



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL 140 OF 2018

(CORAM: F. GIKONYO J.)

EDWARD KIRIMI KOOME.....APPELLANT

-versus-

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in MAUA

SPMCRC No. 1055 of 2015 delivered on 22/10/2018 by Hon. A. G Munene SRM)

JUDGMENT

1. **Edward Kirimi Koome**, the appellant was charged with robbery with violence contrary to section 296(2) of the Penal Code. The particulars were that on 3/3/2015 at Kianda Sub Location in Igembe South District within Meru County, jointly with another not before court robbed Harriet Nyawira of a Techno Mobile Phone and a Panga all valued at Kshs. 2500 and at the time of such robbery used personal violence upon the said Harriet Nyawira.

2. In the trial, the prosecution called 3 witnesses in support of their case.

3. In the judgement dated 22/10/2018 the trial court found the appellant guilty of the offence and sentenced to death. Having been dissatisfied with the conviction and sentence he filed this appeal setting out six grounds of appeal that can be collapsed into 4;

a. That the learned magistrate erred in law and in fact when he failed to note that the prosecution case was not proved beyond reasonable doubt

b. That the appellant's fundamental rights were violated as he was kept in police custody more than the period prescribed by law

c. That vital and crucial witnesses were not called to prove allegations thus violating section 150 CPC

d. That the appellant defence was not considered in anyway by the trial magistrate

Duty of court

4. As first appellate court, I should re-evaluate the evidence afresh and draw own conclusions and findings thereof. See **Okeno v. Republic [1972] EA 32**. However, in doing so the court must warn itself that it neither saw nor heard the witnesses to be able to assess aspects of demeanor.

Elements of offence

5. According to **Section 296(2)** of the **Penal Code**:-

(1)

(2) **If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.**

6. Accordingly, in robbery with violence, the prosecution must prove; (1) theft by the person charged; and (2) that the offender was armed with any dangerous or offensive weapon or instrument, or was in company with one or more other person or persons, or, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person.

7. The appellant in their submissions argued that the prosecution failed to prove their case beyond reasonable doubt. The respondent argued that all elements of the crime were proved. What story is told by the evidence?

8. **PW1 Harriet Nyawira** told the court that on 3/3/2015 at around 4 pm, she was coming from cultivating around the park when she met with the appellant and Mugambi. The appellant had a dagger and a panga. The appellant slapped her with the panga and 2 of her teeth became loose. She fell down and that was when the appellant left with her techno phone and the panga she was using for cultivation. She then ran and crying, and met Bariu (PW2) to who she explained what had happened. He called the chief who then called the police from Tumutumu. The police went to the scene but did not find anyone. The incident took place during the day and PW1 was able to identify the appellant as one of the persons who robbed her.

9. **PW2 Francis Bariu** corroborated the testimony of PW1 in material respects. He told the trial court that he knows the accused as he is from their village. On the day of the incident he was alone irrigating his farm when he heard screams. He ran towards the place where the scream was coming from and met with **PW1**. She explained to him what had happened and when he reached the road he found the accused and another person. When he asked them why they had beaten **PW1** they ran away. He then made a call to the sub chief who sent 2 police officers. He met with the two officers and pursued the suspects and later went to the police camp. His evidence placed the appellant at the scene of crime immediately after the crime happened.

10. **PW3 Bancy Mutile Maingi**, a clinical officer working at Nyambene Sub County hospital for 12 years now confirmed the injuries sustained by PW1 and the probable weapon used to inflict those injuries. She stated that, on 3/3/2015 **PW1** came to the hospital complaining of having been assaulted by 2 persons. PW1 narrated that she had been hit by a panga and also kicked. She was in fair general condition and was not under the influence of alcohol or drugs. She had tenderness and swelling on the left cheek which has a small bruise. Her lower eyelid was swollen and tender with darkening of the skin pigmentation. There was tenderness on the right side of the chest. She concluded that the probable weapon was a blunt object and the injury amounted to harm. From her testimony, the injuries were consistent with the evidence by PW1.

11. **DW1 Edward Kirimi** in his testimony denied the allegations and stated that he was not arrested with any exhibits and neither was he arrested during the act. The evidence by the prosecution was cogent and consistent that the appellant stole a phone and panga from PW1. During the theft, the appellant was in company of another, armed with dangerous weapons namely a dagger and a panga, and used actual violence upon and caused bodily injuries to PW1. The evidence by DW1 was therefore mere denial. The prosecution proved beyond reasonable doubt the guilt of the appellant. Accordingly, the appeal on conviction fails.

Of sentence

12. The decision in the case of **Francis Karioko Muruatetu & Another v. Republic [2017] eKLR** set a new path; that laws which fetter the discretion of the court in sentencing are unconstitutional. See specifically the following rendering by the Supreme Court;

“Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right.

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Having laid bare the brutal reality of the mandatory nature of the sentence under Section 204 of the Penal Code, it becomes crystal clear that that Section is out of sync with the progressive Bill of Rights enshrined in our Constitution specifically; Articles 25 (c), 27, 28, 48 and 50 (1) and (2)(g).”

13. Adoption of progressive and purposive approach in the administration of justice comes at a command from the Constitution- in particular article 159 and 259- and its sole aim is to enable courts to serve substantive justice. Accordingly, to my mind, the principle emerging in Muruatetu case frees the hands of the court from the shackles of law that fetter court’s discretion in sentencing. Thus, I hold the view that, any law which prescribe sentence whose effect is to take away or restrict the discretion of the court in sentencing is unconstitutional in all cases. Consequently, looking at the circumstances of this case, only death penalty was available to the trial court, and this may have caused prejudice in sentencing. On that basis, I set aside the death sentence imposed on the appellant. In lieu thereof, I sentence the appellant to 14 years’ imprisonment with effect from 22/10/2018 when the appellant was first sentenced.

Dated, signed and delivered at Meru this 30th day of June 2020

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F. GIKONYO

JUDGE

Representation: -

1. Appellant acting in person

2. State Counsel for the prosecution – Vincent Maina