REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL APPEAL 17 OF 2019

(CORAM: F.M. GIKONYO J.)

(From the conviction and sentence of Hon. S.M. Githinji (S.P.M) in Narok CMCR No. 372 of 2007 on 6th July 2009)

PAUL NJOROGE NDUNGU....APPELLANT

-VERSUS-

REPUBLIC..............................RESPONDENT

JUDGMENT

1. The appellant was charged with Robbery with violence contrary to section 296(2) of the Penal Code. It is alleged that on the 26th day of March 2007 at Ilmasharian area, Narok in Narok District of the Rift Valley Province , the accused jointly with others not before court robbed off Beatrice Pusy Namunyak one TV Samsung coloured , one Lg, dvd , ONE Sony radio cassette, 5 pairs of table set clothes, two blankets, two mobile phones makes Nokia 1100 and 2100, one pair of bed sheets, two kilograms of cooking fat, DC's of various sets , two black medium suits, cash 2,500/= and at or immediately after the time of such robbery and actual violence to the said Beatrice Pusy Namunyak.

2. The appellant faced a similar charge in count II, with particulars of offence being that on the 26th day of march 2007 at ILmasharian area, Narok in Narok District of the rift valley province, the appellant jointly with others not before court robbed off Jackson Keimoo Sopia kshs. 200 and at or immediately before or immediately after the time of such robbery used actual violence.

3. The prosecution called 7 witness while the defense gave sworn testimony and did not call any witnesses.

4. He was tried for the offence and convicted on the charge of robbery with violence and sentenced to death.

5. Having been dissatisfied with the conviction and sentence he filed this appeal.

6. The appellant cited 8 grounds in his petition of appeal. He however, filed amended grounds of appeal under Section 350(3) (v) of the C.P.C. that;

> **i. The learned trial magistrate erred in law and fact by relying on evidence of identification by PW2 and PW4 evidence of identification that lacked credence and therefore unable to support a safe conviction. recognition was not proved in evidence.**
>
> **ii. The learned trial magistrate erred in law and fact by basing his conviction on evidence on matters of tracking of foot prints while the evidence in support of the same was not watertight and could not be used as a basis for a safe conviction.**
>
> **iii. The learned trial magistrate erred in law and fact when failed to note that no investigations were carried out but the prosecution and failed in law not analyzing the whole prosecution evidence as adduced thus occasioning a miscarriage of justice.**
>
> **iv. The learned trial magistrate erred in law and fact by failing to give reasons as to why the defence of the appellant was acceptable or not.**
>
> **v. The learned trial magistrate erred in law and fact by awarding a death sentence under section 296(2) of the penal code this sentence was declared unconstitutional by the recent decision in <u>Karioko Muruatetu & Another Vs Rep petition no. 15 of</u>**

2015 [2017] eKLR.

Appellant's submissions

7. The Appellant argued his appeal through written submissions. He submitted that the circumstances that prevailed were not favourable for positive identification. That PW2, PW3 and PW4 were all asleep in their house and were woken up by robbers who had broken into their house. PW3 was honest that he did not recognize any of the robbers.PW2 and PW4 did not record a first report to the police showing that they had identified the appellant as one of the robbers. Their statements to the police were recorded when the appellant was already in police custody. The purported torches were with the robbers, PW2 and PW4 did not tell court how they used torches being held by the robbers to identify them.PW2 told the court that she recognized the voice of the appellant. The trial court did not inquire the exact words spoken and did not inquire whether the witness was familiar with the voice of the appellant. The evidence of tracking the appellant by foot prints was raised by PW2. She told the court that they arrested the appellant a kilometer from her house. The evidence of foot prints leading to the arrest of the appellant was flimsy if not altogether incredible. He argued therefore that the evidence on recognition, voice identification and tracking by foot prints does not qualify the standards set out under section 107 of the evidence act. He cited the cases of ***Wamuga Vs Republic [1989] Klr 424, Said Bakari Ali And Two Others Vs Republic Cr. App No. 900 Of 2003 ,Choge Vs Republic [1955] 1 KLR, Anjononi Vs Republic, Samuel Njuguna Gichuhi Vs Republic [2017] HCCR App No. 126 Pf 2015, And Paul Etole & Another Vs Republic [2001] eKLR Cr.App. No. 24 of 2000.***

8. The appellant submitted that PW7 did not conduct proper investigations as none of the witnesses recorded a first report. He cited the case of ***Tererali S/O Kirongozi and 4 Others Vs Republic [1952] 19 Eaca259***

Respondent's Submission

9. The prosecution submitted that the appellant was recognized by PW2. That there were circumstances which favoured positive identification; there was sufficient light and there was conversation between the appellant and PW2.

