



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 79 OF 2018**

**CORAM: D.S. MAJANJA J.**

**BETWEEN**

**MIREGI LEKUMUSA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence of Hon. M. Maundu, SPM dated 19<sup>th</sup> January 2012 at the Chief Magistrate's Court at Isiolo in Criminal Case No.229 of 2011)*

**JUDGMENT**

1. The appellant, **MIREGI LEKUMUSA**, was charged and convicted on two counts of the offence of robbery with violence contrary to **section 296 (2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars were that on 19<sup>th</sup> April 2011 at Loparanai area in Samburu East District of Rift Valley Province, being armed with a dangerous weapon namely an AK 47 rifle with another not before the court robbed Peter Njuguna cash Kshs. 800/- and a mobile phone Nokia CI worth Kshs. 9000/- and George Wachira of Kshs. 200/- cash.

2. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see ***Okeno v Republic [1972] EA 32***). Before I consider the grounds of appeal, I will set out the facts of the case.

3. The prosecution case was that on the afternoon of 19<sup>th</sup> April 2011, the complainants, Peter Njuguna Njihia (PW 1) and George Wachira (PW 2) were travelling in a Mitsubishi Canter registration number KBB 653Z from Wamba to Isiolo. PW 2 was the driver. Along the way they were confronted by two men. The assailant with a rifle ordered them to alight. He also had a whip. PW 1 recalled that the assailant with a rifle and whip hit him on the left hand while demanding money. PW 1 gave him the Kshs. 800/- he had and a Nokia CI which the assailant took. PW 2 also surrendered Kshs. 200/- to him. When the assailants heard a KPLC vehicle coming, they ordered PW 1 and PW 2 to board their vehicle as the KPLC lorry passed. PW 1 recalled that when he looked at the side mirror, he saw one of the assailant's being hit by the that lorry. As the assailant's left, they drove off and reported the incident at Wamba Police Station.

4. PW 1 further testified that he received a call from Wamba Police Station informing him that a suspect had been arrested and a mobile phone recovered. When he went to the police station, he identified the Nokia phone as his. As he told the police he could identify the assailants, he attended an identification parade where he identified the appellant. PW 2 also attended the identification parade and identified the appellant as the assailant.

5. William Gichungi Muthomi (PW 3) and Antony Waweru Mwai (PW 4) were the passenger and driver of the KPLC lorry registration number KAH 634H that PW 1 and PW 2 had seen on the material day. PW 3 recalled that when he was near Wamba he saw a stationary lorry and when he passed it, he saw a person emerge from behind the lorry with a rifle pointed at him. The lorry slowed down but did not stop. He felt the vehicle had hit something but drove off. PW 4 recalled that as they approached a stationary lorry, he saw two people emerge from the back, one of whom was armed with a gun. He had dyed red hair and a red sheet. The other person had a jungle jacket. When the person with the gun entered the road, he recalled that PW 4 decided to accelerate the vehicle causing it to hit the tip of the gun. The impact of the lorry threw the assailant on the side of the road. PW 3 and PW 4 proceeded to report the incident at Wamba Police Station.

6. The Chief of Koiting Location, Kitosi Lembaga (PW 5) testified that on 19<sup>th</sup> April 2011, he was informed by police officers at Wamba that a vehicle had been attacked within his jurisdiction and that a KPLC lorry had hit one of the robbers on the right leg. On the following day, he went to the scene of the incident with Justus Lalambaa (PW 6). They started tracking some footprints which appeared to be two people wearing *akala* tire shoes. They followed the tracks until they found the appellant in the bushes with his foot massively swollen. PW 5 radio-called police officers who came immediately.

7. PC Nicholas Mburugu (PW 7) and the investigating officer, Sergeant Julius Kathurima (PW 10) proceeded to the scene where they met PW 5. They arrested the appellant who had a swollen right ankle and a slight cut on his head. PW 10 searched the appellant and recovered a Nokia CI from the right side of his pocket. PW 7 arrested the appellant and took him to Wamba District Hospital where he was examined and treated by Frimin Kosgei Cherop (PW 9) who produced the P3 medical report form. PW 9 confirmed that the appellant had a swelling on the right eye and the right side aspect of the face and his right foot had a swelling and which was one day old.

8. Once the appellant was in custody, an identification parade was conducted by Chief Inspector Mark Bundi Kwaria (PW 8) where the appellant was identified by PW 1 and PW 2 as the assailant. PW 10, the investigating officer, gave an account of the investigation after PW 1 and PW 2 made a report of the incident.

9. In his unsworn statement, the appellant denied the charges. He testified that on 20<sup>th</sup> April 2011 at about 8.00am, he was stopped by many people as he was watering his animals at a dam. He was hand cuffed against a motor vehicle and interrogated over an incident he did not understand. He stated that his leg got dislocated when he was cuffed against the vehicle.

10. After hearing the evidence, I have outlined, the trial magistrate was satisfied that the prosecution had proved both counts beyond reasonable doubt. The appellant relied on the amended supplementary grounds of appeal and written submissions to support his appeal. The main ground was that the trial magistrate erred in law and fact in failing to note that there was no positive identification at the scene of the incident as the robbers had completely covered their faces. He contended that in the circumstances, the identification parade was not necessary since none of the witnesses saw their faces. He complained that the prosecution evidence was contradictory and uncorroborated and that he was not found with the offensive weapon. He submitted that there was no evidence to connect him with the offence and his defence was not considered.

11. Counsel for the respondent submitted that the prosecution proved all the elements of the robbery and that the appellant was positively identified by PW 1 and PW 2 at the identification parade following clear identification at the scene where they interacted with the appellant for a sufficient period of time. The identification, counsel submitted, was corroborated by application of the doctrine of recent possession where the appellant was found with PW 1's phone near the scene of the incident. He urged the court to dismiss the appeal.

