



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 135 OF 2016**

**CORAM: D.S.MAJANJA J.**

**BETWEEN**

**KENNEDY ODHIAMBO OGWENY.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence of Hon.M. Obiero, PM dated 4<sup>th</sup> October 2016 at the Principal Magistrates Court at Bondo in Criminal Case No. 703 of 2015)*

**JUDGMENT**

1. The appellant, Kennedy Odhiambo Ogweny was found guilty of the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)** and sentenced to suffer the death penalty. The particulars of the offence are that on 7<sup>th</sup> June 2016 at around 2200hrs at Osewe village, Ochieng'a Sub-location in Rarieda within Siaya County, the appellant jointly with another not before court while armed with offensive weapons namely clubs and a panga robbed one James Onyango Kwadha of Kshs. 20,000/- and immediately before or after the time of such robbery wounded the said James Onyango Kwadha.

2. The appellant now appeals against conviction and sentence. In his petition of appeal and written submissions he contends that the trial magistrate erred in law and fact by failing to find that the investigations were not conclusive hence there was possibility of error and that the magistrate erred convicting him against the weight of the evidence. He submits that there was no independent evidence to support the identification by the two witnesses. The State's position is that the prosecution proved the offence beyond reasonable doubt.

3. A summary of the facts giving rise to this charge was that on the material day at around 10.00pm, the complainant (PW 1) was walking home from Ragegni market. When he reached behind their house, two people jumped from a nearby maize plantation and attacked him using rungas and a panga. They subdued him and took Kshs. 20,000/- from his pocket. PW 1 called for help and his sister Sophia Juma (PW 2) came with a torch and shone the light on the two assailants. PW 1 testified that one of them ran away but he was able to recognise the appellant as they hailed from the same village. PW 2 asked the appellant why he was attacking PW 1. He responded that he would do as he wished and then ran off. PW 1 testified that during the robbery he suffered a fractured arm and injuries on his chest. PW 2 assisted PW 1 into the house and on the following day she escorted him to Aram Police station where they recorded statements and later to Madiany District Hospital where PW 1 was treated and the P3 form filled and produced by a clinical officer, Collins Omondi Ouma (PW 4). He observed that PW 1 was injured on his arms and legs and opined that the injuries were caused by a blunt and sharp object.

4. The Investigating Officer, Corporal Francis Odongo (PW 3) testified that after PW 1 reported the matter, he recorded witness statements and carried out his investigations following which he charged the accused with the offence.

5. When put on his defence, the appellant chose to give an unsworn statement and called one witness. He denied robbing the appellant and stated that on that day he was at his grandmother's home with other children and he went to sleep at 11:30pm. The appellant's grandmother Margaret Oyugi (DW 2) supported the appellant and testified the material date they were at her home with the appellant and they later went to sleep past 11:00pm.

6. The offence of robbery with violence under **section 296(2)** of the **Penal Code** is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see **Dima Denge Dima & Others v Republic NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR, Oluoch v Republic [1985] KLR 549** and **Ganzi & 2 Others v Republic [2005] 1 KLR 52**).

7. From the facts I have outlined, I have no doubt that the prosecution established the offence of robbery with violence through the clear and

credible testimonies of PW 1 and PW 2. Their respective testimonies confirm that more than one assailant attacked PW 1. PW 1 was hit with a rungu and panga and he fell and his money was stolen. The injuries he sustained were confirmed by PW 2 and PW 4. I therefore find and hold that the prosecution proved that the elements of robbery with violence.

8. I now turn to the key issue in this appeal which is whether the appellants were identified as the assailants. This question revolves around identification of persons in difficult conditions. In a plethora of authorities; *Maitanyi v Republic* [1986] 2 KLR 75, *Karanja & Another v Republic* [2004] 2 KLR 140 and *Wanjohi & Others v Republic* [1989] KLR 415 ) In *Kiarie v Republic* [1984] KLR 739, the Court of Appeal was even more categorical on reliance on such evidence holding that the evidence must be “*absolutely watertight*” to justify conviction. In *Wamunga v Republic* [1989] KLR 424 the Court of Appeal warned that;

***[W]here the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely be the basis of a conviction.***

Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him (see *Maitanyi v Republic (Supra)* and *R v Turnbull* [1967] 3 ALL ER 549).

9. It is also accepted in law that evidence of recognition is stronger than that of identification because recognition of someone known to one is more reliable than identification of a stranger (see *Anjononi & Others v Republic* [1980] KLR 59). But in *Wanjohi & 2 Others v Republic (Supra)*, the Court of Appeal held that, “*recognition is stronger than identification but an honest recognition may yet be mistaken.*”

10. Turning to the evidence, it is clear from the evidence that this was not a case identification of a stranger as both PW 1 and PW 2 disclosed that the appellant was from the locality. This is confirmed by the fact that DW 2 admitted in her evidence that PW 1 was her neighbour.

11. When the attack took place, it is PW 2 who went to rescue PW 1. She had a torch and was able to see the appellant at close proximity because they talked and PW 2 asked him why he was assaulting PW 1. Both PW 1 and PW 2 were able to describe the clothes he was wearing; a black jacket and a white T-shirt. I hold that circumstances were favourable for positive identification given the nature of the light, the close proximity and the degree of interaction between PW 2 and the appellant coupled with the familiarity with the appellant.

12. As to whether, the PW 1 and PW 2 made the first report naming the appellant. The evidence is that PW 1 stated that it is her father who identified PW 1 to the police. PW 3 stated that it PW 2 and her father who identified the appellant when he was arrested and that PW 1 and PW 2 suspected him when they made the complaint. To my mind, this is sufficient evidence that the appellant was well known, was named and arrested at the completion of the investigations.

13. The totality of the prosecution evidence lays waste to the appellant alibi defence. I therefore affirm the conviction.

14. In light of the Supreme Court decision in *Francis Karioko Muruateru & Another v Republic* SCK Pet. No. 15 OF 2015 [2017]eKLR, the mandatory death sentence for the offence of murder was declared unconstitutional. In the case of *William Okungu Kittiny v Republic* KSM CA Criminal Appeal No. 56 of 2013 [2018]eKLR, the Court of Appeal applied the *Muruatetu* decision *mutatis mutandis* to the provisions of section 296(2) of the *Penal Code*. I therefore quash the sentence of death imposed on the appellant. I now invite the appellant to offer his mitigation before imposing the final sentence.

SIGNED AT KISUMU

D.S. MAJANJA

JUDGE

DATED and DELIVERED at SIAYA this 20<sup>th</sup> day of April 2018.

J. A. MAKAU

JUDGE

Appellant in person.

Mr Okach, Senior Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.