



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 120 'A' OF 2018

PROTUS MOMANYI KARIUKI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in Criminal Case No. 488 of 2012 in the Senior Principal Magistrate's Court at Limuru

J U D G M E N T

1. Protus Momanyi Kariuki, the Appellant herein was initially charged with five others with the offence of Robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of the charge state that on 27th May, 2012 at **Redhill Village Kiambu** the Accused persons jointly, while armed with crude weapons namely a hammer and two jack knives, robbed **James Nyoro Kibutiri** of **cash KShs. 45,000/=** and at or immediately before or after the time of the robbery wounded James Nyoro Kibutiri.

2. The trial commenced after a long hiatus, during which some of the original Accused persons absconded. Such that, on 3rd December, 2014 the DPP substituted a charge sheet in respect of the remaining four Accused persons. The charge and particulars remained the same. Even so, the prosecution confirmed to the court on 2nd March 2016 that the first Accused in the new charge sheet had died, and withdrew the charges against him. Leaving the 2nd, 3rd and 4th Accused who were **Joseph Mwaura Macharia**, **Protus Momanyi Kariuki** (Appellant herein) and **Samuel Ngugi Karuga** the 2nd to 4th Accused respectively. At the conclusion of the trial the three were found guilty and convicted on the charge. They were subsequently sentenced to death.

3. In order to obviate future confusion, I will refer to the Appellant herein as **Protus**, in this judgment. He was the 3rd Accused in the lower court under the new charge sheet. The substance of the grounds of appeal raised by **Protus** in the so-called Memorandum of Appeal filed on 10th July 2018, is that the conviction was not based on credible or sound evidence. **Protus** also filed supplementary grounds on the eve of the hearing of his appeal, restating this challenge and also attacking the sentence of death imposed on him.

4. **Protus** filed written submissions in support of the appeal. At the hearing of the appeal on 10th July, 2018 **Protus** sought to rely on the said submissions. He did not dispute that the robbery in question occurred. His contention is that the Complainant admitted in his evidence that he did not identify any of the robbers thus there was no evidence of his involvement in the robbery. **Protus** submits that the evidence adduced through police officers required independent corroboration to support the finding of the trial court that he was caught at the scene, and that he participated in the robbery.

5. The Director of Public Prosecutions (DPP) opposed the appeal. Through Miss Abong'o the DPP submitted that the prosecution evidence established that **Protus** was one of the six men found in the home of the Complainant and that in the circumstances of arrest, the question of mistaken identity did not arise. Miss Abong'o submitted, reiterating evidence by prosecution witnesses, that all the ingredients of the offence were proved.

6. The court has considered the submissions raised on this appeal. The duty of the first appellate court was succinctly stated in the timeless decision of the Court of Appeal for East Africa in **Pandya v R [1957] EA 336:-**

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

7. Briefly, the prosecution case in the lower court was as follows. The Complainant **James Nyoro Kibutiri (PW1)** was a resident of Redhill. He was about 90 years old and lived with his equally aged wife Joyce Nyariara Nyoro in their Maisonette home at Kagera Estate, Tigoni at the material period. He had employed a worker, one **Harun** and also kept several dogs in the compound. On the morning of 27th May, 2012, **PW1** was in the kitchen with his wife and a grandchild named after her. At about 6.00 a.m. **Harun** knocked on the door ostensibly to collect water for use in milking cows. **PW1** was apprehensive because his dogs had been barking incessantly at the time. He instructed **Harun** to go and investigate the cause, declining to open as yet. **Harun** returned to the door and assured **PW1** that all was well.

8. **PW1** the opened the door and **Harun** entered. Within minutes, six young men forced their way into the house. Grabbing **PW1** by the neck they demanded money. They were armed with crude weapons including ropes and knives. Hoping to buy time, **PW1** immediately directed them to his bedroom upstairs where, he loudly declared, he had KShs.45,000/= in his coat. Some of the men followed **PW1** upstairs to his bedroom while two remained with his wife and grandchild. Having taken the cash, the men assaulted the Complainant, occasioning him injuries, before stripping him naked and trussing up all his limbs. His wife suffered a similar fate and sustained similar injuries.

9. It appears that someone quickly tipped police at Kantaria Police Post. PC Vincent Makori (**PW2**), CPL Mutisya and PC Mogere were the first to respond at about 6.40 a.m. They forced the gate open and upon assessing the situation, called for reinforcement. Police officers from Tigoni Police Station, including PC Khalid Shukri (**PW5**) under the command of CIP Ibrahim Omar (**PW3**), arrived at the scene and found the first squad firing in the air. **PW3** upon learning that the robbers were still inside the house shouted for the robbers to surrender. The six robbers, who had scampered upon hearing gun shots came out of the rooms of the house to the verandah where **PW3** stood. They lay on the verandah floor. Included among them was **Protus**.

10. A search was mounted in the house but no other persons were found. The knives and a sum of KShs.5,000/= hidden in the ceiling was retrieved with the assistance of one of the suspects. **PW1** was freed and in the company of his injured wife taken to hospital, where he was treated by James Kabue (**PW4**) who also completed the respective P3 forms. The six men were placed under arrest and after interrogation, escorted to the Tigoni Police Station. **Harun** disappeared on the material date.

