REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CRIMINAL APPEAL NOs.2 & 3 OF 2018

(Consolidated)

HILLE ARBIER.....1ST APPELLANT

LOURYEN ARONGOR.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgement of Principal Magistrate Hon. B.M. Ombewa Marsabit Court Criminal Case No.355 of 2017).

JUDGMENT

The appellants were charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the offence are that the appellants, on the 17th July 2017 at around 2200 hours at Sericho sub-location of illeret location within North Horr sub-county of Marsabit county; jointly robbed ABDI ALIM OMAR a mobile phone make Galaxy Samsung valued at Ksh.15000 and at or immediately before the time of such robbery used actual violence against the said ABDI ALIM OMAR.

The trial court convicted the appellants and sentenced them to suffer death. The grounds of appeal for both appeals are the same. The grounds are:-

1. That the appellants pleaded not guilty to the allegation against them during the case.

2. That the learned trial magistrate erred in law and fact in failing to provide the appellants with charge sheet and statement during the trial for a just decision to be reached.

3. That Article 50(2) of the Constitution stipulates that every accused person has the right to affair trial which includes the right:

(i) To be presume innocent until contrary is provided

(ii) To be informed of the charge with sufficient details to answer it and to be represented by counsel

(iii) To have adequate time and facilitates to prepare a defence in view of the above the appellant lack all the right to a fair trial.

4. That the learned trial magistrate erred in law by relying on the complaint allegations without any witness or evidence in convicting the appellant.

5. That the learned magistrate erred in law and fact when he failed to consider that no weapon was recovered from the appellant during arrest and no exhibit was produced in court to that effect.

6. That the appellants are a first offenders and sole bread winners to their family

7. That bearing in mind the circumstance of the case the sentence passed is manifestly excessive.

8. That the learned trial magistrate erred in both law and fact since it was at night 10.00pm the complainant never mentioned the kind of light that was used to identify the accused persons.

9. That the learned magistrate erred in both law and fact when he relied on the complainant's fabricated evidence and with no witnesses being with him during the said incident.

10. That the complainant did not booked the said incident at the Police station of illeret.

11. That he complainant initially complained of assault and later fabricate at the lower court and charge sheet was changed to robbery with violence.

Mr. Kiogora appeared for the appellants. Counsel relied on the grounds of appeal. Counsel maintains that Article 50(2) of the Constitution was violated as the appellants were not accorded an advocate by the state. Substantive injustice was occasioned to them. The conviction is based on identification. The trial Court did not test the evidence of identification at night. The nature, size and position of the security light was not determined. One Sarit who was a crucial witness was not called to testify,. Nothing was recovered.

Mr. Chirchir, learned prosecution Counsel, opposed the appeal. Counsel maintains that the appellants were well known to the complainant. Identification was by way of recognition. There was security lights installed by the County Government. PW1 knew the appellants by their names. The 1st appellant called the complainant and then robbed him. PW1 used to watch video together with the appellants. All crucial witnesses were summoned. The appellants fully participated in the proceedings and their rights were not violated. The victim was injured. Counsel maintains that the Court has the power to review the sentence in view of the Supreme Court decision in **FRANCIS KARIUKO MURUATETU & ANOTHER –v- REPUBLIC, Petition No.15 & 16 of 2015**. Counsel maintains that in view of the value of the stolen phone at Ksh.15,000, the death sentence is unfair.

This is a first appeal. The court has to evaluate the evidence afresh and make its own conclusion. **PW1 ABDI ADAN** was the complainant. On 17.7.2017 at about 10.00pm he was from watching a movie at Sericho village in illeret when the 1st appellant called him. The other appellant joined his colleague and two other co-accused who were put on probation due to their age. It is PW1's evidence that he knew the appellants. They assaulted him using sharp objects and took his Galaxy 2700 phone valued at Ksh15,000. He was left bleeding profusely. He went to one Siad and asked for help. Said took him to one Franco who had a motor cycle. He was taken to illeret Police station and later illeret health center. He was then treated at Lodwar for two days and was referred to St. Luke's hospital in Eldoret. According to PW1, he identified the appellants as there was security lights installed by the county Government. There were six attackers in total but two were not arrested. He lost consciousness after the attack.

PW2 ABDI KARIM JULUBA was asleep on 17.7.2017 when PW1 was taken to his place. He took PW1 to hospital and they were told to report at the Police station first. PW1 told him that he was assaulted by people known to him.

