



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 103 OF 2018.

PETER MWANGI ISAAC.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(BEING AN APPEAL FROM THE JUDGEMENT OF HON. HON. Y. I KHATAMBI (SRM) DATED 26TH OCTOBER 2018 IN CRIMINAL CASE NO. 1962 OF 2016).

JUDGEMENT

1. The appellant with another were charged with the offence of Robbery with violence contrary to Section 296(2) of the Penal code. The particulars of the offence were that on the 2nd day of August 2015 at Ndongori Village Gilgil sub county within Nakuru County jointly with another not before court while armed with dangerous weapons namely pangas, knives and rungus robbed ELIUD MATHU cash money Kshs. 2000/= and after or immediately before or immediately after the time of such robbery inflicted serious bodily injuries that led to the death of the said ELIUD MATHU.

2. The appellant was convicted and sentence to serve life imprisonment hence this appeal. The appellant has raised the following amended grounds of appeal challenging the judgement;

i. THAT, the learned trial magistrate erred in law and in fact by failing to find that the appellant's identification was not positive and as such could not found a safe conviction.

ii. THAT, the learned trial magistrate erred in law and in fact by failing to appreciate that the evidence of dying declaration as admitted into evidence lacked credence and as such could not provide a basis for convicting the appellant.

iii. THAT, the learned trial magistrate erred in law and in fact by failing to find that the prosecution case was vitiated with contradiction and as such could not corroborate the charge.

iv. THAT, the learned trial magistrate erred in law and in fact by failing to appreciate that the charge sheet was fatally defective.

v. THAT, the learned trial magistrate erred in law and in fact by failing to consider the appellant's defence but instead shifted the burden of proof on him yet it was the prosecution's duty to prove the appellant's guilt beyond reasonable doubt.

vi. THAT, the sentence imposed is harsh and excessive since it is not informed by the unique factors circumstances of the offence.

3. Before looking at the merits or otherwise of the appeal it shall be worthwhile to summarize the evidence as presented during trial.

4. **PW1 (PW8) HARUN IKENYE NDUNGU**, testified that on 2nd August 2015 at around 8pm he heard some noise by people claiming that they go to the scene. He rushed towards baba Kuria's home and found him lying on his back inside his house. He stated that the deceased (Eliud Mathu) had separated with his wife and he lived together with the appellant. He added that the deceased claimed that the appellant had robbed him of Kshs. 2000/= and disappeared after attacking him. The deceased had injuries on his head, nose, hand and leg and they rushed him to the Nakuru Provisional Hospital together with the deceased sister. They later reported his death to the police and the police visited the deceased's house and checked it. The appellant was traced in Dundori and promptly arrested.

5. On cross-examination he confirmed that he knew the deceased since childhood. He stated that he did not find the appellant at the scene but the deceased claimed that the appellant had robbed him of Kshs. 2000/= and attacked him.