10. The prosecution submitted that the evidence of the foot prints that led from the crime scene to the home of the appellant was only one part of the evidence that the trial court considered in convicting the appellant contrary to the allegations by the appellant that the trial court based conviction on the foot print evidence.

11. The prosecution submitted that they proved beyond reasonable doubt all the ingredients of the offence of robbery with violence.

12. The prosecution submitted that the trial court considered the defence of the accused and dismissed it as a red herring that could not shake the prosecutions' evidence.

13. The prosecution submitted that at the time the trial magistrate was rendering his judgment on 6th July 2009 we were still under the old constitutional dispensation; the Supreme Court was not in existence. Be that as it may, the sentence imposed by the trial court is a legal sentence provided in law. The Supreme Court in the ***Muruatetu*** case on 6th July 2021 at paragraphs 11, 14 and 15 have issued directions that the principles set out were applicable to murder cases only. The prosecution cited the case of ***Andrew Amatala V Republic [2021] eKLR.***

14. In conclusion, the prosecution submitted that the conviction was safe as against the appellant. Mr. Karanja, urged this court to uphold it as well as the sentence.

ANALYSIS AND DETERMINATION

Court's Duty

15. First appellate court is under duty to re-evaluate the evidence presented at trial and draw its own independent conclusions. Except, it must bear in mind that it neither saw nor heard the witnesses give their testimonies. Thus, matters of demeanor are best observed by the trial court. See ***Okeno vs. Republic [1972] E.A 32***.

16. I have perused the lower court record, written submissions and authorities relied upon by both parties. The ultimate question is: -

i. Whether the prosecution proved its case beyond reasonable doubt.; and

ii. Whether the death sentence is illegal or appropriate sentence.

Elements of crime

17. The elements of the offence of robbery with violence were set out by the Court of Appeal in the case of ***Oluoch –Vs – Republic [1985] KLR*** thus:

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

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

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

c) 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 ………" [Emphasis mine].

18. And according to the case of ***Dima Denge Dima & Others vs Republic,Criminal Appeal No. 300 of 2007,:***

> **"…The elements of the offence under Section 296 (2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence."**

19. In this case PW2 clearly stated that three men broke into and entered the house while they were armed with Pangas and sticks. PW3 stated that the appellant in the company of two people were armed with an axe, another had a club and a simi.

20. PW6 stated that he went to the home of the appellant and he was able to recover an axe and a club. The same was produced as **P Exh 4** and **3** respectively.

21. PW2 in her evidence stated that she was hit with 'leleshwa sticks' on the right wrist and shoulders whereas PW3 stated that he was also hit with a stick. Their evidence was corroborated by PW1 – a clinical officer who examined PW2 on 2/4/2007. He filled the P3 form produced as **P Exh 1.**

22. PW1 further examined PW3 on the same day and prepared his P3 form which was produced as **P Exh 2**. in both instances he assessed the degree of injury as harm

21. PW4 – the house girl in her evidence stated that she was also beaten with a stick in an effort to make her produce her phone.

22. Accordingly, the prosecution proved beyond reasonable doubt that; (i) the offenders were armed with dangerous and offensive weapon or instrument; (ii) the offender were in company with one or more person or persons; and (iii) at or immediately before or immediately after the time of the robbery the offenders wounded, beat, strike or used other personal violence them.

23. Nonetheless, as the incident occurred at night, care should be taken to ensure the appellants were positively identified as the perpetrators of the offence. The court in ***Wamunga v. Republic (1989) KLR 424*** at 426 had this to say:

> **"Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."**

24. I have interrogated the circumstances under which identification was made. PW2 testified that she recognized the appellant after he took her aside and as he was folding bed sheets and blankets the two torches illuminated the room very clearly. The appellant and his colleagues had taken the complainant's torch as well. The complainant further identified the appellant as he was beating her with the stick and while in the process of the appellant folding the beddings. She recognized him as Njoroge since she had known him since 1997 when he used to live in a boma of Teeka. In the year 2005 the appellant used to sell charcoal. In December 2005 the appellant was among workers who had planted beans in her land.

