



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 137 OF 2017**

**ARTHANUS WAMBUA.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**CONSOLIDATED WITH**

**CRIMINAL APPEAL NO. 138 OF 2017**

**PATRICK MUTISO MUIA.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

*(An appeal from the judgment of Hon. B.A Owino (SRM) dated and delivered in Thika Law Court on 7<sup>th</sup> Day of December 2010 in criminal case No. 443 of 2009)*

**JUDGMENT**

1. The appellants were jointly charged in the Chief Magistrates Court at Thika in Criminal Case No. 443 of 2009 with the offence of attempted Robbery with violence contrary to **Section 297(2) of the Penal Code**.

The particulars of the offence was that on the 19<sup>th</sup> January 2009 at Masinga in Machakos District jointly with others not before the court, while armed with metal bars attempted to rob from **Daniel Kitili Kakwati and during the time of such attempt used personal violence to the said Daniel Kitili Kikwati**.

**In count two, they were accused of attempting to rob from Faith Nthenya Kitili and during the time of such attempt used personal violence to the said Faith Nthenya Kitili.**

2. Count two was an alternative charge of robbery. They were tried and upon conviction sentenced to suffer death on the 7<sup>th</sup> December 2010.

3. This appeal is against both the conviction and sentence. As the first appellate court, I am mandated to re-examine the evidence adduced before the trial court and come up with my own findings. - **Cr. Appl. No. 272 of 2005 Isaac Ng'ang'a alias Peter Ng'ang'a** and quoted in **Republic -vs- George Onyana Anyang & Another (2016)e KLR**.

4. The offence of attempted robbery with violence is stated under **Section 297 of the Penal Code** and carries a death sentence upon conviction. It is a serious offence. The court must therefore be satisfied that indeed the offenders committed the offence. There should be no room at all for doubts. There ought to be a complete chain of events that points to the offence and to the persons so charged – See **Abanga Alias Onyango -vs- Republic Cr. Appl. No. 32 of 1990(UR)**.

5. The ingredients of the offence that ought to be proved for a conviction to be sustained are:

**1. If the offender is armed with any dangerous or offensive weapon or instrument, or**

**2. Is in the company with one or more other persons or persons, or**

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

6. The appellants grounds of appeal as stated in their petitions and Memorandums of appeal are numerous but shall be condensed.

Each of the two appellants filed their separate grounds of appeal, but both raise same issues, being:

**1. Defective charge sheet**

**2. Lack of proper and positive identification**

**3. Inconsistencies and contradictions in the prosecution evidence.**

**4. Failure by trial Magistrate to consider their defences.**

7. **Athanus Wambua** appellant in HCCA No. 137 of 2017 shall be referred to as the 1<sup>st</sup> appellant while **Patrick Mutiso Muia- HCCA No.138/2017** shall be referred to as the 2<sup>nd</sup> Appellant in this consolidated appeal.

8. I have considered the charge sheet and the particulars of the offence. I do not see any defect therein. The offensive and dangerous weapons alleged to have been in the possession of the appellants is well stated as metal bars. The offenders were in the company of one another and others not before the court.

Analysis of the evidence produced shall confirm whether or not the evidence supports the charge, the conviction and the sentence.

#### **9. Identification by Recognition**

Evidence of identification was adduced by PW1 and PW2. Guided by the case **Wamunga -vs- Republic (1989) KLR 426** when it was stated that:

***“It is trite that 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 conviction.”***

10. Further, in the case **Republic -vs- Turnbull & Others (1976) 3 All ER 549** a case cited and quoted with approval in our Kenyan courts, Lord Widgery, CJ pointed out that:

***“Recognition may be more reliable than identification of a stranger, but even then the witness is purporting to recognise someone whom he knows, the Jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made---All these matters go to the quality of the identification evidence. If the quality is good and remains good and at the close of the accused's case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger.”***

11. **PW1** and **PW2** evidence was that the two appellants together with two others attacked them as they rode home on a bicycle whereof they were thrown off the bicycle. **PW1** testified that they identified two of the attackers as Wambua and Mutiso (1<sup>st</sup> and 2<sup>nd</sup> appellants), that Wambua was his neighbour and Mutiso used to work at a Posho Mill where he used to frequent. He testified that he managed to hit the 1<sup>st</sup> appellant as other men were attacking his wife **PW2**. They were screaming and villagers came to help them when they (appellants fled), and that the villagers identified and recognised him as Musyoka, that he confessed and gave names of the attackers as the Appellants, Nduluma and Mutunga.

12. On cross examination by 1<sup>st</sup> appellant, **PW1** stated that he knew him by appearance and name, and was able to identify him by light from his torch and the assailants torch that were lit during the incident. **PW1** testified that he knew the 2<sup>nd</sup> appellant for well over 8 years as he used to work at the posho mill, and even stated the primary school he used to attend.

