



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 69 OF 2019

SEBASTIAN MIRITI SAMUEL.....1ST APPELLANT

MESHACK GITONGA MUGAMBI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence of the Hon. G. Sogomo PM

made on 25/3/2019 in TiganiaPM Cr. Case No. 82 of 2014)

J U D G M E N T

1. **SEBASTIAN MIRITI SAMUEL** and **MESHACK GITONGA MUGAMBI** (“the appellants”) together with two others were charged with the offence of robbery with violence contrary to *section 296(2) of the Penal Code*.

2. It was alleged that on 10/12/2015 at Kathankuma market Amugaa sub-location, Amugaa Location in Tigania East within Meru County, jointly with others not before court, they robbed **Gedion Mwiti Kaane** of his cash Kshs.2,000/- and two mobile phones make Nokia 1110 serial no. not known and Itel 2080 serial no. 358057066025600 all valued at Kshs.4,500/- and at immediately before or after the time of such robbery while armed with crude weapons namely, pangas, knives, sticks and a piece of timber frame beat and chopped off the right hand wrist using a panga to the said **Gedion Mwiti Kaane**.

3. The complainant withdrew the case against the 2nd and 3rd accused and the case against the appellants proceeded. The trial Court found the appellants guilty, convicted and sentenced them to serve 30 and 15 years imprisonment, respectively with hard labour.

4. Aggrieved by that decision, the appellants have appealed to this Court against both the conviction and sentence raising 8 grounds of appeal. **Mr. Haron Gitonga**, Learned Counsel for the appellants, collapsed the said grounds into four issues as follows: -

a) Whether the trial Court was right in allowing the withdrawal of the charges against the appellant’s co-accused.

b) Whether the prosecution case was proved to the required standard.

c) Whether the appellant’s defence was properly considered.

d) Whether the sentence meted out on the appellants was excessive.

5. The parties filed and argued the appeal vide written submissions which the Court has carefully considered.

6. This being a first appeal, this Court is enjoined to review and re-evaluate the evidence afresh with a view to making its own independent findings and conclusions. In so doing, the Court must give regard to the fact that the trial Court had the advantage of seeing the witnesses testify. **See Ekeno v. Republic [1972] EA 32.**

7. The prosecution case was that on the material day, **Gedion Mwiti Kamene (Pw1)** (“the complainant”) was at his home at **Antuambua Tigania**, when his neighbour one **Gatibu** came and informed him that she had seen the 1st appellant pass at his land swear to kill him. He decided to run away from his home but 70 meters away, he met the 1st appellant and 4 other persons whom he knew. He run and hid in

Kiraithe's house.

8. The attackers pursued him, broke the door to that house and flushed him therefrom. They frog-marched him to Kathankumi market where the 1st appellant, with the help of the 2nd appellant severed his wrist. Good Samaritans took him to hospital where he was admitted for 6 months. The attackers took from him 2 mobile phones and Kshs. 2,000/. After he healed, he was issued with a P3 form which **Martha Njeri, Pw2** filled on 21/6/2016 relying on the treatment notes from the Meru Level 5 where the complainant had been treated.

9. On the material day, **Mary Kanjuki (Pw3)**, the wife of the complainant was with him when **Gatiba** came and warned her husband about his enemies. The appellant left the compound and shortly thereafter she heard screams. When she rushed to where the screams were coming from, she noticed that it was Kiraithe's home. His attackers flushed him out of that house, frog-marched him to the local market where they severed his wrist. She was able to recognise the 5 attackers who included the 2 appellants herein. She sought assistance and took him to hospital.

10. **Fredrick Kiunga Muriuki (Pw4)** was a driver in Garissa. On the material day he was on his way to see his boss at Maua. When he reached Kithure village, he heard screams. He rushed to see what was going on when he found that **Pw1** was being chased by amongst others, the appellants. He later saw them frog-march the complainant to the market where they severed his hand.

11. **PC. Stanley Kipchumba (Pw5)** investigated the case. The complainant visited Mikinduri Police Station that morning at about 11.00am accompanied by relatives and reported what had happened to him. He went to hospital and returned on 17/12/2017 to record his statement. **Pw5** visited the scene where the complainant had lost his wrist as well as the house of Kiraithe whose house he photographed. **Susan Gatiba** and **Kiraithe** declined to record statements for the fear of the 1st appellant.

12. In their defence, the appellants testified on oath and called 2 other witnesses. The 1st appellant (**Dw1**) denied assaulting the complainant or robbing him the mobile phones or cash. He told the Court that on the material day, he was at his home where he had hired **Juma Misheck Gitonga** to construct him a cow shed. He had also hired **George Mugambi** and **Lawrence Mutwiri** to fence his land.

13. Later that morning, he later learnt that the latter two had had a scuffle at his land with the complainant and others. He rushed there but found that the scuffle had ended and the matter reported at Mikinduri Police Station. He stated that he had been framed because of a dispute of land he had with the complainant's father.

