



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 124 'B' OF 2019

MOSES KIBITOK TANUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from conviction and sentence in Iten SPMCrC No 1057 of 2016 by Hon.H.M. NYABERI)

JUDGMENT

1. The appellant (**MOSES KIBITOK TANUI**) was jointly charged with three others for the offence of robbery with violence contrary to section 296 (2) of the Penal Code, the particulars being that on 20/09/2016 in **ELDORET WEST** sub-county, within **UASIN GISHU** county, jointly with another not before the court, while armed with offensive weapons, namely knives, robbed **Dr GEOFFREY BARAZA WASIKE** of motor-vehicle registration number KBQ 296 F make **NISSAN WINGROAD** silver in colour, , one black travelling bag containing one Sony camera serial number 356980/05/3813311/0.one COMPAQ mini laptop CNU9434YKB, ONE I-pad make TECNO869874006265761, a power bank make HUAWEI serial number 21024519312M6403-3924, one mobile phone charger, one black USB cable, one white USB cable, a driver's licence C of C No KVU 163, one mobile phone make TECNO IMEI number 358100749673-03, one KCB cheque book, one operating loupe, one laptop charger, one terra byte hard drive transcend, nine surgical gloves, two note books, two packets of VALTAS OD 500mg tablets, one pair of shoes, one NATIONAL BANK ATM card, one KCB ATM card, cash Kshs. 3000/- all to the total value of Kshs 1,300,000, the property of the said **DR BARASA**, and at the time of such robbery, used actual violence. He was convicted on this charge and sentenced to death.

2. He was also jointly charged with three others with the offence of Kidnapping with intent to confine contrary to section 256 of the Penal Code as read with section 259 thereof, the particulars being that on the same date at the same time and place, while armed with knives with intent to cause **DR GEOFFREY BARASA WASIKE** to be secretly and wrongfully confined, kidnapped him. He was convicted and sentenced to 4 years' imprisonment (but held in abeyance in light of the death sentence on count 1)

3. The evidence presented at the trial was that **DR BARASA** (a neurosurgeon at the Moi Teaching and Referral Hospital) met **GILBERT KIRWA** (who was the 1st accused at the trial) who had been calling him on claims of being nephew to one **JANE** who had sold some land to the doctor, and he wanted to refund the purchase price. When they met, he told the complainant that the money was with his paternal uncle who lived in **KUINET**. So they left together in the complainant's car.

4. On the way they met the 2nd accused and the appellant, and the 1st accused requested the complainant to pick them. The appellant sat in the co-driver's seat, while the other two sat at the back, the complainant was asked to let the appellant drive, as he was the one who knew their destination, but the complainant declined and continued driving until he reached a blind corner.

5. He was told to stop, and when he was about to switch off the ignition key, a knife was placed on his neck and chest from the back, while one hand covered his eyes. The threesome roughed him up, and threatened him with death if he dared to scream before pushing him to the back seat where they trampled on him on the floor of the vehicle demanded Kshs 1.5m so as to spare his life, and the complainant called a friend and requested him to deposit some KShs 1.9 million in his account, saying it was deposit for purchase of a vehicle. The complainant was forced to write a cheque for Kshs 900,000 in favour of the appellant. This transaction was confirmed by PW 10 **GEOFFREY MULANDO** (a teller at KCB Eldoret branch) and PW8 (**CLEOPHAS ONDIEKI KERRE**), a service quality manager at **KCB Eldoret branch**.

6. The complainant also gave out his **National Bank ATM card** and his pin number, and the card was used to withdraw some Kshs 30,000 on the same day. The car doors were locked with a child lock so the complainant could not escape. Eventually, he was driven to **EDEN SQUARE HOTEL** and taken to one of the rooms which had metal grills. He was locked inside one of the hotel rooms, and the door secured with a padlock from outside, so he could not escape. Eventually the complainant was rescued by police officers who also managed to arrest his attackers and recover all his stolen property except the money. He also clarified on cross-examination that he did not lose the Kshs

900,000/- as he blocked the cheque the following day. The appellant's co-accused led police to his arrest. Investigations disclosed that the 4th accused was the mastermind of the kidnapping, but that all the accused participated in the robbery and kidnapping.

7. In his defence, the appellant said he only knew the 4th accused who had called him to say he would be writing a cheque in the appellant's name, as they had engaged in a land deal which had gone awry (at the bottom of the cheque was the complainant's name). He claimed to have deposited the cheque into his account at KCB, although he did not avail his bank statement nor the land sale agreement.

He denied kidnapping the complainant or robbing him.

