



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO 120 OF 2017**

**SAMUEL NGUGI KARUGA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From original conviction and sentence in Criminal Case Number 488 of 2012 in the Senior Principal Magistrate's Court at Limuru by Hon G.H. Oduor (CM) on 1<sup>st</sup> March 2017)**

**JUDGMENT**

**INTRODUCTION**

1. The Appellant herein, Samuel Ngugi Karuga was jointly charged with Peter Njuguna Njenga, George Kinyanjui Thaaara, Francis Kimemia Wainaina, Joseph Mwaura Macharia and Protus Momanyi Kariuki (hereinafter referred to as his Co-Accused persons 1, 2, 3, 4 and 5 respectively) for 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 27<sup>th</sup> day of May 2012 at Redhill village in Kiambu County, jointly with others not before court, they robbed James Nyoro Kibutiri (hereinafter referred to as "PW 1"), cash Kshs 45,000/= (Forty Five thousand only) and at or immediately before or immediately after the time of such robbery while armed with crude weapons namely hammer and 2 jack knives, wounded him.
3. After his Co-Accused persons 1 and 2 absconded, the said Charge Sheet was substituted on 3<sup>rd</sup> December 2014 to reflect four (4) Accused persons. Subsequently, on 2<sup>nd</sup> March 2016, the Prosecutor informed the Trial Court that Co-Accused person 3 had died. This therefore left the Appellant herein, his Co-Accused persons 4 and 5 to proceed with the case.
4. The Learned Trial Magistrate, Hon G.H. Oduor Chief Magistrate convicted them for the offence of robbery with violence and imposed on them the death sentence as was prescribed under the law.
5. Being dissatisfied with the said judgment, on 6<sup>th</sup> July 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.
6. When the matter came up for hearing on the said 19<sup>th</sup> March 2018, the State tendered oral submissions.

**LEGAL ANALYSIS**

7. 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”.**

8. Having considered the Appellant's and States' Written Submissions, this court found the following issues to have been placed before it for determination:-

1. Whether or not the Appellant's fundamental rights to a fair and impartial trial had been violated;
2. Whether or not the Prosecution proved its case beyond reasonable doubt;
3. Whether or not the Learned Trial Magistrate complied with the provisions of the law when he wrote his decision.

9. The court therefore dealt with the said issues under the distinct and separate heads shown herein below.

#### **I. RIGHT TO A FAIR AND IMPARTIAL TRIAL**

10. Amended Ground of Appeal No (4) was dealt with under this head.

11. The Appellant argued that on 8<sup>th</sup> October 2014, the Learned Trial Magistrate adjourned the trial for fifteen (15) minutes to enable them be furnished with the Witness Statement of No 233309 CIP Ibrahim Omar (hereinafter referred to as "PW 3") and the two (2) P3 Forms.

12. He contended that the time given was not sufficient to have enabled him prepare for his defence as enshrined in Article 50(2) of the Constitution of Kenya, 2010 that provides as follows:-

**"Every accused person has the right to fair trial which includes the right to have adequate time and facilities to prepare a defence."**

13. The state did not submit on this issue.

14. A perusal of the proceedings showed that on 13<sup>th</sup> June 2012, the Trial Court ordered that the Appellant and his Co-Accused persons be furnished with Witness Statements on payment (**sic**). When the matter came up on 8<sup>th</sup> October 2014, they all confirmed that they were ready to proceed with the hearing and the Trial Court proceeded to take the evidence of PW 1, No 93594 PC Vincent Makori (hereinafter referred to as "PW 2") and "PW 3".

15. The Learned Trial Magistrate adjourned the matter for fifteen (15) minutes so that "he" could be furnished with the documentation referred hereinabove by the Appellant herein. When the Trial Court reconvened, the Appellant's Co-Accused informed it that it had got all the relevant documents and the hearing continued.

16. It was not clear from the said proceedings whether the Learned Trial Magistrate adjourned the matter *suo moto* or if it was at the behest of the Appellant's Co-Accused 1 who confirmed that he had received all the relevant documents. Appreciably, the Appellant did not inform the Trial Court that he had not received all the documents he wanted before proceeding with the hearing on the said date.

