REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 65 OF 2017

BERNARD KIPKURUI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment/Decree and Orders of Hon Mararo Principal Magistrate dated 13th July, 2017 in Nakuru Criminal Case No. 3128 of 2014)

JUDGMENT

1. The Appellant was charged with the offence of **Robbery with Violence contrary to Section 295 as read with Section 296 (2) of the Penal Code.** The particulars of the charge are that on the 26th October 2014 at Kampi ya Moto in Rongai District of the Nakuru County, while being armed with a crude weapon namely rungu robbed **Mosses Nyaga Musa** cash of kshs: 20,000/= and immediately before the time of such robbery wounded the said **Moses Nyaga Musa**.

2. The appellant pleaded not guilty, the case proceeded for full trial. The prosecution called 5 witnesses while the appellant gave an unsworn defence without calling any witness. The trial magistrate found the prosecution to have proved the charge beyond reasonable doubt; convicted the appellant of the offence charged and sentenced him to death.

3. The appellant being dissatisfied by the conviction and the sentence, filed this Appeal and relied on appended grounds filed on 9th October 2019 set out as hereunder: -

i. The learned trial magistrate failed to consider the appellant mitigation, circumstances of the commission of the offence and award a harsh and cruel sentence, thus the appellant therefore prays for case re-hearing for the purpose of sentence-rehearing and re-sentencing as was held in the supreme court decision in **Karioko Muruatetu and another Vs Republic (2017).**

ii. That the trial magistrate erred in law and facts by holding that the evidence of identification by recognition was proved, but failed to note that the complainant was well known to the appellant so recognition could not stand.

iii. That the trial magistrate erred in law and facts by convicting that appellant in a prosecution case where the ingredients of robbery with violence under **Section 296(2) of the Penal Code** were not present therefore the charge was not proved.

iv. That the trial magistrate failed in law to note that the defence of the appellant was truthful, that there existed bad blood between the appellant and PW2 thus a possibility for framing.

4. The Appellant urged court to quash the conviction, set the sentence aside and set him at liberty.

APPELLANT'S CASE

5. In his amended submissions, the appellant submitted that his mitigation was not taken into account while passing sentence as the trial court applied the mandatory death sentence provided by the law. He submitted that the Court should have conducted a sentence rehearing exercise, weighing the circumstances that prevailed at the time the offence was committed and any mitigating circumstances that prevailed to enable the Court reach at a reasonable sentence. He relied on the Supreme Court case of **Francis Karioko Muruatetu & Another Vs Republic [2017] eKLR** to urge the honourable court to reconsider his case for rehearing for purpose of resentencing.

6. On evidence of identification, the appellant submitted that identification was not free from the possibilities of error thus the charge was not

proved. He submitted that his conviction and sentencing was premised on evidence of identification by PW1 and PW2 and this evidence was obtained at night making it is very difficult for the said evidence to be free from the possibilities of errors. He submitted that PW1 and PW2 did not state the duration they had the assailant under their observation and in view of doubt on identification charge against him was not proved.

7. He relied on the case of **Anjonini Vs Republc (1980)KLR 59** where the Court of Appeal held as follows:-

> **"Recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon the personal knowledge of the assailants in some form or the other"**

8. Further that PW2 who corroborated the evidence of PW1 stated that a person known as **Jamaica** attacked and robbed the complainant but the name **Jamaica** was not clearly brought out in the evidence and the appellant's name in the charge sheet is **Bernard Kipkurui**. On cross examination PW 1 and PW2 never told the court that the accused was also referred to as J**amaica**. Further the source of light used to identify the Appellant was not explained.

9. On the ground that the appellant's defence was not considered, he submitted that he was not at the crime scene and that he was framed up by PW2 as they had bad blood between them; that PW2 is his brother-in- law and he had fallen out with his wife who is the appellant's sister after a fight which left him hurt when PW2 went to get his children and implicating him on the robbery is a revenge.

10. He submits that his defence raised reasonable doubt in the prosecution's case and it was an error in law to convict the appellant without critically analysing his defence as was tendered.

PROSECUTION'S CASE

11. The state counsel made oral submissions on behalf of the state. On identification, she submitted that PW1 and PW2 knew the appellant over a long period of time and during the robbery, PW1 was able to see the appellant as the veranda which was lit with a bulb that had bright light. She said PW2 was also able to speak to the appellant during the incident. The appellant was identified in the dock by PW1 and PW2. During the incident PW2 addressed the appellant as **Jamaica** as that was the name he used and he responded to PW2 by saying *"daktari let me do my work."*

12. As to whether the appellant was given opportunity to defend himself, state counsel argued that the appellant never availed any witnesses to testify neither did he state where he was on the day of the robbery; that he only talked about his day of arrest and said he had a grudge with the complainant but failed to adduce evidence to that effect. She submitted that PW1's evidence was corroborated by PW2 and prosecution proved their case beyond reasonable doubt.

ANALYSIS AND DETERMINATION

13. This being the first appellate court, I am expected to subject the entire evidence adduced before the trial court to fresh evaluation and analysis. This I do while bearing in mind that I never had the opportunity to hear the witnesses and observe their demeanour. The principles that apply in the first appellate court are set out in the case of **Okeno Vs Republic [1972] EA 32** where it was stated as follows:-

> **"The first Appellate Court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. Republic [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 findings and conclusions; 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 v. Sunday Post, [1958] EA 424.)"**

i. Whether the offence of robbery was proved beyond reasonable doubt.