6. Upon being re-called to the stand, he stated that on 2nd August 2015 at 8.00pm he was spraying his cows when he heard someone scream. He left and went towards the scene where he found the deceased lying on the ground facing up. He asked him what happened and the deceased told him that 'Murimi' whose real name was Peter Nyota had called his name and he opened the door. That the appellant entered the house and attacked him. He stated that he went to Sam's mother who called the deceased sister PW4, she came to the scene and so did PW5. He stated that before getting to the scene they met their chief who accompanied them and he told them to go to Elementaita Police station. At the police station P3 form was filled and they left for PGH hospital. He positively identified the appellant before the court. He added that it appeared that the appellant was alone during the attack.
7. On further cross-examination he stated that he had seen the appellant the previous evening and that the Chief referred them to Elementaita police station. That however, the same had not been captured in his witness statement. He stated that the deceased informed the police that he was attacked at 9.00pm. He confirmed that the appellant name was Peter Nyota Mwangi *alias* 'Munene'.
8. When cross-examined by the court he said that he did not hear anything take place at night and he could not remember whether there was moonlight.
9. **PW2 JOHN NGENGA KURIA**, testified that the deceased was his brother while the appellant was the deceased's neighbor. He stated that on 2nd August 2015 he was in Njoro when he received a call from his sister Theresia Nyogatha and she was crying. He later learnt his brother had been attacked and was about to die. He rushed to Nakuru PGH hospital and while there the deceased told him that his attacker was staying with him. That his attacker had pounced on him and robbed him Kshs. 2000/= and attacked him on the process. He added that the deceased mentioned the name of his attacker as Peter Murimi. That he was present together with Nyogatha, Geoffrey and Ikenye when the deceased was making his dying declaration.
10. Upon being recalled he confirmed that the deceased referred to the appellant as Peter Murimi. He stated that upon further inquiry the deceased stated that the appellant had no job for one week and that on Saturday the appellant went home as always and when opening the door, the appellant hit him with a *panga* and *rungu*. He stated further that the deceased lived in a mad house with no electricity and that he knew it was the appellant as he used to come home at night. He added that the appellant called out the deceased name, demanded for money, he punched him to the floor and took Kshs. 2000/=. That after taking the money the appellant continued punching the deceased. He confirmed to have gotten the said information from the deceased while he was in the hospital. He positively identified the appellant before the court and stated that there was no existing grudge with the appellant.
11. Upon cross-examination he confirmed seeing the appellant on his arrest and that he did not know him and that he earlier did not know of his whereabouts.
12. **PW3 MARGARET MUTHONI MWANGI** testified that the appellant was her son and that on 2nd August 2015 police officers came to inquire if the appellant was her son and she confirmed that he was. She stated that the police had informed her that the appellant had earlier injured someone through robbery. She added that by then the appellant was not at home and she did not know of his whereabouts. That the appellant used to work in Narok and could come once in a while but as from 31st July 2015 the appellant used to leave for work but on 2nd August 2015 he did not come home. She stated further that she knew the deceased as he grew with the appellant and prior to the material day they used to work and lived together.
13. Upon being recalled to the stand, she stated that the appellant was her 9th son and that he had come to visit her one week prior to the incident and that he used to go to his small farm in Ndondori. She stated further that the appellant never told her if he worked with the deceased, that the deceased was from their area and she knew him well. She stated that she did not know where the appellant lived but she positively identified the appellant before the court.
14. **PW4 (PW1) TERESIA WANJIKU NYOGATHA** testified that on 2nd August 2016 at 8.30 am she received a phone call from her co-wife who alerted her to rush quickly to her brother's (the deceased) house who had been attacked seriously. Upon her arrival the deceased told her that he was attacked by Peter Mwangi Isaac and robbed of Kshs. 2000/=. She stated that their other brother joined her and they took the deceased to Nakuru Provincial hospital. That they passed by Elementaita police station to report and that his brother recorded the deceased last words before he passed on. She added that she did not take part in the post-mortem exercise and that the appellant after the incident the appellant disappeared from that area and after one year he was arrested in Dundori after one.
15. When cross-examined she confirmed that she knew the appellant since childhood and she did not find the appellant or his belongings in the deceased house.
16. Upon being recalled to the stand she stated that their family had no grudge with the appellant and him and the deceased were neighbors separated by two farms. She added that the deceased never informed her if he had problems with the appellant and that she used to talk with the deceased once in a while as he had no phone.
17. **PW5 (PW4) GEOFFREY WAINAINA KURIA**, testified that he knew the appellant as they grew up together as childhood friends. He confirmed that the appellant name was Peter Mwangi Nyota *alias* Peter Mwangi Murimi *alias* Peter Mwangi Isaac *alias* Ihimeri. He stated that the deceased was his elder brother and he used to claim that he worked and lived with the appellant. He stated further that on 2nd August 2015, he was called by his brother George Maingi Kuria and told to go to the deceased's wife that there was bad news. He rushed there and found a big crowd and his brother was lying on the ground with a deep cut on the head, his hands and legs broken. They then rushed the deceased to the hospital and they passed through Elementaita Police station to report. While at the hospital the deceased before he died mentioned his attacker as Peter Murimi Nyota and had robbed him Kshs. 2000/=. He said that the appellant disappeared for one year before being arrested. He also did not witness the post-mortem.
18. When cross-examine he confirmed that he did not witness the incident.

19. Upon being re-called to the stand he stated that while at the hospital, him and his elder brother were left with the deceased and he told them that he was injured by the appellant and another person whom he did not know. He added that the whole conversation was taped. He confirmed that he knew the appellant as he lived in their village and that they had bought land together.

