



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 01 OF 2018

PETER NJUGUNA NDICHU.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

{Being an appeal against the Conviction and Sentence by Hon. L. M. Wachira – SPM Gatundu dated and delivered on the 21st November 2017 in the original Gatundu Senior Principal Magistrate’s Court Criminal Case No. 1241 of 2016}

JUDGEMENT

The appellant was sentenced to suffer death for **Robbery with violence contrary to Section 296 (2) of the Penal Code.**

The particulars of the charge were that on 18th September 2016 at Mwea village Gatundu North Sub-county within Kiambu County jointly with another not before court he robbed Michael Muiruri Miringu of a mobile phone make X TIGI valued at Kshs. 1500 and Kshs. 500/= cash and at the time of such robbery used actual violence to the said Michael Muiruri Miringu.

The appellant had also been charged with an alternative charge of **Handling stolen property contrary to Section 322 (3) of the Penal Code** for which he was acquitted after being convicted on the main charge.

He also faced a charge of **Assault in Resisting Arrest contrary to Section 253 (a) of the Penal Code** on which he was convicted but the sentence was suspended when he was sentenced to death on the main count.

Briefly the facts of the case are that on the material day at about 7pm the complainant (Pw1) and his 4-year-old son one Christopher Kahuria were walking home when they met the appellant and another man who the complainant did not know. The appellant who was known to the complainant started harassing him before hitting him on the face and taking off with his phone X TIGI phone grey in colour and a cash of Kshs. 500. The appellant and his companion then fled. The complainant reported the matter to the police. The next day he took police officers to the appellant’s home but the appellant saw them and ran away and escaped arrest. The following day the complainant spotted the appellant at a trading centre called Gatuku and alerted police officers at Mwea Police Station who went to arrest him. The court heard that when the complainant pointed out the appellant to the two officers they made to arrest him but the appellant resisted and even bit one of them (Pw3 – complainant in count II) on the left hand. They nevertheless overpowered him. Upon frisking him they found a phone which the complainant identified as the one the appellant had stolen from him at the time of the robbery. During the trial, the complainant produced a receipt to prove the phone was his. The complainant testified that there was light where the robbery occurred and that there was no grudge between him and the appellant prior to that. Umuro Diba (Pw3) a police constable who was attached to Mwea Police Station testified that on 18th September 2016 at 6.54pm he received a report from the complainant concerning the robbery. He stated that he booked the report and referred the complainant to hospital. Pw3 confirmed that the next day he went to the home of the suspect with another officer but the appellant saw them and ran away. He further stated that on 24th September 2016 the complainant informed them that he had seen the appellant at Gatuku Trading Centre. They went there immediately but the appellant took to his heels. He stated that he chased the appellant and although the appellant bit him he overpowered him and apprehended him. He stated that when he searched the appellant he found him with an X TIGI phone which the complainant identified as the one stolen from him during the robbery. Pw3 further stated that when the complainant reported the incident to him, he mentioned the name of the accused and disclosed he had not identified the other man. Pw3 stated that he tried to get a statement from the complainant’s son but he did not manage because he was too young. Pw3 testified that he was treated at Igegania Hospital for the injury inflicted upon him by the appellant. He stated that he did not know the appellant prior to the report by the complainant and that on the two occasions he went to arrest him he was accompanied by the complainant. His testimony was corroborated by PC James Maigua (Pw5) and by Dr. George Kimani (Pw2) who confirmed that on 24th September 2016 he treated Pw3 who had gone to Igegania Level 4 Hospital with a history of assault by a suspect. He stated that he classified the degree of injury inflicted upon Pw3 as harm. Pw3 told the court that he asked the appellant if he had a receipt to prove he owned the phone found in his possession but he did not. The complainant however had a receipt which proved he was the owner.

David Kabuga (Pw4) a clinical officer attached to Igegania Level 4 Hospital testified that he saw and examined the complainant at the hospital on 19th September 2016. He stated that the complainant had a history of being assaulted by a person known to him and that he had a

swollen and tender right face. He estimated the age of the injuries to have been 12 days and the same to have been caused by a blunt object. He stated that he filled his findings in A P3 Form.

When the trial Magistrate put the appellant on his defence he elected to make an unsworn statement. The appellant stated that he was a miraa seller and that he was framed by the complainant after he refused to continue making illicit liquor for him. He stated that when he was arrested on 24th August 2016 all he had was miraa and 100/=. He was however shocked to find the complainant at the police station. He stated that he heard the allegations by the complainant in court for the first time and contended that it was also in court that he saw the phone for the first time. He told the court that the complainant instigated his arrest as he was interested in his (appellant's) business and contended that the appellant had taken over his kiosk.

At the hearing of this appeal, the appellant was represented by Mr. Chris Maina, Advocate. The appeal was argued partly by way of written submissions and partly through oral submissions.