17. In the premises foregoing, this court found the Appellant's Amended Ground of Appeal No (4) not to have been merited and the same is hereby dismissed.

#### **II. PROOF OF THE PROSECUTION'S CASE**

18. Amended Ground of Appeal Nos (1) and (2) were dealt with under this head because they were related.

19. The Appellant argued that the Learned Trial Magistrate did not believe that there was mistaken identity although other than PW 1, other crucial witnesses were not called to testify. He referred this court to the case of **Bukenya & Others 1972 EA 549** in which it was held that:-

**"The Prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses evidence may be adverse to the Prosecution's case".**

20. He also placed reliance on the case of **John Kenga vs Republic Cr Appeal No 181 of 1984 (CA) NRB** where the appellant therein was acquitted on account of some witnesses not having been called to testify.

21. He added that PW 1 did not tell the Trial Court how long he stayed with his attackers to enable him to have positively identified him. He pointed out that this was pertinent because PW 1 testified that he had never seen him prior to the attack herein.

22. In this regard, he relied on the cases of **Kelvin Kimathi Nyaga vs Republic Cr Appeal No 109 and 106 of 2012 (sic)**, **Oscar Waweru Mwangi vs Republic Cr App No 2 of 1999 (unreported)**, **Anjonini & Others vs Republic 1980 KLR** amongst several other cases where the common thread was that courts are enjoined to scrutinise the evidence of identification or recognition and be satisfied that the circumstances of a positive identification are favourable and free from the error of mistaken identity.

23. He further referred this court to several other cases in which it was held that the burden of proof lay with the prosecution to prove the assertions that it was making against an accused person and that the evidence that was adduced therein must be corroborated - See **Muiruri Njoroge vs Republic Cr Appeal No 115 of 1982 CA (sic)**, **Njoroge Kigichi vs Republic [2009] e KLR**.

24. He submitted that it was doubtful that PW 2 could have covered two (2) kilometers on foot from the police station and still found him in PW 1's house. In addition, he argued that no finger print impressions or photographs were taken to prove that he was arrested in PW 1's

house. He was emphatic that his evidence that he was arrested by the roadside going to collect milk was plausible and that the fact that he never raised the issue earlier on during the trial did not amount to an afterthought.

25. On its part, the State was emphatic that the Appellant and his Co-Accused persons were arrested inside PW 1's and consequently, the question of there having been mistaken identity did not arise. It added that PW 1's wife was not called as a witness because she was mentally challenged, a fact that was stated by PW 5.

26. This court carefully considered the evidence that was adduced during the trial and noted from PW 1's evidence which was corroborated by PW 2, PW 3 and PW 5 that the Appellant and his Co-Accused persons were arrested in PW 1's house. Although PW 1, who was elderly, did not see the faces of his attackers, PW 3 personally arrested the Appellant and his Co-Accused persons from his house. PW 5 also confirmed having found the Appellant and his Co-Accused persons at the verandah of PW 1's house and ordered them to surrender. PW 2 also went to the scene and confirmed that he found the Appellant and his Co-Accused persons in PW 1's house.

27. As the State correctly stated, the issue of mistaken identity could not have arisen. It was immaterial that PW 1's wife was not called to corroborate PW 1's evidence as the same was corroborated by PW 2, PW 3 and PW 5 who rushed to the scene after being alerted of the robbery. In addition, part of the money the Appellant and his Co-Accused persons had robbed PW 1 was recovered in the ceiling board of PW 1's house after the Appellant's Co-Accused person No 1 led the police officers to where it had been hidden. It was therefore not necessary for the Prosecution to have dusted for the finger prints or produced photographs to prove where the Appellant was arrested.

28. The Appellant and his Co-Accused persons were arrested early in the morning when the lighting conditions were favourable and free from error of identification by PW 1, PW 2, PW 3 and PW 5. Indeed in his own evidence, the Appellant testified that it was about 7.45 am – 8.00 am.