PW3 PAUL ARBOLE LEURYN was working at illeret health center. PW1 was taken to the health center in the morning of 18.7.2017. He had a fresh wound at the occiput region of his head and an open bleeding wound below the chin. He also had bruises on the lower abdomen. PW3 later filled the P3 form. He referred PW1 to Moi Teaching and Referral Hospital.

PW4 P.C. SAMSON NJENGA was stationed at illeret Police station and investigated the case. The case was reported at the station in the morning of 18.7.2017. He referred PW1 to illeret Health center and PW1 was later referred to Lodwar and then to Moi teaching and Referral Hospital. PW1 mentioned six people. They managed to arrest four with the assistance of the village elders.

PW5 PC TIMOTHY MAKAU was stationed at illeret Police station. PW1 was taken to the station while bleeding profusely. On 19.7.2017 when PW1 gained full consciousness, he gave the names of his attackers. PW5 arrested the appellants.

The 1st appellant, Louren Arongor was the 3rd accused before the trial court. He gave sworn evidence. He testified that he got information that someone had been assaulted. He is a fisherman and got information about the attack from fish buyers. He denied committing the offence.

The second appellant, **HILLE ARBIER** was the 4th accused before the trial Court. He gave sworn evidence. It is his evidence that he is a fisherman. He was arrested and told that he had assaulted someone. He had no reason to assault PW1. He denied committing the offence. He had lived with PW1 in harmony.

The issue for determination is whether the appellants violently robbed PW1 of his phone. It is PW1's evidence that he had his phone and was trying to go to a place where he could get network when he was called by the appellants. He knew both appellants and their co-accused. There was security lights where he was robbed. He was also attacked and suffered serious injuries. The evidence does prove that indeed PW1 was robbed. In the process he suffered injuries Mr. Kiogora contends that the conviction is based on identification by one witness. There is nothing wrong with such form of identification. PW2 testified that PW1 told him that he had been attacked by people known to him.

According to PW1, he identified the appellants before he was attacked. He knew them and therefore recognized them. He had no grudge with them as they used to watch video together. That is why he approached them when they called him. The appellant gave out the appellants' names when he gained consciousness. He was able to confirm in court that it is the appellants who assaulted him and robbed him of his phone. The Police did not arrest the wrong people. The evidence establishes that there were six attackers. Two were not arrested. PW1 suffered serious injuries during the robbery. I do find that the state proved its case beyond reasonable doubt. It is the appellants who robbed PW1 on 17.7.2017. The was enough light at the time of the robbery. Security lights are by nature not dim lights. PW1 recognized his attackers. He talked to them before he was attacked. The respective defence evidence does not raise any doubt on the prosecution case.

Counsel for the appellants contend that the appellants' constitutional rights were violated. There is no mandatory requirement that the state must provide advocates to defend anyone charged with the offence of robbery with violence. The appellants know their rights and that is why they retained an advocate to argue their appeal. There was no miscarriage of justice.

The appellants were sentenced to suffer death. The sentence is lawful under section 296(2) of the Penal Code. Mr. Chirchir maintains that the death sentence is unfair given the circumstances of the case. The value of the stolen phone was Ksh.15,000 counsel relies on the case of **FRANCIS KARIUKO MURUATETU & OTHERS (SUPRA)** where the Supreme Court held that the mandatory nature of the death sentence in murder cases is unconstitutional. The supreme Court in that case held as follows:-

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

The appellants in their respective defences indicated that they are the sole bread winners of their families. Their contentions were confirmed by the pre-sentencing report prepared by the Probation officer on 12.2.2018. The 1st appellant is confirmed in the report to be suffering from T.B.

Given the circumstance of the case, I do find that the death sentence is not appropriate. In my view, the **FRANCIS MURUATETU (Supra**) decision can be applied in respect of any other instances where the death sentence is provided as the mandatory sentence. I do hereby set aside the death sentence imposed by the trial Court. However, the appellants should be punished for their criminal acts. Despite the pathetic status of their families, it is clear to me that PW1 suffered serious injuries and this calls for imposing prison sentence upon the appellants.

In the end, the appeal on conviction is disallowed. The death sentence is hereby set aside and is replaced with five (5) years imprisonment. The appellants to serve five years imprisonment from the date of their conviction.

Dated, Signed and Delivered at Marsabit this 27th of September 2018

S. CHITEMBWE

JUDGE