



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 208 OF 2017

PATRICK MUEMA MBALUKAAPPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(An Appeal from the judgment of Mr. C.O Nyawiri on 23rd May 2017 in Makueni in Makueni SPM Criminal Case No. 330 of 2016)

JUDGMENT

1. **Patrick Muema Mbaluka** the Appellant was charged with the offence of attempted robbery with violence contrary to section 297(2) of the penal code. The particulars were that the Appellant on the 15th day of May 2016 at Kyuasini Village, Kyuasini sub-location in Makueni district within Makueni county attempted to rob **Muendo Kiawa** while armed with a panga.

2. He denied the charge and the case proceeded to full hearing after which he was found guilty, convicted and sentenced to death.

3. Being aggrieved by the Judgement he filed this appeal citing the following grounds;

a) That the subordinate court erred in law and fact in sustaining a conviction and sentence on a defective charge sheet.

b) That the subordinate court erred in law and fact in holding a conviction and sentence contrary to article 26(1) and 159(2) of the constitution.

c) That the subordinate court erred in law and in fact when failing to observe the regulations of the criminal procedure code.

d) That the subordinate court erred in law and fact when accepting and relying on contradictory evidence that lacked credibility to base and sustain a conviction and sentence.

e) That the subordinate court erred in law and fact when drawing and applying the doctrine of recent possession of the alleged used weapon which wasn't proved.

f) That the subordinate court erred in law and fact when conducting an unfair trial without observing that the same wasn't affirmative proved.

4. A summary of the prosecution case is that PW1 **Muendo Kiawa** who is a boda boda operator arrived home with his motor bike on 15th May 2015 at about 9.15 p.m. He left it one (1) meter from the house, with the head lamps still on. He opened the house in order to push the motorbike inside the house. As he pushed it he heard footsteps. When he was in the process of putting it in a standing position, he saw a person entering the house. The person who looked down to hide his face, threw a panga at PW1 but it missed him.

5. The person who was demanding for money came and held PW1 by the waist and the latter also held him and started screaming. The motorbike lights were still on and he saw him and identified him as the Appellant. His mother **Mutinda Kiawa (PW2)** responded to the screams and arrived with a spotlight.

6. PW1 said he had grown up together with the Appellant who was his neighbor and they had attended school together. When PW2 arrived she flashed her torch on the person she had found struggling with PW1 whom she identified as the Appellant, a person she had known for a long time.

7. It was after PW2's arrival that the Appellant ran away leaving behind his panga. PW1 then made reports at Mukuyuni patrol base and gave the Appellant's name. PW3 **Kanusu Mbaluka** is the Appellant's step mum. She confirmed that the Appellant lived with her and her

husband in the same house.

8. It was her evidence that on 15th May 2016 at 3.00 p.m. when she arrived home from church she found her panga missing, but did not ask anybody about it. She identified EXB 1 as her missing panga. She had previously identified it at Mukuyuni police station. It was on 16th May 2016 that she learnt of the arrest of the Appellant.

9. PW4 **Wilson Ndunge** is a community policing man of Kyuasini area. He was among those who arrested the Appellant at Kyuasini market, at Mukuka's kiosk. PW5 corporal **Cleophas Nyongesa** confirmed that the office received a report from PW1 in respect to the attack by the Appellant.

10. When placed on his defence the Appellant elected to make an unsworn statement denying the charge. He said he was at his home making bricks on 16th May 2016. He later went to the market in the evening from where he was arrested by police officers and nyumba kumi people. Thereafter he was taken to Mukuyuni patrol base then to the court where he was charged.

11. When the appeal came for hearing, he wholly relied on his written submissions. It was his submission that the charge was defective since it does not state the three ingredients required in such a charge. He also challenged the death sentence meted on him. He relies on the **Francis Karioko Muruatetu** case in arguing the same.

12. He contends that there is no record of the language he used during the proceedings. He referred to the case of **Antony Njeru Kathiari & Another –Vs- Republic [2007] eKLR** to support his argument.

