



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCRA NO. 14 OF 2018

KENNETH MWITI KABII.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No.168 of 2013 in the Principal Magistrate's Court at Chuka Law Courts by M. Sudi on 29th March 2019.)

J U D G E M E N T

1. **KENNETH MWITI KABII** the Appellant herein was charged with two counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code** vide **Chuka Chief Magistrate's Court Criminal Case No. 168/13**. The particulars of the 1st count as per the charge sheet are that on 24th day of February 2013 at Nkaani village, Kathingithu Sub-Location Kaare Location within Tharaka Nithi County jointly with others not before court while armed with a dangerous weapon namely a kitchen knife did rob **MARTIN KIMATHI** his cash money of **Kshs.10,000** and immediately before or immediately after did use actual violence by slapping the said Martin on his cheek.

2. In regard to the 2nd count, the particulars are that on the same date at the same location, the Appellant jointly with others not before court while being armed with a dangerous weapon namely kitchen knife he robbed (Diana Gaceri/wife to Martin Kimathi) her mobile phone make Nokia 1110 valued at Kshs.2500/-.

3. The Appellant denied both counts but upon trial, he was found guilty on both counts, convicted and sentenced to death. The Appellant felt aggrieved and filed this appeal but before I consider the grounds raised, this court will look at the background of the case against the Appellant at the trial court.

4. The prosecution initially charged the Appellant with another co-accused Elphas Kirimi Katherya who subsequently jumped bail forcing the prosecution to proceed with the case against the Appellant by amending the charge sheet after efforts to trace the 1st accused proved futile.

5. The prosecution's case against the Appellant was hinged on positive identification of the Appellant. Both the complainant (PW1) testified that he identified the Appellant by recognition since he lived in the same locality. He further testified that the presence of electricity light (bulb) and a torch he had helped him identify the Appellant and Kirimi among the four member gang that raided their house on that material night (at around 9.30 pm). Both witnesses (PW1 and PW2) testified that violence and threat to violence was used in robbing them with PW1 stating that he was robbed of Kshs.10,000/- while PW2 stating she was robbed of her Nokia Mobile Phone.

6. When placed on his defence the Appellant denied committing the offence and stated that he was at his house at the material time. He further pointed out that nothing was recovered from him.

7. The trial court in its judgment found that the defence of alibi raised was unfounded and found the evidence tendered against to be sufficient to found a conviction and sentenced him to serve death sentence.

8. The Appellant as observed above was dissatisfied with the finding of the trial court and filed this appeal raising the following seven grounds in his petition namely;

i) That the learned trial magistrate erred in law and fact by failing to note that the prosecution witnesses gave inconsistent, contradictory and conflicting testimonies.

ii) That the trial court erred by not finding that Section 296(2) was unconstitutional.

iii) *That the prosecution's case was not proved beyond reasonable doubt.*

iv) *That the learned trial magistrate erred by failing to note that the complainant testified that the light at his house was damaged by perpetrators which means there was no light at the scene.*

v) *That the trial court erred by failing to note that no exhibit was tendered to support allegations against him.*

vi) *That his defence was rejected without reasons being given.*

vii) *That there was no evidence from independent witnesses.*

9. In his written submissions, the Appellant has contended that the light at the scene of crime was not sufficient for positive recognition. He has pointed out that PW1 contradicted himself by stating that there was electricity light and that he had a torch. He submits that there was no corroborating evidence to identify him such as item of clothing, time the complainant and Appellant were together and whether they may have known each other prior to the incident.

10. The Appellant has further submitted that this court should consider how far apart the witness was from the perpetrator and whether there were identification features that would cause the witness to remember the perpetrator as well as mental state of the victim at the time. He relies on the decision in the case of Toroke -vs- Republic in his contention that a mistake can happen in both recognition as well as identification.

11. He further submits that there was no proof that the complainant was beaten. He points out that PW1 did not see him and that the prosecution's case was full of inconsistencies.

12. The State/Republic has opposed this appeal and has supported both the conviction and the sentence meted out by the trial court.

13. The Respondent in summary contends that the offence was proved to the required standard and that the prosecution's witnesses were consistent and candid.

14. The Respondent faults the Appellant's argument that **Section 296(2)** of **Penal Code** is unconstitutional stating that the same is still valid as when the Appellant was charged and when the sentence was passed.

15. On identification, the State points out the fact that the Appellant and the complainants were known to each other prior to the incident and that when PW1 opened the door, the security lights were on and had also walked to the door with a torch in hand. The state contends that there was no indication that the light was dim to interfere with identification

16. The State has relied on the decision in Oluoch -vs- Republic [1985] eKLR which emphasized the elements of robbery with violence and Odhiambo & Another -vs- Republic [2005] 2 KLR which also defined the said elements as, being armed and being in the company of others distinguishing **Section 295** from **Section 296** of the **Penal Code**.

