



REPUBLIC OF KENYA

IN THE HIGH COURT

AT VOI

CRIMINAL APPEAL NO. 7 OF 2017'

B E T W E E N:

PATRICK MURIMI WAWIRA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Decision of Hon N. N. Njagi SPM in Case No 76 of 2017 in the SPM's Court in Wundanyi delivered on 16th November 2017)

J U D G M E N T

1. The Court has before it an Appeal filed on 29th January 2018. The Appellant was convicted of the Offence of Robbery with violence contrary to **Section 296(2) of the Penal Code**. The Learned Trial Magistrate set out the evidence which the Court was to evaluate and the Defence. The Learned Trial Magistrate said, "*There is no doubt in my mind that the accused was positively identified as is a requirement of the law. I have no doubt that the complainant was injured at the time of the robbery. Violence was used and that is the reason why the neck was injured as per the doctors observations on the P3 form – exhibit-2. The wire was used to inflict the injuries on the complainant. The degree of injury was assessed as grievous harm.... The Defence of the accused is but a mere denial of the offence before the court, the alibi defence brought by the accused does no hold at all. I do find the accused guilty as charged.*".

2. On the question of the sentence, the Learned Trial Magistrate notes that the Accused was a first offender. He then went on to say, "*The court notes that the sentence provided for is Death. I will sentence the accused to suffer Death.*". The Sentence was passed on 8th December 2017.

3. The Appellant filed a Petition of Appeal on 29th January 2018. In addition, he filed an application for leave to lodge an appeal out of time - also on 29th January 2019. He does not explain the delay in filing his Appeal. Nevertheless, on 2nd March 2018 Hon Lady Justice Jacqueline Kamau admitted the Appeal for hearing out of time as she had granted leave to appeal out of time on 21st February 2018.

4. As stated above, the Petition was filed on 29th January 2019. The Appellant wishes to appeal against his conviction and sentence. The Petition states:

"I the undermention do most humbly beg leave to appeal against both the conviction and sentence for an offence of robbery with violence passed upon me by the chief/principal/senior resident/1st class/and 2nd class Magistrate SPM'S Wundanyi.

In criminal case 76/017 dated 8/12/2017.

I plead not guilty.

(Here state grounds of appeal and separate sheet if necessary)

I am a poor man and have no money for appeal"

2. The Grounds of Appeal are enumerated thus:

An appeal from the original conviction and sentence in cr. Case no 76/017. Judgment delivered and dated 8th day of December 2017 at SPM's court Wundanyi.

1. That the pundit trial magistrate erred in both law and fact to convict me in failing to note that the prosecution failed to prove their case beyond reasonable doubt c/sec 109 and 110 of the evidence act.
2. That the pundit trial magistrate erred in both law and fact to convict me by failing to consider that the prosecution evidence adduced in their case was contradictory, desepant and inconsistent c/sec 150 of the criminal penal code.
3. That the pundit trial magistrate erred in both law and fact to convict me in failing to note I was identified on the dock in the court law which is worthless and contrary to section 46 of the police standing orders.
4. That the learned trial magistrate erred in both law and fact to connect me in relying on the evidence of a single witness.

REASONS WHEREFORE: _ That I pray, may this appeal be allowed conviction quashed and sentence set aside and set me at liberty.

3. The Appellant also filed an Affidavit in Support in which he states: *I MAN/538/017 CON PATRICK MURIMI WAWIRA C/O Manyani maximum security prison of Taita Taveta district of coast province do make an oath and states as follows:-*

1. That I the appellant am a Kenyan male adult of sound mind competent to swear this affidavit.
2. That I was arrested charged, tried and convicted for an offence of robbery with violence c/sec 296(2) of the penal code and sentenced to suffer death judgement delivered and dated 8th December 2017.
3. That I beg leave to this Hon Court to allow me lodge my appeal out of time
4. That I make this affidavit in support of my application.
5. That what is deponed here is true to the best of my knowledge, information and belief

5. The Appellant has also filed Amended Grounds of Appeal dated 16th July 2018 handwritten in English and said to be prepared by the Appellant. This is noteworthy as the Appellant informed the Court that he required an interpreter in the Kikuyu language because he was unable to understand English as well as Swahili. An interpreter was provided. The Amended Grounds of Appeal are set out as follows:

