REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL APPEAL NO. 76, 77, 79 & 80 OF 2017

1. ROBERT MOMANYI NYABATE.....1ST APPELLANT

2. JOSEPH SERETI ONSONGO.....2ND APPELLANT

=VRS=

REPUBLIC.....RESPONDENT

{Being an appeal against the conviction and the sentence of Hon. B. M. Kimtai – SRM

dated and delivered on the 3rd day of November 2017 in the Original Keroka

Principal Magistrate's Court Criminal Case No. 232 of 2017}

JUDGEMENT

The appellants were sentenced to death for robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code.

The particulars of the charge were that on 14th March 2017 at Mochenwa village in Masaba North Sub-county within Nyamira County jointly and being armed with offensive weapons namely pangas they robbed Monicah Nyaboke Keraro of Kshs. 50,000/= and immediately after the time of such robbery wounded the said Monicah Nyaboke Keraro.

They pleaded not guilty to the charge and the prosecution called four witnesses to prove its case. Both appellants testified on oath. After evaluating the evidence adduced by both sides the trial magistrate found them guilty and sentenced them to death. They felt aggrieved and hence this appeal. Initially they had filed separate appeals with the 1st appellant Robert Momanyi Nyabate filing Appeals Nyamira HC No. 76 of 2017 and No. 79 of 2017 and the 2nd appellant filing Appeals No. 77 of 2017 and 80 of 2017. All the four appeals were later consolidated and heard together. The grounds of appeal are that: -

"1. The Learned Trial Magistrate erred in law in ignoring a cardinal principal in criminal law and procedure that the burden of proof lies on the prosecution and that they must prove each and every ingredient of the charge beyond reasonable doubt.

2. The Learned Magistrate erred in law and fact in holding that the prosecution had proved the case beyond reasonable doubt against the appellant while deciding the case against the weight of evidence.

3. The Learned Trial Magistrate misdirected himself in law and fact in relying on discredited evidence thereby causing a miscarriage of justice.

4. The Learned Trial Magistrate was biased in his judgement, which misstated the evidence on record and thereby wrongly convicted the appellant.

5. The Learned Trial Magistrate failed to make a finding that there existed some doubts in the prosecution's case, and further failed to make a finding thereof that the benefit aforesaid was to be given to the appellant and erred in law in failing to acquit the appellant as a result thereof.

6. The learned trial magistrate gravely misdirected herself in basing the Appellant's conviction on mere speculation and

conjecture by making a farfetched inference on the guilt of the Appellant.

7. The Learned Magistrate erred in law and fact in failing to give due regard to the material contradictions, discrepancies and inconsistencies in the prosecution case thereby reaching a wrong decision and resulting in a miscarriage of justice.

8. The Learned trial magistrate gravely misdirected herself in basing the Appellant's conviction on mere speculation and conjecture by making a farfetched inference on the guilt of the Appellant.

9. The Learned Trial Magistrate erred in law in failing to consider the defence case adequately and failed therefore in making a finding in favour of the Appellant thereof.

10. The Learned Trial Magistrate erred in law and fact in failing to believe the appellant's defence and further found no reason for not believing the Appellant and failed in giving proper or any reasonable grounds for rejecting the appellant defence from the evidence adduced which defence covered facts which were weighty and cogent.

11. The Learned Magistrate wrongly approached the principle on failure to produce certain evidence inclusive of that of the investigating Officer thereby wrongly failing to make the presumption that the withheld evidence would have been unfavourable to the prosecution.

12. The Learned Magistrate erred in his appreciation of the law applicable and the evidence adduced against the Appellant in the circumstances of the case.

13. The Learned Magistrate erred in his general approach to the whole case.

14. The conclusions of the Trial Magistrate on the evidence were improper and therefore to be interfered with by the High Court.

15. The Appellant's right to a fair trial was infringed in the trial in the lower court as well as denial to right to counsel."

It is their prayer that the appeal be allowed so that the conviction is quashed and the sentence is set aside. They have prayed that in the alternative this court should declare there was a mistrial in the lower court and discharge them.

At the hearing of the appeal the 1st appellant applied to act in person as his Advocates, Nyandieka & Associates had stopped representing him. The 2nd appellant was however represented by Mr. Nyagaka, Advocate. Parties to the appeal agreed to canvass the appeal through written submissions which were duly received.

In determining this appeal, I must as a first appellate court be minded of the duty to re-evaluate and reconsider the evidence in the court below so as to arrive at my own independent finding. I do so bearing in mind that this court did not see or hear the witnesses give evidence and hence did not observe their demeanour – **(See Okeno Vs. Republic [1972] EA).**

Briefly the facts in the case were that on 14th March 2017 the complainant arrived home at 7pm from the grazing field. As she walked towards her house she saw a man who had a panga running towards her. She quickly entered her house, locked it and hid under the bed. The man however broke the window and entered the house and dragged her from her hideout. He cut her on the head and legs several times and dragging her up to the door he went back into the house and took away Kshs. 50,000/= which her daughter had given her. She had hidden the money in a box where she had kept fish. She screamed twice but nobody responded. She identified that man as the 1st appellant and stated that the 2nd appellant was keeping watch at the gate. She stated that the 2nd appellant was armed with a panga and a stick and that he too cut her on the leg with the stick. A woman called Naomi heard her screaming and went to her house and then called her children who went the following day and took her to Christamarian Hospital in Kisii. She later reported the matter and obtained a P3 Form. Treatment notes detailing how she was managed and a P3 Form assessing the degree of injury she suffered were produced in evidence.

