REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

MISC CRIMINAL APPLICATION NO 25 OF 2018

(CORAM: F. M. GIKONYO J.)

DANIEL MUNGAI KURIA.....APPELLANT

-VERSUS-

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

Appeal against conviction and sentence imposed by Hon. S.M. GITHINJI

in NAROK CMCCRC NO 537 OF 2007

JUDGMENT

[1] This appeal is against conviction and death sentence imposed by Hon. S.M. GITHINJI for robbery with violence contrary to section 296(2) of the Penal Code in NRK CMCCRC NO 537 OF 2007.

[2] The appeal raises 5 grounds which are essentially complaints:

i) That identification was by a single witness whose evidence was not corroborated;

ii) That conviction was based on suspicion, biased evidence by a former lover;

iii) That the trial court did not carry out a fair and objective analysis of his defence; and

iv) That the sentence was harsh and excessive.

Duty of court

[3] As first appellate court; I should evaluate the evidence and come to own conclusions except I am reminded that I neither saw nor heard the witnesses. See**: R vs. OKENO [1977] EALR 32**. In this exercise, the court is not beholden or compelled to adopt any particular style. What must be avoided however is mere rehashing of evidence as was recorded or trying to look for a point or two which may or may not support the finding of the trial court. Of greater concern should be to employ judicious emphasis and alertness, keep your eye on the law and have an ear for subtleties of evidence adduced so as not to miss the grace and power of the testimony of witnesses and the applicable law. Such is a style that insists on simplicity in writing and keeping as close as possible to the words used in the testimony recorded. Ultimately, little difficulty or none at all will be experienced in making the overall impression of the evidence, facts and the law applicable in sheer clarity and directness. I shall so proceed.

Elements of crime

[4] The offence of robbery is defined in section 295 as follows: -

> ***295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.***

[5] And according to section 296(6) of CPC: -

(2) 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.

[7] The evidence of PW1 was that, on 4th day of February 2007 at 1.00am, three people broke down her door using a huge stone, entered into the house, forced her out of the bed and stole Kshs. 43,000. They took Kshs, 40,000 from under the mattress and Kshs. 3,000 from the cupboard which was in the room. The robbers were armed with pangas and axe. One of them hit her with the flat side of the panga. The question is; whether the appellant was amongst the three persons who robbed PW1.

[8] The appellant argues that, although identification of him was of recognition, the evidence by PW1 was not free from possibilities of error as it was in very difficult circumstances. According to him, there was no light in the house which made it almost impossible to to identify the assailants using their torches. He submitted that the evidence of identification by a single witness need to be treated with caution. He cited the case of MAITANY vs. REPUBLIC (1986) KLR 196. He urged that PW1 must have been scared at the time making it difficult for her to do a clear identification. He says that all these factors were not considered by the trial court.

[8] The prosecution argued that PW1 properly identified the appellant under the torch light shone on him by mistake by one of the robbers. And that, this is a person she knew well. They submitted that this was corroborated by the evidence of PW2 who enquired from PW1 whether she recognized any of the robbers and she said to him that the appellant was one of them.

[9] What does the evidence portend?

[10] PW1 told the trial court that the robbers forced her out of the bed, one of them hit her on the right thigh, and they stole money which was in the mattress (Kshs. 40,000) and the cupboard (Kshs. 3,000). According to PW1, the appellant was standing near the cupboard when one of the robbers shone torch light on his face albeit by misstate; and she was able to see and recognize Kuria- the appellant herein. She stated that Kuria was wearing a red jacket at the time. She went further to state that; at the time the three persons were leaving, she was tempted to call Kuria by his name and ask him why he had treated her that way. But, she feared and did not ask.

[9] I am aware that the court must exercise caution when basing conviction on evidence of a single identifying witness. Similarly, the court must consider the circumstances in which the identification was done so as to eliminate any possibility of mistaken identity. According to PW1, she identified the appellant under torch light shone on the appellant by one of the attackers albeit by mistake. PW1 categorically stated that she saw Kuria, the appellant- a person she knew well for he was living at mama Kirerenge's home. She also knew him as a person who was doing casual work in the area. The evidence depicts a person who was clear in her mind that the person she saw on the fateful night was Kuria, the appellant herein. The evidence of PW2 is relevant here and augments the evidence by PW1; when he stated that when PW1 unlocked the door for him, he asked her whether she recognized any of the attackers, and PW1 told him that Kuria was one of the people who robbed her. I see more; PW5, the IO confirmed that PW1 reported that she had recognized one of the suspects and that he was wearing a red jacket. This is quite assuring that PW1 identified Kuria- the appellant as one of the persons who robbed her. From the record, I see not any delusion or mistaken identity on her part.

[11] Evidence by PW1 was that these people were armed with pangas and axe. The appellant was armed with a panga and an axe which she described had new handle.

[12] The ground that the conviction was based on biased evidence by an ex-lover does not hold sway as the said evidence only related to; (1) the second count for which he was acquitted; and (2) the date when the appellant was arrested; but not related to his identification for purposes of robbery with violence against PW1.

[13] His defence was merely a denial. The defence is displaced by the evidence adduced by the prosecution witnesses. Accordingly, I find that the prosecution has proved beyond reasonable doubt that the appellant in company with others and armed with dangerous weapons, robbed the complainant of Kshs. 43,000. Immediately before the robbery, they used personal violence upon PW1. I find him guilty of robbery with violence contrary to section 296(2) of the Penal Code. His appeal on conviction fails.

Of sentence

[12] Death was only available sentence to the trial court at the time. The law now is as per the Supreme Court decision in Muruatetu case that a law which prescribes a mandatory sentence offends the Constitution for taking away the discretion of the court to mete out appropriate sentence. Accordingly, I set aside the death penalty and sentence him to 25 years imprisonment from the date of his original conviction. It is so ordered. Right of appeal explained.

Dated, signed and delivered at Narok through Microsoft Teams Online Application this 3rd day of February, 2021

F. GIKONYO

JUDGE

In the presence of:

1. Mr. Kasaso – Court Assistant

2. The appellant

3. Ms. Torosi for the Respondent

F. GIKONYO

JUDGE