REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO 140 OF 2017

(FORMERLY NAIROBI CRIMINAL APPEAL NO. 325 OF 2011 AND MURANG'A CRIMINAL APPEAL NO. 378 OF 2013)

JOSEPH KAMANDE MIRING'U……..……..APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Thika Criminal Case No 4888 of 2010) (Hon. Owino, SRM) dated 3rd November 2011)

JUDGMENT

1. The appellant, Joseph Kamande Miring'u, was charged before the Chief Magistrate's Court at Thika with 2 counts of the offence of robbery with violence contrary to section 296(2) of the Penal Code. On the first count, the particulars of the offence were that on the 18th day of November 2010, at Karimamwaro village within Murang'a County, jointly with others not before the court, while armed with a dangerous weapon, namely a panga, robbed Julius Macharia Mburu of one Quicktel mobile phone, an Artec Radio, six plates and two bedsheets, all valued at Kshs 4,150.00, and at the time of such robbery used actual violence on the said Julius Macharia Mburu.

2. The particulars on the second count were that on the night of 18th November 2010, at Karimamwaro village within Murang'a County, the appellant, along with others not before the court while armed with dangerous weapons, namely *pangas*, robbed Daniel Mburu Kuria of four Mobile phones of make Nokia 1200, Nokia 1600, Nokia 1110, Motorolla C118, a jacket, jeans, four trousers all valued at Kshs 19,100.00 and at the time of such robbery used actual violence to Daniel Mburu Kuria.

3. He was tried and found guilty on both counts and was sentenced to serve a term of life imprisonment for both offences.

4. Aggrieved with both his conviction and sentence, the appellant filed the present appeal. In his amended grounds of appeal which are undated but were filed in court with his written submissions, he argues that the trial court erred, first, in basing his conviction and sentence on unsafe identification evidence; relying on the inconsistent testimony of the prosecution witnesses, namely PW1 and PW4; failing to consider that the items that were allegedly stolen were neither recovered nor produced in court as exhibits; not taking into consideration his sworn alibi defence; and for failing to compel the prosecution to call crucial witnesses to give evidence.

5. This is a first appeal. Accordingly, I am required by law to re-evaluate the evidence presented before the trial court and reach my own conclusion. In doing so, I bear in mind that I have neither seen nor heard the witnesses, which the trial court had the advantage of doing- see the decision of the Court of Appeal in **Isaac Ng'ang'a Alias Peter Ng'ang'a Kahiga V Republic (2006) eKLR** in which the court stated:

> ***"In the same way, a court hearing a first appeal (i.e. a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same."***

6. The prosecution case against the appellant was as follows. Daniel Mburu Macharia (PW1) was a business man who run a shop in Karimamwaro village in Kandara. On the night of 18th November 2010, at around 1:00 a.m., he was woken up by people talking within his compound. He then heard a loud bang coming from the direction of his brother's house. He got out of bed and went outside to check what was going on. As he approached his brother's house, he met a man with a bright torch, and asked him to identify himself. Daniel noticed that the person had a *panga* and sensing danger, he ran back to his house and switched on the security lights. He then realized that the person that he had met was the appellant, whom he called 'Kamande'. He recognized the appellant because they had known each other since childhood, and he knew that the appellant lived about one kilometer from one of his grandfather's homes. Once the appellant realised that he had been seen, he begun to shout "Corporal! Corporal", after which Daniel heard a gunshot.

7. Julius Macharia Mburu (PW2) was asleep in his house on the material night. He heard a bang at his door and heard some movement from outside his house. He got out of bed to check what was happening and realized that there were four intruders inside his house. One of the intruders ordered him to lie down and tied his hands behind his back. During this time, they injured his mouth which resulted in a loose tooth. The intruders then left him in the house, and he heard them breaking the door to Daniel's (PW1) house. Julius managed to untie himself and fled the scene and raised the alarm. He returned later on to find that certain things were missing from his house, among them 2 pairs of bedsheets, 2 radios and assorted plates all valued at Kshs 4,150.00. The next day, the police called him and informed him that a suspect, the appellant, had been arrested.

8. Julius was attended to by Moses Njiru (PW6) a clinical officer at the Kandara Health centre, on 24th November 2010. Moses filled in a P3 form in which he assessed the injuries suffered by Julius as harm. He produced this form as evidence of the injuries.

