



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.34 OF 2018**

**CLEOPHAS KHAEMBA MUHANJI .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An Appeal arising out of the conviction and sentence of Hon. H. Nyaga CM delivered on 15<sup>th</sup> January 2018 in Makadara CM Cr. Case No. 986 of 2012)**

**JUDGMENT**

The Appellant, Cleophas Khaemba Muhangi was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on 27<sup>th</sup> December 2011 at Gikomba Market, Shauri Moyo in Nairobi County, the Appellant jointly with others not before court, while armed with dangerous weapons namely pangas and an axe robbed John Mutiso Kiilu of Ksh.10,000/- and a cellphone Nokia 1200 all valued at Ksh.14,000/- and immediately before or immediately after the time of such robbery used actual violence to the said John Mutiso Kiilu (the complainant). When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged and sentenced to death. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition for appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial court for convicting him yet the prosecution failed to discharge the burden of proof to the required standard of proof beyond any reasonable doubt. He was aggrieved that the trial court failed to establish that proper investigation was not carried out. He was further aggrieved that the trial court did not consider his defence in arriving at its decision. He took issue with the death sentence meted out by the trial court and asserted that the same was unconstitutional. In the premises, the Appellant urged this court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During hearing of the appeal, the Appellant presented to court written submission in support of his appeal. He urged the court to allow his appeal. Ms. Nyauncho for the State opposed the appeal. She submitted that the Appellant in the company of others robbed the complainant of cash Ksh.10,000/- and a mobile phone. The Appellant was well known to the complainant. The complainant knew him by name. The complainant was seriously injured as a result of the robbery. He was admitted in hospital for two months. The prosecution availed witnesses who witnessed the robbery. They all knew the Appellant prior to the robbery. The Appellant was therefore positively identified. She asserted that death sentence was appropriate in the circumstances since the complainant sustained serious injuries. In the premises therefore, she urged this court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows: The complainant (PW1) sold clothes at Gikomba Market for a living. On 6<sup>th</sup> November 2011 at about midday, the Appellant in the company of two men went to his place of work. They attacked a pregnant lady who was wearing a chain around her neck. They stole the chain. After a few minutes, a man came to inquire who had robbed the pregnant lady. PW1 told him that it was the Appellant and his accomplices. The following day, the Appellant came back to PW1's place of work and started hurling insults at him. He threatened to kill him. The Appellant left and came back with a knife. When PW1 saw him, he ran away. He reported the incident at Shauri Moyo Police Station.

On 27<sup>th</sup> December 2011, PW1 was at his place of work. He was serving a customer. All of a sudden he heard his customer scream. He saw the Appellant and his accomplice try to steal a phone from his customer. He managed to stop the robbery. The Appellant and his accomplice hurled insults and threatened him. They left. After about half an hour later, the Appellant, in the company of about nine others came back. They were armed with an axe, an iron bar and pangas. The Appellant was holding the axe. They attacked him. The Appellant cut his hand with the axe. He also lost his right eye. They stole his Nokia mobile phone as well as Ksh.10,000/- from his pockets. He lost consciousness. He woke up at St. Mary's Hospital Lang'ata. He was admitted at the hospital for about a month.

PW2, Jeremiah Kitheka worked at Gikomba Market. He witnessed the incident on the material day. He saw the Appellant trying to steal a phone from one of PW1's customers. PW1 managed to stop the robbery. The Appellant left. He came back with a group of people. They were armed. The Appellant was carrying an axe. They attacked PW1. PW2 raised an alarm. He ran to the Chief's office to report the matter. By the time they came back to the scene, the Appellant and his accomplices had already left. PW1 had cut injuries on his head and his hand. They took him to hospital. PW3 and PW4 also worked at Gikomba Market. They witnessed the incident. They narrated to court the events of the material day as told by PW2 and PW1.

PW5, Dr. Zephaniah Kamau examined PW1 on 18<sup>th</sup> May 2012. This was about five months after the alleged robbery occurred. PW1 had healed injuries on his head. A computed tomography (CT) scan of his head showed a depressed fracture of the right frontal bone. His right eye was missing. He had a scar on his right wrist. He also had a healing wound on his left knee. He stated that the injuries were likely caused by a sharp object. He classified the injuries as grievous harm. He stated that PW1 was previously admitted at St. Mary's Hospital Lang'ata. He produced the complainant's P3 form into evidence.

The investigating officer, PW6, stated that he was on duty at Shauri Moyo Police Station on 6<sup>th</sup> November 2011. PW1 came to the police station. He reported that some men had threatened to attack him. He knew one of the men. The police were however not able to apprehend the suspects as they went into hiding. On 27<sup>th</sup> December 2011, PW6 received a report that PW1 had been attacked. He was admitted at St. Mary's Hospital Langata and was in critical condition. A group of men attacked him because he stopped a robbery attempt on one of his customers. When PW1 was discharged, he recorded his statement. He identified the Appellant as one of the people who had attacked him. The gang also robbed him of cash. On 5<sup>th</sup> February 2012, the Appellant and some of his accomplices were arrested by police officers at Gikomba.

