



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CRIMINAL APPEAL NO. 56 OF 2016

(From Original conviction and Sentence in Criminal Case No. 196 of 2016 of the Principal Magistrate's Court at Wang'uru).

SIMON MBUTHIA MWANGI.....APPELLANT

V E R S U S

REPUBLICRESPONDENT

JUDGMENT

1. The Appellant Simon Mbuthia Mwangi was charged with the offence of Robbery with Violence **Contrary to Section 296 (2) of the Penal Code**. He denied the charge. Upon full hearing the trial Magistrate convicted the Appellant and sentenced him to the prescribed mandatory death sentence on the 19/10/2016.

2. The particulars of the offence are that on the 27/3/2016, at Ngurubani Township within Kirinyaga County jointly with others not before the court while armed with dangerous weapon namely a knife robbed Boniface Karani Muriuki a bicycle and cash Kshs 5,000/- all valued at Kshs 15,000/- and at or immediately after used actual violence to the said Boniface Karani Muriungi.

3. The Prosecution called five(5) witnesses. All gave sworn evidence. The Appellant also gave sworn evidence and called no witnesses.

Prosecution's Case at the trial Court.

4. A summary of the Prosecution case was that the complainant was called by the Appellant who told him that he had green maize to sell. The two did not know each other prior to the telephone call. They agreed to meet at Ngurubani, at Nice Digital City. The complainant rode his bicycle to the agreed venue. They met and agreed to go to the Appellant's house and informed the Appellant that he had called his wife to bring the keys to the house. While at the house and waiting for the keys as alleged, two men joined them.

5. At that point, the appellant told the complainant that he had been sent by his wife to collect Kshs 30,000/- otherwise he would finish him. The appellant then stabbed him on the leg with a knife, while the other three held him at the arms. The complainant told them that he had only Kshs 5,400/- but had more in his house. The Appellant then called two motorbike riders who took them to the house leaving one of them at the scene. It was his testimony that the Appellant took his bicycle. About 100 meters to his house, the complainant and others left the Appellant and together went to collect the money from the house, but instead the complainant went to report at the Administration Police (AP) Camp. Upon return, the Appellant and the others had left.

6. The following day, one of the suspects the Appellant was found selling a bicycle at Ngurubani town. He was arrested and was Identified as the one who stabbed the complainant and took his bicycle. The bicycle was however never recovered. The complainant was later treated at Kimbimbi Sub-County Hospital on the 30/3/2016 where he was given a P3 and treatment notes. The bicycle was never recovered, nor the stolen money. On cross examination, the complainant testified that at the Police station, he Identified the Appellant positively as he was with him for a long period during the day, and had his telephone number that he called him with.

7. PW2 was a motorbike rider who testified to have carried the complainant and another man, at Kangai and heard them demanding money from the complainant. He testified that the Appellant refused to pay for the motor bike ride and was arrested by other Boda boda riders, but never paid the Kshs 400/- fare.

8. PW3, a Motor bike rider reiterated PW2's evidence as one of the motor bike riders who ferried the Appellant's accomplices to Kangai Market.

9. PW4 was the Clinical Officer who confirmed to have treated the complainant's wound caused by a knife stab.

10. The Investigating Officer testified as PW5. His investigation reviewed that the complainant was in the business of selling green maize at Ngurubani Town. His evidence was that the Appellant was arrested when he failed to pay for motor bike fares that he had hired to take him and three other persons to Kangai. The knife used to stab the complainant was never recovered. He was the arresting Officer too. He preferred the charges of Robbery with violence against the Appellant

Defence evidence before the trial court.

11. In his defence, the Appellant denied having robbed or stabbed the complainant. He gave a completely different narrative of the day's events, that he went to buy rice as a rice seller which he paid for, but on the following day, about 5.00 Pm at his place of work he found the rider who he had hired to ferry the rice for him waiting with other people who beat him up and was rescued by Police Officers who were nearby, who took him to the Police Station, and on the 30/3/2016, charged him with the offence of robbery with violence. He denied commission of the offence.

12. Being dissatisfied with the said Judgment, the Appellant lodged this appeal on eight grounds that may be grouped into four,

Thus;

1. That the trial Magistrate erred both in law and fact in failing to observe that the particulars of the offence were not proved beyond reasonable doubt.

2. Failure by trial Magistrate by considering uncorroborated evidence of the Prosecution witnesses.

3. Failure to consider the Appellants defence.

4. Contradictions and inconsistencies in the prosecution evidence.

13. To urge the appeal, the Appellant filed written submissions, to which the Republic as Respondent responded by written submissions.

