



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CORAM: D.S. MAJANJA J.

CRIMINAL APPEAL NO. 143 OF 2014

BETWEEN

JOHN SANYA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. M. Njagi, SRM dated 9th

September 2014 at Eldoret Magistrate's Court in Criminal Case No. 4885 of 2013)

JUDGMENT

1. The appellant, **JOHN SANYA**, was charged, convicted and sentenced to death for the offence of robbery with violence contrary to **section 296(2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the offence were that on 26th October, 2013 at Matunda Sub-location, Nzoia Location in Likuyani District with Kakamega County, jointly with another not before the court robbed **JOHN WAWERU** cash Kshs. 7,000/=and immediately before the time of such robbery used actual violence on the said **JOHN WAWERU**.

2. The appellant has appealed against the conviction and sentence on the grounds set out in petition of appeal. He contends that the trial magistrate erred by not considering that an identification parade was not conducted as required by law as the complainant knew the attacker. He further contended that the trial magistrate erred by convicting him based on a dock identification which is worthless. He complained that the prosecution did not prove the offence beyond reasonable doubt and that trial magistrate failed to take into account that the complainant's first report was that he was conned and not robbed.

3. It is the duty of the first appellant court to evaluate the evidence afresh and reach its independent conclusion while taking into account that the it never heard or saw the witnesses testify. In order to proceed with this task and before I consider the issues raised the appellant, I will outline the evidence as it emerged before the trial court.

4. The complainant, John Waweru (PW 1) recalled that on 26th October 2013 at 9.00 am, he was at Matunda Town where he was to buy a cow. He found the appellant at the cattle auction area and told him he wanted to buy a cow worth Kshs. 7,000/=. The appellant was with another person and then set off to look for a cow but immediately after, the appellant held his throat, put his hand in the trouser pocket and strangled him as he took the Kshs. 7,000/=. PW 1 lost consciousness briefly and when he recovered, he decided to go to report the matter at the police station.

5. At about the same time, Antony Mwangi Muniu (PW 2) who had come to the market with PW 1 recalled that as he was parking his motorcycle, he saw PW 1 being strangled by the appellant. He went where PW 1 was and he told him that the appellant had stolen the Kshs 7,000/=. Both PW 1 and PW 2 decided to go and report to the police station and as they were coming back, they saw the appellant at an Mpesa shop. They called the police and the appellant saw them coming he started running away.

6. Corporal Galcha Abdikadir (PW 3) recalled that on the material day PW 1 and PW 2 had come to report an incident of robbery. He exchanged phone numbers with PW1. After a while, PW 1 called him and told him he had seen the culprits at an Mpesa Shop. He and other officers gave chase and the appellant was arrested. Erick Soita Juma, a Clinical officer at Khalaba Hospital, testified that he examined PW 1 on 6th November 2013, 6 days after the incident. He noted that the PW 1 had tenderness on his neck, on rotation, flexion and extension. He concluded that the injuries were inflicted by a blunt weapon.

7. In his defence, the appellant denied that he was at the market on the material day. He stated that he went to work to make bricks at 7.00 am and at about 11.00 pm, he went back to his house. Shortly thereafter police officers came and arrested him.

8. The offence of robbery with violence under **section 296(2)** of the *Penal Code* is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at, immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see *Dima Denge Dima & Others v Republic* NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR, *Oluoch v Republic* [1985] KLR 549 and *Ganzi & 2 Others v Republic* [2005] 1 KLR 52).

9. I am satisfied that all the elements of robbery were proved as PW 1 testified that he was strangled by an assailant who was in the company of another person who took money from his pocket. The thrust of this appeal is whether the appellant was identified as one of the assailants.

10. This was a case of identification of a stranger however, PW.1. and the appellant spoke for a while as they talked about cows in broad daylight. As PW 1 testified, the appellant was the one leading them to where the cow was. I am therefore satisfied that the time of day, the proximity and nature of interaction were all circumstances favourable for positive identification. The testimony of PW 1 was corroborated by that of PW 2 who saw PW 1 being assaulted and that is why when they could identify him and he was thus arrested. Since the appellant was arrested within the vicinity of the market and on the same day, an identification parade would not be useful in the circumstances.

11. I have scrutinized the record and I did not find any reason why PW 1 and PW 2 would lie about a stranger. This evidence when considered alongside the alibi defence proffered by the appellant displaces it. PW 3 was not arrested at home but in the market. Nothing was suggested to PW 3, the arresting officer, that he was at home on that day when he was arrested. When he saw the police officers, he started running away which act was inconsistent with his innocence. The alibi defence therefore crumbles on the weight of the prosecution evidence. The appellant also suggested the PW 1, in his first report, informed the police that he had been conned and not robbed. When the question was put to PW 1 he reiterated the fact that he had been robbed. No such question was put to PW 3 to confirm the fact.

12. The appellant raised the issue that other witnesses in the market were not called. The law concerning the number of witnesses to be called was aptly summarized in *Keter v Republic* [2007]1 EA 135 the court held that, “*The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.*” **Section 143 of Evidence Act (Chapter 80 of the Laws of Kenya)** provides that, “*No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.*” In my view, both PW 1 and PW 2 gave credible evidence and it was not suggested either in the defence or in cross-examination of any of the witnesses that there was anyone else who would give exculpatory evidence. From the totality of the evidence I have outlined, I affirm the conviction.

13. As regards the sentence, the mandatory death sentence was found unconstitutional by the Supreme Court in *Francis Karioko Muruatetu & Another v Republic* SCK Pet. No. 15 OF 2015 [2017] eKLR. The same principle was applied to the offence of robbery with violence under **section 296(2)** of the *Penal Code* by the Court of Appeal in *William Okungu Kittiny v Republic* KSM CA Criminal Appeal No. 56 of 2013 [2018]eKLR. I therefore set aside the sentence imposed on the appellant.

14. In conclusion, I affirm the conviction and allow the appeal against sentence to the extent that I quash the sentence of death and substitute it with **twelve (12) years’** imprisonment from 28th October 2013.

DATED and DELIVERED at ELDORET this 23rd day of April 2019.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Mumu, Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.