REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 151 OF 2017

CORAM: D.S. MAJANJA J.

BETWEEN

ANDREW KAIBUBE M'LINYIRU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. A.G.Munene, SRM dated 21st July 2017 at the Chief Magistrate's Court at Maua in Criminal Case No. 1067 of 2013)

JUDGMENT

1. The appellant **ANDREW KABUINE M'LINYIRU** was charged with the offence of robbery with violence contrary to **section 296 (2)** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. It was alleged that on 30th March 2013 at Konju village, Machunguru sub-Location, Igembe North District of Meru County, jointly with others not before court while armed with dangerous weapons namely a firearm robbed **PETER KINYUA** of miraa valued at Kshs. 15,000/= and during such robbery threatened to use personal violence. The appellant was convicted and sentenced to death. He now appeals against conviction and sentence.

2. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see ***Okeno v Republic*** **[1972] EA 32**).

3. The facts leading to this case were that on the material morning at about 3.00am, Peter Kinyua (PW 1) testified that he was with John Karinga Ithalie (PW 2) whom he had hired to help him guard his miraa. They heard some noises outside and when they went out they found a group of 6 to 7 people plucking miraa. PW 1 told the court that he was able to recognize the appellant before they heard a gunshot and they all scattered. PW 1 testified that he reported the matter on the next day at Laare Police Station. In the meantime, he was summoned by the Njuki Ncheke elders because the appellant had reported to them that PW 1 falsely reported him to the police.

4. Stanley Kiramburi M'Arangi (PW 3), the Njuri Ncheke elder told the court that the appellant had complained to them that PW 1 had made a false report about him to the police. Unfortunately, the appellant became unruly at the meeting and was escorted to the police station where he confirmed that PW 1 had indeed reported that the appellant had robbed him of miraa.

5. In his sworn defence, the appellant denied the charges and stated that PW1 and himself had a grudge following a land dispute.

6. The thrust of the appellant's case is that the prosecution did not prove its case beyond reasonable doubt. In his amended grounds of appeal, he complains that the trial magistrate failed to note that the prevailing circumstances in the matter were not favourable for positive identification. He also complained that the trial court did not take into account the fact that there was a land dispute between him and the complainant and that the evidence was fabricated.

7. 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)**.

8. Having evaluated the evidence, I am satisfied from the testimony of PW 1 and PW 2 that a robbery took place. There was a gang of people stealing miraa from PW1's farm and in the cause of stealing thereto used violence by firing a firearm.

7. The key issue in this appeal is whether the appellant was identified as one of the assailants. The incident took place at night in admittedly difficult circumstances. This calls for careful examination of the evidence to exclude the possibility of mistaken identity. Such evidence must be watertight before a court can return a conviction (see ***Abdalla Bin Wendo & Another v R* [1953] 20 EACA166**, ***Wamunga v Republic* [1989] KLR 42** and ***Maitanyi v Republic* [1986] KLR 198**). 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 ***R v Turnbull* [1967] 3 ALL ER 549)**. These requirements are, however, relaxed when dealing with the case of recognition because, *"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"* (see ***Anjononi & Others v Republic* [1980] KLR 59**). However, even in such cases, the court must bear in mind that even where parties had prior or close relationship, mistakes can still be made in identification hence the court must still exercise a level of caution.

10. PW 1 told the court that he had a torch and panga when he went to the shamba. He further testified that he approached one of the robbers and got a hold of him and raised alarm. It is only after the firearm was fired that he released him. He recognized that it was the appellant. The appellant admitted in his evidence that he was his in-law. Hence this was a case of recognition and the fact that PW 1 and the appellant were in close contact and that he had a torch to my mind is evidence of circumstances favourable for positive recognition.

11. Although the investigating officer was not called to testify there is ample evidence that PW 1 reported or named the appellant on the very morning at Laare Police Station. PW 1 testified as much and PW 3 confirmed that when they took the appellant to the police station he had already been reported. In any case, the reason why the appellant to the Njuri Ncheke is that PW 1 had already reported him to the police. Nothing emerged from the statements put to PW1 that he did not name him in his first report. I have also considered one issue of a grudge over a land dispute that when the issue was put to PW 1 in cross-examination he flatly denied it.

12. The totality of the evidence is that the appellant was duly recognized as one of the assailants who came to steal miraa and threatened to inflict violence on PW1. I affirm the conviction.

13. Following the Supreme Court decision in ***Francis Karioko Muruateru & Another v Republic* SCK Pet. No. 15 OF 2015 [2017]eKLR** declaring the mandatory death sentence for the offence of murder unconstitutional and the subsequent case of ***William Okungu Kittiny v Republic* KSM CA Criminal Appeal No. 56 of 2013 [2018]eKLR** where the Court of Appeal applied the ***Muruatetu*** decision *mutatis mutandis* to the provisions of **section 296(2)** of the ***Penal Code***, I therefore set aside the sentence. I am therefore call upon the appellant to make his mitigation.

DATED and DELIVERED at MERU this 30th day of May 2018.

D.S. MAJANJA

JUDGE

RULING ON SENTENCE

The offence of robbery with violence is serious. I have taken into account that the fact that the appellant is a first offender and he has expressed remorse. I therefore sentence him to **fifteen (15) years** imprisonment. Right of appeal explained.

DATED and DELIVERED at MERU this 30th day of May 2018.

D.S. MAJANJA

JUDGE

Appellant in person.

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