25. PW4 testified that at around 2.00 a.m. while she was asleep she heard people talking outside the house. She woke up and went to the sitting room where someone had directed the torch in her direction. She ran back to her bedroom. It was her evidence that the thugs then kicked in her bedroom door and two of them entered including the appellant. They then demanded that she gives them her phone which she did not have. They struck her on the back with a stick. The appellant then began to ransack the room going through the bags. She recognized him as he was going through her things. The other appellant used the torch to direct light towards the appellant to enable him see what he was doing. She was later able to describe the appellant to PW2 and PW5. The appellant was someone PW4 had seen before as he used to live with Teeka.

26. The appellant engaged PW2 in a conversation even telling her to pray for him and his fellow thugs. The conversation between the appellant and PW2 was at such a proximity, and I do not find any element of a mistake in recognizing the voice of the appellant.

27. After the robbery the appellant went back to warn PW2 not to disclose the incident. She got another opportunity and was able to recognize him from his voice as well as under the torch light which was still on.

28. On cross examination, PW2 confirmed that the appellant was standing about 4 metres from her.

29. During reexamination PW2 confirmed that the robbery took about half an hour.

30. The evidence show that there was sufficient light in the house under which the witnesses saw the robbers. The witnesses clearly saw them and were able to identify them using their voices as well. I cannot find any element of mistake or delusion on the part of the witnesses in the identification of the appellant as one of the people who robbed the complainants on the fateful night. The circumstances favour positive identification and do not exhibit any particular difficulty in the identification of the assailants.

31. Further evidence show that some of the alleged weapons used in the robbery were recovered at the appellant's house. The connection is clearly visualized by the evidence.

32. It bears repeating that, the evidence adduced proves beyond reasonable doubt that, the appellant, in company with others and armed with

dangerous weapons, robbed the complainants and also used violence on persons thereto immediately before or during or immediately after the robbery.

33. Accordingly, the appeal on conviction fails.

Death sentence: illegal or inappropriate

34. The Penal Code prescribes a death sentence for the offence of robbery with violence. The trial court imposed the sentence as provided in law. I have perused the decision by the trial court and it is apparent that the death penalty was imposed because it was the only sentence prescribed in law at the time.

35. It was argued for the appellant that the death sentence was no longer provided for, and so the trial court imposed an illegal sentence. This, however, is a misinterpretation of the decision of the Supreme Court in **Francis Karioko Muruatetu & another v Republic [2017] eKLR**. What the Court did was to remove the mandatory nature of the death sentence in section 204 of the Penal Code for being inconsistent with the Constitution: and held that the court has the discretion to impose a sentence other than death in accordance with the circumstances of the case. In my understanding, the death penalty is still prescribed in law.

36. The directions given on 6th July 2021 by the Supreme Court in the case of **Francis Karioko Muruatetu & Another vs Republic** *inter alia* was that the said decisional law is not an authority to declare all mandatory or minimum sentences unconstitutional. Its application was limited to murder cases falling within its scope. Therefore, this being a case for robbery with violence, the request by the appellant for review of sentence on the basis of **Muruatetu case** is misconceived. He has to argue his case on the basis of law and facts of the case.

37. The question is whether there is any lawful reason to interfere with the discretion of the trial court in passing sentence.

38. In ***James Kariuki Wagana vs Republic [2018] eKLR,*** Prof. Ngugi J observed that while the penalty of death is the maximum penalty for both murder and robbery with violence, the court has the discretion to impose any other penalty that it deems fit and just in the circumstances. He further observed that the death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder. He noted that while force had been used in the case before him, it could not be said that the appellant used excessive force, nor did he “unnecessarily injure the Complainant during the robbery” and was not armed during the robbery. He therefore reduced the appellant’s sentence of death to imprisonment for fifteen years, from the date of conviction.

39. In the case before me, all the ingredients of robbery with violence have been met. The appellant, who was in the company of others, robbed the complainants, and in the course of the robbery, the appellant not only used force, but was armed with a dangerous weapon with which he used to beat or hit the complainants causing bodily injuries. The PW1 assessed the degree of injury as harm.

40. The level of violence unleashed on the complainants is sufficiently serious to warrant long term imprisonment. The violence did not cause death or grievous harm.

41. In the circumstances, I will reduce the death penalty to a term of imprisonment for 35 years from the date of first arraignment in court that is on 4/4/2007 in compliance with section 333(2) of the CPC. At the time the offence was not bailable.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 8TH

DAY OF DECEMBER, 2021

F. GIKONYO M.

JUDGE

In the presence of:

1. The appellant

2. Kasaso CA