered on 8<sup>th</sup> of January 2018 in NAKURU Court Criminal Case No. 3764 of 2016)*

**JUDGMENT**

1. The Appellant, John Wesonga Musumba, was charged ,as per the charge sheet amended on the 24<sup>th</sup> of February 2017, with two counts of Robbery with violence contrary to Section 296 (2) of the Penal Code.
2. On the 1<sup>st</sup> count the particulars of the offence as per the charge sheet are that on the 27<sup>th</sup> day of October 2016 at Shinners Girls area in Lanet Ward within Nakuru county jointly with others not before court while armed with crude weapons robbed Monicah Wangechi Mwaura a fridge, television, Decoder, Blender, Laptop, Iron Box, Black handbag, three pairs of sheets, assorted clothes, spoons, seven ufurias, two Nokia mobile phones all valued at Kshs. 115,500/= the property of Monicah Wangechi Mwaura and immediately before the time of such robbery threatened to use such violence to the said Monicah Wangechi Mwaura
3. On the 2<sup>nd</sup> count, the particulars of the offence as per the charge sheet are that on the 27<sup>th</sup> day of October 2016 at Shinners Girls area in Lanet Ward within Nakuru county jointly with others not before court while armed with crude weapons robbed Enid Kimutai one Itel Mobile phone valued at Kshs. 5,500/= the property of Enid Kimutai and immediately before the time of such robbery threatened to use such violence to the said Enid Kimutai.
4. After a fully fledged trial, the Trial Court convicted the Appellant on both counts and sentenced him to death on each count. The Court also held in abeyance the death sentence with respect to the second count.
5. The Appellant is dissatisfied by both the conviction and sentence and has appealed on this Court. The grounds of Appeal are that:
  - a. *The Learned Trial Magistrate erred in law and facts when he failed to consider the contradicting evidence*
  - b. *The sentence issued and/ or meted out was rather harsh*

*c. The Learned Trial Magistrate erred in law and in fact when he failed to consider the Appellants defence evidence*

*d. The Learned Trial Magistrate erred in law and fact when his theory as to exactly what happened.*

6. The Appeal was argued by written submissions followed by oral highlighting. In summary, the Appellant submitted as follows:

a. That the security in the area where the Appellant and the Complainant lived was not good and several incidents of theft had happened where the Appellant had also been robbed. It was, therefore, not possible to pin the robbery on him.

b. That the Appellant was never arrested with the goods of the Complainant. He stated that the investigations that were done were shoddy. No search was done in the Appellant's house.

c. He was never interrogated neither was he given an opportunity to be heard.

d. The identification parade was totally neglected and/ or was never conducted. The Investigating Officer admitted that they had not taken the Appellant through the identification parade.

e. He further submitted that voice recognition could not suffice due because:

i. The witness had to tell Court the duration within which they had known the Appellant/ Accused person

ii. The Court had to establish how often the Accused person interacted with the Complainant

iii. The Court had to put into consideration instances where the voices are imitated and the percentage where voices resemble.

f. The Court should have considered the Appellant's defence.

g. The death sentence on the Appellant was harsh.

7. In oral arguments, Mr. Simiyu, Counsel for the Appellant stated that the The sentence was harsh. He also argued that the case was handled from a preconceived point of view. He found the reliance on voice recognition problematic because, he argued, there are many people called "John". Mr. Simiyu further argued that the recognition evidence was problematic because the Learned Trial Magistrate did not consider the intensity of the light.

8. Mr. Simiyu further faulted the use of the doctrine of recent possession in the case. Relying on the decision in Francis Muchiri Joseph v Republic [2014] eKLR, he argued that the doctrine should only be utilized when the stolen goods are found in the actual possession of the Accused Person.

9. The Appeal was opposed by the State. Mr. Chigiti argued that the conviction was proper and safe and that the evidence of recognition was water-tight. He pointed out that the Complainants were able to identify the voice of the Appellant and that they knew each other for a long time. He also pointed out that the lights were on and that the 2<sup>nd</sup> Complainant was able to identify the Appellant.

10. On sentence, Mr. Chigiti recommended that the death sentence in this case should be substituted with imprisonment for thirty years.

11. It was the testimony of Monicah Wangechi Mwaura (PW 1) and Enid Njeri Mutai (PW 2) that there were four people who entered the house armed with pangas. PW 1 discovered a panga that produced as evidence and marked PMFI 2. PW 1 and PW 2 further went on to state that they were raped by the

perpetrators. PW 5 recovered a panga from the scene, a metallic grill and spoons.

