REPUBLIC OF KENYAq

IN THE HIGH COURT OF KENYA AT MURANG'A

CONSOLIDATED CRIMINAL APPEALS NO. 151 OF 2014

PETER MAINA KIMANI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the judgment of P. Nditika, Ag. Senior Principal Magistrate,

in Kandara Criminal Case No. 73 of 2014 delivered on 5th June 2014.]

JUDGMENT

1. The appellant was convicted of *robbery with violence* contrary to section 296 (2) of the **Penal Code**. He was sentenced to *suffer death*.

2. The particulars of the charge read as follows-

> *"On the 6th day of February 2014 at about 20:00 hours at Mutitu village, Kandara District within Murang'a County, jointly robbed Francis Njoroge Karanja of his phone makae Itel valued at Kshs 3,500 and cash Kshs 4,000 and immediately before the time of such robbery wounded the said Francis Njoroge Karanja."*

3. An appeal number *67 of 2015* was lodged through counsel on 2nd December 2014. The appellant had lodged another petition in person on 10th December 2014. The original appeal was *withdrawn*. The present appeal was then *amended* with *leave* on 5th March 2019.

4. There are four amended grounds. They can be can be condensed into two: Firstly, that the conditions were unsuitable for a positive identification; and, secondly, that the sentence was excessive.

5. Learned counsel for the appellant, *Mr. Wandai*, submitted that the complainant was drunk. He was attacked by several people. It was at night. If he could not identify the other assailants it was illogical to say he identified the appellant. Regarding sentence, learned counsel prayed for leniency.

6. The Republic contests the appeal. The position of the State is that all the ingredients of the offence were proved.

7. This is a first appeal to the High Court. I have *re-evaluated* all the evidence on record 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

10. On the material day at about 7:30 p.m., the complainant was at a bar. The appellant, a nephew, came and requested for a beer. He refused but eventually bought him a beer. He however asked the appellant to sit at a separate table. The complainant said that he (complainant) had taken alcohol at a forest before coming to the bar. But he said he *"was not that much drunk"*.

11. PW2, the bar waitress, confirmed that the complainant and the appellant were at the bar; and, that the complainant took one beer and a soda. She said the appellant bought beers for a number of patrons.

12. The complainant then started walking home on foot. About a kilometer from the bar, he saw the appellant and another man. The place was known as Karimamwaro.

13. The other man had a metal rod. He said he could not identify him but that he had seen him earlier at the bar. He was emphatic that he identified the appellant from the torch light and from the clothes he was wearing: a black striped shirt and jeans jacket (exhibits 7 and 8).

14. The assailants asked him to stop. They started hitting him. He fell down. He shone a light on the attacker. One of them cut him with a *panga* as he tried to block the blow. They stole Kshs 4,000 and the cellphone. He screamed. The assailants took off. Members of the public came to his rescue.

15. Two of those who responded were PW3 and PW4. The complainant had been cut on the hand. He did not disclose the name of the assailants immediately. They got a motorbike and took him to the Kandara Health Centre. PW4 said that after the complainant received treatment, he confided that he was attacked by the appellant and one of *Kiarie's* sons.

16. The complainant reported the matter to Kandara Police Station. He produced the P3 form and treatment notes (exhibits 1 and 2). The appellant was arrested two weeks later.

17. PW5 was Moses Njiru. He is a clinical officer at Kandara Sub-County Hospital. He confirmed that the complainant's right hand had a cut wound. He opined that it was caused by a sharp object. He classified the degree of injury as harm. He filled in the P3 form on 12th February 2014 relying on the initial treatment notes.

18. PW6 was Police Constable Lagat. He was the investigating officer. His evidence largely followed the narrative by the complainant. He confirmed that he did not carry out an identification parade because the complainant identified his attackers at the time of the incident.

19. I have then considered the substance of the defence. The appellant made a brief *unsworn* statement. He protested his innocence. He agreed that the complainant bought him a beer earlier that evening. But he said the complainant left him at the bar; and, that he did not leave until 3:00 a.m. He later heard that the complainant was robbed.

20. A number of matters arise from that evidence. The first relates to identification. In ***Kiarie v Republic*** [1984] KLR 739, the Court of Appeal had this to say-

> *"It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction."*

21. See also ***Maitanyi v Republic*** [1986] KLR 198 at 201. In the matter at hand, the complainant and the appellant *knew* each other. He is a *nephew*. They were together in the bar. Although the offence took place at night, the complainant identified the appellant from his torchlight. He called out his name, *Maina*. He also identified him from his clothes.

22. It is true that he did not disclose their identities immediately. But after he was treated, he told PW3 that he was attacked by the appellant and one of *Kiarie's* sons.

23. I have reached the conclusion that notwithstanding his *drunk* condition, he positively identified the appellant as one of his attackers. It was evidence of *recognition*; stronger than mere *identification*. ***Wamunga v Republic*** [1989] KLR 424.

24. The next key question is whether *all* the ingredients of the offence of *robbery with violence* were established. 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".*

25. In our criminal justice system, the *legal burden* of proof lay throughout with the prosecution. ***Woolmington v DPP*** [1935] AC 462, ***Bhatt v Republic*** [1957] E.A. 332.

26. There were two thugs. They were armed with a *panga* and metal rod. True, the weapons were not produced in court but they were *sufficiently* described by PW1. The appellant and his accomplice *stole* money and a cellphone from the complainant. They wounded the complainant in the course of the robbery. The injuries were corroborated by medical evidence.

26. When juxtaposed against the clear evidence of the prosecution, the defence by the appellant is a completely *bogus*. He was clearly placed at the bar and at the scene of the robbery. The fact that the complainant did not identify his accomplice does not mean he could not identify the appellant. They were *relatives*; and, had been *together* at the bar moments earlier.

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

28. I will now to turn to the sentence of death. Until recently, the offence attracted the mandatory sentence 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."*

29. This court on a first appeal *may* review the sentence. The sentence imposed on an offender must be *commensurate* to his moral

blameworthiness. ***Macharia v Republic*** [2003] 2 E.A 559

30. The appellant is a *first offender*. The appellant in *mitigation* prayed for leniency. I have considered those matters. The appellant and his accomplice were armed with a metal rod and *panga*. The complainant suffered a cut wound on the right hand. In this case, justice can only be served by a long prison term.

31. The upshot is that the appeal on conviction is *dismissed*. The sentence of death is *set aside*. I sentence the appellant to serve *twenty (20) years imprisonment*. For the avoidance of doubt, the term of imprisonment *shall* take effect from *18th June 2014*, the date of his original conviction.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **MURANG'A** this 26th day of March 2019.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Appellant.

Ms. Mukami holding brief for Mr. Karuga Wandai for the appellant.

Ms. Gichuru for the Republic.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.