REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 7 OF 2017

JOHANA LUNANI----------APPELLANT

=VRS=

THE REPUBLIC----------RESPONDENT

{Being an Appeal against the Conviction and Sentence of Hon. H. Barasa – PM Eldoret dated 19th January 2017 in the original Eldoret Chief Magistrate's Court Criminal Case No. 5427 of 2013}

JUDGEMENT

The appellant was sentenced to death following conviction on two counts of robbery with violence contrary to Section 296 (2) of the Penal Code.

The particulars of the charges were: -

> **Court I** On the 13th day of November 2013 at Chimoi area in Lugari District within Kakamega county, jointly with others not before court while armed with dangerous weapons namely rungus, knives and stones robbed JOSEPH NDUNG'U KAMUNGE of one mobile phone make Samsung 3335, one travelling bag, eight long trousers, six shirts, a driving licence COFF NO. DJ15587, ID card no. [...], a radio cassette make Sony, wallet and an Equity bank ATM card and cash Ksh.600/= all valued at Ksh. 17,500/= and immediately before time of such robbery used actual violence against the said JOSEPH NDUNG'U KAMUNGE.
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> **Count II** On the 13th day of November 2013 at Chimoi area in Lugari District within Kakamega county, jointly with others not before court while armed with dangerous weapons namely rungus, knives and stones robbed GEOFREY BANANA of three empty crates, eight kilograms of wheat, two kiloframs of tea leaves, two kilograms of omena, one kilogram of tomatoes, one baby suit, one towel and cash Ksh. 2,700/= all valued at Ksh. 3,650/= and immediately before time of such robbery used actual violence against the said GEOFREY BANANA.

The appellant pleaded not guilty on both counts but upon hearing and evaluating evidence from both sides the trial Magistrate found him guilty and convicted him on both counts then sentenced him to death but held the sentence on Count II in abeyance.

At the hearing of the appeal the appellant was represented by Miss Wamalwa Advocate of Kiprop Luseria & Co. Advocates while the State was represented by Ms. Kagali.

The appeal is premised on the amended Memorandum of Appeal with eight grounds of appeal as follows: -

> **"1. THAT the learned trial magistrate erred in law and in facts by convicting the appellant while relying on the evidence of a single witness, particularly on the issue of recognition.**
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> **2. THAT the learned trial Magistrate erred in law and in fact by convicting the appellant without observing that the complainant was slapped on the face and at the moment he was frightened and/or confused and he could not have properly recognized his assailants.**
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> **3. THAT the learned trial Magistrate erred in law and in fact by convicting the appellant without observing that the first culprit arrested by to police was released hence the investigations and the court was biased.**
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> **4. THAT the learned magistrate erred in Law and facts by convicting the appellant without observing that the source of light allegedly used by the complainant to recognize the assailants was not sufficient for identification.**

5. <u>THAT</u> the learned trial Magistrate erred in law and in fact in by basing the conviction on unsatisfactory factors.

6. THAT the trial Magistrate erred in law and in facts by convicting me the appellant without observing that the suspects arrested with the complainants phones was not made the prosecution witness, hence the alleged case was not proved beyond reasonable doubt as required by the law.

7. <u>THAT</u> the learned trial magistrate erred in law by making a finding that the offences of robbery with violence carry a mandatory death sentence which was unconstitutional.

8. <u>THAT</u> the death sentence was manifestly harsh and unjustified."

In her written submissions, Miss Wamalwa, Learned Advocate for the appellant faulted the trial Magistrate for convicting the appellant on what she described as evidence of identification which was not positive, evidence of a single witness, contradictory evidence and evidence which was insufficient. She cited several cases in support of her submissions. On the sentence, it was her submission that based on the case of **Francis Karioko Muruatetu & another v Republic [2017] eKLR** the mandatory death sentence was unconstitutional and the trial Magistrate ought to have considered the appellant's mitigation and the nature and circumstances of the offence before imposing the **"illegal"** sentence. She urged this court to allow the appeal and set the appellant free.

On her part, Miss Kagali, Learned Prosecution Counsel opposed the appeal and submitted that all the ingredients of the offence of robbery with violence were proved against the appellant beyond reasonable doubt and that the appellant was positively identified as one of the robbers. On the sentence, she left it to this court to consider whether it could adopt the case of **Francis Karioko Mutuatetu & another v Republic (supra)** to the circumstances of this case**.**

As an appeal is in the nature of a retrial, my duty is to reconsider and evaluate the evidence before the trial court so as to arrive at my own independent conclusion while bearing in mind that I did not see or hear the witnesses who testified at the trial – **See Okeno v Republic [1972] EA 32.** I have also carefully considered the submissions by both sides.

