REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO.18 OF 2014

JOSHUA KIMATHI MITHERU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case

No. 850 of 2012 of the Chief Magistrate's Court at Meru

by Hon. D.W Mburu – Ag. Principal Magistrate)

JUDGMENT

The appellant, **JOSHUA KIMATHI MITHERU**, was Charged with an offence of robbery with violence contrary to section 296 (2) of the penal code.

The particulars of the offence were that on 6th April 2011 at Kianjai Location in Tigania West District of Meru County while armed with a dagger robbed **ANTHONY MWENDA** of his bicycle and mobile phone all valued at Kshs. 8000 and cash Kshs. 70/= and immediately before the time of such robbery injured the said **ANTHONY MWENDA**.

The appellant was found guilty of the offence and sentenced to death. He now appeals against both conviction and sentence.

The appellant was in person and raised raised the following five grounds of appeal:

1. That the learned trial magistrate erred in law and in facts in flouting the provisions of section 150 of the Criminal Procedure Code.

2.That the learned trial magistrate erred in law and in facts in flouting the provisions of article 26(1) of the Constitution.

3. That the learned trial magistrate erred in law and in facts in flouting the provisions of article 49 (1) (f) and (g) of the Constitution.

4. That the learned magistrate erred in law and in fact by failing to make a finding that the alleged identification and or recognition was not free from possibility of error.

5. That the learned magistrate erred in law and in facts by relying on conflicting evidence.

The state opposed the appeal through Mr. Odhiambo, the learned counsel.

The facts of the case were briefly as follows:

At about 2 P.M the complainant was riding his bicycle from Machaku. He was with Peter Mutabiri as his pillion passenger. They met with the appellant who asked him for money. The appellant then proceeded to beat him before robbing him of his bicycle, mobile phone and some money.

In his defence the appellant pleaded an alibi. He 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 I 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 VRS. REPUBLIC 1972 EA 32.**

Section 150 of the Criminal Procedure Code is on the power of the court to summon witnesses. It provides as follows:

A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:

Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either

party may be prejudiced by the calling of that person as a witness.

This is a discretionary option by the court where ends of justice requires the exercise of the same. In the instant case this need did not arise.

Although the appellant does not state in what way he complains article 26 of the Constitution was breached, the most likely reason is due to the sentence that was meted out. The article at sub article 3 provides as follows:

(3) A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law.

The constitution of Kenya has not outlawed death sentence and it recognizes that the life of an individual may be deprived pursuant to the written law. In the instant case the Penal Code provides for death penalty where an accused has been found guilty of the offence of robbery contrary to section 296 (2). The learned trial magistrate did not therefore breach the said article as claimed by the appellant.

It is now settled law that when the rights of an accused person have been breached by the police either during the investigation of the case or during his arrest, his redress can only be through a civil case and cannot act as a sanitizer of the alleged offence and cannot be a basis for an acquittal. This was settled by the court of appeal while addressing such a breach under the old constitution. These rights are the ones envisaged under article 49(1)(f)&(g). This was in the case of **Julius Kamau Mbugua v Republic [2010] eKLR.** The learned judges stated:

"In our view, it is not the duty of a trial court or an appellate court dealing with an appeal from a

trial court to go beyond the scope of the criminal trial and adjudicate on the violations of the right to personal liberty which happened before the criminal court assumed jurisdiction over the accused.

However, the trial court can take cognizance of such pre-charge violation of person liberty, if the violation is linked, to or affects the criminal process. As an illustration, where the prolonged detention of a suspect in police custody before being charged affects the fairness of the ensuing trial e.g. where an accused has suffered trial – related prejudice as a result of death of an important defence witness in the meantime, or the witness has lost memory, in such cases, the trial court could give the appropriate protection – like an acquittal. Otherwise the breach of a right to personal liberty of a suspect by police *per se* is merely a breach of a civil right, though constitutional in nature, which is beyond the statutory duty of a criminal court and which is by Section 72 (6) expressly compensatable by damages."

If the appellant is aggrieved that his rights were violated, he can seek redress in a civil court.

The evidence on record indicate that the complained of incident occurred at about 2 P.M. The conditions for identification were favourable. This was a case of recognition of people who knew each other for a long time.

Both the complainant and Peter Mutabari(PW3) narrated how the appellant stopped them and stabbed the complainant before robbing him. The only discrepancy I note in their evidence of these two witnesses is that Peter Mutabari testified that the appellant did not talk to the complainant before the robbery. The complainant however said that the appellant demanded money from him. In my view this is a minor discrepancy that is not material.

When Lucy Kaburu (PW6) responded to the alarm raised by Peter Mutabari she saw the appellant running away with a bicycle with members of public on hot pursuit. The fact that she had earlier cohabited with the complainant does not disqualify her as a witness.

The medical evidence adduced by Geoffrey Muthomi (PW4) confirmed that the complainant had stab wounds.

The appellant contended that on 6th April 2011 he was working at Mikinduri on a road that was under construction. He called David Mwiti (DW2) with whom he said he was working. This witness however said they did not work together in April 2011 in November 2011. The learned trial magistrate was therefore right in dismissing his defence.

The evidence on record was overwhelming against the appellant. The offence of robbery under section 296 (2) of the Penal code was proved to the required standards.

From the foregoing analysis of the evidence on record, I find that the appeal of the appellant lacks merit. The same is dismissed.

DATED at Meru this 19th day of December, 2016

KIARIE WAWERU KIARIE

JUDGE