14. The 2nd appellant testified as **Dw2**. He denied robbing or assaulting the complainant. He told the Court that on that day, he had been hired by the 1st appellant to construct for him a cowshed with **Juma**. That **Joseph Kibiti** came and informed them of a scuffle at the 1st appellant's land whereby the 1st appellant left them and went there. He was arrested about a month later. He had been framed because of a land dispute he had with the complainant's brother, one **Nyaga**.

15. **Peter Juma Mutua (Dw3)** was constructing a cowshed at the 1st appellant's homestead when **Joseph Michubu (Dw4)** came and informed the 1st appellant that there was a fight at his, the 1st appellant's farm. The 1st appellant left to the farm but found no one. He went to report the incident at the police station.

16. The first ground was that the trial Court erred in allowing the withdrawal of the charges against the appellant's co-accused. The appellants contended that the trial Court did not have jurisdiction under **section 176 of the Criminal Procedure Code (CPC)** to allow the withdrawal of the charges against the 2nd and 3rd accused because they were facing a felony.

17. The withdrawal was conducted during the trial. The appellants did not at all oppose the same so that the trial Court could pronounce itself on it. I do not think that the appellants can properly raise the objection at this stage having failed to challenge the said withdrawal at that time. If they felt that the withdrawal was prejudicial to them, they should have raised it then and seek the review of the trial Court's decision. That they did not do. They cannot raise it at this stage.

18. In any event, I note that the trial Court considered that the application for withdrawal was being made because the complainant had reconciled with the concerned accused. That being the case, I do not think that once the complainant felt he did not wish to press on with the case against the two accused, he could be forced by the trial Court to soldier on with it. That would have been acting in futility as he would have chosen not to testify against them thereby frustrating their trial.

19. A reading of **section 176 of the CPC** shows that, it does only bars a trial Court from initiating a reconciliation if the charge is a felony. It does not however, bar a court from recording a reconciliation if it is initiated by the complainant. That ground fails.

20. The second ground was that the prosecution case had not been proved to the required standard. **Mr. Gitonga** submitted that, the evidence produced did not marry with the particulars of the offence. While the particulars stated that what was stolen included an Itel phone and Nokia 1110, **Pw1** stated that what was stolen from him was a Techno and Nokia phones. That the complainant did not mention the names of the appellants to the police.

21. Counsel further submitted that the complainant testified that it was the 2nd accused who severed his hand and not the appellants. That the prosecution had failed to call **Susan Gatiba and Kiriathe** who were crucial witnesses. Further, that there was contradiction in the evidence of **Pw1 and Pw2** as to who the complainant met during the ordeal. Counsel concluded that **Pw5** had not effectively or sufficiently investigated the case. That he did not seek to verify the sim cards in the alleged mobile phones.

22. On his part, **Mr. Namiti, Senior Prosecution Counsel** submitted that the prosecution had established all the ingredients of robbery. He relied on the case of **Oluoch v. Republic [1985] KLR**. That the evidence was consistent and the appellants were positively identified

through recognition.

23. In **Odhiambo & Another v. Republic [2005] 2 KLR 176**, the Court of Appeal held: -

“The act of being armed with a dangerous or offensive weapon is one of the elements or ingredients which distinguishes a robbery under section 296(2) and the one defined under section 295 of the Penal Code. Other ingredients or elements under section 296(2) include being in the company of one or more persons or wounding, beating etc the victim and since all these are modes of committing the offence under section 296(2), ...”.

24. From the foregoing, it is clear that, in a robbery with violence case, the prosecution has to prove that an accused was either armed with a dangerous weapon, or he was in the company of one or more persons or at or immediately before or after the commission of the robbery, the offender wounds, strikes or beats or uses personal violence on the victim.

25. The appellants contend that the robbery of the phones was not proved. The evidence before the trial Court was that the complainant had two phones, a techno and a nokia which the attackers took. Since the Techno was not included in the particulars of the charge, and there was no evidence that an ITEL phone was stolen, that removes one phone from the case against the appellants and leaves the Nokia phone.

26. The complainant testified that the two phones had sim cards. However, when challenged, he was unable to give the alleged two phone numbers. **Pw5** who investigated the case stated that only one phone had a line but could not tell which one. Further, he confirmed that he did not investigate from the mobile phone providers the mobile numbers for the alleged phones.

27. To this Court’s mind, there was no sufficient evidence that was proffered to prove that either the two phones, or any of them, existed or they had been stolen by the appellants either as alleged or at all. How could the complainant know or recall his mobile numbers? His wife or any of his relatives must have saved the same if they ever existed. Accordingly, there was no prove of theft of the alleged mobile phones.

28. However, the complainant’s testimony that he had KShs. 2,000/- which the attackers took after ransacking his pockets was not challenged or displaced. The theft of the said sum was proved to the required standard.

29. It was submitted that the complainant did not give the names of his assailants to the police. When the investigations officer testified, he categorically stated that the complainant had mentioned his tormentors as **Sebastian Miriti, Gitonga, Mutwiri, Mutinda and Michubu**. I find that contention to be without merit and I reject it.