- 1) That the Pundit trial Magistrate erred in both law and fact to convict me. In failing to note that both the Court administration and the prosecution administration denied me my constitutional right to fair administrative action as captured under Section 47(1) and (2) of the Constitution of Kenya 2010.
- 2) That the Pundit trial Magistrate erred in both law and fact to convict me in failing to note that the prosecution evidence adduced in Court was obtained in a manner that violated my rights and fundamental freedoms. In the bill of rights thus admitting the same redered the trial unfair ... the same was detrimental to the administration of justice contrary to Article 50(4) of the Constitution of Kenya 2010.
- 3) That the pundit trial magistrate erred in both law and fact to convict me in failing to note that the prosecution limited my rights and fore mentioned freedoms. In the bill of rights which should not be limited contrary to article 25 (c) an (d) of the Constitution of Kenya 2010.
- 4) That the pundit trial magistrate erred both in law and fact to convict me in failing to note that I was not given reasons for my arrest during arresting me, contrary to article 49(1)(a)(i); (ii) (iii) of the Constitution of Kenya 2010.
- 5) That the pundit trial magistrate erred both in law and fact to convict me in failing to note that the prosecution and the court administration denied me my constitutional rights to a fair trial contrary to article 50(2) of the Constitution of Kenya 2010.
- 6) That the pundit trial magistrate erred in both law and fact to convict me in failing to note that the prosecution failed to produce medical documents to establish whether PW-3 was a technically qualified or skilled in the field of medicine or where he had studied medicine and when contrary to Section 48(1) of the medical act.
- 7) That the learned trial magistrate erred in both law and fact to convict me in failing to note that the prosecution failed to prove their case against me beyond reasonable doubt Section 107, 108, 109, and 110 of the evidence act.
- 8) That the pundit trial magistrate erred in both law and fact to convict me in failing to note that the prosecution's evidence adduced in the case was contradictory, inconsistent and full of discrepancies contrary to section 163 of the evidence act.
- 9) That the pundit trial magistrate erred in both law and fact to convict me in failing to note that the prosecution relied on dock identification besides there was no identification parade exercise neither was there any production of identification parade form c/s 46 of the Police Standing Orders.
- 10) That the pundit trial Magistrate erred in both law and fact to convict me in failing to note that the charge sheet was defective c/s 137 of the CPC.

11) That the pundit trial magistrate erred in both law and fact to convict me in failing to note that the prosecution failed to bring evidence witnesses to ascertain the truth of this case c/s 180 of the CPC.

6. In addition to the grounds of appeal going to the merit of the decision the Appellant is now complaining that the Court Administration and the Prosecution Administration have not complied with **Section 47(1) and (2)** of the Constitution by denying the Appellant fair administrative action and that the Prosecution's evidence that was adduced in Court was obtained in a manner that violated the Appellant's rights and obtained in a manner that violated his fundamental freedoms however, those invasions to his rights were not fully particularised nor raised at trial.

6. The Appellant filed his Written Submissions dated 19th July 2018. They run to 189 pages handwritten in English, with the explanation that all the "Grounds [are] Consolidated and Argued together. The arguments put forward are:

(1) The Prosecution Case is based on the evidence of Patrick Macharia, that evidence is "a series of fantastic theories, myths, stereo thoughts, conveyed fragments of the witnesses and attractive reasoning which have no room in law

(2) The Appellant pleaded not guilty

(3) The Appellant's Defence was an alibi and he gave a detailed account of his whereabouts

(4) The Appellant's evidence was clear and consistent and at no point contradictory

(5) The Appellant vehemently denied any involvement in the alleged incident his narration was watertight and believable

(6) His life has been put at stake

(7) He cites a Court of Appeal Authority **Criminal Appeal No 331/2001 CA Nyeri** for the proposition that the more serious the charge the heavier the burden of proof.

(8) The Proceedings name two different people as PW-1 and that is a conspiracy to introduce irrelevant evidence.

(9) The Doctor who completed the P3 was not properly qualified.

The Submissions go along in the same vein throughout the nearly 200 pages.

7. Written Submissions on behalf of the Respondent were filed on 23 January 2019. In relation to the allegation that two different people were called as PW-1, the Respondent's submissions clarify that the use of the name Patrick Maghaga instead of Patrick Macharia is a typographical error. In fact the certified copies of the Proceedings and the Charge Sheet show PW-1/Complainant to be Patrick Macharia.