13. The Appellant contends that the prosecution witnesses contradicted themselves in their testimony. He submitted that, their evidence did not support the particulars in the charge sheet. Further that the trial court relied on the doctrine of recent possession of the weapon and on evidence of a single witness to convict him without warning himself as was stated in the case of **Maitany –Vs- Republic (1986) KLR 198**. Finally, he submits that there wasn't sufficient evidence to make the court convict him.

14. Learned counsel for the Respondent Mrs. Owenga opposed the appeal and wholly relied on the evidence on record.

Analysis and determination

15. This being the first appellate court, it is my duty to re-evaluate the evidence adduced before the trial court and come up with my own findings and conclusions. I have to bear in mind that I neither saw nor heard the witnesses who testified and give an allowance for it. See **Okeno –Vs- Republic [1972] E.A. 32; Simiyu & Anor –Vs- Republic [2005] IKLR 192**.

16. I have carefully considered the evidence on record, grounds of appeal and the rival submissions and the authorities cited. I find the issues falling for determination to be as follows:-

- i. *Whether the charge sheet was defective.*
- ii. *Whether the Appellant was unable to follow proceedings due to lack of interpretation in a language he understood during the trial.*
- iii. *Whether the court applied the doctrine of recent possession.*
- iv. *Whether the prosecution proved its case against the Appellant to the required standard.*
- v. *Should the court interfere with sentence of death?*

Issue no. (i) whether the charge sheet was defective.

17. It is the Appellant's submission that the charge sheet before the court did not contain all the 3 elements for a charge of attempted robbery with violence. Section 297(2) Penal Code defines attempted robbery with violence as follows;

“If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons or if, at or immediately before or immediately after the time of the assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

18. The particulars in the charge sheet before the court read as follows;

“On the 15th day of May 2016 at Kyuasini Village, Kyuasini Sub-location in Makueni District within Makueni County Patrick Mwema Mbaluka attempted to rob Muendo Kiawa while armed with a panga.”

It is clear that the person who attempted to rob the complainant was armed with a panga. Being armed with an offensive weapon or instrument is one of the ingredients. The operative word in section 297 (2) Penal Code is **OR**. So the establishment of any of the three elements is sufficient proof of the offence. I therefore find no defect in the charge sheet and that ground fails.

19. Issue no. (ii) Whether the Appellant was unable to follow proceedings due to lack of interpretation in a language he understood during the trial.

This is something that is clear from the record. During the trial a court clerk by the name Mwengi was in court. It's indicated that PW1, PW2, PW3 testified in Kikamba language which was obviously interpreted into the language of the court which is English. PW4 testified in Kiswahili while PW5 did so in English. The clerk Mwengi was there to interpret for the court, the Appellant and the witnesses. The allegations by the Appellant are not therefore borne by the record. He was clear on what was going on during the trial.

Issue no. (iii) whether the court applied the doctrine of recent possession.

20. The Appellant submitted that he was convicted on the basis of recent possession of a panga. It is clear from the evidence that the Appellant was not found in possession of the panga. The panga (EXB1) had been left at the scene of incident. The evidence of the panga was clearly laid down by the learned trial Magistrate. I therefore do not find any weight in this.

Issue no. (iv) Whether the prosecution proved its case against the Appellant to the required standard.

21. The key point here is identification. This incident took place at night when PW1 had finished work and come home to pack his motor bike. Both PW1 and PW2 said they knew the attacker very well and they identified him. The Court of Appeal in the case of **Simiyu & Anor (Supra)** stated this on such identification.

“(2) In every case in which there is a question as to the identity of the accused, the fact of there 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 gave the description and purport to identify the accused, and then by the person or persons to whom the description was given.

(3) The omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attackers' identity.

(4) In the present case, neither of the two courts below demonstrated any caution. Further, there was no inquiry as to the nature of the alleged moonlight or its brightness or otherwise or whether it was a full moon or not or its intensity. In the absence of any inquiry, evidence of recognition may not be held to be free from error.

