



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL CASE NO.188 OF 2015**

**SAMUEL NJUGUNA NG'ANG'A.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

***Being an appeal against the conviction and sentence in C.M's Court Nakuru Criminal Case Number 2414 of 2013 delivered by Hon. L. W. Gicheha (SPM) on 4th August, 2015***

**JUDGMENT**

1. The appellant **Samuel Njuguna Nganga** together with another were charge with three counts of robbery with violence contrary to section 296 (2) of the penal code particulars of the three counts as set out hereunder:

**COUNT I: Offence of robbery with violence contrary to section 296 (2) of the penal Code**

Particulars: The accused Mohamed Mbugua Kamau and Samuel Njuguna Ng'ang'a on the night of 24th/25th January 2013, at Oraimutia Village, Oraimutia Location, Ol-Joro-Orok Division, within Nyandarua County, jointly with others not before court, while armed with offensive weapon namely pangas , iron bars, axes and knives robbed DAVID MBOGO NGINYA of his motor vehicle make Forces Daihatsu registration number KAJ 924S, red in colour, gasoline generator, water pump, rechargeable torch, mobile phone make Kabambe, mobile phone make motorolla and food stuffs all valued at Kshs.538,950/= and immediately after the time of such robbery murdered the said DAVID MBOGO NGINYA.

**COUNT II: Offence of Robbery with violence contrary to section 296 (2) of the Penal Code:**

Particulars: The accused Mohamed Mbugua Kamau and Samuel Njuguna Ng'ang'a, on the night of 24th January, 2013 at Oraimutia Village, Oraimutia Location in Ol-Joro-Orok Division, within Nyandarua County, jointly with others not before court, while armed with offensive weapons namely pangas, iron bars, axes and knives robbed Peter Kamau Kiarie of cash Kshs.11,400, mobile phone make Nokia 1208, a black hat, a green torch and a bread all valued at Kshs.15,895 and immediately after the time of such robbery wounded the said PETER KAMAU KIARIE.

**COUNT III: Offence with violence contrary to Section 296 (2) of the Penal Code**

Particulars: On the nights of 24th/25th January, 2013 at Oraimutia village, Oraimutia Location in Ol-Joro-Orok Division within Nyandarua County jointly with others not before court, while armed with offensive weapon namely pangas, iron bars, axes and knives robbed PETER MACHARIA MBUGUA a mobile phone make Nokia 1280 serial number not known, a pair of black leather shoes and a cap all valued at Kshs.2,400 and immediately before the time of such robbery wounded the said PETER MACHARIA MBUGUA.

Alternative

**Charges: Handling stolen property contrary to Section 322 (2) of the Penal Code**

Particulars: The accused Mohamed Mbugua Kamau on the 12th day of February 2013 at Kiamaina Estate, Maina Location with Laikipia County, otherwise than in the course of stealing dishonestly retained a pair of black half boots shoes and a black jacket with a grey strip both valued at Kshs.7,300, the property of the deceased DAVID MBOGO NGINYA, having reasons to believe them to be stolen goods.

Particulars: The accused Mohamed Mbugua Kamau on the 12th day of February, 2013 at Kiamaina Estate, Maina Location within Laikipia County, otherwise than in the course of stealing dishonestly retained a green torch valued at Kshs. 150 the property of PETER KAMAU KIARIE having reasons to believe it to be stolen good.

2. The appellant denied the three main charges and the alternative counts. The case proceeded for hearing with prosecution calling 14 witnesses and the appellant adduced unsworn statement and never availed any witness. The trial magistrate found the appellant and the other accused person guilty of the three counts of robbery with violence, convicted and sentenced each of them to death for count one and suspended sentence of the 2<sup>nd</sup> and 3<sup>rd</sup> count. Being dissatisfied by the said determination, the appellant filed this appeal on the following grounds: -

*i. That the appellant pleaded not guilty to the charges during the plea time and still maintain the same up to date.*

*ii. That the learned trial magistrate erred in law and in facts when he found the appellant guilty in the present case and yet there was no direct evidence to link the appellant to the said crime in question.*

*iii. That the learned trial magistrate erred in matters of law and facts when he based his conviction against the appellant and yet article 50 (2) (b) of the constitution of Kenya was violated.*

#### **SUBMISSIONS BY THE APPELLANT**

3. The appellant submitted that he is innocent despite being found guilty. He stated that he was mistaken as one of the robbers during the robbery and further submitted that the prosecution failed to prove their case against him as what is on record are mere allegations.

4. The appellant submitted that the complainant stated that he was attacked by a group of thugs in the forest at 8pm while walking home and the only source of light was a torch and moonlight. He submitted that the complainant was not able to identify his perpetrators as he was hit immediately he tried to flash at his perpetrators. He further submitted that he was found guilty for being in possession of a green torch whose ownership was not proved. He submitted that as per the testimony of Pw10, the items found in the appellant house were not sufficiently proved to belong to the complainant; that ownership documents were produced to that effect.

5. The appellant further submitted that his rights as enshrined in article 50 of the Constitution were violated in that after the charge was substituted, the same was never read and explained to him as required by the law. This greatly prejudiced him as he did not adequately prepare for his defence and submitted that the plea taking process was not followed by the trial court.

6. Finally, the appellants submitted that the finger print process was flouted. He submits PW11 testified to having been present during the finger print taking and dusting but he did not tell the court who was conducting the process. He stated that PW13 was tasked with taking the finger prints and dusting but he did not tell the court when and how the same was done. He submitted that there is no evidence on record on how dusting was done. He submitted that the court acted ultra vires in admitting the finger print evidence as the process was illegal. He further submitted that he was not able to challenge the finger print evidence as the witnesses who was responsible for collection, preservation and forwarding to the expert did not attend court to testify.