17. The Respondent also contends that the defence put forward by the Appellant was a sham and while it supports conviction, it states that the Appellant can only benefit from resentencing after mitigation.

18. This court has considered this appeal and the opposition the same from the State. In my considered view the main issues for determination are basically 2 which are;

(i) Whether identification was positive

(ii) Whether the sentence meted out was constitutional/appropriate.

(i) Identification

19. This court has looked at the evidence tendered by the Respondent in regard to identification. It is clear that the prosecution's case in this regard hinged on the evidence of a single witness which was the complainant (PW1). It is trite that trial courts must treat with caution cases where the identification is based on the evidence of a single witness. It is obvious in this instance that though the wife of the complainant was also robbed at the same time, she did not identify anyone as she says she was found in the bedroom and told to face the wall which she did. PW1 on the other hand had by then opened the door to the gang and courtesy of a security light at the door he stated clearly that he recognized two of the four members of the gang. He identified and recognized the appellant and one Kirimi. He says that the Appellant beat him up and sat on him. He stated he recognized the two clearly. This is what he told the trial court.

" I know the accused we went to the same schools and we live in the same area. I was able to identify them with the electric bulb and torch....."

The above testimony in my view depicted positive identification. The Appellant during cross-examination did not challenge the complainant regarding his identification and recognition and cannot in my view challenge that fact in this appeal because the evidence tendered on identification was overwhelming notwithstanding that the evidence was based on the evidence of a single witness. Where evidence of a single witness is clear candid and strong as was in this case the same is safe and sufficient to found a conviction.

20. The Appellant has complained that he was not told of his right to recall witnesses after the prosecution applied and was allowed to amend the charge sheet on 30th August 2017. I have looked at the record of proceedings and have noted that the amendment by the prosecution was only to remove the name of the 1st accused because he had absconded and wanted to proceed with the case against the Appellant only. The amendment did not alter in any significant way the prosecution's case against the Appellant and the Appellant did not make any application to recall any witness. This court finds that the amendment did not prejudice the Appellant. He got the opportunity and did cross-examine all the witnesses who testified at the trial.

21. The Appellant has contended there were inconsistencies in the prosecution's case but I am unable to find any inconsistency or contradiction in regard to his identification as one of the perpetrators in the robbery that took place that night. This court finds that having regard to the evidence tendered by the prosecution, the case against the Appellant was proved to the required standard in law and I find that his conviction was safe and well founded on both counts.

Sentence

22. The Appellant has contended that **Section 296(2)** of the **Penal Code** is unconstitutional following the recent supreme Court's decision in the case of ***Francis Karioko Muruatetu [2017] eKLR***. This court finds that to some extent the Appellant is right because though the Supreme Court was dealing with a case of murder, the same principle applies owing to the mandatory nature of the sentence prescribed by **Section 296(2)** of the **Penal Code**. This court finds that just like the trial court's hands are not tied by **Section 204** of the Penal Code in respect to a person found guilty of murder, **Section 296(2)** of the **Penal Code** does not bar a trial court from exercising discretion in sentencing notwithstanding the mandatory nature of the sentence prescribed under **Section 296(2)**. That mandatory nature is what was found to be unconstitutional in **Muruatetu's case** (supra). The same applies *mutatis mutandis* to the provision of **Section 296 (2)** of the **Criminal Procedure Code**.

23. This court while finding that the trial court's hands were not tied when meting out the death sentence, notes that the Appellant never did himself any favours by choosing to remain silent and refusing to mitigate. He has not stated in this appeal why he took that option. He has only complained that the other sentence should have been held in abeyance. It is trite that if an accused person commits a series of offence at the same time in a single act or transaction, a concurrent sentence is imposed and the trial court in this instance decided that the 2 (death) sentence would run concurrently. However owing to the nature of the sentence I agree with the Appellant that the other sentence should have been held in abeyance which really does not matter much because the attendant result is one and the same (death).

This court has considered the severity of the sentence and the fact that the Appellant was a 1st offender. The trial court in light of **Muruatetu** should have handed any other sentence other than death sentence which I find to be a little bit harsh.

In the premises this court for the aforesaid reasons upholds the conviction on both counts but reverses the death sentences. In its place the Appellant is hereby sentenced to serve **20 years** imprisonment each of the counts. Both sentences to run concurrently less the period the Appellant has been in custody when his bond was cancelled. This appeal therefore succeeds only to that extent.

Dated, signed and delivered via skype this 28th day of April 2020.

R .K. LIMO

JUDGE

28/4/2020

Judgement delivered via skype in presence of Momanyi for ODPP and the accused person.

R.K. LIMO

JUDGE

28/4/2020