14. The ingredients of robbery with violence were established in the case of **Johana Ndung'u Vs Republic (Criminal Appeal No. 116 of 1995) UR** to include:-

> **"In order to appreciate properly as to what acts constitute an offence under Section 296 (2), one must consider the sub-section in conjunction with Section 295 of the Penal Code. The essential ingredient of robbery under Section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the ingredients constituting robbery are in the three sets of circumstances prescribed in Section 296 (2) as set out below and prove of any one of them constitute the offence of robbery with violence. The three ingredients are as hereunder: -**
>
> > **1. If the offender is armed with any dangerous or offensive weapon or instrument, or**
> >
> > **2. If he is in company with one or more other person or persons, or**
> >
> > **3. 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".**

15. In his testimony, PW1 testified that he was attacked outside the door of his house as he was trying to open the house. He said he was

with PW2 who had accompanied him to his house. He said the appellant tried to snatch the house key and in process the appellant hit him on the mouth injuring his teeth two of which came out. He said he had kshs 20,000 in his pocket which the appellant took. Complainant showed the court the injured teeth and wooden rungu used to hit him and that he also had a panga hidden in his hip. PW3 **Dr. Njoroge Kanyotu** produced P3 in Court which confirmed that the complainant sustained soft tissue injuries on his gums and lost two incisor teeth.

16. There is therefore no doubt that the assailant used actual violence on the complainant. Evidence adduced also confirms that the assailant was armed with a wooden rod which he used to inflict injury to the complainant. There is no doubt that the ingredients for the offence of robbery with violence was committed.

17. However, the appellant herein is challenging identification. His reason the evidence of PW2 should not have been believed by the trial court because he had a grudge with him.

18. Record show that the complainant said he recognised the appellant as there was bright light at the veranda of his house. He said he had known the appellant before the incident. He said when PW2 screamed neighbours went to the scene but the appellant run away. PW2 confirmed that at the material time, he had accompanied PW1 to his house at the material time and while PW1 was opening the door, the appellant who he had known as **Jamaika** hit him from behind.

19. PW2 stated that when he asked appellant why he was attacking PW1, the appellant asked him (PW2) to go very far and let him do his work. PW2 said he moved behind and he saw the appellant hit PW1 until he fell down. He confirmed that he screamed and when people arrived, they found one tooth down. He showed Court the wooden rod used to hit PW1. PW2 confirmed that there was bright light at the veranda. In cross examination PW2 said he called appellant by name and the appellant also respondent to him by calling him *daktari*. In re-examination, PW2 said he had known the appellant for almost 5years and had no grudge against him. He said the appellant had wronged him but they were reconciled. In his defence the appellant confirmed that he knew PW2 as he was his brother-in-law.

20. The appellant never disputed the form of lighting in PW1's veranda. Even though he alleged that he was framed up because PW2 had a grudge with him the person attacked in this case was PW1 not PW2 yet they were together; There is no doubt that he recognised the appellant as he called him by name and in response appellant also called him back**.** From the foregoing, I have no doubt that the appellant was seen and recognised by PW1 and PW2.

ii. Whether appellant's defence was considered

21. In his defence, the appellant talked of having disagreed with his wife before which led to him disagreeing with PW2. He however never sufficiently demonstrated how the disagreement led to the offence committed against PW1. From evidence adduced, there is no doubt that PW1 was attacked and robbed.

22. From the foregoing I find that the offence against the appellant was proved beyond reasonable doubt.

iii. Whether sentence imposed is constitutional/whether this court should interfere with the said sentence.

23. Sentence imposed by the trial court upon convicting the appellant was death sentence which is prescribed by law. **Section 296(2)** uses the word shall; meaning the sentence is mandatory. The Supreme Court in the case of **Francis Karioko Muruatetu & another Vs Republic [2017] eKLR** found that the taking away of the discretion of the Court in sentencing by statute is unconstitutional. It ties the trial Court to a particular sentence and any mitigation given by the accused person remains superfluous. I do agree that discretion should be left to the Court to decide on sentence to be imposed; as circumstances differ from case to case and the Court should not be left helpless in a situation where circumstances warrant a sentence other that mandatory sentence provided by statute.

24. In view of decision in **Muruatetu** case, I will consider the circumstances under which the offence was committed. I note that the appellant was given an opportunity to mitigate. I have considered his mitigation; I have considered the fact that he had 2 children at the time of sentence and the fact that he had been in remand for a period of 3 years; and find that sentence of 12 years' imprisonment will be sufficient in the circumstances.

25. FINAL ORDERS

1. Appeal on conviction is hereby dismissed.

2. Appeal on sentence is allowed.

3. Sentence is hereby reduced to 12 years' imprisonment.

4. Sentence to run from the date of sentence in the lower court.

Judgment dated, signed and delivered via zoom at Nakuru This 28th day of May, 2020

.....

RACHEL NGETICH

JUDGE

In the presence of:

Schola - Court Assistant

Appellant in person

Rita for State