9. Teresia Wairimu Mburu (PW4), gave a similar account of the events of the material night as had Julius. On the 18th November 2010, at around 1:00 a.m. while she was asleep in her house, she was awoken by a loud bang at her main door. She got up, peeped through her window, and realized that her home was under attack. Using the security light that was in the compound, she looked and saw the appellant who was pacing up and down, as if keeping watch for his accomplices. She then heard Daniel (PW1) ask "*wewe ni nani?*" She called out to Daniel to enquire what was happening, but instead of answering her, he turned back quickly and then she heard someone shout "*piga bunduki*". She could hear the appellant communicating with someone, but she did not come out to see who it was. She waited inside the house until her other family members with whom she shared a compound came out and together they raised the alarm. They also called the area chief as well as his corporal.

10. Daniel Mburu Kuria (PW5) was also at home on the material night, and he too was woken up by loud thuds at his door. He realized that four people had forced themselves into his house. The assailants pulled him down to the floor and begun searching through the house. They demanded money from him but he had none, so they instructed him to lead them to his grandmother's house. During the course of the robbery, he heard a male voice call out "*corporal piga bunduki*" after which all the assailants fled. In the course of the robbery, he lost five phones namely a Nokia 1600, Nokia 1110, Nokia 1200, Motorolla C118, Motorolla C119, phone batteries, 4 pairs of trousers, and a jean jacket, all worth about Kshs 19,000.00. Of the four men, he recognized the appellant who was casually known to him before the incident and lived near his home.

11. The matter was reported to Corporal Jackson Mwanza (PW3) from the Karima Mwaro AP police post. At around 2:00 a.m. on the material day, he received a call that there had been a robbery and he rushed to the scene. He interviewed Daniel (PW1) who said that he identified one of the assailants - Kamande wa Miring'u, the appellant-whom he had seen with the aid of security lights at his home. Daniel led the police to where the appellant was living, and there they found the appellant's father who informed them that the appellant was not there and directed them to where he was currently living. They arrested the appellant and escorted him to the police station. PW3 later on handed over the case to the Kabati police station.

12. After evaluating the evidence led by the prosecution witnesses, the trial court found that the appellant had a case to answer and therefore placed him on his defence. In his sworn testimony, the appellant denied committing the offences he was charged with. He claimed that on the material day, he woke up and went to work at the hotel where he was engaged as a cook. He worked until night time then returned home and went to bed. Later that night some administration police came and arrested him. His sole witness, his mother, Mary Waithera, (DW2), stated that on the day that the appellant was arrested, he had come home at around 8:00 p.m., eaten and then gone to sleep in his house. Later on that night, two police officers came and arrested him for a robbery. She stated in cross-examination that she did not know where he went to after they parted in her kitchen.

13. After considering the prosecution evidence and the defence, the trial court found that the appellant was positively identified as being present during the robbery, that the evidence on identification was firm and consistent and that the prosecution evidence was not displaced by the appellant's defence. It therefore found that the prosecution had proved its case against the appellant beyond reasonable doubt and found him guilty as charged on both counts.

14. At the hearing of his appeal, the appellant relied on his written submissions through which he expounded on the grounds of appeal. He faulted the trial court, first, for relying on the contradictory evidence of the prosecution witnesses in reaching a conviction. In the appellant's view, the evidence given by Daniel (PW1) was that he saw the appellant at the scene and therefore recognized him. However, Julius (PW2) testified that he knew the appellant, but he did not see him during the robbery. It was therefore the appellant's contention that it would not have been possible for one witness to claim to have seen him, while the other did not see him. In his view, there is no way Daniel recognized him considering there were four robbers at the scene that night.

15. The appellant further challenged the evidence led by Teresia (PW4) who testified that she did not know the appellant before the attack, but identified him in the dock during the trial. The appellant contends that for such identification to be proper, it ought to have been preceded by an identification parade. Since it was not, this identification was unsafe and the evidence of this witness could not be relied upon.

16. The appellant's final challenge on the identification evidence was that it was not sound due to the fact that it was unclear what the nature of the light used by the witnesses was. He submitted that if there was light from the security lights as alleged, then both Julius (PW2) and Teresia (PW4) should have been able to see the appellant. In the event, he contends that the evidence led as to the circumstances surrounding the identification was insufficient and the trial court ought not to have relied on it.