#### **SUBMISSIONS BY THE RESPONDENT**

1. **Ms. Rita Rotich** for the state submitted that the appellant was sentenced by **Hon. Gicheha** for the offence of Robber with violence. On identification of the appellant as one of the persons involved in the robbery, he submitted that PW1 stated that she was able to see the persons who robbed him as he had a torch which was produced as exhibit 2 and there was also moonlight on the material night

2. She further submitted that PW2 stated that her husband was murdered and his items recovered from the home of the appellant; the items recovered were produced in Court as exhibits. She further submitted that the accused persons stole the deceased's motor vehicle in the course of the robbery and finger prints were lifted by PW11 and PW13 and the experts were able to match the finger prints to the appellants.

3. The state counsel submitted that during the robbery, the accused persons were armed with a panga, axes and knives and they robbed the complainant cash kshs 11,400, loaves of bread, mobile phone valued at kshs 2,500, a cap and an iron rod. She added that the complainant (PW1) was also robbed of clothes and T-shirt stolen was recovered. She submitted that PW1 was injured and the degree of injury was classified as harm; that PW1's P3 and postmortem of the deceased were produced in Court as exhibits. She submitted that the deceased's cause of death was found to be suffocation and blunt trauma; and further the deceased's employee was robbed of Nokia Phone, identity card and his shoes and that he sustained bruises on his hand and a cut wound on his back.

4. On the allegation that the magistrate closed the case without calling a witness, she submitted that the prosecution called 13 witnesses and that accused never said which witness was excluded. She added that the complainant described the torch used at the time of the robbery and the torch was recovered from the appellant.

#### **ANALYSIS AND DETERMINATION**

5. 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 v. 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.)”**

6. In view of the above, I have perused and considered evidence adduced before the trial court and considered grounds of appeal and submissions herein. From the evidence adduced, there is no doubt that the three complainants were robbed and one **David Mbogo** murdered in the course of the robbery. I consider the following to be in issue: -

*i. whether sufficient evidence was adduced to link the appellant to the offence*

*ii. Whether the sentence imposed was harsh and excessive*

**(i) Whether sufficient evidence was adduced to link the appellant to the offence.**

7. PW1 in his testimony stated that at around 8 pm, he was walking from work through a forest when 6 people confronted him. He stated that 5 of them were armed with pangas while the 6<sup>th</sup> one was armed with an axe. He testified that, despite the fact that there was moonlight, he flashed a torch on one of them directly and on doing that, he was hit on top of the middle of the head.

8. PW1 further stated that after being hit by the suspect on the head, they took cash kshs 11,400, a mobile phone and a cap from him and used his clothes to tie his hand and legs together and left him in the forest while bleeding profusely. He said that when he went to police station to report, he learnt that **Mbogo** who was his customer had been killed in the forest. He said he was able to identify the 1<sup>st</sup> accused **Mohammed Mbugua Kamau** and not the appellant herein.

9. PW10 a police officer who was attached to OI-Joro-Orok AP post testified that upon report from an informer, they went to appellant’s house on 10<sup>th</sup> December 2013 and on search, they found a torch belonging to one of the victims from the appellant’s house.

10. PW13 a finger print expert from CID headquarters testified that he compared the appellant’s finger prints with finger prints lifted from vehicle registration number KAG 924S which belonged to one of the victims **David Nginya Mbogo** who was robbed and killed in the robbery and found the fingerprints lifted to have similar characteristics with sample of finger prints from the appellant. He produced the samples and report in Court as exhibits.

11. PW14 the investigating officer confirmed that PW1 identified a metal road and a torch which was taken from him after being attacked in the forest while going home from work. He said it’s the appellant who led to arrest of the other suspect and the appellant’s finger prints were taken and they matched prints lifted from finger prints dusted from the vehicle.

12. In his defence, the appellant said he did not know why he was arrested. He confirmed that his finger prints were taken and said the green torch was his.

13. Evidence adduced confirmed that the torch that was stolen from PW1 by the attackers was recovered from the appellant’s house and besides the evidence of recovery of recently stolen items from appellant’s house, the finger prints lifted from the vehicle of a victim **David Ngaruiya Mbogo** who was robbed and killed matched the sample taken from the appellant as per evidence of PW13 who produced the report confirming that in Court.

14. From the foregoing, there is no doubt that prosecution adduced evidence which proved beyond reasonable doubt that the appellant was among the suspects who attacked and robbed the victims herein. The appeal on conviction cannot therefore stand.

**(ii) Whether the sentence imposed was harsh and excessive.**

15. The appellant was **sentenced to death** as provided by statute for the offence of **robbery with violence contrary to section 296(2) of the penal code**. The said provision is coached in mandatory term. However, the Supreme Court has declared the mandatory nature of sentences unconstitutional as it takes away the discretion of the judicial officer to impose sentence according to circumstances of each case. It renders the mitigating factors superfluous.

16. In view of the above I have considered the circumstances of this case. I have considered the nature of violence involved; it resulted in the death of the victim in count one and the other two victims robbed and injured. I find it appropriate to set aside the death sentence imposed and sentenced the appellant to 25 years’ imprisonment for count one, and 15 years’ imprisonment each for Count two and three.

## **17. FINAL ORDERS**

1. Appeal on conviction is hereby dismissed.

2. Appeal on sentence is allowed.

3. Sentence of death set aside and appellant is sentenced to 25 years’ imprisonment for count one and, 15 years’ imprisonment each for count two and three.

4. Sentence in respect to the three counts to run concurrently.

5. Sentences to commence from the date the appellant was sentenced before the lower court.

**Judgment dated, signed and delivered via zoom at Nakuru**

**This 26<sup>th</sup> day of November, 2020**

**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Jeniffer - Court Assistant

Rita for State

Appellant present in person.