



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**(CORAM: CHERERE -J)**

**CRIMINAL APPEAL NO. 110 AND 111 OF 2017**

**(CONSOLIDATED)**

**BETWEEN**

**STEPHEN KARIUKI KIMANI alias STEVE.....1ST APPELLANT**

**STEPHEN KARIUKI WACHIRA alias KARIS.....2ND APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(An appeal from the conviction and sentence in Criminal Case Number*

*3037 of 2015 in the Chief Magistrate's Court at Kiambu by Hon. J.Kituku (PM) on 31.08.17*

**JUDGMENT**

**Background**

1. **STEPHEN KARIUKI KIMANI alias Steve** (who was the 4<sup>th</sup> accused in the lower court) and **STEPHEN KARIUKI WACHIRA alias Karis** (who was the 2<sup>nd</sup> accused in the lower court) (*hereinafter referred to as the 1<sup>st</sup> and 2<sup>nd</sup> Appellants respectively*) have appealed against conviction and sentence on the charge of robbery with violence contrary to Section 295 as read with section 296 (2) of the Penal Code. Appellants and two others that were acquitted were charged with violently robbing one Peter Ngamao Mogaka on the night of 16<sup>th</sup> and 17<sup>th</sup> December, 2015 while armed with dangerous weapons and using actual violence on the said Peter Ngamao Mogaka. The 1<sup>st</sup> Appellant was also charged with *an alternative charge of being in possession of suspected stolen stolen a Samsung TV, 4 DVD machines, 3 speakers, one adaptor cable, 3 computer cables and 2 new bedsheets* contrary to section 323 of the penal code.

**The prosecution's case**

2. The prosecution called 4 witnesses in support of the charges. **PW1, PETER NGAMA O MOGAKA** the complainant recalled that on 16.04.15, at about 11.00 pm, he went out to feed dogs and it was then that he was confronted by the 2<sup>nd</sup> Appellant who upon instructions from the 1<sup>st</sup> Appellant stabbed him on the left chest and back causing him to fall down and while there, the 2<sup>nd</sup> Appellant hit him on the left knee with an axe whereas the 1<sup>st</sup> Appellant stabbed his private parts causing him to lose consciousness. The witness stated that there was security lighting at the scene and that he had known the Appellants who were frequent patrons at Makuti Bar in Kasarani where the offence was committed.

3. **PW2 PURITY MUNENE** stated that she saw people that she did not identify jump over the fence of the bar. It was her evidence that she went out after police arrived at the scene and saw the complainant bleeding profusely.

4. **PW3 JANE WAIRIMU THIONGO**, the owner of the bar called police after **PW2** informed her that she had seen suspicious people jumping over the fence of the bar. She later visited the scene and found the complainant bleeding profusely and three of her dogs lying dead.

5. **PW4 CPL GABRIEL MATATA**, the investigating officer stated that on the night of 18<sup>th</sup> and 17<sup>th</sup> December, 2015, he was on duty when he heard screams from Njathaini Bar. He stated that he visited the scene with PC RUTO and they found the complainant bleeding profusely and three dogs lying dead and they called the owner of the bar PW3. It was his evidence that the Appellants were arrested after they were

implicated by the complainant and that upon their arrest, the 1<sup>st</sup> Appellant was found in possession of **suspected stolen Samsung TV, 4 DVD machines, 3 speakers, one adaptor cable, 3 computer cables and 2 new bedsheets**. In cross-examination, the witness conceded that the complainant did not name his assailants when he made his first report on 17.12.05. He also conceded that 2<sup>nd</sup> Appellant was arrested at Njathaini police post where he had gone to visit his friend who had been arrested.

### **Defence case**

6. In his unsworn defence, the 1<sup>st</sup> Appellant denied the offence and stated that he was arrested while attending a birthday party at the scene of crime a month after the offence was committed.

7. In his unsworn defence, the 2<sup>nd</sup> Appellant similarly denied the offence. He stated that he was arrested at Njathaini police post where he had gone to visit his friend who had been arrested.

### **Conviction and sentence**

8. The trial court found the charge proved and sentenced the Appellants to suffer death.

### **The Appeal**

9. The conviction and sentence provoked these appeals. In their separate petitions of appeal and written submissions, Appellants raised the following main grounds of appeal:

**1) The court erred in relying on the evidence of recognition was not supported by cogent evidence**

**2) The trial was conducted in breach of Article 50(4) of the Constitution**

**3) That their defences were not considered**

10. When the appeal came up for hearing on 12.09.19, the appellants through their counsel Mr. Maingi sought to wholly rely on their grounds of appeal and written submissions.