11. Upon being placed on his defence, **Protus** elected to make a sworn statement. To the following effect. That he was a resident of Githiga and had until May 2012 been working as a casual at KARI, Kabuku. At the end of the assignment he learned from his father of an ongoing military recruitment exercise. His father introduced him to his ex-military friend who advised them to inform the village elder of **Protus'** intentions to join the army.

12. The village elder recommended that he performs a sacrificial ritual to cement his chances in the recruitment. The ritual which included the sacrifice of a goat, was held in a thicket close to **Protus'** home. In the course of the ritual **Protus** was tattooed on the chest with a razor blade. He apparently lost his senses and only came to in February 2013 when he was informed that he had committed a crime at Kabuku and been released on bond. He had no recollection of the alleged crime.

13. There is no dispute that a gang of men who were armed with knives and crude weapons forced their way into **PW1's** home on the morning of 27th May 2012. They demanded money and assaulted the Complainant and his wife. A sum of KShs.45,000/= or thereabout was taken from the Complainant by the robbers, and only a part of it was later retrieved from the ceiling by police.

14. This appeal turns on the sole question of the participation of **Protus** in the said robbery. It is true as **Protus** has pointed out, that **PW1** did not identify any particular person in his evidence, admitting that he could not recall the faces of the robbers. It is the evidence of the police officers, that is **PW 2, PW3** and **5** that **Protus** was one of the persons found inside **PW1's** house when police arrived upon receiving a distress call. **PW2, 3** and **5** described the scene at the time of their arrival and the unfolding events. These events are corroborated fully by **PW1**. **PW1** stated that as the robbers assaulted and trussed him, he heard gun shots outside, and that the robbers then scampered.

15. **PW3** described the scene upon his arrival at the house as follows:

“We got there (PW1's) and found G 45 Security. There were also officers from Kantaria Police Post. The police had surrounded the house and were shooting. I was told the robbers and house owner were inside. I got out my gun and shouted from the verandah to the suspects to either surrender or be shot. The Accused persons then got out of the rooms one by one and I made them lie down... six suspects had came out... four of them are before the court in the dock.”

16. During cross-examination by the witness reiterated this version and stated in particular reference to **Protus** that:

“I found police had surrounded the hou. We entered the house to rescue Mr. Nyoro. I asked you to come out. You did. I saw you. I could not record all the descriptions in my statement. I recorded your names and took your finger prints. There was no possibility of a mix-up of the suspects... it is you I arrested and arraigned in court.”

17. **PW5** when cross-examined by **Protus** stated that he interrogated him and recognized him as one of the robbers arrested at the time. As for **PW2**, when questioned by **Protus** he replied:

“We found the thieves inside the house. I saw them. I identified them. You were among the six (6) men we found in Mr. Nyoro's house. You surrendered. I did not describe the appearance of the six men in my statement.”

18. The trial magistrate observed in his judgment that:

“All three officers (PW2, 3 and 5) were very consistent in their respective testimonies under oath and having observed their demeanors I find no reason to doubt them. The incident occurred early in the morning and the Accused persons, who from

the evidence acted in concert, were taken straight from the house to the police station. Apart from PW1 and his family, no one else was in the house which had been secured by police officers. I therefore do not believe that the Accused person's identities were mistaken."

19. Of course **Harun** had been at the home and was possibly the one who was used to persuade **PW1** to open the door to give the robbers access to the house. Nonetheless, there were no intervening lapses in the entire transaction and in the end, the robbers were subdued while still inside **PW1**'s house. The transaction chain described by **PW1, PW2, 3** and **5** commenced with the entry of the robbers into **PW1**'s house and continued unbroken until the robbers were arrested. There was consistent and credible evidence that the robbers were found inside the house and forced to surrender to the police officers who were led by **PW3**.

20. The assertion by **Protus** that the testimony of the police officers required independent corroboration has no basis in law. But in any event, so far as the presence, subduing and subsequent arrest of the robbers inside the house is concerned, **PW1** corroborated the police version of events. His evidence was not less useful in that regard merely because he stated that he could not identify the robbers.

21. The trial court considered the defence offered by **Protus** and dismissed it on grounds *inter alia* that the alleged insanity or spell on the part of **Protus** was never raised or noted during the trial. This indeed was a most remarkable defence by an Accused who had vigorously cross-examined prosecution witnesses and on all accounts, presented as a sane and lucid individual. In any event, the defence was completely displaced by the evidence tendered by the prosecution.

22. For my part, having reviewed the prosecution evidence, I find that all the elements of the offence were established and further that **Protus** and his accomplices were caught in *flagrante delicto* and arrested by the police officers. The Lower court's findings were based on concrete and credible evidence and the conviction is safe. In the circumstances, I reject the appeal with regard to the conviction.

23. So far as the sentence of death is concerned, the court does, in terms of the decision of the Court of Appeal in **William Okungu Kittiny v R [2018] e KLR** set aside the death sentence imposed and direct that **Protus** be produced, alongside his co-Accused, whose appeals were determined in similar manner, before the Chief Magistrate Limuru on 25th October 2018 for a fresh hearing in respect of sentence and for appropriate orders. Because the decisions in the appeals in respect of the said co-Accused were delivered in June 2018, an order will issue in the respective appeal files for such production.

DELIVERED AND SIGNED AT KIAMBU THIS 19TH DAY OF OCTOBER, 2018

C. MEOLI

JUDGE

In the presence of:

The Appellant

Ms Mwenesi for the DPP