20. **PW6 (PW5) DR. TITUS NGULUNGU**, testified that he was attached to PGH Nakuru and he conducted post mortem on deceased body. He stated that the deceased body was identified by Jane Njeri. He stated further that he examined the body of a male African adult, the same had lost a lot of blood and had cuts, lacerations on front of the head, eyes, nose, legs from neck to the right ankle. That the lacerations were from 50mm and the smallest was 15mm. He added that his overall examination was that the lungs had collapsed which was a clear indication that the deceased did not breath well and that there were also blood clots. It was his conclusion that the cause death was massive loss of blood and shock due to being hit with a blunt object. He produced the post-mortem report and the same was marked as Pexh 1.

21. **PW7 SGT. CHARLES MARIA No. 65033**, testified that on the material day he was the duty officer and a report from the deceased was received. The same was in relation to assault and crime. He stated that the deceased reported with difficulty and mentioned two people who had injured. One of the attackers was identified as Peter who lived with the deceased in the same house. He prepared the Occurrence book and his brothers took him to Nakuru Provincial hospital. He stated further that the deceased was bleeding and had serious injuries. That they later visited the scene in Kiambogo, they found a lot of blood stained and they inquired the whereabouts of the attacker. They however were not able to trace the attacker until 15th August 2016 when they received a report from the deceased brother that the attacker had been arrested in Ndongori. The attacker was brought to the station by the Ndongori police officers and she recorded a statement. She stated that the appellant was charged and the deceased brother identified him and stated that the appellant lived with the deceased. He identified the appellant in court.

22. Upon cross-examination he confirmed that the deceased gave the report by himself and that he spoke with difficulty. He stated that the deceased said he was injured by Peter and Kshs. 2000/= was stolen. He stated further that the appellant mother told them that he worked and lived with the deceased. That he also did not find the appellant's belonging in the deceased house. He added that the appellant aunt did not record any statement and also declined to testify. He said that his statement should captured August not July and that it was a mistake. He added that the first report was made by Wachira and Ikenye as the deceased got to a point he was unable to speak.

23. On re-examination he said that the deceased stated that Peter whom he worked with injured him.

24. **PW8 PC ANDREW KIMUTAI**, testified that on 5th July 2016 at 8.00 pm he was on duty and was informed that an individual at Centre had killed someone at Kiambogo. He went there and found the appellant at a butchery and he told him to accompany him to his office, where he asked him if his name was Peter Mwangi Isaac. PW8 stated that he was not sure of the accusation so he placed the appellant in the cell and informed his boss of the arrest. The appellant was later picked by police from Elementaita police station. He identified the appellant before the court and confirmed that he was the arresting officer.

25. Upon cross-examination he stated that it was intelligence report that led to the arrest.

26. When placed on his defence the appellant gave unsworn evidence where he stated that he lived in Ndongori Bahati and the deceased was one of his neighbor. His wife had left him due to heavy drinking. He stated further that upon arrival in Ndongori Kiambogo in 2013 he heard from people that the appellant sold household items and that he began stealing from people. That he was arrested in 2014. He added that he met the deceased in Kiambogo and they started planting trees in 2016. The appellant stated that on 1st July while at a butchery an officer came and told him to accompany him to the police station where he was placed in a cell and was told that PW2 would give him first information.

27. He stated that PW2 told him his elder brother had decided that he be appellant and that was when he was charged with the offence before the court. He stated further that he did not commit the offence and that he was very close to the deceased. He added that he had a very good relationship with the deceased's brothers and sisters.

28. Parties were directed to file written submissions. Both parties filed their written submissions.

Appellant's submissions

29. The appellant submitted that positive identification of an assailant is crucial and that wrong identification of an assailant would lead to punishing the wrong person for an offence that he/she did not commit. The appellant submitted that his contention was that he was not properly identified as the perpetrator of the present offence. He added that his name was also not clear. He draws the court's attention on the cases of **Cleophas Otieno Wamunga v Republic [1989] KLR 424** and **Robert Gitau vs Republic CA NO. 63 OF 1990(unreported)**.

30. The appellant submitted further that all the witness who testified save for PW3 stated that they deceased told them what had transpired before he died and that there was no eye witness of the offence. He submitted further that caution must be exercised by the court when relying on evidence of dying declaration. He placed reliance on the case of **Philip Nzaka Watu vs Republic [2016] eKLR**.