8. The Written Submissions on behalf of the Respondent were filed on 23rd January 2019. They raise the following points:

a. The Appellant was charged with robbery with violence contrary to **Section 296(2)** of the **Penal Code** in **Wundanyi Case No 76 of 2017**.

b. The Appellant was found guilty

c. The Appellant was sentenced to death by the Trial Court.

d. The incorrect spelling of the Complainant's name was a typographical error and not a change of identity of the person;

e. The Appellant had the opportunity to cross-examine the Complainant and he did so. At no point did he say that the Complainant was a complete stranger.

f. The Law, and in particular the *Criminal Procedure Code Section 214* allows for a charge to be amended to accord with the facts that are adduced in evidence. In this case the amendment was done in open court and the Appellant was informed. He raised no objection.

g. The discrepancies in the evidence of PW-1 are minor and can be attributed to human memory. The important fact is that he identified the Appellant and said he recognised him. Further the evidence of PW-1 was corroborated by PW-2 who was a co-worker of the Appellant, both being employed by the PW-4. PW-2 also placed the Appellant at the scene of the crime.

h. The PW-3 was produced by the doctor and confirmed that PW-1 had suffered the injuries there recorded as a result of the robbery. It is admissible and properly on the record.

i. The number of witnesses called is a matter in the discretion of the prosecuting authority and cannot be dictated by an accused (Section 143 Evidence Act, Cap 80).

9. This is a first Appeal. The duty and function of the Court at the first appeal is to reconsider the evidence afresh bearing in mind that the trial court had the advantage of seeing and evaluating the witnesses in person, putting it in a good position to evaluate demeanour etc relating to veracity. The Court notes that the proceedings in the Lower Court show that the Accused was provided with a Kikuyu interpreter. He was accorded the same facility for the purposes of this Appeal.

he Charge sheet

10. The Particulars of the Offence as stated in the Charge sheet are; *“that PATRICK MURIMI WAWIRA on th 28th day of January 2017 at about 2000 HRs at Jambo Village Mwachambo Location within Tita Taveta County, jointly with another not before court, robbed Patrick MACHARIA cash Kshs 100,405/= and immediately before or at the time of such robbery caused actual violence to the said PATRICK MACHARIA.”.*

11. The Trial Court heard the evidence of numerous witnesses. Patrick Macharia and James Ireri Kinyua told the Court that they knew the Accused. They identified him and placed him not only at the scene of the crime but also the perpetrator of the violence. The violence described was particularly brutal as the perpetrator grabbed PW-1 and tied him up and attacked him. He also tied wire around his neck. The Appellant denied the offence in totality. The trial court called that a “bare denial”. He said he was in Kirinyaga on 28th January 2017. The Arresting Officer gave evidence that the Accused was eventually arrested in Kirinyaga but he “ran away” after the robbery. Under cross-examination the Appellant admitted he was employed by Ireri Kinyua (PW-2) and that he knew Patrick Macharia (PW-1). In the circumstances, he corroborated the identification evidence. He did not put forward any witness to support his alibi. The Appellant did not provide any challenge to the medical evidence of the injuries sustained nor did he challenge the amount of money taken from the car. In the circumstances the conviction is safe.

12. The Appeal against conviction is dismissed. In relation to sentence the Accused was treated as a first offender but nevertheless sentenced to death, that being a reflection on the seriousness of the offence. However, in light of the spirit of the Supreme Court decision in Francis Muruatetu, this Court resolves that this matter be remitted back to the PM’s Court in Taveta for re-sentencing. This Court feels that is the most just outcome as it gives demonstrates that whatever sentence is applied, it is decided pursuant to a full and proper exercise of the Court’s discretion.

13. It is also ordered that the National Probation Service is directed to appoint a suitable officer to prepare a Report on this case. Such report must include the full background details on the circumstances of the Complainant at the time of the offence and since.

Order accordingly,

FARAH S. M. AMIN

JUDGE

SIGNED DATED AND DELIVERED at Voi on this the 20th day of December 2019

In the Presence of:

Court Assistant: Josephat Mavu

Prosecution: Ms Mukangu

Appellant: Present in Person.