When the Appellant was put to his defence, he testified that he was a shoe vendor at Gikomba Market. He stated that he knew PW1 very well. On the material day, he had an argument with PW1. He was drunk. They fought. He was also injured. He was later arrested on 11<sup>th</sup> February 2012. He stated that he only fought with the complainant. He denied robbing the complainant.

This being a first appeal, it is the duty of this court to re-evaluate and reconsider the evidence adduced before the trial court before reaching its own independent determination, whether or not to uphold the decision of the trial court. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make a comment regarding the demeanour of the witnesses (See *Okeno vs Republic* [1972] EA 32). In the present appeal, the issue for determination is whether the prosecution proved its case on the charges brought against the Appellant of robbery with violence contrary to Section 296(2) of the Penal Code to the required standard of proof beyond any reasonable doubt.

It was evident from the facts of the case that the prosecution relied on direct evidence of identification to secure the conviction of the Appellant. This was a case of identification by recognition. PW1 stated that he had seen the Appellant on numerous occasions at Gikomba Market. PW2, PW3 and PW4 also stated that they had seen the Appellant at the said market prior to the alleged robbery. The Appellant stated that he knew the complainant. PW1 narrated to the court how the Appellant had threatened him prior to the material day. On the material day, the Appellant in the company of others, attacked him and robbed him of his phone and cash Ksh.10,000/- that were in his pockets. He sustained serious injuries to his head, right wrist and left knee. He lost his right eye. The evidence of PW5 as well as the treatment notes adduced in evidence confirmed that the Appellant sustained the stated injuries. The robbery occurred in broad daylight at about 4.30 p.m. The conditions favouring a positive identification were therefore present. PW1, PW2, PW3 and PW4 all placed the Appellant at the scene of crime. The Appellant was positively identified and placed at the scene of crime.

The Appellant submitted that the evidence adduced by the prosecution pointed to the offence of assault and not robbery with violence. In his defence statement, he stated that on the material day he was drunk. He had argument with the complainant. They fought. He denied robbing the Appellant. This court is not convinced that the Appellant's version of events is true. Several prosecution witnesses stated that the Appellant was in a gang of people that attacked the complainant at his business premises. The Appellant submitted that the investigating officer stated that he received information that PW1 was attacked. There was therefore no report of robbery. The complainant stated that after the Appellant and his accomplices attacked him, he lost consciousness. He regained his consciousness at the hospital. He noticed that his mobile phone and money (Ksh.10,000/-) that were in his pocket had been stolen. PW2, PW3 and PW4 witnessed the Appellant and his accomplices attack the complainant. They left the scene and went to report the incident at the Chief's office. When they came back, the Appellant and his accomplices had escaped. The complainant was on the ground. PW2 and PW4 took him to hospital.

Therefore, the first report to the police was made by the witnesses who saw the Appellant attack the complainant. They were not aware that the complainant was robbed. The complainant was admitted at the hospital for a month. He was in critical condition. He made a report of the robbery at the earliest opportunity immediately he was discharged. PW6 recorded the complainant's statement. He stated that the complainant informed him that he was robbed. The complainant did not make two contradicting statements to the police. **Section 119 of the Evidence Act** provides that a court may presume the existence of any fact which it thinks likely to have happened having regard to, among other things, the common cause of natural events, human conduct in their relation to the facts of a particular case. The trial court's finding that the Appellant robbed PW1 was not only supported by the evidence of PW1 but also by the presumption that, in the circumstances of this case, the Appellant and his gang assaulted the Appellant and robbed him.

The aggravated offence of **robbery** as described under **Section 296 (2)** of the **Penal Code** may be complete with or without use of violence, as long as there has been a theft and the offenders are either armed with offensive weapons or offenders are more than one. (See *Oluoch v Republic* [1985] KLR 549). In the present appeal, the particulars of the charge are very clear. The Appellant robbed the complainant of his Nokia mobile phone and cash worth Ksh.10,000/-. The Appellant was in the company of about nine people. The evidence of the prosecution witnesses established use of violence occasioned on PW1 by the Appellant and his accomplices. The medical evidence adduced by PW5 corroborated PW1's claims that he sustained serious injuries during the robbery on the material day. There was also an element of revenge in the complainant's attack and robbery. It was clear that the complainant was targeted because he had previously prevented the Appellant from robbing his customers. **The defence put forward by the Appellant does not dent the otherwise strong and cogent evidence adduced by the prosecution witnesses connecting him to the offence.** From the above analysis of the evidence, this court is of the view that the prosecution has established its case on the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** to required standard of proof beyond any reasonable doubt.

The upshot of the above reasons is that the Appellant's appeal on conviction lacks merit and is hereby dismissed.

As regards sentence, following the recent decision by the Supreme Court in **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR**, the court has discretion of sentencing the Appellant on the basis of severity of the offence now that the mandatory death sentence has been declared unconstitutional. In the present appeal, the Appellant was sentenced to death by the trial court. This court has considered the Appellant's mitigation. The evidence adduced by the prosecution established that violence was used. The Appellant and his gang robbed the complainant and seriously injured him in the course of the robbery. His injuries were classified as grievous harm. In the premises, this court sets aside the death sentence given by the trial court. The same is substituted with a sentence of life imprisonment. It is so ordered.

**DATED AT NAIROBI THIS 27<sup>TH</sup> DAY OF MARCH 2019**

**L. KIMARU**

**JUDGE**