The offences herein occurred when a truck that was being driven by the complainant in Count I stalled on a slope after its brake pipe was cut. Pw1 stopped and got out of the truck, which was hauling a trailer with a container, to check what had happened only to be attacked by a group of people who were armed with axes and pangas. In the process he sustained a cut on the right wrist and mouth. He got a lucky break when he flagged down an oncoming motorist who stopped and took him to a police road block where he reported the matter. Pw1 had given two brothers from the locality a lift one of them the complainant in Count II (Pw2). Pw2 testified that after Pw1 left the truck to check what was happening he saw people who were armed with stones, rungus and iron bars chase after him. The attackers emerged from a sugar plantation on the left side of the road. He could hear them telling Pw1 to go into the sugar plantation but Pw1 ran away while shouting for help. Pw2 stated that two people forced the passenger door open and entered the driver's cabin. One had a knife. They roughed him up and ordered him not to scream. He stated that all the while his brother was sleeping in a bed in the cabin. Pw2 testified that there was a full moon and as the cabin light was on he was able to see and identify the attackers as they ransacked the cabin before he was pulled outside. He stated that it was then that he saw the appellant and recognized him. He testified that the appellant tripped him and he fell and the gang started kicking and stepping on him before one of them intervened and said he was his cousin. It was then that he was ordered to get up and run away which he did oblivious that there were other attackers ahead. One of them hit him on the back with a metal rod and he fell only to see the lights of the vehicle with which Pw1 and police officers were using to come to the scene. The attackers dispersed and he escaped to a nearby home. He stated that during the incident he was robbed of three empty bread crates, eight kilograms of wheat, two kilograms of "omena", two kilograms of tea leaves, 1 kilogram of tomatoes, a new baby suit, a towel, old T-shirt, long trouser and cash Kshs. 2700/=. He sustained injuries on the right wrist joint, right knee, right big toe and on the back. He stated that on that very night he took police officers to the home of the appellant but they did not find him. The complainant in Count I testified that he lost a phone and a bag containing his clothes. He stated that an attempt was made to break into the container and to steal the truck's battery but the same was not successful. The attackers however made away with the truck's Sony radio valued at Kshs. 7000/=. His phone was later recovered from one Edwin Butich a resident of that area who was charged jointly with the appellant but who died before the conclusion of the trial.

In his testimony, the appellant stated that he lived along the highway and that on the material day he was at his second wife's house. He stated that he only heard about the carjacking incident the day after it happened. He stated that after attending a funeral the following day he was called to Kisumu on 20th November 2013 for an interview and he did not go back home until 23rd November 2013 when he was arrested on allegation that he was involved in a robbery. He identified Pw2 as his neighbour but stated that there was a grudge between them because of telling the person who used to sell sugar to Pw2 not to do it on credit. He stated that because of that, Pw2 vowed to teach him a lesson. He contended that Pw2 mentioned five other suspects and two were arrested and then released. He contended that he was framed and stated that he had been implicated in another robbery in the same area yet it had occurred while he was in Nairobi. He denied having fled from the area.

There is no doubt that on the material night Pw1 and Pw2 were robbed. The attackers were more than one and they were armed and they used actual violence against the complainants as evidenced by the P3 Forms produced. The ingredients of robbery with violence were therefore proved beyond reasonable doubt.The only issue for determination is whether the appellant was positively identified as one of the robbers.

It is trite as submitted by Miss Wamalwa that visual identification in criminal cases can cause miscarriage of justice and should be carefully tested. It is also trite that the evidence of a single witness must be carefully tested and that such evidence must be watertight to justify a conviction. Counsel cited several cases most of them binding on this court and I agree with the principles therein. In this case it was Pw2 who claimed to have identified the appellant. His was evidence of recognition because as admitted by the appellant they were known to each other. I have tested the evidence of Pw2 including that regarding the lighting at the scene – the truck's head lights, moonlight and cabin light – the distance from which he alleges to have seen him and his conduct after the robbery and I am satisfied that he positively identified the appellant. Samuel Mburu (Pw3), a police officer who was on patrol along the highway on the material night confirmed that he received a report of the attack from Pw1. He also confirmed that Pw2 gave them the names of the four people he had recognized during the attack. He confirmed that one of them was the appellant. He also confirmed that Pw2 took them to the appellant's home on that very night but they did not find him. The evidence of Pw2 though it was that of a single witness was therefore well corroborated. It was also not shaken either by

cross examination or the testimony of the appellant. I find it credible and watertight. I found no contradictions in the evidence of the prosecution witnesses to water it down. For one, Pw1 was categorical that when he alighted from the truck and was confronted by the attackers he fled the scene by means of a vehicle that he flagged down. He was categorical that he left Pw2 and one other person who is deceased in the vehicle. Secondly the issue of the truck being at Lwandeti was rendered immaterial by the appellant's own admission that a "carjacking" occurred in that area on the material night and lastly there was no contradiction regarding the fate of the third victim as alleged. I do also find that there was no alibi mounted by the appellant because his evidence was that he left for Kisumu on 20th November 2013 yet the robbery took place on 13th November 2013. Moreover, the allegation that he could not have been at the scene did not dislodge the watertight and cogent evidence of Pw2. The allegation of a grudge between them could only have come as an afterthought as it was not put to the witness during cross examination. It is my finding that the charges against the appellant were proved beyond reasonable doubt and that his appeal against conviction on the two charges has no merit.

On the sentences, it is clear that the only reason he was sentenced to death was because at the time that was the mandatory sentence. The Supreme Court pronouncing itself in the case of **Francis Karioko Muruatetu & another v Republic [2017] eKLR** has since declared the mandatory nature of the sentence unconstitutional and it behoves this court to consider the nature and circumstances of the case and the appellant's mitigation and mete out an appropriate sentence.

It is not clear whether the third person in the truck died during the robbery. What is clear going by the medical evidence adduced is that the violence meted against Pw1 and Pw2 only amounted to harm which is the least degree of injury. It is also clear that the appellant was a first offender. Taking into account his plea in mitigation and the circumstances of the offence, a death sentence would not be appropriate. Accordingly, I set aside the same and substitute it with one for a term of imprisonment for twenty (20) years on each count and further order that the same shall run concurrently from the date the appellant was sentenced by the lower court. It is so ordered.

Signed and dated this 15th day of January 2020.

E. N. MAINA

JUDGE

Dated and delivered in Eldoret this 21st day of January 2020.

H. A. OMONDI

JUDGE