31. The appellant went on to submit that the prosecution case was marred with contradictions. He added that the said contradictions were never explained yet the same contributed to his conviction. The appellant submitted further that the said contradictions by PW1, PW2 and PW4 in their testimonies cannot provide corroboration of the evidence on record. He placed reliance on the following cases; **State of Punjab v Jagir Singh [1974] 3 SCC 277**, **Sekitoleko vs Uganda [1967] EA 53**, **Twehangane Alfred vs Uganda Crim. App. No 139 of 2001, [2003] UGCA, 6** and **David Ojeabuo vs Federal Republic of Nigeria [2014] LPELR-22555 (CA)**.

32. Regarding the life sentence, the appellant submitted he tendered his mitigation but however his sentence was harsh and undesirable

considering the facts and circumstances of the commission of the offence. He relied on Article 6 of the International Covenant on Civil and Political Rights which provides that every human being has the inherent right to life, the same should be protected and that no one shall be arbitrarily deprived of his life. He went on to submit that all trial courts when sentencing are bound by sections 216 and 329 of the Criminal Procedure Code and 389 of the Penal Code. He draws the court's attention to the cases of **Edwin Otieno Odhiambo v Republic [2009] eKLR**, **Joseph Njuguna Mwaura and 2 Others vs Republic [2013] eKLR** and **Doughlas Mathaura Ntoribi v Republic [2014] eKLR**.

33. He urged the court to allow the appeal, quash the conviction and set aside the sentence.

Respondent's submissions

34. The respondent's submissions identified 3 issues for determination by the court. Firstly, whether the ingredients for the charge of robbery with violence were sufficiently proved. The respondent submitted that PW1, PW2, PW4 and PW5 testified that they saw the deceased on the material day after the incident and he had been injured badly. The respondent submitted further that the deceased before he died mentioned that the appellant at the attack was accompanied by another person. That therefore two of the key ingredients for the offence of robbery as per the provisions of 296 (2) of the Penal Code were met. It further placed reliance on the case of **Oluoch vs Republic [1985] KLR**.

35. On the second issue whether a dying declaration is admissible as evidence the respondent submitted that the admissibility of dying declarations was set out in the case of **R vs Andrew [1987] AC 281**. That further, in the case of **R v Peter Maina Mugeriki [2017] eKLR** the court in applying the said principles in the aforementioned case held that the key consideration was that the victim or declaration must be in a fit condition to give statement; secondly, that the victim should not be under the influence of anybody or prepared by prompting tutoring or imagination. The respondent submitted that the deceased was in a clear state of mind and there were no elements of distortion by the statements by PW1, PW2 and PW4.

36. The respondent placed reliance in the case of **R v Peter Maina Mugeriki** where the court stated that there need not be corroboration for a dying declaration to be admissible in court but the same ought to be treated by caution.

37. Lastly, on whether the respondent was able to prove its case beyond reasonable doubt the appellant submitted that it sufficiently proved the ingredients of the offence and that the appellant when he was put on his defence did not raise to his defence any issue that could prove the contrary. The respondent submitted further that the imprisonment for life fits the crime and that the violence was also so severe that the deceased succumb to the injuries. It urged the court to dismiss the appeal and uphold both the sentence and conviction.

Analysis and determination

38. How the first appellate court should approach an appeal was discussed in the case of **OKENO V. REPUBLIC [1972] EA 32**. as follows:

“It is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld.”

39. Upon carefully considering the proceedings as well as the evidence tendered and the exhibits produced and together with the parties' written submissions the following issues arise for determination by the court;

i. ***Whether the appellant was sufficiently identified.***

ii. ***Whether the evidence of a dying declaration is admissible.***

iii. ***Whether the prosecution proved their case on the required standard of beyond reasonable doubt.***

40. On the first issue, whether the appellant was sufficiently identified the appellant submitted that he was not properly identified as the perpetrator of the present offence and that his name was also not clear. The respondent on the other hand submitted that before the deceased died he identified the appellant as the person who robbed him of Kshs. 2000/= while beating him. Further PW2 when he was recalled to the stand he testified that the deceased told him that the appellant called out his name, demanded for money, punched him to the floor and took Kshs. 2000/=.

