



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CORAM. D. S. MAJANJA J.

CRIMINAL APPEAL NO. 14 OF 2019

BETWEEN

JULIUS GACHOKA NDUNG’U.....APPELLANT

AND

REPUBLIC..... RESPONDENT

(Being an appeal against the original conviction and sentence dated 27th February 2018 in Criminal Case No. 5676 of 2016 at the Magistrates Court in Thika before Hon.C. A. Otieno-Omondi, PM)

JUDGMENT

1. The appellant, **JULIUS GACHOKA NDUNGU**, was charged, convicted and sentenced to death for the offence of attempted robbery with violence contrary to **section 297(2)** of the **Penal Code (Chapter 63 of the laws of Kenya)**. The particulars of the charge were that on 28th July 2016 at Gitambaa Trading Centre within Ruiru town in Kiambu County, jointly with others not before the court, while armed with offensive weapons namely pangas and other assorted weapons attempted to rob one **PETER KANGETHE KHIHIKO** of his goats and immediately before or immediately after the time of such attempted robbery wounded the said **PETER KANGETHE KHIHIKO**.

2. The prosecution called 6 witnesses to prove its case which was as follows. The complainant, Peter Kangethe Kihiko (PW 1) stated that he was at home on 28th July 2016 and at about 2.00am, he went to check on his goats. There was no light in the goat pen and as he was there, someone grabbed him. When his wife, Alice Nyambura (PW 3), heard the commotion, she put on the lights at the main door. He saw the appellant emerge from behind the person holding him and when the person noticed that he had been seen, he tried to prick PW 1’s eyes with a metal rod but hit him near the left eye on the head causing him to collapse. He regained consciousness when he was being taken to hospital where his left eye was stitched. He told the court that when he left hospital he reported the incident to the police who came to his home and found the animal pen had been broken into but no goats had been stolen. He testified that he knew the appellant as a neighbour and reported that he was one of the assailants.

3. John Njoroge, PW 2, a brother to PW 1, testified that he was awoken by PW 3 screaming on that material night. He went to PW 1’s house and found that he had been injured on his hand and head. He took him to hospital. He told the court he did not ask PW 1 who had attacked him. PW 3 testified that she heard commotion when PW 1 went out of the house. When she put on the light, she saw 3 people causing her scream. She went back to the house. When she came back PW 1 had been injured while PW 2 had come. The assailants had fled. They assisted to take PW 1 to Ruiru Hospital and reported the matter to the police. She stated she did not identify the assailants but after he came from hospital, PW 1 told her that the appellant is the one who attacked him. She stated that the home had security lights which she put on when she heard commotion outside. She knew the appellant as a neighbour.

4. Samuel Gichuki Irungu, PW 4, was the Clinical officer who examined PW 1 on 31st May 2017 and filled the P3 medical form which showed that PW 1 was brought to hospital on 28th May 2017. PW 1 had blood stained clothes. He had a cut wound on the scalp and face, a cut wound on the left shoulder and left arm. He opined that the injuries were caused by a panga and physical contact like kicks and blows. He assessed injuries as harm.

5. AP Sergeant David Masita, PW 5, testified that while he was at Kihunguro AP Post within Ruiru on 27th July 2016 at about 2.00 am he received a distress call from a member of the public who informed him of a robbery, he went to the scene which was PW 1’s home and found he had been rushed to hospital. PW 3 told him she could identify one of the robbers who she named as Julie the short name for Julius. On the next day, they started looking for the appellant and found him at his home and arrested him.

6. The Investigating Officer, PC Benjamin Kurgat, PW 6, testified that he was on duty on the material night when he was informed of the incident. He proceeded to the scene with other officers and found that PW 1 had been rushed to Ruiru Hospital. He went to the hospital

where he found PW 1 nursing injuries. PW 1 told him that there were 3 assailants one who was known as *Julie*. One the next day, he learnt that *Julie* had been arrested and was brought to the police station and later charged.

7. When the appellant was put on his defence, he made a sworn statement. He told the court that on 26th July 2016, his wife was away to visit her mother and 27th July 2016, he was with his family members the whole day until 10.00pm and was arrested on 28th July 2017 in a hotel close to where he resided. He testified that he did not flee and that no weapon or stolen item was recovered from him. He stated that his family and the complainant's family had a sour relationship.

8. A boda boda operator and elder and the appellant's father, Joseph Ndungu Njoroge (DW 2), recalled that on 27th July 2016 he was with the appellant at his vegetable stall whereupon he left to attend to his daughter's house for some discussions which went on until 10.00pm. On the following day at about 7.30am, he was called by a police officer and informed that the appellant had been arrested and was at the AP Post but did not know about the complainant until 3 months later. He claimed that the complainant made a malicious accusation against his son.

9. Based on the aforesaid evidence, the trial magistrate held that the appellant was identified as the person who attacked PW 1 while attempting to steal. The appellant now appeals against conviction and sentence. The gravamen of his appeal contained in his grounds of appeal filed on 23rd April 2018 is that the prosecution failed to prove that he was the person who attacked PW 1. He pointed out the evidence of recognition was not preceded by a cogent first report. He submitted that crucial witnesses did not testify and that the evidence presented by the witnesses was contradictory.

