



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 141 OF 2017.**

**MARTIN MWANGI NDUNGU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(An appeal from the Original Conviction and Sentence in Criminal Case No. 2676 of 2008 dated 5<sup>th</sup> February 2010 in the Chief Magistrate's Court at Thika by Hon L.W. Gicheha -SRM)***

**JUDGEMENT**

1. **Martin Mwangi Ndungu** the Appellant herein was the accused at the Chief Magistrates Court in Thika Criminal Case No. 2676 of 2008. He was charged with Robbery with Violence Contrary to section 296(2) of the Penal Code. The particulars of the charge were that on the 2<sup>nd</sup> day of July 2008 at Mutuma village Mang'u in Thika District within Central Province, the appellant jointly with another not before the court, robbed Antony Njoroge Ndumbi his mobile phone make Nokia 2300, spectacles, a cap and a wallet all to the total value of Kshs. 6,200/= and at the time of such robbery injured the said Antony Njoroge Ndumbi.

2. The Appellant denied the charge and the case proceeded to full hearing at the end of which he was found guilty, convicted and sentenced to suffer death. He has appealed against the whole judgment citing the following supplementary grounds:

- (i) THAT the learned trial magistrate erred in law and fact in failing to find that the charge was based on doubtful identification or recognition.*
- (ii) THAT the learned trial magistrate erred in law and fact in failing to find that the investigations carried out were shoddy and gave rise to evidence so insufficient to warrant a conviction.*
- (iii) THAT the learned trial magistrate erred in law and fact in failing to comply with the clear provisions of section 150 of C.P.C.*
- (iv) THAT the learned trial magistrate erred in law and fact in failing to pronounce the sentence to be served contrary to section 169(2) of the CPC.*
- (v) That the law (judge made law) in 2017 removed the fetters placed on the court's discretion when passing sentence in cases hitherto attracting mandatory death penalty.*
- (vi) That the mandatory nature of death sentence under section 296(2) of the Penal Code to which the Appellant was committed to prison has no legal or constitutional variation to the mandatory nature of death sentence under section 204 of the Penal code which has been declared unconstitutional by Supreme Court of Kenya.*
- (vii) That the mandatory nature of death sentence under section 296(2) of the Penal code is not the date sentence contemplated under Article 26(3) of the Constitution for lack of precision and graduated sentencing structure and therefore unconstitutional.*
- (viii) That where the Hon. Court's findings are to the negative on ground 1-4 by rules in favour of ground no 5 and 6 above, an appropriate sentence be meted pursuant to section 333(2) of the Criminal Procedure Code.*

3. A Summary of the evidence on record is as follows: **PW2 Antony Njoroge Ndumbi** the complainant testified that on 2<sup>nd</sup> July 2009 at around 10.30 p.m. he was walking home alone from the shops, when two people emerged from the coffee plantation. There was moonlight and he was near the manager's house which had security lights on. From the moonlight and electricity light he was able to identify the Appellant whom he knew as they hailed from the same area.

