



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MURANG'A**

**CRIMINAL APPEAL NO. 13 OF 2015**

**ELIUD MBURU GITAU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***[Appeal from the judgment of A. Mwangi, Senior Resident Magistrate, in***

***Kigumo Criminal Case No. 1381 of 2013 delivered on 27<sup>th</sup> January 2015]***

**JUDGMENT**

1. The appellant challenges his conviction for *robbery with violence* and the *death* sentence.
2. His learned counsel, *Mr. Karuga Wandai*, raised nine grounds in the petition of appeal dated 9<sup>th</sup> February 2015. When he appeared before me on 28<sup>th</sup> September 2020, he withdrew the document titled *amended grounds of appeal* filed by his client (in person) on 1<sup>st</sup> September 2020 together with the attached submissions. Instead, he relied on his written submissions lodged earlier on 31<sup>st</sup> August 2020.
3. The Republic contests the appeal. There are written submissions filed on 9<sup>th</sup> September 2020. The case for the State is that all the ingredients of the offence were proved; and, that the sentence meted out was lawful.
4. This is a first appeal to the High Court. I have *re-evaluated* all the evidence and drawn *independent* conclusions. I remain cognizant that I neither saw nor heard the witnesses. *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190
5. On the night of 14<sup>th</sup> October 2013, the complainant was attacked by two thugs outside his gate. They wrestled him to the ground. One of them, whom he identified as a person from his village known as *Mburu* (the appellant), put a handful of soil into his mouth. They robbed him of cash, wristwatch and a mobile phone.
6. One of the attackers managed to escape. But the complainant held onto the appellant. The commotion attracted his dogs. His son (PW2) also responded and found the appellant struggling with his father. He said he recognized the appellant because they were classmates; and, there was moonlight. The appellant took off but was re-arrested by PW2 and handed over to Administration Police Officers, Stephen Mwendia (PW3) and Charles Rioba.
7. In his defence, the appellant admitted he had been drinking earlier with the complainant. He conceded that they engaged in a fight outside the complainant's gate. However, the appellant's version (which I find difficult to believe) was that the complainant was demanding back some Kshs 1,500 which he had paid him earlier in the bar for some unfinished work.
8. From my re-appraisal of evidence up to this point, I am satisfied that the appellant was *positively* identified by the complainant and his son as one of the two attackers. It is true that it was at night. But there was moonlight and he was well known to the two witnesses. It was thus evidence of *recognition*; stronger than mere *identification*. *Wamunga v Republic* [1989] KLR 424, *Maitanyi v Republic* [1986] KLR 198 at 201.
9. Furthermore, the appellant admitted that he fought with the complainant at the scene. He was found wrestling with the complainant and arrested by PW2 with the help of the public. He was saved from a lynch mob by the police.
10. It follows that grounds numbers 1, 3 and 4 in the petition of appeal challenging the identification of the complainant or the quality of

evidence of PW2 on that issue are hollow and dismissed.

11. In grounds numbers 2, 5, 6, 7 and 8 the appellant argues that there was insufficient evidence establishing the offence to the required standard; and, that the learned trial magistrate either disregarded the evidence of the appellant or other exculpatory facts.

12. Section 296 (2) of the **Penal Code** provides-

*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. [underlining added]*

13. The legal burden of proof lay throughout with the prosecution. **Woolmington v DPP** [1935] AC 462, **Bhatt v Republic** [1957] E.A. 332.

14. There were no dangerous or offensive weapons deployed in this case. But there were two brutes. They wrestled the complainant to the ground. The appellant put handfuls of soil into his mouth to stifle his cries for help. From the evidence of the clinical officer (PW4) the complainant had a swelling of the right upper limb which was tender and bruises on the right knee. He assessed the degree of injury as *harm*.

15. Had the appellant acted alone, this would have been a simple robbery. But as I have said there were two attackers. Property belonging to the complainant was stolen. True, the money or mobile phone were not recovered from the appellant. The wristwatch was recovered on the road in the direction taken by the second attacker.

16. That does not negate the fact that the appellant and his accomplice *stole* the complainant's property. They *wounded* him in the course of the robbery. Those injuries were corroborated by clear medical evidence. Like I stated, the defence tendered by the appellant was completely bogus.

17. I am *satisfied* from the entire corpus of that evidence that *all* the material elements of the offence were present; and, that all the ingredients were *proved* beyond reasonable doubt.

18. I will now to turn to ground 9 regarding the sentence of death. The appellant contends that it was "*unreasonable and excessive*".

19. Until recently, the offence attracted the mandatory pain of death. But the Supreme Court in **Francis Karioko Muruatetu & another v Republic** Petition 15 & 16 of 2015 [2017] eKLR held as follows-

*The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26 (3) of the Constitution.*

20. This court on a first appeal *may* thus review the sentence. The appellant was a *first offender* but he declined to tender any *mitigation*. He was thus *not* remorseful. But considering the circumstances of the offence and the minor injuries suffered by the appellant, I will temper justice with mercy.

21. The upshot is that the appeal on conviction is *dismissed*. The sentence of death is *set aside*. I re-sentence the appellant to serve *ten (10) years* imprisonment. For the avoidance of doubt, the term of imprisonment *shall* take effect from *27<sup>th</sup> January 2015*, the date of his original conviction.

It is so ordered.

**DATED, SIGNED and DELIVERED at MURANG'A this 21<sup>st</sup> day of October 2020.**

**KANYI KIMONDO**

**JUDGE**

**Judgment read in open court in the presence of-**

Appellant (absent upon his written consent and due to Covid-19 prison protocols)

Mr. Waiyaki holding brief for Mr. Karuga for the appellant instructed by Karuga Wandai & Company Advocates.

Mr. S. Mutinda for the Republic instructed by the Office of the Director of Public Prosecutions.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.