10. The offence of attempted robbery at **section 297** of the *Penal Code* is defined as follows:

297(1) Any person who assaults any person with intent to steal anything, and, at or immediately before or immediately after the time of the assault, uses or threatens to use actual violence to any person or property in order to obtain the thing intended to be stolen, or to prevent or overcome resistance to its being stolen, is guilty of a felony and is liable to imprisonment for seven years.

(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in the company with one or more than one persons, or if, at or immediately before or immediately after the time of such assault, he wounds, beats, strikes or uses any other personal violence, he shall be sentenced to death.

11. It is clear from the definition that the prosecution established that PW 1 was attacked by more than one person with a weapon on the material night in an attempt to steal from his goat pen. PW 3 also supported PW 1's case that he had been attacked as she saw the assailants before they took off. That PW 1 was assaulted and his injuries were confirmed by PW 2 and PW 3 who were with PW 1 immediately after the incident and who took him to hospital. Likewise, PW 4 confirmed that PW 1 had been injured consistent with the facts narrated by PW 1.

12. The issue as I stated earlier is whether the appellant was one of the assailants who attempted to rob PW 1. The prosecution case was founded on the identification of the accused by PW 1 in admittedly difficult circumstances. This calls for careful examination of the evidence to exclude the possibility of mistaken identity. Such evidence must be watertight before a court can return a conviction (see *Abdalla Bin Wendo & Another v R* [1953] 20 EACA166, *Wamunga v Republic* [1989] KLR 42 and *Maitanyi v Republic* [1986] KLR 198). Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him (See *R v Turnbull* [1967] 3 ALL ER 549). These requirements are, however, relaxed when dealing with the case of recognition because, "recognition of an assailant is 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" (see *Anjononi & Others v Republic* [1980] KLR 59). However, even in such cases, the court must bear in mind that even where parties had prior or close relationship, mistakes can still be made in identification hence the court must still exercise a level of caution.

13. The key testimony implicating the appellant was that of PW 1 who stated that while it was dark, his wife switched on the light at the door of the house and in that moment he was able to recognise the appellant who was a person he knew. During cross-examination, PW 1 stated that they were looking at each other when the appellant hit him. PW 3 did not see the assailants but she confirmed that she switched on the light when she heard commotion outside. She also stated that PW 1 told her who attacked him after he returned from hospital. She recalled that while PW 1 was speaking after the incident, he did not mention the appellant's name. According to PW 5, it is PW 3 who told them that she could identify one of that assailants and it was the appellant referred to by the name Julie. PW 6 told the court that when he went to the hospital to visit after the incident, he was not in much pain and he was able to describe the assailant as a short man whom he said was Julie.

14. This is a case of recognition where the appellant was well known to PW 1 and the other witnesses as he was from the same neighbourhood. He did not deny this fact. In the short time the light was put on, PW 1 and the appellant were face to face when the appellant assaulted him with the metal rod. Given the proximity of the parties and the presence of the security light, I am satisfied that the circumstances of recognition were positive and free from error.

15. In assessing the quality of evidence of identification, it is essential to consider whether the complainant reported the name or gave the description of the person he recognised to those he met immediately after the incident. In *Simiyu and Another v Republic* [2005] 1 KLR 192, the Court of Appeal stated as follows:

In every case where there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by the person or persons who gave the description and purport to identify the accused and then by the person or persons to whom the description was given. The omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attacker's identity.

16. It is clear that when PW 5 went to the hospital to see PW 1, PW 1 told him that the appellant, Julie, is the one who attacked him. Since

the appellant was positively identified and named to the police officer and other persons who asked him about the assailant. The totality of the evidence is that PW 1 identified the appellant as the person who attacked him with a metal rod on the material night. In light of this finding, I reject the appellant's defence supported by his father, DW 2, that there was a disagreement within the family as his counsel did not raise the issue in cross-examination of PW 1 and it only arose in the defence. It was really an afterthought.

17. The appellant was sentenced to death in accordance with **section 297(2)** of the *Penal Code*. Since the mandatory death penalty was declared unconstitutional (see *Francis Karioko Muruatetu & Another v Republic SCK Pet. No. 15 OF 2015 [2017] eKLR* and *William Okungu Kittiny v Republic KSM CA Criminal Appeal No. 56 of 2013 [2018] eKLR*), it is now the maximum sentence.

18. The appellant was charged with attempted robbery with violence which would ordinarily attract a lesser sentence than robbery with violence but is nevertheless a serious offence as the appellant inflicted violence on the complainant. On the other hand, I have considered that the appellant was a first offender, his mitigation and age and the sentiments set out in the Probation Officer's report filed before the trial court. I sentence the appellant to **six (6) years imprisonment** to run from **2nd August 2016**.

DATED and DELIVERED at KIAMBU this 10th day of JANUARY 2020.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Kasyoka, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.