12. PW1 stated that the perpetrators tied her as they menacingly demanded money. They ransacked the house for more money when they discovered that she only had Kshs. 430/-. They even tried to force her to withdraw money from Mpesa/Mshwari and got increasingly agitated when they discovered that she had loans and could not therefore get any money from the mobile platforms. They threatened to kidnap her daughter. They were in the house for a long time – even taking the time to cook in the kitchen.

13. In the midst of the ordeal, PW1 heard the assailants speak to each other and on the phone. On the phone, she heard one of the assailants directing another person on the directions to where they were. The person said “Ingia njia ya karita.” She recognized that voice as one of the Appellant who was her neighbour who lived about 200 metres away from them. She confirmed this to be John when she heard one of the perpetrators say “wee John!” during the robbery. Another assailant admonished the first one not to use names.

14. PW1 was candid that she did not recognize any of the assailants by face. However, PW2 said that she was able to recognize one of the assailants. Like her mother, PW1, she was attacked in her room. The assailants demanded money and phones. They took her phone. Then, one of the tied her up. After a while, the assailant came to grab her to take her to her mother’s room. As she was being led there, she managed to have a glimpse of one of the assailants through the kitchen lights. It was John, their neighbour. The assailant returned later and raped her. All through, the only assailant she was able to identify was John, their neighbour. That John is the Appellant herein.

15. The two Complainants immediately told the watchman, Mason Ombiso about their ordeal. They also told him that they had identified John as among the assailants. They proceeded to John,s house. Along the way, there was a trail of some of the household items robbed from the Complainants leading to the Appellant’s house. On getting to the Appellant’s house, they searched it and found one spoon which PW1 identified as one of the ones which had been stolen from her house.

16. The Investigating Officer, who testified as PW5 confirmed that in the initial report, the two Complainants stated that it is the Appellant who had robbed them in the company of three other people and that they had identified him through voice and facially.

17. In his sworn evidence, the Appellant denied staging the robbery. He claimed that he had been framed yet he is the one who had tried to coordinate security in the otherwise highly unsafe neighbourhood. He stated that the robbery could have been done by any other person and that he himself had recently been a victim of robbery. He disputed the identification evidence and protested that the search had been done in his house without his presence.

18. The Learned Trial Magistrate analysed the evidence presented and was persuaded that a case had been made out beyond reasonable doubt that the Appellant was one of the assailants. In doing so, the Learned Trial Magistrate relied on the evidence of voice recognition; physical recognition and the doctrine of recent possession.

19. After due analysis of the evidence as I am required to undertake as a first appellate Court, I agree with the Appellant that the elements of the doctrine of recent possession were not satisfied here. In ***Gideon Meitekin Koyiet v Republic [2013] eKLR (Criminal Appeal No. 297 Of 2012)*** the Court of Appeal stated that the doctrine of recent possession is applicable where the Court is satisfied that the Prosecution have proved the following:

- a) *That the property was found with the suspect;*
- b) *That the property was positively identified by the complainant;*
- c) *That the property was recently stolen from the complainant.*

20. In the present case, there was sparse evidence on how and where the spoons were recovered. PW4 seemed to suggest that it was only one spoon which was found; and that it was found in the Appellant's house. PW5, the Investigating Officer, talked of three spoons; and suggested that they were found in the Appellant's compound. Given this inconsistency, it was unsafe to conclude that the property was found on the Appellant for purposes of the application of the doctrine of recent possession.

21. I will now turn to the evidence on recognition. The legal position on identification was succinctly stated by the Court of Appeal in *Kariuki Njiru and 7 others –vs-R (2001) eKLR*, thus:-

*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 carefully, 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. The surrounding circumstances must be considered (See **R. vs. Turnbull (1976) 63 Civil Appeal R.132**). Among the factors the Court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all.*

22. The decision in *R V Turnbull, [1977] QB 224*, provides useful guidelines in so far as identification is concerned. The court stated:-

*Whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the Accused which the Defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the Accused in reliance on the correctness of the identification or identifications...*

*The judge should direct the jury to examine closely the circumstances in which identification by each witness came to be made.*

*i. How long did the witness have the Accused under observation*

*ii. At what distance,*

*iii. In what light*

*iv. Was the observance impeded in anyway*

*v. Had the witness ever seen the accused before*

*vi. How often, if only occasionally, had he any special reason for remembering the accused*

