



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 100 OF 2017

CORAM: D.S. MAJANJA J.

BETWEEN

ANDREW MUNGATHIA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. A. G. Munene, SRM dated 5th September 2017 at the Chief Magistrate's Court at Maua in Criminal Case No. 3740 of 2012)

JUDGMENT

1. The appellant **ANDREW MUNGATHIA** was charged with the offence of robbery with violence contrary **section 296(2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. It was alleged that on 20th December, 2012 at Nkadone village, Nkathi location of Igembe North District within Meru County while armed with a dangerous weapon namely a stone, he robbed Silas Mukaria, one goat valued at Kshs. 3000/= and during the said robbery he used personal violence against the said Silas Mukaria. The appellant was convicted and sentenced to death and now appeals against conviction and sentence.

2. The thrust of the appellant's case before this court as set out in the amended grounds of appeal and in his written submissions is that the offence was not proved beyond reasonable doubt. The State opposes that appeal and contends that the prosecution proved every element of the offence.

3. 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**).

4. Silas Mukaria (PW 1) testified that on 20th December, 2012 at about 4.00 pm, he was pruning his miraa trees outside his house. His goats were tethered nearby. His daughter came and told him that the appellant had stolen one goat. PW1 followed him but the appellant picked a stone and hit him. He fell and was taken to hospital. In the meantime, the appellant released the goat.

5. Stanley Mungania (PW 2) was nearby when he heard someone screaming that his goat had been stolen. He went outside and saw the appellant pulling a goat. After a short while he saw PW 1 following the appellant while screaming. He stated that he saw the appellant pick a stone and hit PW1 who fell. He assisted PW 1 and took him to Laare Health Centre.

6. Mischeck Gitonga (PW 3) was also at home when he heard PW1 screaming, he saw PW 1 chasing the appellant who was pulling a goat. He released the goat but hit PW1 with a stone. By the time he reached there, a crowd had gathered. They chased the appellant to a nearby house and locked him in.

7. In his defence the accused denied the offence. He told the court that on 20th December 2012 he was a Nkadone market selling miraa when PW 1 confronted him and accused him of stealing his miraa. PW 1 rejected his offer to give him miraa instead and took him to the police station.

8. The facts as I have narrated fall within the definition of the offence of robbery with violence under **section 296(2)** of the **Penal Code**. The offence 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/or 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. The testimony of PW 1 was corroborated by PW 2 and PW 3. It was daytime and all the witnesses knew him. As per the testimony of PW 3, the appellant was arrested at the scene immediately after PW 1 gave chase and he released the goat then stoned PW 1. All these events took place without a break in the evidence. The totality of this evidence is that robbery with violence was proved. It was thus not necessary to call PW 1's daughter who told him that the accused was stealing the goat and the investigating officer who would merely give an account of the investigation. The testimony of PW 1, PW 2 and PW 3 was sufficient to prove the offence. The conviction is therefore affirmed.

10. 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. I note that the accused was a first offender, he stole a goat that was recovered and he has expressed remorse. I hereby sentence him to **five (5) years** imprisonment to run from the date of conviction.

DATED and DELIVERED at MERU this 28th 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.