41. In **Donald Atemia Sipendi v Republic [2019] eKLR** the court cited with approval the case of **Kariuki Njiru & 7 others vs Republic Criminal Appeal no. 6 of 2001 (Unreported)** where the court held inter alia that: -

“the law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error.”

42. Further, in **Anjononi & Others –Vs – Republic [1980] KLR** the court held that: - ***“to be “more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”***

43. In **Simon Kiptum Arap Choge & 3 others v Republic [1985] eKLR** where the court held:

“Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual recognition. In receiving such evidence, care would be necessary to ensure that it was the appellant person’s voice, that the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it.

44. In the instant case, PW1, PW2, PW4 and PW5 gave very cogent and concise account of the events of what transpired and their testimonies remained unshaken under cross-examination by the appellant, despite the few discrepancies. More importantly the appellant was a person who was not a stranger to the deceased and he was able to identify his voice. Further, from the evidence the appellant was known to the deceased as they were neighbors and he knew and would recognize his voice well a fact the appellant admits in his defence.

45. The appellant argued that his name was not brought out clearly as to whether it was ‘**Peter Mwangi Murimi**’, or ‘**Peter Nyota Mwangi**’ or simply ‘**Peter**’. On the other hand, the appellant does not dispute any of the aforementioned names to be his and further he has not presented any other name/s together with documents as evidence proving his true identity to the contrary. In view of the foregoing this court finds that the appellant was positively identified.

46. On the second issue, whether the evidence of a dying declaration is admissible. The appellant submitted further that all the witnesses who testified save for PW3 stated that they deceased told them what had transpired before he died and that there was no eye witness of the offence. That further, caution should must be exercised by the court when relying on evidence of dying declaration. The respondent submitted that the deceased made a statement to PW1, PW2 and PW4 before he died and that PW1 stated that the deceased told her that the appellant came to his house on the material day, knocked on the door and he opened. He stated further that when he opened the door the appellant attacked him by cutting and beating him on the face, legs, hand and took Kshs.2000/=.

47. Under **section 33(a) of the Evidence Act**, a statement made by a deceased person relating to his cause of death is admissible in evidence:

“When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.”

48. Lastly, on whether the prosecution proved their case on the required standard of beyond reasonable doubt, Section 296 (2) of the Penal Code provides as follows with respect to the offence of robbery with violence:

“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.”

49. This was affirmed by the Court of Appeal in the case of **OLUOCH –VS – REPUBLIC [1985] KLR** where it was held: -

“Robbery with violence is committed in any of the following circumstances:

The offender is armed with any dangerous and offensive weapon or instrument; or

The offender is in company with one or more person or persons; or

At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person” [our own emphasis].

The use of the word OR in this definition means that proof of any one of the above ingredients is sufficient to establish an offence under section 296(2) of the Penal Code.

50. In the instant case, PW2 and PW4 testified that the deceased claimed that the appellant used a club, *jembe/panga* and injured him. PW5 upon being recalled to the stand testified that the deceased told them that he was injured by the appellant and another person whom he did not know. PW7, the officer who recorded the deceased statement also testified that the deceased reported that two people injured him. Further, PW6 the doctor who performed post-mortem testified that he examined the deceased’s body and the same had cuts and lacerations on front of the head, eyes, nose and legs. He further produced the post-mortem report in support of his testimony.

51. The appellant on the other hand submitted that the prosecution case was marred with contradictions. The Court of Appeal decision in **Erick Onyango Odeng’ v. Republic [2014] eKLR** cited with approval the Uganda Court of Appeal case of **Twehangane Alfred v. Uganda Criminal Appeal No. 139 of 2001, [2003] UGCA, 6** in which it was held as follows:

“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case.”

52. In view of the foregoing evidence, the court finds that the prosecution proved all the ingredients of robbery with violence and it was

safe for the trial court to conclude as such. Further, the contradiction noted in the witness statement in my view are minor and do not affect the main substance of the prosecution case. The appellant was placed on the scene of crime and he did not provide any alibi or call any witness on his defence.

53. In the premises the court does not find any merit in the appeal and the same is hereby dismissed.

DATED SIGNED AND DELIVERED VIA VIDEO LINK THIS 15TH DAY OF DECEMBER 2021.

H K CHEMITEI

JUDGE