29. Section 143 of the Evidence Act Cap 80 (Laws of Kenya) gives discretion to the prosecution to decide the number of witnesses to prove a fact. It was therefore not mandatory for the Prosecution to have called PW 1's wife as a witness firstly because PW 5 stated that she was mentally challenged as can be seen hereinabove and secondly, PW 1's evidence was corroborated by PW 2's, PW 3's and PW 5's evidence. The case of **Bukenya vs Republic** was therefore not useful to the Appellant's case.

30. Going further, the Appellant's oral Submission that the child PW 1 referred to was a twenty (20) years old was quite telling because in his unsworn evidence, he did not make any reference to having seen the said twenty (20) year old. Making reference to her only placed him at the scene of the offence because he could not have become seized of such information if he was not at the scene. The provisions of Section 111 (1) of the Evidence Act became applicable herein as the burden now rested on him to explain how he knew that the child PW 1 was referring to was twenty (20) years old.

31. Section 111(1) of the Evidence Act provides as follows:-

**“When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:**

**Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:**

**Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence...”**

32. 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.**

33. 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.

34. The Appellant was in the company of more than one (1) person, they robbed PW 1 and immediately before and during the incident they injured him, which was confirmed by a Registered Clinical Officer at Tigoni District Hospital, James Kabue, (hereinafter referred to “PW 4”). This proved the ingredients of robbery with violence contrary to Section 296(2) of the Penal Code.

35. Taking the aforesaid into consideration, this court came to the firm conclusion that the Prosecution proved its case beyond reasonable doubt and that the evidence that was adduced by the Prosecution witnesses actually displaced the Appellant's unsworn evidence. He did not therefore persuade this court to find that there was any malice on the part of the Prosecution witnesses to have implicated him in the offence herein. The Learned Trial Magistrate therefore acted correctly when he convicted him for the offence of robbery with violence contrary to Section 296(2) of the Penal Code.

36. In the circumstances foregoing, this court found and held that the Amended Grounds of Appeal Nos (1) and (2) were not merited and the same are hereby dismissed.

### **III. COMPLIANCE OF DECISION**

37. Amended Ground of Appeal No (3) was dealt with under this head.

38. It was the Appellant's further submission that the Learned Trial Magistrate failed to state the points for determination when he wrote his judgment which was contrary to Section 169 (1) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

39. Section 169 (1) of the Criminal Procedure Code provides as follows:-

**“Every such judgment shall except as otherwise expressly provided by this code, be written by or under the direction of the presiding officer of the court in language of the court shall contain the point or points for determination, the decision thereon and the reasons for the decision and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.”**

40. A perusal of the judgment by the Learned Trial Magistrate showed that he considered both the evidence that was tendered by the Prosecution witnesses, who he said corroborated each other and found that there could therefore not have been a case of mistaken identity and in addition, that the Appellant's defence, was an afterthought as he had not raised the same earlier during trial.

41. This court could not have agreed more with the findings of the Learned Trial Magistrate. The Appellant's assertions that his decision was contrary to the provisions of Section 169 (1) of the Criminal Procedure Code were neither here nor there as this court was satisfied that he gave reasons for the conclusion that he arrived at.

42. In the premises foregoing, the Amended Ground of Appeal No (3) was not merited and the same is hereby dismissed.

### **DISPOSITION**

43. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was lodged on 6<sup>th</sup> July 2017 was not merited and the same is hereby dismissed. Instead, this court hereby affirms the conviction as the same was lawful and fitting.

44. However, in view of the recent case of **Petition No 15 of 2015 Francis Muratetu & Another vs Republic** where the Supreme Court 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 Senior Principal Magistrates Court at Limuru Law Courts for re-sentencing, if need be. This matter shall be placed before the Senior Principal Magistrate of Limuru Law Courts on 10<sup>th</sup> July 2018 for his and/or her further orders and/or directions.

45. It is so ordered.

**DATED and DELIVERED at KIAMBU this 26<sup>th</sup> day of June 2018**

**J. KAMAU**

**JUDGE**