



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**CRIMINAL APPEAL NO 153 OF 2017**

**MARTIN NJENGA NDUNGU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From original conviction and sentence in Criminal Case Number 9 of 2015 in the Principal Magistrate's Court at Kikuyu by Hon D.N. Musyoka (PM) on 11<sup>th</sup> May 2017)**

**JUDGMENT**

**INTRODUCTION**

1. The Appellant herein, Martin Njenga Ndungu, was jointly charged with George Ngugi Kungu (hereinafter referred to as his "Co-Accused person") with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code Cap 63 (Laws of Kenya).
2. The particulars of the charge were that on the 13<sup>th</sup> day of May 2015 at Thogoto area in Kikuyu Kiambu County within Central Region, jointly while armed with dangerous weapon namely knife robbed Shiprah Wanjugu Nyuyo (hereinafter referred to as "PW 1") one mobile phone make Samsung, cash Kshs 15,000/=, ATM Card for Barclays Bank and CFC Bank, National ID Card and keys all valued at Kshs 39,000/= and immediately before the time of such robbery used actual violence to the her (sic).
3. In the alternative, they were charged with handling stolen goods contrary to Section 322 (1) (2) of the Penal code.
4. Being dissatisfied with the said judgment, on 30<sup>th</sup> June 2017, the Appellant filed a Chamber Summons seeking leave to file his Appeal out of time, which application was allowed and the Petition deemed to have been duly filed. He relied on five (5) Grounds of Appeal. On 19<sup>th</sup> March 2018, he filed Amended Supplementary Grounds of Appeal and Written Submissions. This time he relied on four (4) Grounds of Appeal.
5. When the matter came up for hearing on 19<sup>th</sup> March 2018, the State tendered oral submissions.

**LEGAL ANALYSIS**

6. As this is a first appeal, this court analysed and re-evaluated the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

**“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanor”.**

7. Having considered the Appellant's and State's Written Submissions, this court found that the only issue that was placed before it for determination was whether or not the Prosecution proved its case beyond reasonable doubt.
8. The Appellant submitted that he was convicted on the sole identification of PW 1 without the Trial Court having warned itself of the dangers of relying on such evidence. He pointed out that the incident was said to have occurred at 7.30 pm and as a result his identification by PW 1 was not free of error.
9. He added that in any event, PW 1 did not say for how long she struggled with her attackers after she was hit on the head and pinned on the ground to give her sufficient time to identify them without an investigation parade having been conducted.

10. He referred this court to the cases of Turnbull [1976] 3 ALL ER 549, Roma vs Republic [1967] EA 583 and Abdalla Bin Wendo & Another vs Republic 20 EACA 166, where the common thread was that great caution must be exercised before convicting an accused person based on the evidence of a single witness.

11. He was emphatic that PW 1 found him in the cell where he had been arrested for a different offence and that police officers showed her "Mato" which name she called and he responded to. He averred that the duration and circumstances under which she was attacked were not sufficient for her to have said that she positively identified him. He was categorical that she observed him when he was being taken to the police station.

12. On its part, the State submitted that the attack occurred in an area that was well lit and as result, PW 1 was able to see the physical features of her attacker which were recorded in the initial report at the Administration Police (AP's) camp. It added that it was not necessary for an Identification Parade to have been conducted because PW 1 recognised him at the police station.

13. From the evidence that was adduced before the Trial Court, on the material date and time, PW 1 was heading home when she was attacked and robbed by two (2) men. She saw the Appellant's face but not of his accomplice whose face had been hidden behind a marvin. She was subsequently informed that her bag containing her ID, NHIF Card, Barclays Bank Card, keys and phone, which she identified in court, had been recovered from the Appellant's Co-Accused person's house. She added that when she went to the police station, she called out the name "Mato" because she had heard his Co-Accused call him by that name when she was attacked. He responded to the name and came out of the cell. At the time, the Appellant had been arrested for another offence.

14. A Clinical Officer attached at Wangige Timothy Kinuthia (hereinafter referred to as "PW 2") confirmed that PW 1 sustained injuries caused by blunt and sharp objects during the attack. He adduced in evidence, the Hospital Treatment Notes and P3 Form to prove the said injuries. He classified the injuries as "harm".