11. Mr. Ndombi, learned State Counsel opposed the appeal and whereas he conceded that the complainant did not name the assailants in his first report, he stated that he had done so in his statement. He submitted that the trial was fair and that Appellants were not arrested on suspicion.

### **Analysis and Determination**

12. As the first appellate court in the instant appeal, I am required and indeed duty bound to subject the evidence tendered in the lower court to thorough re-evaluation and analysis so as to reach my own conclusion as to the guilt or otherwise of the appellant. In doing so I must give allowance to the fact that I neither saw nor heard the witnesses as they testified and therefore cannot comment on their demeanour. (See **OKENO – VS – REPUBLIC (1972) E.A. 32**).

13. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions for the appellants and for the state.

14. The gravamen of this appeal really turns on the issue of identification, nay, recognition of the appellants by the complainant. The offence was committed at night and hence, the means by which the appellants were identified by recognition becomes critical. According to the complainant, the Appellants were known to him physically since according to him, they were frequent patrons in the bar where he worked. He also stated that there was security lighting at the scene that enabled him to see the Appellants clearly.

15. The difference in approach between identification and recognition was expressed thus by Madan J.A for the Court in **Anjononi and Others vs The Republic [1980] KLR**:

**“.....This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant 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. We drew attention to the distinction between recognition and identification in Siro Ole Giteya Vs. The Republic (unreported.)”**

16. That is not to suggest of course, that cases of misrecognition cannot occur (See **Karanja & Anor vs. Republic [2004] KLR 140**) and courts are still duty-bound to examine such evidence with great care.

17. That being the case it was necessary for the trial court to test the reliability of such identification. In the case of **Maitanyi vs Republic (1986) KLR 198**, the Court of Appeal held: -

**“.....That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light**

available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into.

18. In the recent case of John Muriithi Nyagah v Republic [2014] eKLR, the Court of Appeal held: -

**“In testing the reliability of the evidence of identification at night, it is essential to make an inquiry of the relevant circumstances such as the nature of the light, the strength of the light, its size, its position relative to the suspects etc.”**

19. The court record shows that the learned trial Magistrate did not at all, evaluate the nature of the light, the strength of the light, its size, and its position relative to the Appellants to test the reliability of the evidence of identification at night.

20. The absence of inquiries as to the light condition at the scene of crime by the trial Magistrate notwithstanding, this court is under a duty to consider if there is other evidence that point to the Appellants’ culpability. Whereas the complainant told court that he knew the Appellants physically, he did not give their description to anyone or to the Police. In the case of Simiyu & Another V. R (2005) 1 KLR 193 the Court of Appeal expressed itself on this point as follows: -

**“In every case in which there is a question as to the identity of the accused, the fact of their having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who give the description and purport to identify the accused and then by the person or persons to whom the description was given. The omission on part of complainant’s to mention their attackers to the police goes to show that the complainants were not sure of the attacker’s identify.”**

21. In light of the above, I have come to the conclusion that complainant failed to give the description of the Appellants immediately he made a report to Police because the circumstances were not favourable for positive recognition. I similarly hold that in such unfavourable circumstances, the complainant was not in a position to identify the Appellants and his evidence that he recognized them is hence rejected.

22. Failure by complainant to name the Appellants whom he claimed he knew physically ought to have sowed a seed of doubt on the mind of the learned trial magistrate concerning the recognition of the Appellants and such doubt should have been resolved in favour of the Appellants.

23. Concerning the recovery of **suspected stolen Samsung TV, 4 DVD machines, 3 speakers, one adaptor cable, 3 computer cables and 2 new bedsheets from the 1<sup>st</sup> Appellant**, the record demonstrates that the exhibits were neither produced nor was any decision on the same made by the trial court. That being the position, all the item recovered from the 1<sup>st</sup> Appellant ought to have been released to him and it is so ordered.

24. There is neither evidence that the trial court in convicting and sentencing the Appellants relied on evidence that was obtained in a manner that violated any right or fundamental freedom in the Bill of Rights nor is there any evidence of a grudge between Appellants and any police officer.

25. Having considered the evidence in its totality, the appeal succeeds. Had the Appeal been unsuccessful, I would have had a duty to resentence the Appellants in line with the Supreme Court decision in Francis Kariuki Muruatetu & Another v Republic & 5 others [2016] eKLR which declared the mandatory death sentence unconstitutional.

26. In the end, the convictions are hereby quashed and the sentences set aside and unless otherwise lawfully held, it is ordered that Appellants shall be set free forthwith.

**DELIVERED AND SIGNED IN KIAMBU THIS 25<sup>th</sup> DAY OF October 2019**

**T. W. CHERERE**

**JUDGE**

In the presence of-

**Court Assistant - Nancy**

**Appellants - Mr. Maingi**

**For the State - Mr. Kasyoka**