8. The trial court considered the evidence presented and found that the attackers were more than person and were armed. They immediately threatened to kill and used force against the complainant, then robbed him of his property, thus demonstrating a common intention and design, and satisfying the ingredients for the offence of robbery with violence.

9. Further, that the evidence showed him and his co-accused used deceitful means to lure the complainant from his place of work. That they secretly and wrongfully confined the complainant, while extorting money from him knowing that he was a person of means, and the offence of kidnapping was also proved.

Appellant's defence was considered but rejected as failing to discredit what the prosecution had established.

10. In arguing the appeal, Mr Maritim submits on conviction, that the evidence was contradictory and it was not safe to make a finding of guilt. That the court did not analyse the totality of the evidence, and erred in finding that the charge of kidnapping was proved.

11. As regards the sentence meted out, the appellant's counsel urges this court to adapt the emerging jurisprudence developed by the Supreme Court in the case of **Francis Muruatetu and Anor v Republic [2017] eKLR** in respect of the mandatory death sentence. He has also cited the case of **Gerald Ndoho Munjuga v R [2016] eKLR** to the effect that the objective of criminal law is to impose an appropriate, adequate, just and proportionate sentence commensurate with the nature, gravity and manner in which the crime is committed.

12. It is argued that the appellant was not given time to tender his mitigation at the trial, pointing out that the appellant was a young university student who had learnt from his mistakes, and urges the court to be compassionate.

13. In opposing the appeal, Miss Okok on behalf of the DPP submits that the prosecution discharged its burden of proof to the required reasonable standard, and all the ingredients of robbery with violence and kidnapping were met. That the evidence of the prosecution witnesses was credible, consistent and well corroborated on both counts.

14. As regards the sentence, Miss Okok concedes that although legal, it was rather harsh and excessive since the evidence showed that the complainant was not injured, and all his properties were recovered. She is agreeable to the sentence on count 1 being reviewed, but urges this court to uphold the sentence in count 2.

15. I have considered the respective submissions and also perused the proceedings and judgment of the trial court. Actually the trial court keenly analysed the evidence, considered the law, definitions, material ingredients required to prove offences the appellant was facing. The appellant claimed that the evidence was contradictory without specifying what constituted contradiction. Infact the witnesses were consistent and unshaken even under cross-examination.

16. Indeed, on the charges of robbery with violence the evidence established that the appellant was more than one person, they were armed with offensive weapons which they used to threaten and intimidate the complainant, and during the incident they used force against him. They had a common intention and also forcefully stole his property.

On the charge of kidnapping, the evidence confirmed luring the complainant, kidnapping him and confining him against his will, while extorting money from him. I hold and find that the conviction was safe and I uphold it.

17. As regards the sentence, I take cognisance of the Supreme Court's pronouncement in the **Muruatetu** case which can be used as a foundation for the scrutiny of mandatory sentencing in general. The logic -mandatory aspect is regardless of the offence and similarly the absence of discretion is applicable across any other mandatory sentence. The **Muruatetu case** (supra) recognised that the trial process does not stop at conviction of the accused; the principle of a fair trial must be accorded at the sentencing stage.

18. Mandatory sentences have the effect of disregarding mitigation thus depriving the court of its discretionary powers. I have as well taken into account as the judiciary's sentencing guidelines on principles underlying sentencing to include-

a) **Proportionality** to the offending behaviour i.e. the punishment must not be more or less than is merited in view of the gravity. Sentencing is considered the primary prerogative of trial courts and they enjoy wide discretion to determine the type and severity of a sentence on a case-by-case basis. In doing so, they follow judge-made, broad sentencing principles known as the "**triad of Zinn**," which require that, when making sentencing determinations, judges consider three things:

b) the gravity of the offense,

c) the circumstances of the offender,

d) and public interest.

19. I take into consideration that the bulk of the complainant's property was recovered and restituted to him. I take note that the appellant has been in confinement since the year 2016, and I am persuaded that the death penalty meted on count I is rather harsh and excessive. I therefore set aside the death sentence meted out in count 1 and substitute it with a 10-year sentence which shall run from the date of conviction.

As regards the sentence on count II, I am in agreement with the prosecutor, that given the circumstances, manner in which the offence was executed, I find that the sentence on this count was proper and decline to interfere with the same. However, the sentences shall run concurrently and I so order.

VIRTUALLY DELIVERED AND DATED THIS 2ND DAY OF MARCH 2021

H. A. OMONDI

JUDGE

Miss Okok for DPP

Mr Maritim for Appellant

C/A Komen

Appellant present