REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 143 OF 2017

PETER WAINAINA KABAGE..... APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From an original conviction and sentence in Criminal Case Number 334 of 2011 in the Chief Magistrate's court at Thika)

JUDGMENT

1. The appellant Peter Wainaina Kabage was on the 17th January 2011 charged with the offence of robbery with violence contrary to **Section 296(2) of the Penal Code**. Particulars of the offence were that on the 14th January 2011 around 14.40 hours at Ngumani village in Muranga County while armed with a crude weapon namely *panga* robbed Tabitha Wanjiku Kshs.100/= and at the time of such robbery threatened to use actual violence to the said Tabitha Wanjiku.

He was tried, convicted and sentenced to suffer death as by law provided. This was on the 25th October 2012.

2. The appeal is against both the conviction and sentence upon grounds that the trial magistrate erred in law and fact by convicting the appellant on contradictory uncorroborated and unreliable evidence, that the offence was not proved beyond reasonable doubt, that the evidence of recognition lacked merit and that the language used in the proceedings was not known to the appellant.

3. The prosecution called four witnesses, while the appellant offered no defence.

My duty is to re-examine and re-analyse the prosecution evidence and come up with my own findings and conclusions but being aware that I never saw or heard the witnesses testify – **Republic -vs- George Anyango Anyang & Dennis Oduol Onyoso – Criminal Appeal No. 53 of 2016 (2016) e KLR.**

4. PW1 evidence was that on the 4th January 2011 while at a funeral at the village she went to a bush for a shortcall, and placed her purse on the ground, when two men one with a *panga* and the other with a stick appeared. The man with a *panga* took the purse. It was her evidence that:

> ***"I told him the purse is mine and the other who had a stick told him "do not return the purse --- and they took the purse, opened and saw Kshs,100/=, my phone and documents. I then screamed, neighbours came arrested the one with a panga and the other with a stick ran away--- it is the accused Wainaina who had the panga."***

5.**PW2 John Kiarie** was the chief of the area and was one of those who heard the victim's screams and went to rescue her. He testified that it was around 10.00.a.m. and that upon arrest of the man with a panga by members of the public, the *panga* and Kshs.100/= was recovered.

6. **PW3** was a police officer who arrested the appellant. His evidence was that the offence was committed around 12.45a.m.,and after recovered the money from the appellant.

When placed on his defence, after provisions of **Section 211 of Criminal Procedure Code** were explained to him he opted to keep quiet.

That is the evidence upon which the conviction was grounded on.

7. I have considered the appellants grounds of appeal as well as his submissions.

An offence of robbery with violence under **Section 296(2) Penal Code**, three ingredients must be proved:

1. That the offender was armed with a dangerous weapon.

2. That he was in company with one or more other persons or

3. That immediately before or immediately after the time of the robbery the offender threatened to use actual violence.

8. The evidence of **PW1** the victim shows that the appellant though carrying a *panga* did not threaten to use it on her. Her evidence was that the appellant with the other took the purse from the ground and refused to return it to her. No where is it stated that both men threatened her. The fact of a person carrying a *panga* in itself is not criminal. The intention to use it on a person, and the actualization or actual threat in my view, is what is criminal.

9. I find no basis upon which **PW1** testified that she told nighbours who came to rescue her that the appellant told them that he armed himself to cut human beings who offend him.

None of the witnesses testified to this. It is therefore hearsay.

10. The victim **PW1** in her evidence did not state that she knew the appellant or recognised him and if so in what manner. She only stated it was Wainaina the accused who had the *panga*. Undoubtedly it was during the day though the exact time of the offence is contradicted by PW2, and PW3, both stating different times between 10.00a.m. (PW2), and 12.45 p.m by PW3. The victim **PW1** did not state at what time the said offence was committed, but only that it was during the day.

11. On fair trial, I do not agree that the appellant was not supplied with the witnesses statements. The trial court had made an order to that effect and at the commencement of the hearing, the appellant did not tell the court that he did not have them. I have also noted that the language used in court was English/Kiswahili. During plea taking, the same language was indicated as having been used. The appellant upon the facts being read to him, he pleaded not guilty. The appellant therefore understood the proceedings. **Article 50 of the Constitution** was thus complied with and no violation of any nature arose in the course of the proceedings.