14. The duty of a first appellate court is to determine whether the Appellant was correctly convicted and/or sentenced in respect of the offence he was charged with. The court will however not interfere with the trial court's Judgment unless it finds that the trial court misdirected itself as regards its findings of facts or the law. If it so finds, the court will interfere and deal with the matter as it deems fit, including substituting its own findings and orders, including setting aside of the conviction or altering of the sentence – **Jaylaney Yayha Osman –v- R (2019) eKLR and Okeno –v- Republic (1973) EA 32**. The fresh evaluation must have regard that the court never saw or heard the witnesses testify.

15. In evaluating or re-assessment of the evidence, it is imperative to evaluate all the evidence, and not to be selective in determining what evidence to consider.

The facts to be proved, and the reasons for the Judgment by the trial court must appear in the Judgment of the trial court. The best indication that a court has applied its mind in the proper manner is to be found in its reasons for the Judgment including acceptance and the rejection of the respective witnesses – **S –vs- Singh (1975) (J) SA 227(N) at 228**.

16. In other words, in order to determine whether there is merit in any of the submissions made by the respective parties in the appeal, this court must consider the evidence led in the trial court, juxtapose it against the Judgment by the trial court, and finally determine whether there is any basis for interfering with the Judgment.

I have considered the trial court's Judgment and the reasons for the conviction and sentence.

Analysis and Determination.

17. The offence of robbery with violence is stated at **Section**

296(2) of the Penal Code, thus

296(i) Any person who commits the felony of robbery with violence is liable to imprisonment for fourteen years.

296(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.

18. The elements of the offence of robbery with violence were elaborated by the Court of Appeal in **Ganzi & 2 Others –v- R (2015) 1 KLR and Johanna Ndungu –v- Republic Cr. App. No. 116 of 2005 (unreported)** as follows:-

1. If the offender is armed with any dangerous or offensive weapon, or

2. If he is in the company with one or more persons, or

3. If at or immediately before or immediately after the offence of the robbery, he wounds, beats or strikes or uses any other violence to any person.

19. It is trite that proof of any one of the above ingredients is enough to base a conviction of the offence under **Section 296 (z) of the Penal Code** as held in the case **Oluoch –v- R (1985) KLR 549**. The guilty of a person is not to be proved by direct evidence only. Circumstantial evidence that enables a court to deduce a particular fact from circumstances of facts that have been proved, can form a strong basis for establishing the guilt of an accused person as direct evidence – **Musili Tulo –v- Republic**.

20. On the matter of identification by one or more witnesses, the **Court of Appeal in Mwaura –v- R (1987) eKLR 648**, held:

In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a Judge to deal with such matters as the length of time the witness had for seeing who was doing what is alleged, the position from the accused and the quality of light.

21. Further in **Anjononi & Others –vs- R (1976-1980) KLR 1566** the CoA rendered that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.

22. There are guidelines stated in the case **Republic –vs- Turnbull (1976) 3EA 549** on the evidence of identification at night that it must be tested with the greatest care, and must be absolutely watertight to justify a conviction also as held in **Nzaro –v- R (1991) KAR 212 and Kiarie –v- R (1984) KLR 739** wherein the CoA held that in determining the quality of identification using light at night, it is at least essential to ascertain the nature of light available, what sort of light, its size and its position relative to the suspect.

23. Issues for determination.

1. Whether the Appellant was positively identified.

2. Whether the complainant was robbed of his bicycle and if by who.

3. Whether the Appellant was armed with a dangerous weapon and in company with one or more persons.

4. Whether actual violence was used on the complainant.

24. The offence of robbery with violence was committed during day time. By a telephone call, the Appellant and the complainant agreed to meet at the home of the Appellant, for purposes of doing business of selling of maize. While waiting for the Appellant's keys to his house from an alleged wife, the two were joined by two men. The Appellant asked him to give them Kshs 40,000/- or he would be finished (killed). The Appellant had come to the meeting place riding his bicycle. As he had no money to the tune of Kshs 40,000/- he was knifed (stabbed) at his leg with a knife. He however parted with Kshs 5,000/- that he had with him.

25. By the above uncontroverted evidence, the element under **Section 296(2) Penal Code**, the fact was corroborated by the evidence of PW-2- and PW-3- who, with their motorbikes carried the Appellant and his accomplices to the complainant's house apparently to collect more money, but the Appellant was left 100 meters away, while the others accompanied the complainant.

26. The distance between the scene and the victim's house was long stated to be over one hour's ride. During the journey, the complainant had sufficient time with the Appellant and the other three men, to be able to sufficiently identify him positively. It was during day time. The trial court held that it had no doubt that it was the accused (Appellant) who called the complainant on the material day and took him to Kangai Shopping Centre where they were joined by the three other men, where they then attacked him and robbed him of his money and the bicycle which was never recovered – **Mwaura –v- R (supra)**.

