



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 131B OF 2017

CORAM: D.S. MAJANJA J.

BETWEEN

JOSPHAT KAUNYANGI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. G. Sogomo, SRM dated 19th October 2017 at the Chief Magistrate's Court at Tigania in Criminal Case No. 878 of 2016)

JUDGMENT

1. The appellant, **JOSPHAT KAUNYANGI**, was charged and convicted of the of robbery with violence contrary to **section 296 (2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars of the charge were that on 4th September 2015 at Nkomo Location in Tigania West district within Meru County, he robbed phone make Tecno valued at Kshs. 2,500/= and cash Kshs. 12,000/= and immediately before the time of such robbery used actual violence on the said **BENSON KIMATHI** by assaulting him and did grievous harm on him. The appellant was sentenced to death and 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 is that on 4th September 2015 at about 8.00pm, Benson Kimathi (PW 1) was from a canteen in Kirueuru headed home when he was attacked by someone with a machete. The person struck him on the right forearm but he caught him and pushed him into a ditch while screaming. The assailant bit him on his light breast area and fled. He told the court that the assailant, whom he recognized as the appellant, stole his Kshs. 12,000/- and Tecno cell phone.

4. Joram Mbaabu (PW 2) was one of the people who responded to PW 1's screaming. He recalled that on the material night, he was called via cell phone and told that PW 1 had been cut with a machete and as he was going to the scene, he met the appellant without a shirt carrying a machete. He found PW 1 injured on his right hand. PW 1 told him he lost his phone and that it is the appellant who attacked him.

5. Joshua Gakii (PW 3) also recalled information that PW 1 had been attacked and when he went to the scene he found PW 1 had been injured on his right hand. He told the court that they took PW 1 to hospital where he was admitted for 2 months. PW 1 later told him that the appellant attacked him.

6. Geoffrey Muthomi Murithi (PW 4), the Clinical Officer who produced the P3 medical form, confirmed that PW 1 had a deep cut on the right wrist, a human bite on the lower lip and left shoulder. The injuries, he opined were inflicted by a sharp object. He assessed the injuries as grievous harm. PC Karen Ruto (PW 5) of Nchiru Police Station recalled that on 4th September 2015 at 9.55pm, PW 1 was brought to the police station while unconscious. She observed his injuries. The members of public told her that PW 1 had informed them that the appellant was amongst the people who attacked him. She issued the P3 form. She also testified that the appellant was arrested on 7th April 2016 after he had gone into hiding. In cross-examination, she stated that she visited his home several times but was informed he was not there.

7. In his defence, the appellant testified that the case against him was fabricated as he was working at Maua when the incident took place. He claimed that he was being framed because he reported the assault of his daughter by PW 1's son.

8. 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).

9. I am satisfied from the totality of the evidence that the elements of robbery with violence were proved as PW 1 was attacked by an assailant with a machete who injured him while stealing his money and phone. The key issue in this appeal is whether the appellant was identified as the assailant as it was a night.

10. From the testimony of PW 1 and the appellant, they knew each other hence this was a case of recognition. PW 1 and the appellant wrestled and were in close proximity and given the nature of moonlight, I am satisfied that the appellant was properly identified. Moreover, PW 2 placed him in the vicinity as he was running away from the scene. PW 2, PW 3 and the investigating officer all confirmed that PW 1 told those who came to assist him at the first opportunity that it is the appellant who was the assailant.

11. The totality of the evidence is that it displaces the vague alibi given by the appellant that he was in Maua. The allegation of the grudge was not put to PW 1 in cross-examination hence his defence was a sham and his guilt compounded by the fact that he disappeared from the village. I reject counsel's submission that failure to produce the machete or stolen items would weaken the prosecution case. It is clear that PW 2 saw the appellant ran way and PW 5 confirmed he disappeared hence the items could not be produced. I therefore affirm the conviction.

12. 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 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

I note that the appellant is a first offender and prays for leniency. However, the offence is serious. He wounded the complainant by cutting him and causing grievous harm. I therefore sentence him to **twenty (20) years** imprisonment. Right of appeal explained.

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

D.S. MAJANJA

JUDGE

Ms Okello, Advocate for the appellant.

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