17. The appellant's final submission was that there was nothing linking him to the crimes that he was charged with. In his view, considering that he was arrested soon after the attack, the fact that none of the stolen items were recovered from him exonerates him. He contends therefore that his conviction was unsafe, and he asked the court to quash it and set aside the sentence imposed on him.

18. Learned Prosecution Counsel, Mr. Ongira, opposed the appeal on behalf of the state. He submitted that even though the robbery occurred at 1:00 a.m., there were security lights in the homestead. During the course of the robbery, Daniel (PW1) stepped outside and met with the appellant who was holding a *panga*. When he ran back into the house, Daniel (PW1) looked out into the compound, and from the security

light he recognized the appellant. This was evidence of recognition as the appellant and Daniel had known each other since childhood. This evidence was corroborated by the evidence of Julius who said that a number of people had got into his house and that certain items had been stolen. Counsel further submitted that in as much as Julius (PW2) did not identify the appellant, the evidence of recognition of Daniel was sufficient to place the appellant at the scene of the crime. It was Mr. Ongira's submission therefore that all the ingredients of the offence of robbery with violence were present: the assailants were armed; they were in a group of two or more; they did steal from both Daniel and Julius, and they also used actual violence on Julius, as was shown by the P3 form that was adduced in evidence by the clinical officer.

19. Mr. Ongira submitted that the trial court considered the prosecution case and found that a *prima facie* case had been established, and it was not disproved after the defence case. Further, that after the trial court considered the appellant's defence, it found that the prosecution case was cogent and consistent, and that the defence evidence was not credible. It was also his submission that the court had given the appellant an opportunity to mitigate but he did not. Learned Counsel therefore asked that the appeal be dismissed and the conviction be upheld.

20. I have considered the prosecution and defence evidence on record, as well as the judgment of the trial court. In order to sustain a conviction for the offence of robbery with violence, the evidence must show one of the following three ingredients: that the offender is armed with a dangerous or offensive weapon or instrument, that he or she is in the company of one or more persons, or that at the time of the robbery or immediately after the robbery, he wounds, beats, strikes or uses any other violence to any person. In addition to the proof of any one of these ingredients, there is also the requirement that the person who is accused of the offence must be positively identified- see **Suleiman Kamau Nyambura v Republic [2015] eKLR (Criminal Appeal No. 5 of 2013).**

21. The evidence led before the trial court was clear that on the early morning of 18th November 2010, a group of four assailants attacked the homestead where Daniel Mburu Macharia (PW1), Julius Macharia Mburu (PW2), Teresia Wairimu Mburu (PW4) and Daniel Mburu Kuria (PW5) were living. During the attack, both Daniel (PW1) and Julius (PW2) had various items belonging to them taken from them. Further, Julius (PW2) was injured in the mouth in the course of the robbery as emerged from his evidence and that of the clinical officer, PW6. It is therefore without question that there was a violent robbery at their homestead.

22. The question is whether the appellant was properly identified as one of the persons who perpetrated the robbery. The evidence shows that the appellant was placed at the scene of the crime by three witnesses. The first was Daniel (PW1) who claimed to have recognised him, as did the other Daniel (PW5). The third was Teresia, (PW4) who identified the appellant in the dock.

23. Regarding Teresia's identification, the appellant urged this court to find that her evidence was tainted due to the fact that the witness had not identified him in a properly conducted identification parade prior to the dock identification. I am aware that previously, the legal position with respect to dock identification based on the prevailing jurisprudence was that dock identification was generally worthless. See for example the holding of the Court of Appeal in **Amolo v Republic [1991] LLR No. 4381 (CAK)** where the court, reiterating the holding in **Gabriel Njoroge v Republic (1982-88)** on the worth of dock identification, explained the reason why there was a reluctance to accept dock identification in the following terms:

> ***"The reason for the Court's reluctance to accept a dock identification is part of the wider concept, or principle of law that it is not permissible for a party to suggest answers to his own witness, or, as it is sometimes put, to lead his witness. Taking this a stage further, the reason for the rule against leading a witness is that to do so would clearly detract from the veracity of the evidence given and reduce its value. For it is manifest that in all criminal cases, … the accused person stands in the dock of the court. Consequently, it is self-evident to the witness that the person standing in the dock is the one whom the prosecution desires to be identified."***