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

The **ingredients** of the offence of **Robbery with violence contrary to Section 296 (2) of the Penal Code** are: -

1. **Stealing.**
2. **The offender is armed with any dangerous or offensive weapon or instrument, or**
3. **The offender is in company with one or more other person or persons or**
4. **At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses other personal violence to any person (see *Oluoch v Republic [1985] KLR 549*).**

The complainant testified that he was accosted by the appellant who was with another man; that the appellant gave him a blow on the face before taking his X TIGI phone and Kshs. 500/= which was in his pocket. At the hearing the trial Magistrate referred to the phone stolen from the complainant as XTD but the receipt produced in evidence confirms that it was X TIGI. The reference to the phone as XTD was clearly an error on the part of the court perhaps being that is what the trial court heard. The phone stolen was an X TIGI which was exhibited and then produced in evidence. The complainant positively identified the phone as his and produced a cash sale receipt which in my view confirms the phone was X TIGI but not XTD. The submission by Counsel for the appellant that it was not proved that the phone belonged to the complainant has no substance.

The complainant also stated that he was assaulted during the robbery and to prove that the prosecution produced a P3 Form which revealed he had sustained a swollen and tender right zygomatic region. He was treated with antibiotics and analgesics and the degree of injury was classified as harm. It is my finding therefore that having established there was a theft (of phone and cash 500/=), that there was violence at or immediately before the theft and that the perpetrators were two, then the ingredients of robbery with violence as defined in **Section 296 (2) of the Penal Code** were proved beyond reasonable doubt.

The only point for determination is **whether it was proved beyond reasonable doubt that the appellant committed the offence.**

Counsel for the appellant submitted that there was no corroboration; that the court convicted the appellant on the evidence of a single witness which was weak; that an adverse inference should be drawn from the prosecution's omission to call the complainant's four-year-old son who was present. In the case of **Maitanyi v Republic [1986] KLR 198** the Court of Appeal stated concerning reliance on the evidence of a single witness: -

- “1. *Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.*
2. *When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available, conditions and whether the witness was able to make a true impression and description.*
3. *The court must warn itself of the danger of relying on the evidence of a single witness. It is not enough for the court to warn itself after making the decision. It must do so when the evidence is being considered and before the decision is made.*
4. *Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.”*

Whereas in the judgement the trial Magistrate did not expressly use the words “**I warn myself**”, it is clear that she was alive to the need to warn herself and indeed it was her finding that the complainant's evidence though it was of a single witness, was corroborated. On my part I am not convinced that the omission to call the complainant's four-year-old son weakens the prosecution's case. This is because there is other evidence to corroborate that of the complainant, the most crucial being that the appellant was found in possession of the phone stolen from the complainant during the robbery. It is also not lost to this court that although the offence took place at 7pm the complainant was able to recognize the appellant because he knew him very well. Evidence of recognition by a person known to the perpetrator has been taken by the courts to be more reliable – (see **Wamunga v Republic [1984] KLR 424**). Moreover, the fact that the appellant was found in possession of the phone barely a week after the robbery is corroboration enough as recent possession devoid of a reasonable explanation by the appellant is

proof that he stole the phone. The appellant did not offer any explanation at all on how he came by the phone. That the complainant knew the appellant is corroborated by the fact that he readily led police officers to him and this was corroborated by the two police officers (Pw3 and Pw5). Pw5 testified that in his report the complainant stated that he knew his assailant and even led them to his house but he (the appellant) managed to escape. It was also proved beyond reasonable doubt that the appellant assaulted Pw3 as he resisted arrest. I am satisfied that the conviction for robbery with violence and for assault in resisting arrest were safe and I uphold the same.

On the sentence, Counsel for the appellant submitted that the sentence was excessive. I note from the record that the only reason the trial Magistrate imposed the death penalty is because her hands were tied by the mandatory nature of the sentence. However, it has since been held by no less than the Supreme Court that that mandatory nature of the death sentence is unconstitutional and that trial courts now have discretion to sentence the people brought before them depending on the circumstances of each case (**see Francis Karioko Muruatetu & Another v Republic [2017] eKLR**). I agree with Counsel for the appellant that the circumstances of this case do not warrant a death sentence. The weapon used was a fist; the injuries inflicted were not very serious and the stolen phone was recovered. There is therefore justification for this court to interfere with the sentence so that the appellant too can enjoy the same rights brought by jurisprudence in the **Francis Karioko Muruatetu & Another v Republic case (supra)**.

Accordingly, the death sentence is set aside and substituted with a sentence of imprisonment for five (5) years. On the sentence on Count II the same was suspended because of the death sentence and it has not lapsed as submitted by Counsel. Accordingly, the same shall take effect and shall run consecutively with the one for Count I.

For the avoidance of doubt the following are the orders of this court: -

- (i) The appeal on conviction is dismissed.**
- (ii) The death sentence in respect of Count I is set aside and is substituted with one for five (5) years imprisonment.**
- (iii) The suspension of the sentence in Count II is lifted and the appellant shall now serve six (6) months imprisonment for that offence.**
- (iv) The sentences on Count I and II shall run consecutively.**

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