Gideon Omosa (Pw2) testified that on 14th March 2017 at 7am he received a call from someone who first told him that his mother was dead but when he disconnected the call he was called again and told that his mother was badly injured and needed help. He went home and found she had severe cut wounds on the head and there was blood near the door of her house. When he took her to Keroka Hospital he was advised to take her to Christamarian. The injuries on the head and leg were sutured. Pw2 testified that his mother told him that her assailants were the two appellants in this case. He also stated that that morning he met Robert (the 1st appellant) who threatened to cut him as they had cut his mother.

Joel Ongaro (Pw3), a Clinical Officer at Nyamira Hospital testified that he examined the complainant on 20th March 2017 and filled her P3 Form. He told the court that the complainant had been treated at Kisii but that his own examination revealed she had cut wounds on the head and the left leg. The cut wounds had already been sutured. He classified the degree of injury as harm.

Naomi Nyanchoka (Pw4) was compelled to give evidence after she declined to do so. She told the court that on the material day she found the 2nd appellant at the gate of the complainant's house. She stated that he was holding a stick. When she entered the complainant's house she saw blood on the door. She also stated that she heard the complainant screaming and when she saw her she was bleeding on the face. She confirmed that she called the complainant's children using the complainant's phone. She testified that she saw the 1st appellant who had a panga leaving. She confirmed that the complainant told her that the 1st accused had taken her Kshs. 50,000/=.

Both appellants testified on oath and vehemently denied any involvement in the offence. The 1st appellant stated that he was a farmer and that he spent the material day in his shamba. He later went to give fodder to his cow and heard some noise at his neighbour's house. He peeped and heard the neighbour saying she had been attacked and her Kshs. 50,000/= stolen. He stated that on 16th March 2017 at 6am he was arrested in his house. He stated that his house is about 100 metres from the complainant's. He was quick to state that there were no differences between him and the complainant. He confirmed that he lived in the same place with the 2nd appellant.

The 2nd appellant stated that he too was a farmer. He stated that on the material day he left his home at 6am. At 7am he went back to the house and then left for Keroka where he stayed until 2pm. On arrival at home he heard that the complainant had been attacked. After that he went and grazed his cattle until 5pm. Then he saw a police vehicle stop next to his house. The officers went to the complainant's house then left. The next day at 5am he was arrested in his house. He contended that he was not at the scene at the material time. He also disclosed that the complainant was his aunt.

The appellants both conceded that a robbery took place at the home of the complainant that day. The 1st appellant stated that he heard the complainant screaming and when he peeped in her compound he heard her saying she had been robbed of Kshs. 50,000/=. The 2nd appellant confirmed that the day after the robbery he saw police officers going to the complainant's house. The fact of robbery is therefore not in doubt and the only issue is whether the complainant positively identified the appellants as her attackers. Counsel for the 2nd appellant has submitted that the complainant could not have identified the attackers because she was bleeding profusely from the cut on her head. He contended that mistaken identity was a possibility given that she was the only identifying witness. My finding is that the identification of the appellants was free from error. The complainant knew the appellants very well as they were her neighbours. This was conceded by the appellants with the 2nd appellant saying that she is his aunt. The complainant had just arrived home when the 1st appellant followed her to her house. When she saw he had a panga she sensed danger and ran and locked herself in the house. He pursued her and broke into the house through the window, dragged her from her hideout and cut her several times. He then went and took her money. It is my finding that the complainant had ample opportunity to see and recognize the 1st appellant whom she knew very well. She also recognized the 2nd appellant when he joined the 1st appellant. Her evidence was corroborated by Naomi (Pw3) who was the first to arrive when the complainant screamed. Pw3 testified that she saw the 1st appellant walking away from the complainant's house with a panga and that she found the 2nd appellant standing near the complainant's gate. Pw3 was a competent and compellable witness and there was nothing sinister in compelling her to testify. It is my finding that her testimony is credible and trustworthy and that she had hesitated to testify for fear of the appellants.

The appellants also contend that there was contradiction between the evidence of the complainant and her son regarding the time of the robbery. I am not convinced there was such a contradiction. Pw2 was clear that he received a call about the robbery at 7am on the day following the robbery. It was Pw2 who took the complainant to hospital. He was clear that he was not there during the robbery and did not pretend to have seen the robbers. The fact that the complainant did not hesitate to tell him who her attackers were is proof that she had recognized them and knew them.

The 1st appellant told the court that he heard the complainant saying she was robbed of Kshs. 50,000/=. Her evidence that she had that money in her house could therefore not have been farfetched. It is my finding that it was not necessary to call her daughter to prove that she had given her that money. I am also not convinced that failure to call the investigating officer in this case was fatal to the prosecution's case. The evidence on record was cogent. The 1st appellant's own defence placed him at the scene of crime while the alibi raised by the 2nd appellant was weak. It was raised late in the proceedings and the prosecution did not get a chance to test it. Moreover, the 2nd appellant made a general statement of where he was. He did not mention any specific place so that even had he raised the alibi at an earlier stage in the trial it would not have been possible for the prosecution to dislodge it. The charge against the appellants was proved beyond reasonable doubt. The appeal on conviction has no merit. It is dismissed.

As for the sentence the death penalty was at the material time a mandatory in offences of this nature. The Supreme Court has since then rendered a decision declaring the mandatory nature of the sentence unconstitutional and convicted persons sentenced to death are now at liberty to review of their sentence. The appellants are therefore at liberty to apply. The appeal is otherwise dismissed. It is so ordered.

The appellants shall be supplied with a copy of this judgement.

Signed, dated and delivered in Nyamira this 21st day of February 2019.

E. N. MAINA

JUDGE