REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 53 OF 2014

LUCY WANJIRU NJOKI .....APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

(From the original conviction and sentence in criminal case No.485 of 2013 of the Senior Principal Magistrate's Court at Kigumo by Hon. D.O Orimba – Senior Principal Magistrate)

JUDGMENT

The appellant, **LUCY WANJIRU NJOKI**, was charged with the offence of robbery contrary to section 296 (2) of the Penal Code.

The particulars of the offence were that on 15th May 2013 at Maragua Ridge location, Murang'a within Murang'a County, jointly with others not before court, while armed with clubs robbed **DANIEL NG'ANG'A WANJIRU** of a motor cycle Registration number KMCT 733D and at or immediately before or immediately after the time of the said robbery used actual violence to the said **DANIEL NG'ANG'A WANJIRU.**

She was sentenced to Life imprisonment.

She now appeals against both conviction and sentence.

The appellant was in person. She raised six grounds of appeal which can be summarized as follows:

1. That the learned magistrate erred in law and in fact by failing to appreciate that the appellant's fundamental rights were breached.

2. That the learned magistrate erred in law and in fact by failing to consider that the purported identification could have been mistaken.

3. That the learned magistrate erred in law and in fact in convicting the appellant without sufficient evidence to support the charge.

The state opposed the appeal through M/s. Joyce Gacheru, the learned counsel who also applied for the enhancement of the sentence after submitting that the sentence meted out was illegal.

Briefly the facts of the prosecution case are as follows:

When the complainant reached at a place called Pumwati at about 8 pm, he was accosted by five men and one lady who robbed him of his motor cycle. He raised an alarm and with the assistance of the members of the public they arrested the appellant as she was fleeing.

In her defence the appellant denied any involvement in the offence.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO Vs. REPUBLIC 1972 EA 32.**

I wish to start addressing the easiest issue. Section 296 (2) of the Penal Code provide as follows:

> **If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.[emphasis mine]**

The learned trial magistrate having found the appellant guilty of the offence under section 296(2) of the Penal Code had no option but to mete out the only prescribed sentence. The sentence he meted out was therefore illegal.

It is not sufficient for the appellant to make a blanket claim of her fundamental rights having been breached. It is incumbent upon any such appellant to clearly show which of the many rights has been breached so as to enable the court to interrogate the proceedings to establish the true position. The many in which the appellant has complained leaves me with nothing to interrogate. In **DAVID NJOROGE MACHARIA Vs. REPUBLIC [2011] eKLR** on the issue of legal representation in capital offences it was held:

> **We are of the considered view that in addition to situations where "substantial injustice would otherwise result", persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re-trial where no such legal representation was provided. The reasons are that, firstly, the provisions of the new Constitution will not apply retroactively, and secondly every case must be decided on its own merit to determine if there was serious prejudice occasioned by reason of such omission.**

The complainant's evidence is at variance on the number of the robbers that attacked him. In court he testified of having been accosted by five men and a lady. However, **AP Leah Wanjiku Waithera (PW3)** testified that he reported that he was robbed by two ladies and a man. Can the complainant be trusted to tell the truth if the information attributed to him is at variance with his own testimony in court? the court of appeal in the case of **NDUNGU KIMANYI V REPUBLIC (1979) KLR 282** held:-

> **"The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence."**

From the time of the robbery to the time the appellant was arrested the chain of events was definitely broken. The complainant said after he was robbed, the robbers fled with the motor cycle. This was at night and he cannot claim not to have lost sight of the appellant. He does not testify as to what made him conclude that the appellant was one of the robbers after her arrest. The only other witness who testified that the appellant was with the robbers was **APC Peter Koigi (PW6).** He testified that the robbers on seeing the crowd disappeared into a bush. When they pursued is when they arrested the appellant. In her

defence the appellant said she had been send to buy paraffin. She heard people passing by and when she went to check she was arrested by the mob who started beating her.

The learned trial magistrate made the following observation:

> **"I believe the lady the complainant saw among the thugs was the accused. She is unable to explain to court why even the said grandmother never bothered to follow her at the police station or testify before the court."**

This was a wrong approach. A believe however strong cannot replace evidence. In the case of **KIARIE Vs. REPUBLIC (1984)KLR 739** it was held:

> "**An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable."**

In the instant case the learned trial magistrate shifted the burden of proof to the appellant. The defence she raised cannot be said to be unreasonable.

From the foregoing analysis of the evidence on record, I find that the conviction was unsafe. The same is quashed and the sentence is set aside. The appellant is therefore set at liberty unless if otherwise lawfully held.

DATED at MURANG'A this 19th day of August 2016

KIARIE WAWERU KIARIE

JUDGE