24. In **Samuel Mwaura Muiruri & 2 others v Republic [2002] eKLR (Criminal Appeals Nos. 117, 131, 133 of 2000 (Consolidated))** the Court considered the utility of dock identification in light of the above holding and explained that:

> ***It is believed that because an accused sits in the dock while witnesses give evidence in a criminal case against him undue attention is drawn towards him. His presence there may in certain cases prompt a witness to point him out as the person he identified at the scene of a crime even though he might not be sure of that fact. It is also believed that the accused's presence in the dock might suggest to a witness that he is expected to identify him as the person who committed the act complained of.***

25. Even then, the Court held that dock identification was not entirely worthless in the following terms:

> ***But the holding in Gabriel Njoroge case (supra) appears to us to be too broadly couched. We do not think it can be said that all dock identification is worthless…. We do not think that evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification.***

26. Applying this finding to the facts before me, I am of the view that Teresia's evidence with respect to identification of the appellant was not worthless. Her evidence was that when she realised that her home was under attack, she looked outside and she was able to see most of the compound. She saw the appellant who was pacing up and down as if he was keeping watch for someone. Her evidence shows that she had ample opportunity to see the appellant as well as sufficient light from the security light through which she was able to see the appellant, whom she described in her evidence as a short, light complexioned man.

27. However, even if her evidence could not be relied on, there was the evidence of Daniel (PW1) who testified that he recognised the appellant with the help of security lights which he switched on when he retreated to his house after he saw that the man he had confronted had a panga. Daniel Mburu Kuria (PW5) also recognised the appellant. While the evidence of recognition is safer than that of identification of a stranger, I am cognizant of the need to be cautious so as not to perpetrate a miscarriage of justice which can occur, since mistakes can arise even in recognition. In **Paul Etole & another v Republic [2001] eKLR (Criminal Appeal No. 24 of 2000)** the Court of Appeal

reiterated the need for this caution in the following terms:

> ***"The appeal of the 2nd appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriage of justice. But such a miscarriage of justice occurring can be much reduced if whenever the case against an accused person depends wholly or substantially on the correctness of one or more identifications of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weakness which had appeared in the identification evidence. It is true that recognition may be more reliable than the identification of a stranger; but even when (a) witness is purporting to recognise someone who he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made."***

28. With this caution in mind, and having considered the evidence of Daniel (PW1) in particular, I am satisfied that it was cogent and clear evidence, and that it was reliable. Daniel had gone out of his house to investigate what was happening when he was woken up by noise from outside. He met with the appellant, and he had an opportunity to look at the appellant; after he fled back to his house, he switched on the security lights to look outside and he recognised the appellant. He was sure it was the appellant he saw since he had known him since childhood. PW1 gave this information to Corporal Mwanza (PW3), and together they tracked down the appellant to his home. When cross-examined by the appellant, Daniel remained firm that he saw the appellant when he got out of the house.

29. I have also noted that the evidence of recognition by Daniel was not shaken by the defence case. In fact, the appellant confirmed that he and Daniel had known each other since childhood. Moreover, the evidence led by Mary Waithera (DW2) the appellant's mother, was that on the night that the appellant was arrested, which, according to the prosecution evidence (PW1 and PW3) was the night after the robbery, he came home, ate then slept. The evidence did not affect the prosecution evidence with respect to the night of the robbery and did not therefore in any way weaken the prosecution evidence.

30. In the circumstances, I agree with the finding of the trial court that the prosecution proved its case against the appellant beyond reasonable doubt. I have not been able to find any contradiction in the prosecution evidence, and I am not satisfied that the fact that none of the items that PW2 was robbed of on the night of the robbery were recovered from him weakens the prosecution case.

31. Accordingly, I find the appellant's appeal to be without merit, and it is hereby dismissed and the conviction and sentence upheld.

Dated and Signed this 7th day of March 2019

MUMBI NGUGI

JUDGE

Dated Delivered and Signed at Kiambu this 10th day of April 2019

C. MEOLI

JUDGE