REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO. 152 OF 2017

MICHAEL NGANGA MAINA.....APPELLANT

=VRS=

THE REPUBLIC.....RESPONDENT

{Being an appeal against the Conviction and Sentence by Hon. J. Kituku – PM Kiambu

dated and delivered on the 26th day of August 2016 in the original Kiambu

Chief Magistrate's Court Criminal Case No. 2938 of 2015}

JUDGEMENT

The appellant was the 1st accused in the court below. Together with his co-accused he was charged with 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 24th November 2015 at Ruaka Trading Centre within Kiambu County, jointly with another one not before the court, being armed with dangerous/offensive weapons namely knives, screw drivers and crude metallic rods, robbed Mr. Charles Maina Muiruri of his wallet containing cash 1000/=, ID card and immediately at the time of such robbery wounded the said Charles Maina Muiruri.

The prosecution called five witnesses and after evaluating their evidence and the unsworn statement of the appellant the court found the charge against the appellant was proved beyond reasonable doubt, convicted him and sentenced him to death. Being aggrieved he preferred this appeal. The appeal is premised on three grounds (as set out in the Amended Petition): -

> **"1. That the learned magistrate erred in both law and fact in upholding the conviction in reliance with the evidence of identification by recognition without considering that the complainant was assaulted by unknown people.**
>
> **2. That, the learned trial magistrate erred in both law and fact by being impressed by the mode of arrest of appellant family had a grudge with the complainant (sic).**
>
> **3. That, the learned trial magistrate erred in both law and fact by rejecting the appellant defence without considering that it had overwhelmed the prosecution case."**

The appeal which is vehemently opposed was canvassed partly by way of written submissions and partly orally.

In his submissions the appellant stated that his conviction rested on the evidence of a single witness – the complainant. He submitted that the offence was alleged to have occurred at 8pm when the circumstances did not favour a positive identification. Citing a decision of the Court of Appeal in **Moses Munyua v Republic Court of Appeal No. 63 of 1987** the appellant wondered why the assertion that the complainant knew his attackers was not contained in the first report. He contended that the first report is a clear test by which truth and accuracy may be gauged. He submitted that the trial Magistrate did not consider the first report although it was before him. He urged this court to consider the report in his favour and find him innocent as the same was to the effect that the complainant was robbed by unknown people yet his testimony was that he knew him (the appellant).

The appellant further submitted that his defence was not considered and was neither accepted nor rejected. He urged this court to evaluate the evidence afresh and to find that the prosecution's case was not proved beyond reasonable doubt, quash the conviction, set the sentence

aside and set him at liberty.

For the State, it was submitted that the charge was proved beyond reasonable doubt as the appellant's evidence was that he was attacked by the appellant who was in the company of two other men one of who was armed with a metal bar; that he knew the appellant for over 10 years; that the men wounded him as confirmed by the P3 Form and robbed him of 500 and an ID card. It was submitted that two witnesses, Pw3 and Pw4 testified that the complainant identified the appellant to them at the stage and further that there was no evidence of a prior grudge to support the defence. Counsel urged this court to find the conviction was safe and hence dismiss the appeal. In reply, the appellant submitted that the P3 Form was a fabrication as it was obtained after he was arrested.

As the first appellate court I have a duty to analyse and evaluate the evidence in the trial court so as to arrive at my own independent conclusion while bearing in mind that I did not hear or see the witnesses giving evidence **(Okeno v Republic [1972] EA 32)**. I have also considered the submissions by both sides.

The complainant testified that on the material day at about 8pm he was walking home from Ruaka Trading Centre when he met three people who were coming from the opposite direction. Immediately they by-passed each other one of them grabbed him while another who was armed with a metal iron bar cut him on the throat and hands. They then took his wallet which contained money and an identity card. He stated that he lost consciousness only to come to at Tigoni Hospital where his kin had taken him. It is my finding that those facts establish the offence of robbery with violence which are **the act of stealing, the application of a dangerous or offensive weapon, the use of violence or threat to use violence** and **the fact that the perpetrators were more than one – see Section 296 (2) of the Penal Code.** The only issue for determination is **whether the appellant was one of the attackers**.

It is my finding that the complainant positively identified the appellant as one of the three people who robbed him. The complainant testified that he knew the appellant for more than ten years which the appellant confirmed by alleging that the appellant had a grudge against his family. Secondly, although the offence occurred at night, it was at a bus terminus with many passing vehicles whose lights aided the complainant to see the attackers. I am satisfied that the circumstances prevailing at the time favoured a positive identification. Moreover, this was evidence of recognition which as was held in the case of **Anjononi & Others v Republic [1980] KLR 59** ***"is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other…."***

The appellant discounted that the complainant identified him because otherwise he would have stated so in his first report. That first report was produced in this court together with the OB extract for that day. I am not convinced that the same support the contention by the appellant. It is clear from both the first report (Investigation Diary) Exhibit 2 and the OB extract (Exhibit 2) that the report was made by people other than the complainant. According to the complainant those are the people who took him to hospital while he was unconscious. That explains why the report states that he was attacked by unknown people. Indeed, it is clear that although the report was recorded, those who made it were referred to Karuri Police Station to file a formal report. In the P3 Form which was issued at Karuri Police Station two days later, by which time the complainant had come to, it is noted that his history was of assault by a group of people known to him. So whereas there was a first report made at Tigoni Police Station the relevant report and OB extract would be the one made at Karuri Police Station where the P3 Form was issued and which confirms that he knew his attackers. There was no much substance in the appellant's defence and the same did not rebut the prosecution's case. The variance in the dates he alluded to is curable under **Sections 204 & 329 of the Criminal Procedure Code.** I am therefore satisfied that the charge against him was proved beyond reasonable doubt.

The appellant did not make submissions specific to the sentence. However, I take cognisance of the fact that he was sentenced to death only because it was mandatory to so do so. Jurisprudence now has it that the mandatory nature of the sentence is unconstitutional and that the courts now must consider the circumstances of the case before pronouncing the sentence. See **Francis Karioko Muruatetu & Another v Republic [2017] eKLR**. I hold that the appellant is entitled to the same rights enjoyed by other convicted persons faced with similar circumstances and there is therefore justification to interfere with the sentence.

Prior to sentencing the appellant, the trial court was informed there were no records and this meant the court could treat him as a first offender and I shall therefore treat him as such and as the degree of injury inflicted upon the complainant was harm meaning the violence meted was not that severe, my finding is that the death sentence was excessive. I accordingly reduce the sentence to imprisonment for five (5) years from the date the appellant was sentenced by the trial court. The appeal on conviction is otherwise dismissed. It is so ordered.

Signed and dated this 23rd day of September 2019.

E. N. MAINA

JUDGE

Dated and delivered in Kiambu this 26th day of September 2019.

C. W. MEOLI

JUDGE