12. It is not clear why the appellant opted not to cross examine any of the prosecution witnesses but it is his right under - **Section 211 of Criminal Procedure Code** so long as that opportunity was accorded to him. The trial court cannot be faulted for the appellants choice and behaviour in court – See **Githaka Malombe -vs- Republic (2015) e KLR.**

13. Although the date of the commission of the offence stated in the charge sheet as 14th January 2011 differs with the date the victim(**PW1**) stated as 4th January 2011 in her evidence in chief, the date 14th January 2011 is corroborated by the court record as to when the appellant was first taken to court, and the Occurrence Book(OB) report date as 14th January 2011. I find it as a clerical error that would not in any way prejudice the appellant. This too goes to the time of the alleged offence. Different actions were taken after the offence was committed and all could not have been done at the same time. **PW2** who with others went to her rescue, spoke of 10.00a.m.

Nothing turns on **PW3** evidence when he spoke of 12.45a.m. obviously it could have been 12.45 p.m. when the appellant was probably taken to the police station after his arrest.

14. The crucial question that I deem fit to interrogate is whether indeed at the time of the commission of the offence the appellant threated to, or used violence on the victim. I have already stated that carrying a *panga* or a stick especially in the village is not an offence *per se.*

The victim **PW1** did not testify that she was threatened with the *panga* before or after the appellant took her purse and the Kshs.100/. None of the prosecution witnesses testified to that.

I am not convinced that the prosecution proved that important ingredient of Robbery with violence to the required standard. It is not consistent with the evidence adduced.

15. It is the duty of the prosecution, and never the accused, to call sufficient evidence to prove an offence. The burden of proof always lies with the prosecution. The accused may decide to keep quiet and say nothing. That in itself cannot be construed as to attach guilt to an accused- **Republic -vs- Silas Magongo Onzere** *alias* **Fredrick Namema (2017) e KLR.**

16. Cumulatively, there is no doubt that the appellant committed the offence of robbery on the complainant and the property robbed being Kshs.100/= recovered. I am not persuaded that any violence was used on the victim before, during or after the robbery.

17. I have come to the conclusion that the cumulative evidence discloses the offence of robbery contrary to **Section 296(1) of the Penal Code,** which is a lesser offence to that under **Section 296(2)** In the case **James Maina Njogu -vs- - Republic- Criminal Appl. No.38 of 2004** (Nyeri) the court citing **Section 179 of the Criminal Procedure Code** stated:

"it is clear from this Section that the power of the court to convict an accused person of an offence lesser than the offence with which the person is charged is only available when the remaining particulars are not proved--- being the particulars necessary to prove the major offence and which particulars are not required to be proved in respect of them in or offence."

18. This was reiterated by the **Court of Appeal in Robert Mutungi Muumbi -vs- Republic Cr. Appeal No. 5 of 2013.**

Accordingly, the element and ingredient that was necessary to prove that violence was used in the commission of the offence the appellant was charged with is lacking. **I shall allow the appeal, quash the conviction and set aside the sentence for the offence under Section**

296(2) and substitute with a conviction for Robbery contrary to Section 296(1) of the Penal Code.

19. In the matter of sentence, I have considered that the property stolen from the victim of Kshs.100/= was recovered and that the appellant has been in custody since the sentence by the trial court was passed, a period close to six years.

Sentencing is at the court's discretion upon consideration of circumstances of each case, including any mitigating factors.

Section 66(1) of the **Interpretation and General Provisions Act** states:

"where in a written law a penalty is prescribed for an offence under that written law, that provision shall, unless a contrary intention appears, mean that the offence shall be punished by a penalty not exceeding the penalty prescribed."

20**. Section 296(1)of the Penal Code** prescribes the penalty for an offence of robbery upon conviction as **"----shall be liable to fourteen years imprisonment.**"- which is the maximum sentence. That means a court has an unfettered discretion to award a lesser sentence.

21. Having taken all the relevant factors into consideration, I proceed to substitute the death sentence under **Section 296(2)** of the Penal Code to a five and half years jail term under **Section 296(1)** of the Penal Code from the trial court's judgment being the 25th October 2012.

22. **In effect, the appellant has served the five and half years jail term.**

He is therefore now set at liberty unless otherwise lawfully held.

It is so ordered.

Dated and Signed at Nakuru this 26th Day of July 2018.

J.N MULWA

JUDGE

Delivered at Kiambu this 2nd of August 2018.

J. NGUGI (PROF.)

JUDGE