30. It was submitted that the prosecution failed to call **Susan Gatiba** and **Kiraithe** who were crucial witnesses. The testimony of **Pw5** who investigated the case was that, **Susan Gatiba** refused to record a statement because of the fear she had of the 1st appellant while **Kiraithe** saw no reason of making any statement as he had already repaired his house.

31. This Court finds that there was sufficient explanation why the prosecution did not call the two witnesses. One, however crucial a witness he is, cannot be forced to record a statement against his will notwithstanding that that may be a civil duty bestowed upon every citizen.

32. It was further submitted that **Pw2**, the wife of the complainant contradicted him when she testified that she was the one who took him to hospital yet the complainant had told the Court that he never met her or **Susan Gatiba** after he had left his home.

33. The record shows that the complainant testified that it was the good Samaritans who took him to hospital after his hand was severed. He also stated that he had seen his wife and **Gatiba** follow him when he was being frog-marched by his attackers.

34. On the other hand, **Pw5** testified that she is the one who took him to hospital. I find the contradiction to be immaterial. **Pw5** told the Court that when the complainant visited the station that morning at about 11am, he was accompanied by his relatives. That corroborates the testimony of **Pw2**. I reckon that with the pain the complainant might have been undergoing at the time, it is doubtful if he would have identified the people who helped him.

35. From the testimony of the complainant, which remained unshaken, his attackers/tormentors were armed with machetes and a wooden frame. They whipped him as they frog-marched him to Kathankuma market whereat they severed his right wrist. A P3 Form produced confirmed the severance of the complainant’s right wrist.

36. The attackers were not only more than one, they were also armed with dangerous weapons. To this Court’s mind, the presence of more than one attacker, being armed with machetes and wooden frame and the severing of the complainant’s wrist, being the use of violence proved the necessary ingredients of the offence of robbery.

37. The complainant identified the attackers. He and his witnesses knew them well as they were neighbours back in the village. The incident occurred at 9am in broad day light. There was no possibility of any mistake in the identity of the attackers.

38. The appellants submitted that the complainant had admitted that it was the 2nd accused who severed his wrist when he withdrew the case against him. That it was therefore not the appellants.

39. It is true that the complainant had told the Court that he was withdrawing the case against the 2nd accused because he had compensated him for having spilt his blood. However, he did not tell the Court that the 2nd accused had done it alone.

40. In his testimony, the complainant had told the Court that, the 2nd appellant placed the wooden frame under his hand then the 1st appellant severed it with a machete. That evidence was neither challenged nor effectively displaced. The robbery and violence was executed by all the attackers, the appellants included, who actively participated in the execution of the common intention.

41. In this regard, this Court is satisfied that on independent evaluation of the evidence on record, the prosecution case was proved beyond any reasonable doubt. The second ground fails.

42. The third ground was that the appellant's defence was not properly considered. That although they gave sworn statements the trial Court failed to evaluate the same. That the trial Court tilted the burden of proof towards the appellants.

43. The appellants gave sworn testimony. They stated that they were at the home of the 1st appellant and that they were not at the scene where the incident occurred. They denied committing the offence. According to them, they were being framed because of land cases they had with the complainant or people related to him.

44. The appellants raised the issue of the existent of some land dispute between the father of the complainant and the 1st appellant only when cross-examining **Pw2**. They never raised it with the complainant or any other prosecution witness. They also did not raise the name of **Nyaga**, the alleged brother of the complainant when he testified.

45. It is also important to note that the appellants did not raise their alibi with the prosecution witnesses. The prosecution witnesses were categorical that they saw the appellants at the house of **Kiraithe** flushing out the complainant therefrom. They saw the appellants frog-march and severe the complainant's hand at Kathankuma market outside the SDA Church. The appellants' evidence did not displace that testimony.

46. Further, it turned out that the 1st appellant did not report to the police the fight that allegedly took place within his farm. Even if he was not there and that when he reached the police and found the combatants had left, since he had allegedly been informed of the breach of peace at his farm and the names given to him, he should still have reported the incident. The only irresistible inference is that he did not make the report because the incident never occurred as alleged.

47. This Court finds that, the appellants defence was properly evaluated and properly rejected. It did not displace the prosecution case. Ground number three is therefore without merit and is rejected.

48. The last ground was that the sentence was excessive. The maximum sentence for robbery with violence is death. The appellants were sentenced to imprisonment for 30 and 15 years, respectively. The trial Court erred in stating that the imprisonment was to be with hard labour. That was illegal as it no longer forms part of our law. That part of the hard labour is hereby set aside.

49. This Court notes that the trial Court found that the acts of violence had turned out to be a profitable enterprise in the area. The Court intended to mete out a deterrence sentence in the circumstances. I find that since the two appellants were involved in a common intention, which they successively executed by severing the complainant's wrist, there was no reason why one had to get a severe sentence than the other. They should have both served the same sentence.

50. Accordingly, I quash the sentences of 30 and 15 years, respectively against the appellants and substitute therefor a sentence of 10 years imprisonment for both of them. The appeal by both appellants against the conviction is dismissed.

It is so ordered.

DATED and DELIVERED at Meru this 28th day of May, 2020.

A. MABEYA

JUDGE