4. Furthermore he had been with the Appellant in the course of the day and they even spoke. That the Appellant was also wearing an overall imprinted "KTDA" which he had worn during the day. He identified his overall as **EXB2**.
5. When the Appellant and his companion emerged they attacked him, hit him on the head and demanded for money from him. He was cut on the head by the Appellant and his hand got fractured. They took from him a Nokia phone 2,300 valued at Kshs 5,000/-, a wallet with bank documents and eye glasses valued at Kshs 6,400/-
6. They left him when he pretended to be dead. He later moved slowly to his house but could not open the door due to the injuries suffered. The next morning he was taken to hospital by his brother (PW3) and niece. On the same day the Appellant's mother brought him his wallet, red cap and spectacles (**EXB 3-5**). She alleged to have recovered them from the scene of crime. The attack was then reported to the police at Gatundu, and the Appellant was arrested.
7. **PW3 James Kamau** accompanied Jane Wanjiku Ndungu (Appellant's mother) to PW2's house as she took to him his documents allegedly recovered by her. He found PW2 injured and he informed him that it is the appellant who had beaten him. The Appellant's mother heard what PW2 told them. This witness and **PW4 Cecilia Wanjiku Maina** took PW2 to hospital.
8. **PW5 George Ndegwa Wainaina** is the investigating officer. He received the report in respect of this case on 3<sup>rd</sup> July 2008 4 a.m. at Gatundu police station. The reporter was PW 2 who had come from the hospital and was in bandages. He told the police that he identified the Appellant as one of the attackers. PW5 testified that PW2's son showed the Appellant to them and he was arrested. They also searched the Appellant's house and recovered therefrom the green KTDA overall that PW2 had seen the Appellant wearing during the attack.
9. **PW1 George Maingi** a clinical officer examined PW2 and filled the P3 form **EXB10** on 22<sup>nd</sup> January 2009. He confirmed that PW2 had cuts on the forehead, bruises on the chest, fractured radius all aged 6 months and 20 days. The weapon of attack was sharp and blunt. He classified the injury as grievous harm.
10. When placed on his defence the Appellant elected to make a sworn statement and called no witness. He denied the charges and stated that on 3<sup>rd</sup> August 2008 he was at his work place preparing to go for lunch when he was arrested by the police. He was then booked and charged. In cross examination he said he had a case with PW2.
11. When the appeal came for hearing the Appellant's basic argument was that there was no sufficient evidence to support the case, as the O.B abstract served on him does not support the evidence. Secondly the arresting officer Kasabuli did not testify. He said the complainant was drunk and did not know what he was doing. He even wondered who took PW2's phone.
12. In his written submissions he challenged his identification by the complainant. He said the conditions for a positive identification were not set out. He referred to the cases of **Wamunga v Republic 1989 KLR 424, 426; Ramazani Bin Mirandu v Republic (1934) EACA 107**. He said there was no inquiry on the brightness of the moon and electricity. On this he referred to the case of **Paul Etole & Anor v Republic Criminal Appeal No 24 of 2009 9CA) Nrb**.
13. He submitted that PW2 did not state how he was able to identify him by voice. See **Karanja v Republic [1985] KLR 290**. Further that the 1<sup>st</sup> report by PW2 did not give any descriptions. He referred to the case of **John Bosco Ziro Kalume v Republic Criminal Appeal No 41 of 1998** to support this argument.
14. It was his submission that the investigations were shoddy and essential witnesses were not called. On sentence he argued that following the Supreme court decision in **Francis Muruatetu & Anor v Republic Petition Nos. 15 7 16 of 2015 [2017]eKLR** the death sentence is unconstitutional and so his sentence should be revised.
15. Mr Maatwa for the State in response opposed the appeal. He submitted that all the ingredients of the offence of robbery with violence had been proven. He added that crucial witnesses were called and the Appellant was known. Further that the P3 form was produced and the court warned itself before convicting the appellant. The identification was by recognition.
16. This is a first appeal and this court has a duty to re-evaluate and reconsider the evidence adduced and arrive at its own conclusion. It has also to bear in mind that it did not see nor hear the witnesses and give an allowance for that. This was the holding in the case of

**Okeno vs Republic 1972 EA 32** where it was held:-

**"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandaya v R, [1957] E.A 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v R, [1957] E.A 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post, [1958] E.A 424."**

17. The Court of Appeal further in the case of **Muthoko & Anor [2008] KLR 297** held as follows:

**"It was the duty of a first appellate court to analyze the evidence and come to its own independent conclusion bearing in mind that it did not hear or see the witnesses and making allowance for that"**

18. I have considered the evidence on record, the grounds of appeal, the submissions by all counsels and the cited authorities. The appellants have raised total of 8 grounds of appeal. Upon considering all I have stated above, I will narrow them to 3 issues which are:-

- 1. Whether the ingredients of robbery with violence were proved by the prosecution.**
- 2. Whether the appellant was identified by the complainant as the person who attacked him.**
- 3. Whether the sentence is lawful.**

19. With regard to the first issue for determination the ingredients of the offence of robbery with violence were clearly set out by the Court of Appeal in the case of **Oluoch v Republic [1985] KLR** where it was held:-

**“Robbery with violence is committed in any of the following circumstances:-**

- a) The offender is armed with any dangerous and offensive weapon or instrument, or**
- b) The offender is in company with one or more person or persons or**
- c) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person.....**

20. The use of the word **OR** in this definition means that proof of any of the above ingredients is sufficient to establish an offence under section 296(2) of the Penal Code. The complainant testified that he was accosted by the Appellant who was in the company of another person he did not know (that fulfills ingredient (b)). He further testified that the attackers were armed with a panga -(that fulfills ingredient(a)).