22. In **Anjononi & Others -Vs- Republic 1976 -1980 KLR 1556 at 1568** the court of Appeal stated as follows;

“The recognition of an assailant is more satisfactory more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.”

23. This incident took place at about 9.30 p.m. PW1's motorbike's head lights were on, so there was light. After opening the door he pushed the motorbike to the house with the lights still on. It was then that he was confronted, and a struggle ensued. PW2 came with her torch and found PW1 and the attacker struggling. She flashed the light on the attacker who took off leaving his panga behind.

24. PW1 and PW2 testified that they knew the attacker who they identified as the Appellant. In fact PW1 explained that he was a neighbor to the Appellant, grown up with him, and schooled together with him while PW2 said the Appellant is from her village and she has known him for a long time.

25. After the Appellant ran away PW1 called and reported the incident to the assistant chief. The next day 16/05/2016 he reported to Mukuyuni patrol base and he came with two officers to his house for investigations. While reporting he gave the name of the Appellant as the culprit. The Appellant was arrested the next day with the help of PW1, PW4 and the area assistant chief.

26. PW1 and PW2 testified that the Appellant had left his panga at the former's house. His evidence is that it is this panga that the Appellant had thrown at him as he demanded for money from him. PW3 who is the Appellant's mum had come home on the afternoon of 15/05/2016 and found her panga missing. She confirmed that she lived with the Appellant in the same house.

27. When she received a report of his arrest on 16/05/2016 she went to the Mukuyuni patrol base. She was shown a panga which she identified as her missing one. It is the same panga that was found in PW1's house having been left there by the Appellant.

28. This evidence connects very well. As per the **Simiyu & Another (Supra)** decision, the conditions for an identification let alone a recognition were favourable. There was sufficient light as described by PW1 and PW2. Secondly the Appellant was well known to them and so the issue of mistaken identity does not arise. Thirdly PW1 reported and gave the Appellant's name to the assistant chief and the police. He is the one who even spotted the Appellant at Kyuasini market and alerted the administration.

29. The evidence on the panga (EXB1) by PW1 and PW2 is supported and links up very well with the evidence of PW3 who is the Appellant's step mum. The Appellant's defence only talks about his arrest on 16/05/2016. He does not state where he was on 15/05/2016 at 9.30 p.m. or thereabout. I am therefore satisfied that the conviction was well founded and should not be interfered with.

Issue no. (v) should the court interfere with sentence of death?

30. The Appellant was convicted and sentenced on 16th March 2017 before the Supreme Court decision in the **Francis Karioko Muruatetu**

& Another –Vs- Republic [2017] eKLR. This decision gave sentencing courts discretion upon conviction of capital offences. Upon conviction the Appellant stated this in mitigation.

“Even if I am committed to jail, that will not help me.”

31. In spite of his utterances which were made maybe because of bitterness, I would wish to look at other aspects of this case as I consider the appropriate sentence. The Appellant though armed with a panga which he threw at PW1, he did not injure him. He was also not able to steal anything from PW1. PW1 and the Appellant are also neighbours.

32. The record confirms that the Appellant was not released on bond, upon taking plea. He was therefore in remand custody from 18th May 2016 to 23rd May 2017 which is exactly one year. He has served about 2½ years of his sentence. I have taken all this into account.

33. Considering the circumstances of this case, I find that his stay in prison has opened his eyes to more meaningful things in life, instead of going for what he has not labored for.

34. The upshot is that the appeal against sentence has merit, while that against conviction is dismissed and conviction upheld. The death sentence is set aside and substituted with a sentence of seven (7) years imprisonment from the date of sentence by the trial court. (23rd May, 2017)

Orders accordingly.

Delivered, signed & dated this 28th day of November, 2019 in open Court at Makueni.

Hon. Hon. H. I. Ong’udi

Judge