



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 115 OF 2017

CORAM: D.S. MAJANJA J.

BETWEEN

JOSEPH GITONGA MUTUMA..... APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. A. G. Munene, SRM

dated 30th September 2016 at Chief Magistrate's Court at Maua

in Criminal Case No. 2899 of 2013)

JUDGMENT

1. The accused, **JOSEPH GITONGA MUTUMA**, 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 on 20th August, 2013 at Athiru Gaiti location, in Igembe South District within Meru County, while armed with a slasher robbed **LAWI KIRIMI** of Kshs. 100/= and at the time of such robbery used personal violence on the said **LAWI KIRIMI**. 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**). In order to proceed with this task, it is necessary to set out the evidence as it emerged from the trial court.

3. On 20th August, 2013 at 4.00 pm, Lawi Kirimi (PW 1) was walking home from Kalauni market. The appellant suddenly emerged from a shamba with a panga and started calling him a thief. He cut him on the right hand five times, on the mouth and knees, where after he lost consciousness. PW 1 recalled that he knew the appellant as they came from the same area. He also told the court that he had only Kshs. 100/= in his pocket and when he recovered it was missing.

4. Patrick Michubu Meme (PW 2) testified that on the material day he heard a woman screaming and when he rushed to where the screams were coming from, he found PW 1 on the ground bleeding profusely from cuts and the appellant searching his pockets and removing Kshs. 100/- from his pocket. Charles Koome (PW 3), who was also in the neighbourhood, heard screams and as he went to the scene, he met the appellant walking away with a blood stained panga. He also found PW 1 on the ground bleeding profusely from panga cuts.

5. PW 1's wife, Monica Kathure (PW 4) was with her husband on that day. After alighting from the stage, they started to walk home. PW 1 told her that he only had Kshs. 100/= when she asked him for money. She suddenly saw the appellant emerge with a panga and cut PW 1. She saw him rifling through his pockets and removed Kshs. 100/=.

6. Thereafter PW 2, PW 3 and PW 4 took PW 1 to Maua Methodist Hospital where he was admitted for 7 days. His injuries were confirmed by David Nyaga (PW 5), a Clinical Officer, who produced the P3 form. He observed that PW 1 had severe cuts on the hand and a fracture and a cut on the upper lip. He classified the injury as grievous harm.

7. The matter was reported to Maua Police Station and investigated by PC. Joseph Masanga (PW 6). He testified that after investigated the matter, he did not find any evidence that PW 1 was a thief. The appellant was arrested and charged.

8. In his sworn evidence, the appellant denied the offence. He only gave an account of his arrest.

9. The thrust of the appellant appeal contained in his petition, amended grounds of appeal and written submissions is that the prosecution failed to prove the offence beyond reasonable doubt. He contended that the PW 2 and PW 3 did not witness the offence and that there was a fight between him and PW 1. He complained that the evidence was contradictory and inconsistent.

10. 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*).

11. The totality of the evidence satisfies all the elements of robbery with violence as the appellant was armed with a panga with which he assaulted the PW 1 and in the course of such assault he was seen by the witnesses taking money from PW 1's pocket which betrayed his intention to steal money from PW 1. The incident took place in broad daylight and the appellant was well known to PW 1, PW 2, PW 3 and PW 4. He was seen at the scene and their collective evidence is that the appellant assaulted PW 1 with a panga. The appellant defence was a mere denial as he said nothing of the events of the day when he was clearly seen by witnesses. Accordingly, the conviction is upheld.

12. As regards the sentence, the Supreme Court in *Francis Karioko Muruateru & Another v Republic SCK Pet. No. 15 OF 2015 [2017]eKLR* declared the mandatory death sentence for the offence of murder 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 set aside the sentence and invite the appellant to make his mitigation.

DATED and DELIVERED at MERU this 29th day of May 2018.

D.S. MAJANJA

JUDGE

RULING ON SENTENCE

The appellant assaulted the complainant with apanga and caused him grievous harm and although he was a first offence and pleaded for leniency, the offence is serious. It therefore sentence, **JOSEPH GITONGA MUTUMA**, to **fifteen (15) years** imprisonment. Right of appeal explained.

DATED and DELIVERED at MERU this 29th 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.