21. He went on to state that the attackers injured him with a panga. Indeed Pw1 confirmed that the complainant sustained a cut on the forehead, bruises on the chest, fracture radius and that the weapon used to attack the complainant was sharp and blunt(that fulfills ingredient (c)). He was robbed of the items complained of and some were allegedly recovered by the Appellant’s mother.

22. I now turn to the most critical part of this appeal which is whether or not the Appellant was identified, PW2. The incident is said to have occurred at about 10.00 p.m. It was dark but according to the evidence adduced by PW2, there was moonlight and electricity light too to help him with visibility. It was PW2’s evidence that the appellant was well known to him as, they were village mates and in fact PW2 had seen the appellant during the day wearing the green overall and they had talked.

23. I am mindful of the fact that the evidence on identification is given by a single witness. This fact does not on its own render this evidence unreliable. In the case of **Maitianyi –V- Republic [1986] KLR** the Court of Appeal held that:

**“Subject to well known exceptions it is trite law that a fact maybe proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification ..... ”**

**In Wamunga v Republic 1989 KLR 424 the Court of Appeal held that:**

- 1. Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.**
- 2. Recognition may be more reliable than identification of a stranger but mistakes in recognition of close relatives and friends are sometimes made.**

24. The complainant gave a very cogent and concise account of the events of the attack and he remained unshaken under cross-examination by the Appellant. The circumstances were optimal for a positive identification. More importantly the Appellant was a person who was not a stranger to PW2. The complainant testified that he knew the appellant from childhood days, and he was able to identify him that night with the available light. He had also seen him during the day.

25. Evidence of recognition which was held in the case of **Anjononi & Others –v – Republic [1980] Klr** to be **“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.”** In this case PW2 was identifying a person already known to him. It was thus a case of recognition and further reduced the risk of a mistaken identity.

26. PW2 said he was also able to recognize the Appellant through his voice. On this point, I am guided by the case of **Choge –vs- Republic [1985] KLR 1** in which the Court of Appeal held in part that:-

**“Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person’s voice, that the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it.”**

27. In the case of Karani –vs- Republic – CRA No.181 of 1984 at Kisumu, the Court of Appeal stated that:-

**“Identification by voice recognition is admissible however, care must be taken to ensure that the voice is that of the appellant.”**

PW2 testified that his attackers were close to him, beating him and demanding for money. He therefore saw the appellant and heard his voice. This he said was an appearance and voice that were not new to him.

28. In the instant case, the Appellant was recognized by the Appellant not only from the clothes he was wearing but even through his voice as he was not a stranger to PW2. Furthermore, the said green overall with a KTDA LOGO which the appellant was wearing during the material night was later recovered from his house by PW5 (the investigating officer) after his arrest the next day.

29. Besides what he saw and heard PW2 went further and acted the next day. He was not able to take any action that night as he was badly injured. The next day the Appellant’s mother whom PW2 and PW3 knew came to the former’s home with some of the items he had been robbed off. She claimed to have recovered them at the scene. Was it a coincidence? There and there PW2 who had already told PW3 who had robbed him repeated in the hearing of the Appellant’s mother that it was the Appellant who had attacked him. He further reported and told the police who it is that had robbed him.

30. PW2 did not have to give any descriptions because he knew the attacker well. It indeed was a case of recognition. The contention by the Appellant that PW2 was drunk and was therefore not able to identify him is not convincing since he never cross examined PW2 on his state of drunkenness. It is therefore an afterthought. Though PW2’s evidence is evidence of a single identifying witness I am satisfied that the conditions were favourable for a plausible identification. The learned trial Magistrate had warned herself of the danger of convicting on evidence of a single witness. My finding on this issue is in the affirmative. The Appellant was positively identified.

**Issue No. (iii) Whether the sentence is lawful**

31. The appellant was accorded an opportunity to mitigate after which the learned trial Magistrate imposed the death sentence. This was the lawful sentence in accordance with section 296 (2) of the Penal Code. The sentence was passed before the decision of the Muruatetu case, which did not outlaw the death sentence but said the death penalty is not mandatory. We are all eagerly waiting for the guidelines from the Attorney General in respect of the re sentencing.

32. In conclusion my finding is that the appeal lacks merit and is dismissed.

Orders accordingly

**Dated, signed this 3<sup>rd</sup> day of August 2018 in open court at Kiambu.**

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**HEDWIG I. ONG’UDI**

**JUDGE**