27. Further **Section 296(2)** envisages a situation that during the robbery, the assailant wounds, beats or strikes the victim.

There is no doubt that the complainant was wounded as stated in the P3 form and treatment notes, produced by the Clinical Officer (PW4) – **Cr. Appeal No. 24 of 2011 – Meru Marigo Kanyago Ithare & Another –v- R (J. Lessit)**. Although the knife was not recovered, the Clinical Officer opined that the wound was occasioned by a sharp object. Circumstantial evidence in the particular case was strong enough to infer that the said wound was due to the stab with the knife. A knife is by all standards a dangerous weapon, and is offensive depending on the manner it is used – **Ganzi & 2 Others (supra)**. As stated in the case **Oluoch –v- R (Supra)**, the guilt of a person can be established not only by direct evidence but also by circumstantial evidence.

28. The circumstances and narration of events by the complainant were not controverted at all by the Appellant in his defence. He completely failed to answer to, or challenge the Prosecution evidence.

The trial Magistrate in his Judgment analysed the entire evidence including the defence evidence which he rejected as untrue. I have examined the defence. I too find it to be far from the truth of the events of the day established by the prosecution witnesses. The Appellant raised a defence of alibi, which again was not proved at all.

29. Contrary to the Appellant's assertion, it is my finding that the trial Magistrate considered the defence and the evidence adduced by the prosecution witnesses to reach to the conclusion he arrived at. The reasons for the Judgment are thus stated therein contrary to the Appellant's allegations. I find no fault with the trial Magistrate's Judgment.

30. On contradictions and inconsistencies, the Appellant in his submissions did not point out any contradiction or the alleged inconsistencies. Upon re-evaluation of the evidence, I find no such contradictions and/or inconsistencies that would otherwise invalidate a valid finding of the trial court. Each of the Prosecution witnesses corroborated the evidence adduced by the complainant –**Musili Tulo –v- R (supra)**. All the grounds of appeal lack merit and are dismissed as baseless.

31. In totality, I find no merit in any of the grounds of appeal put forth by the Appellant. All the elements of the offence of robbery with violence were proved to the required standard of proof, beyond reasonable doubt.

Consequently, the appeal on conviction is dismissed.

Sentence

32. The Appellant was sentenced to death being the only prescribed penalty under **Section 296(2) of the Penal Code**, prior to the Supreme Court decision in **Francis Karioko Muruatetu & Another –v- R (2017) eKLR** when it declared the death penalty unconstitutional. The said decision untied court's hands in sentencing, and gave discretion to hand out any other sentence commensurate to the offence committed, upon considering mitigating factors and other relevant factors, including Probation/Social inquiry reports on the Appellant, as well as the Judiciary sentencing policy, and objectives of sentencing as enunciated in the said decision. Among them are

1. **Age of the offender**
2. **Being a first offender**
3. **Whether offender pleaded guilty**
4. **Character and record of the offender**
5. **Remorsefulness of offender**
6. **Possibility of reform and social re-adaption of the offender and**
7. **Any other factor the court may consider relevant.**

33. The Judiciary's sentencing policy guidelines list the objectives of sentencing as:

1. **Retribution**
2. **Deterrence**
3. **Rehabilitation**
4. **Restorative Justice**
5. **Community Protection**
6. **Denunciation**

34. I have considered the above guidelines and decisions in similar offences.

In Benjamin Keruboi Kipkone –v- R (2018) @ KLR, the armed robbers robbed the complainant of Kshs 250,000/-. The death sentence was substituted with 20 years imprisonment.

In Wycliffe Wangugi Mafura –v- R – (2018) eKLR, the robbers used a firearm to rob an Mpesa agent. The death sentence was substituted with 20 years imprisonment. In **Benson Ochieng & another –v- R (2018) eKLR**, the robbers used guns to rob the complainant. A sentence of 20 years was substituted with the death sentence. In **Cyprian Ingira Ikobwa –v- R (2019) eKLR**, the court substituted the death sentence with 20 years imprisonment.

The decisions are numerous.

35. Considering the circumstances of the robbery in this appeal, the items stolen and the injuries inflicted on the complainant, and the time the Appellant spent in custody and in prison, I am persuaded to set aside the death sentence which I hereby do, and substitute it with a jail term of 16 (sixteen) years imprisonment effective from the trial court's judgment, the 19/10/2016.

Orders accordingly.

Dated, Signed and Delivered at Kerugoya this 17th day of December, 2020.

J. N. MULWA

JUDGE