13. **PW2**, wife of **PW1** testified that she recognized the men who attacked them as the appellants and two others, that they used metal rods to beat them then snatched her hand basket. It was her testimony that the torchlight they had was sufficient to enabled her recognise them. She testified that one of the attackers **Musyoka** held her by the throat but was arrested and beaten seriously by the villagers during which time he named the rest of the attackers. Her handbag was recovered the next day.

14. The investigating officer testified as **PW3**. His evidence was that upon the complainants report of robbery and injury they recovered a metal rod and metal wires at the scene of the attack, while **PW2's** handbag was recovered the next day, and that one of the attackers **Musyoka** died the next day from injuries inflicted by the villagers.

15. **PW4** testified that at about 9.00p.m. on the 19<sup>th</sup> January 2009 while in her house she heard screams and commotion nearby, and with a torch she saw a man she recognised as the complainant – Kitili – who told her he had been attacked, and also saw **PW2** being strangled, she then raised an alarm and villagers come to their rescue.

While at the scene, **PW4** stated that the attackers named the others and she realised that they were all neighbours and she knew them by their appearances, and also knew their parents.

16. The trial magistrate upon the above evidence came to a finding that the attackers were people well known to the complainants and the villagers, and aided by a torch light, they could recognize them clearly, and therefore positive identification and recognition of the assailants.

He believed the evidence of **PW1**, **PW2** and **PW4** as truthful. He found the prosecution evidence truthful, well co-ordinated and cogent. Nothing was suggested of bad blood between the attackers and the victims.

17. A re-examination of the above evidence brings me to the same conclusion reached by the trial magistrate. **PW1**, **PW2** and **PW6** were able to positively identify the attackers including the appellants who escaped and later traced at Nairobi.

18. The dangerous weapons being metal rods and metal wires were recovered at the scene. There is no doubt that the complainants were beaten and wounded during the attack as evidenced by the P3 forms produced by the police officer **PW6**.

I do not agree with the appellants submissions that they were not properly identified as it was night time and the only source of light was by torches, and the trial court erred in failing to interrogate the intensity of the light.- See **Matianyi -vs- Republic (1986) e KLR 198** where the court held that:

**“---what sort of light, its size and position relative to the suspect are all important matters ---”**

19. I have noted that in their cross examination **PW1** stated that he was able to identify the 1<sup>st</sup> appellant by the light of his torch and the appellants torch that he had as both were lit during the incident. He told 2<sup>nd</sup> appellant he could identify him as he had known him over eight years.

20. I am satisfied that the evidence on identification and recognition, and the circumstances were favourable and free from error. Other than the victims, other neighbours who answered the screams were able to identify and recognise the assailants too.

21. I have considered the appellants defences before the trial magistrate.

The 1<sup>st</sup> appellant's defence was that he knew nothing about the robbery and did not know the complainants before the case. It was his further defence that on the material day of the alleged offence, he was at Nairobi going about his business, and that nothing was recovered from him upon his arrest.

The 2<sup>nd</sup> appellant defence is the same as the 1<sup>st</sup> appellants, that he lived in Nairobi and knew nothing about the offence.

22. Cumulatively, the totality of the evidence points to the appellants as the persons with others, who committed the offence. I find no reason at all that would have made the victims to frame the appellants who hailed from the same neighbourhood. The appellants were recognized by the victims as well as the neighbours who went to rescue them during the attack, and indeed the villagers beat one of the attackers to death.

23. I find no persuasive grounds in my mind as to the innocence of the appellants nor their alibi defence. Based on the foregoing I find that the conviction of the appellants was safe and merited. It is upheld.

24. **On the matter of sentence**, I have been urged that judicial discretion should be exercised in view of the holding by the **Supreme Court of Kenya decision in Petition No.15 of 2015, Francis Karioko Muruatetu & Another (2017) e KLR** where the court rendered that:

***a) the mandatory nature of death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution.***

25. **Article 26 of the Constitution** recognises the sanctity of life and the right of every person to life. However sub-section (3) thereof states:

***“a person shall not be deprived of life intentionally except to the extent authorised by this constitution or other written law.”***

To that extent, the court has discretion to consider any mitigating factors that may persuade it to order any other sentence provided by law. In **HCRA No.13 of 2018 Benjamin Kemboi Kipkore -vs- Republic (2018)e KLR and Wycliff Wangusi Mafura -vs- Republic (2018)e KLR**, as well as **Moses Kinyua Muchai -vs- Republic HCCRA No.142 of 2017**, the learned Judges upon consideration of the mitigating factors substituted the death sentences to imprisonment to various jail terms.

26. I have considered the period the appellants have been in custody since 2009 and the mitigation by each of the appellants. I hereby substitute the death sentence with eight (8) years imprisonment.

The sentence shall run from the 7<sup>th</sup> December 2010 the date of the trial court's judgment.

**Dated and signed at Nakuru this 26<sup>th</sup> Day of July 2018.**

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J.N.MULWA

JUDGE

Delivered at Kiambu this 2<sup>nd</sup> Day of August 2018

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J. NGUGI(PROF.)

JUDGE