*vii. How long elapsed between the original observation and subsequent identification to police*

*viii. Was there material discrepancy between the description of the Accused given to the police by the witness when the first seen by them and his actual appearance.*

*If the quality [of the identification evidence] is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however, that an adequate warning has been given about the special need for caution [...]*

*When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example, when it depends on a fleeting glance or on a longer observation made in difficult*

*conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification.*

23. The two Complainants were categorical that they each identified the Appellant. The 1<sup>st</sup> Complainant stated that she listened to the Appellant speaking on the phone and immediately recognized his voice. The Appellant is a neighbour to the Complainants and had been for close to a year. To add to this, in the course of the robbery, one of the assailants called the Appellant by the name “John”. The 1<sup>st</sup> Complainant concluded that the John in question was, in fact, their neighbour.

24. In ***Libambula V Republic [2003] KLR 683*** at page 686 the Court of Appeal held that:

*Normally, evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person's voice, the witness was familiar with it and recognized it and the conditions obtaining at the time it was made were such that there was no mistake in testifying to it that which was said and who said it.*

25. The 2<sup>nd</sup> Complainant identified the Appellant both by voice and visually. She said that the kitchen lights were on and as she was led to the next room, she clearly saw the Appellant. She described his sideburns. She immediately told the Police and PW4 that she had seen and recognized the Appellant.

26. While it is important to exercise caution when analysing evidence of recognition, in this case, there was sufficient evidence to conclude that the Appellant was one of the assailants. The testimonies of the two Complainants corroborated each other and mutually reinforced each other.

27. In ***Anjononi & Others vs. Republic (1976-80) 1 KLR 1566 at page 1568*** Court of Appeal held that:

*.....recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. As such, the parties knew each other well and the witnesses were in a position to recognize the accused.*

28. So it was in this case. The Appellant was well known to the two Complainants having lived as neighbours for well over a year. The circumstances of the recognition here – including the corroboration aspects – also give re-assurance that there is little possibility of error in this case.

29. It was, also, unnecessary to conduct an identification parade in these circumstances. The two victims already knew their assailant through recognition and it would have been pointless to mount one.

30. The upshot is that it is my finding that the conviction was safe in the present case. All the elements for the offence of robbery with violence were established beyond reasonable doubt.

31. What about sentence? The Appellant says that the imposition of the death sentence was too harsh in the circumstances. The Prosecution agrees and suggests, instead, imposition of imprisonment for thirty years.

32. In the aftermath of the Supreme Court decision in ***Francis Karioko Muruatetu & Another v Republic [2017] eKLR*** the death penalty is no longer mandatory as the Learned Trial Magistrate supposed. In the ***Muruatetu Case***, the Supreme Court outlawed mandatory death penalty for murder as unconstitutional and struck down section 204 of the Penal Code to the extent that it prescribed mandatory death sentence upon conviction for murder.

33. The reasoning in ***Muruatetu Case*** respecting section 204 of the Penal Code (the penalty section for murder), has been extended by the Court of Appeal to the mandatory death penalty in robbery with violence cases and probably all other similar mandatory death sentences. That was in ***William Okungu***

***Kittiny v R [2018] eKLR.***

34. Turning to the case at hand, I note that the Appellant offered mitigation and “prayed for justice”. He was a first offender. However, this was a heinous crime; one which was committed in the most inhuman way possible. In addition to robbing the victims by force and menaces, two of the members of the Appellant’s gang of robbers proceeded to forcibly rape the two victims. As the victims testified in Court, both of them are terribly affected psychologically by the events. The family was forced to move from the area after this.

35. While I am not moved to prescribe the ultimate penalty of death, I must conclude that the circumstances call for the longest possible imprisonment period. In my view, thirty years is an appropriate sentence. I will therefore set aside the death sentence imposed. In its place, I will sentence the Appellant to thirty (30) years imprisonment for each of the two counts.

36. The disposition of the case, then, is as follows:

**a. The appeal against conviction is hereby dismissed as unmeritorious. The conviction is hereby affirmed.**

**b. The appeal against sentence succeeds. The death sentence imposed with respect to each counts is hereby set aside. In its place, the Appellant is sentenced to thirty (30) years imprisonment for each of the two counts. The sentences will run concurrently.**

37. Orders accordingly.

**Dated and delivered at Nakuru this 30<sup>th</sup> day of January, 2020**

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**JOEL M. NGUGI**

**JUDGE**