REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 111 OF 2017

CORAM: D.S. MAJANJA J.

BETWEEN

JOSPHAT KIOGORA alias MBOGO.....................................APPELLANT

AND

REPUBLIC...RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. G. Sogomo, SRM dated 21st September 2017 at Principal Magistrate's Court at Tigania in Criminal Case No. 1340 of 2017)

JUDGMENT

1. The appellant, **JOSPHAT KIOGORA alias MBOGO**, 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 29th May 2016 at Kathangali area of Mbeu location, in Tigania West District within Meru county, jointly with another not before court, robbed **ELIKANAH MUTEMBEI** of his cash and a Tecno mobile phone all valued at about Kshs. 3,000/= and during such robbery wounded the said **ELIKANAH MUTEMBEI** by injuring his penis with a knife.

2. The singular issue appeal is whether the appellant was identified as the assailant. The prosecution case was based on the identification by a single witness in 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.

3. Elikanah Mutembei (PW 1) testified how on the night of 29th May 2017, he was attacked by two people one of whom was the appellant whom he knew from the village. The appellant unzipped his trouser and cut his penis with a knife. PW 1 went home and reported the incident to Kageene AP camp. PW1 told the court that on that night there was sufficient moonlight.

4. Bernice Maingi (PW 2), a Clinical Officer at Nyambene Sub County Hospital testified that PW 1 had been attended to at the facility on 2nd June 2016 at 10.00pm. She confirmed that he had a laceration on his penis shaft probably inflicted by a sharp object. She told the court he had been seen on 30th May 2016 at a private hospital.

5. IP Benson Wafula (PW 3) of Nchiru Police Station testified that PW 1 reported the incident 1st June 2016. He issued an arrest order and the accused was arrested on 16th June 2016. He produced photographs showing PW 1's injured penis.

6. When called upon to make his defence, the appellant elected to remain silent.

7. 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**).

8. Having reviewed the evidence, I am satisfied that this was a case of recognition as opposed to identification of a stranger PW 1 testified

that he knew the appellant. In these circumstances, the state of moonlight and the fact that appellant and PW 1 were so close and to the extent that the appellant unzipped his trousers and attempted to castrate him leave no doubt as to the identity of the appellant.

9. PW 1 testified that he first went to report to the AP camp but was sent away because he was told there was insufficient evidence and that is why he reported to Nchiru Police Station on 1st June 2017. He also sought treatment on 30th May 2017 at a private facility. All this evidence, provides assurance that recognition of the appellant was safe and free from error.

10. All the elements of the offence were proved and the conviction was sound. The conviction is affirmed.

11. 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 29th day of May 2018.

D.S. MAJANJA

JUDGE

RULING ON SENTENCE

Considering that the appellant was a first offence, the offence was serious enough to warrant a custodial sentence. I sentence the appellant, **JOSPHAT KIOGORA alias MBOGO** 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.