15. No 881034 PC Cyrus Kiptoo (hereinafter referred to as "PW 3") testified that the Appellant herein led them to his Co-Accused person at a funeral in Makaburi and his Co-Accused person who in turn took them to his house where PW 1's phone was recovered.

16. No 211319183 APC John Odhiambo (hereinafter referred to as "PW 4") told the Trial Court that on the material date, PW 1 went and reported at their AP Camp that she had been robbed by a person who was called "Mato". Thereafter, he heard the said "Mato" had been arrested by his colleagues for another offence. He was the one who called PW 1 to see if the "Mato" in the cells was the same person who had attacked her.

17. No 75714 PC Patrick Kibaru (hereinafter referred to as "PW 5") corroborated PW 3's evidence that they arrested the Appellant's Co-Accused at a funeral and he took them to his house where they recovered PW 1's phone. Apparently, save for the phone, PW 1 recovered all her other stolen items at the scene of the incident. PW 5 was emphatic that it was the Appellant's Co-Accused person who took them to his house.

18. From the evidence that was adduced during the trial, it was evident that the Appellant's identification was based on the evidence of a single witness. Indeed, as the Appellant argued, the conditions under which PW 1 found herself were stressful and there was a possibility of mistaken identity.

19. However, the possibility of there having been a mistaken identity was negated by the fact that PW 1 identified the Appellant from the gap that he had in his teeth, he responded to the name "Mato" when she called it out in the cells where he had been arrested for another offence and her phone was recovered at his Co-Accused person's house after he led police to where his Co-Accused was at a funeral. Indeed, his Co-Accused person did not deny that PW 1's phone was found in his house.

20. Notably, the Prosecution was able to demonstrate that all the ingredients in Section 296 (2) of the Penal Code obtained in this case. The same are that:-

**a. the offender must be armed with any dangerous or offensive weapon or instrument; or**

**b. the offender must be in the company of one or more other person or persons or;**

**c. at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person.**

21. The Charge against the Appellant could be sustained if one any of the aforesaid ingredients were present. However, in this instant case, all the ingredients constituting the offence of robbery with violence were present showing the aggravated circumstances that obtained herein.

22. Indeed, the recent possession of PW 1's phone by the Appellant's Co-Accused who was implicated by the Appellant herein pointed to the two (2) of them of having been PW 1's attackers. The Appellant was in the company of his Co-Accused person and they injured PW 1 as they robbed her. Her injuries were confirmed by PW 2. The Appellant's unsworn evidence was of little and probative value and did not displace that of the Prosecution.

23. Having considered the evidence that was adduced before the Trial Court, this court came to the firm conclusion that the Prosecution proved its case beyond reasonable doubt and that the Learned Trial Magistrate arrived at the correct conclusion that the Appellant's unsworn evidence was unbelievable and that the minor inconsistencies in the Prosecution's case did not prejudice the Appellant and were not fatal to its case. The Appellant did not demonstrate that the Prosecution witnesses had an existing grudge with him necessitating them to frame him.

24. In the premises foregoing, this court found that the Amended Grounds of Appeal Nos (1), (2), (3), (4) and (5) were not merited and the same are hereby dismissed.

**DISPOSITION**

25. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal dated 30<sup>th</sup> June 2017 was not merited and the same is hereby dismissed. Instead, this court hereby affirms the conviction as the same was lawful and fitting.

26. However, in view of the recent case of **Petition No 15 of 2015 Francis Muratetu & Another vs Republic** where the Supreme Court held that found that the mandatory sentence under Section 296 (2) of the Penal Code was unconstitutional, this court hereby directs that this matter be referred back to the Principal Magistrates Court at Kikuyu Law Courts for consideration of re-sentencing, if need be. This matter shall be placed before the Principal Magistrate of Kikuyu Law Courts on 10<sup>th</sup> July 2018 for his and/or her further orders and/or directions.

27. It is so ordered.

**DATED and DELIVERED at KIAMBU this 27<sup>th</sup> day of June 2018**

**J. KAMAU**

**JUDGE**