12. The offence of robbery with violence under **section 296(2)** of the **Penal Code** is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see ***Dima Denge Dima & Others v Republic* NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR**, ***Oluoch v Republic* [1985] KLR 549** and ***Ganzi & 2 Others v Republic* [2005] 1 KLR 52**).

13. From the facts I have set out above, the fact of robbery was proved by the testimony of PW 1 and PW 2 who gave a detailed account of how their vehicle was waylaid by two men one of whom had a firearm. They were threatened with violence and in fact PW 1 told the court that he was hit with a whip on the left hand. Both PW 1 and PW 2 confirmed that the assailant took their money and PW 1's mobile phone. The facts satisfy that each of the limbs of **section 296(2)** of the **Penal Code**. One of the assailants had a firearm, they were two persons and they threatened to use violence.

14. The substantial issue in this case is whether the appellant was identified as the person who attacked PW 1 and PW 2. The incident took place in broad daylight at about 4.00pm. As the assailants were strangers, the cautionary statement of the Court of Appeal in ***Wamunga v Republic* [1989] KLR 424** is still applicable to the circumstances of this case:

***[W]here 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 be the basis of a conviction.***

15. Both PW 1 and PW 2 testified that the assailants were disguised as they had covered themselves. They described the appellant as wearing a red jumper and a kikoi. They interacted for a sufficient period of time when the vehicle was being ransacked and demands being made on them to give them money. Hence PW 1 told the court that he identified the appellant by asking him to say something in Samburu and was thus able to point him out at the identification parade conducted by PW 8. PW 2 stated that he asked each member of the identification parade to open their mouths and talk and he was able to identify the appellant by his voice.

16. I have considered testimony of PW 8 and the identification parade forms. I am satisfied that the rules for carrying out an identification parade were scrupulously adhered to. In respect of each witness, he paraded 8 Samburu morans who resembled the appellant. The appellant voluntarily accepted to participate in the parade and was satisfied in the manner in which the parade was carried out. PW 8 testified that both PW 1 and PW 2 asked each member of the identification parade to speak Samburu and each of them identified the appellant based on voice recognition. I am therefore satisfied that based on the time of interaction, PW 1 and PW 2 were able to recognise the appellant based on voice recognition at the identification parade.

17. There is also other evidence implicating the appellant on the basis of the doctrine of recent possession. In ***Arum v Republic* [2006] 1 KLR 233**, the Court of Appeal set out conditions that must exist before a court can rely on the doctrine of recent possession as a basis of conviction in a criminal case. These include proof that:

- (a) The property was found with the suspect;
- (b) The property was positively the property of the complainant;
- (c) The property was stolen from the complainant;

(d) The property was recently stolen from the complainant.

The proof as to time will depend on the easiness with which the stolen property can move from one person to another.

18. In this case PW 5 and PW 6 found the appellant near the scene a day after the incident and were present when police officers, PW 8 and PW 10, came to the scene. PW 10 recovered a Nokia C1 from the appellant's right pocket. It is the phone that PW 1 had reported stolen and he identified it as his when it was shown to him. Although the appellant did not for example bring a receipt to prove its purchase, when he switched on the phone during the hearing the court was able to see the contacts he had saved. In any case there was no reason for PW 1 to lie and he reported the loss immediately and the appellant did not lay any claim to the phone. On the basis of this evidence, I find that the prosecution satisfied all the conditions for the application of the doctrine of recent possession.

19. Apart from this evidence I have outlined, other evidence implicates the appellant. The testimony of PW 3 and PW 4 was that one of the assailants was hit by the vehicle. The fact the appellant was hit by a vehicle on his right foot was confirmed by PW 5 and PW 6 when they found the appellant near the scene of the incident. The injury was confirmed by PW 9 whom he told that he was injured when a car hit him. Further, PW 1, PW 2, PW 3 and PW 4 identified the red sweater the appellant was wearing when he attacked PW 1 and PW 2 and was seen by PW 3 and PW 4 wearing the same sweater that he was wearing when PW 5 and PW 6 saw him.

20. From the totality of the evidence, I am satisfied that the identification of the appellant by PW 1 and PW 2 was positive and free from the possibility of error. It was confirmed by the application of the doctrine of recent possession as the appellant was found with the Nokia C1 phone belonging to PW 1. In addition, the fact that he was injured was confirmed by other witnesses and he was put within the scene of the incident by PW 5 and PW 6. The sweater he was wearing on the material day he was identified by PW 1, PW 2, PW 3 and PW 4. I therefore affirm the conviction.

21. As regards the sentence, the Supreme Court decision in *Francis Karioko Muruatetu & Another v Republic* SCK Pet. No. 15 OF 2015 [2017] eKLR declared the mandatory death sentence for the offence of murder unconstitutional. The Court of Appeal in *William Okungu Kittiny v Republic* KSM CA Criminal Appeal No. 56 of 2013 [2018] eKLR applied the *Muruatetu* decision and declared the death sentence mandated by section 296(2) of the *Penal Code* unconstitutional. I therefore set aside the sentence and call upon the appellant to make his mitigation.

**DATED and DELIVERED at MERU this 22<sup>nd</sup> day of October 2018.**

**D.S. MAJANJA**

**JUDGE**

**RULING ON SENTENCE**

The offence herein was committed with the use of a firearm. Having considered that the appellant was a first offender and remorseful. I sentence the appellant, **MIREGI LEKUMUISA** to **fifteen (15) years** imprisonment from the date of conviction before the trial court, that is, **20<sup>th</sup> January 2012**.

**DATED and DELIVERED at MERU this 22<sup>nd</sup> day of October 2018.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Mr Kiarie, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.