



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.349 OF 2008**

*(An Appeal arising out of the conviction and sentence of Hon. Maundu (SRM)*

*delivered on 7<sup>th</sup> October 2008 in Kibera Criminal Case No.2164 of 2007)*

**MORRIS OMONDI OKUMU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Morris Omondi Okumu was charged in count 1 with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on 5<sup>th</sup> March 2007 at Ongata Rongai in Kajiado County, the Appellant, jointly with others not before court, while armed with dangerous weapons, namely pangas and rungas robbed Margaret Wambui Kariuki of a TV set 14 inches make Ecotech, a DVD make Nashika, a radio, a big speaker, a wrist watch, a mobile phone make Alcatel and cash Ksh.2,000/- all valued at Ksh.35,000/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Margaret Wambui Kariuki. The Appellant was charged in count 2 with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on 5<sup>th</sup> March 2007 at Ongata Rongai in Kajiado County, the Appellant, jointly with others not before court, while armed with dangerous weapons namely pangas and rungas robbed Felistus Kilunde Mwangangi, one meko gas, a mobile phone make Motorola, a TV set make I-Max Japan and cash Ksh.3,830/- all valued at Ksh.17,830/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Felistus Kilunde Mwangangi.

When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, he was convicted as charged in both counts and sentenced to death. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial court for convicting him based on the evidence of identification which was unsafe. He was aggrieved that the trial court failed to properly evaluate the evidence of PW5 which, in his view, exonerated him from the crime. He took issue with the fact that the trial court in arriving at its decision, failed to consider his defence. He was of the view that his constitutional right as an arrested

person was violated since he was presented before the trial court twenty-one (21) days after his arrest. In the premises, the Appellant urged this court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. He urged the court to allow his appeal. In addition, this court heard oral submissions from Ms. Nyauncho for the State. She opposed the Appellant's appeal. She submitted that the Appellant broke into PW1's house while PW1 was asleep and stole therefrom several household goods. The Appellant gained entry into the house through the window after cutting the grills. The Appellant was arrested by neighbours who heard the complainant's screams. The Appellant was arrested in a nearby bush at the scene of crime. Learned State Counsel asserted that the Appellant was known to PW1. The Appellant also broke into PW2's house and robbed her of several household items. She was a neighbour to PW1. She submitted that PW3 also identified the Appellant. The Appellant was employed as a night guard in a nearby plot. She averred that the area was well lit. The Appellant was apprehended by PW4. Ms. Nyauncho stated that the evidence by the prosecution witnesses was corroborative. She was of the view that the prosecution established its case against the Appellant to the required standard of proof beyond any reasonable doubt. Learned State Counsel conceded to the Appellant's appeal against sentence. She urged this court to consider the fact that the Appellant has been in custody for thirteen (13) years since he was arrested and charged before the trial court. In the premises therefore, she urged the court to dismiss the Appellant's appeal against conviction but consider, as appropriate, the appeal against sentence.

The facts of the case according to the prosecution are as follows: PW1, Margaret Wambui Kariuki, was the first complainant. She stated that she was asleep in her house on the material night of 5<sup>th</sup> March 2007. She was with her husband and daughter who were also asleep. At about 2.00 a.m., she heard a knock on the window. The bedroom glass window was smashed. The assailants started cutting the grills on the window. They were using a big torch. PW1 and her husband raised alarm. One of the assailants entered the house through the window. He placed a panga on her husband's neck and ordered them to keep quiet. Two more robbers entered the house through the window. They ordered PW1 to open the bedroom door and take them to the sitting room. They did not switch on the lights in the house. They asked her to open the main door of the house. The door was made of glass on the upper part. PW1 stated that as she was opening the main door, she saw the Appellant standing outside the door. The security light which was above the door was switched on. He was wearing a black hat and a greenish jacket. She stated that she recognized the Appellant as she had seen him on several occasions in the neighbourhood. She opened the door. The Appellant entered the house. The assailants took several household items as particularized in the charge sheet. They afterwards left and locked the door from the outside. Immediately after the robbers left, PW1 raised an alarm. The neighbours woke up and chased after the assailants. After about 20 minutes, some of the neighbours came back and informed her that they had apprehended one of the robbers. PW1 was able to identify the assailant as one of the men who robbed her. When the neighbours brought the Appellant, he was wearing a greenish jacket but had removed the hat. Police officers from Ongata Rongai arrived shortly thereafter and took the Appellant away.

PW2, Felistus Kilunde Mwangangi, was the second complainant. She was PW1's neighbour. On the material night at about 2.00 a.m., she heard footsteps outside her house. She was in the house with her three (3) year old daughter. Her house was a single room. She was woken up by screams. Suddenly, people who were outside her house smashed her window. She raised alarm. They cut the window grills. Two men entered her house. Another man who remained outside was holding a bright torch which he used to illuminate the house. The two men who were inside the house switched on the lights. They took several household items. PW2 stated that she was able to identify the two assailants since her house was a single room. One of them was holding a panga. He was brown in complexion and had tied a scarf on his head which was red and white. The second assailant was holding a piece of wood. He had a black cap. He was short and of dark complexion. When the assailants left, she raised an alarm. One of the assailants was apprehended by neighbours. He was the short and of dark man who was holding a piece of wood. He however had removed his cap. The said assailant was the Appellant.

PW3, Paul Kinyanjui Kimani, was a neighbour to PW1 and PW2. He was sleeping in his house when he heard screams at about 2.30 a.m. on the night of 5<sup>th</sup> March 2007. He peeped through his window. His

house was next to the gate. The security light outside his house was lit. He saw a man at the gate of the plot carrying a torch and a panga. He recognized the man as the Appellant since he had seen him before. He worked as a night guard at the next plot. He also saw three other men who were carrying household items including a TV set, a gas cylinder and DVD. The Appellant was gesturing the men with his hands. He was directing them to exit the plot through a hole that was on the fence and not to use the main gate. The Appellant was standing about five (5) meters away from his house. He was able to identify him using the security light outside his door. The assailants fled. Some of the neighbours gave chase. They managed to apprehend the Appellant. Police officers arrived at the scene. They arrested the Appellant. PW3 stated that he had seen the Appellant in a nearby plot where he was employed as a watchman for about a month prior to the robbery incident.

PW4, Benson Macharia, also lived in the same plot as PW1, PW2 and PW3. On the material night at about 2.00 a.m., he heard footsteps outside his house. When he peeped outside, he discovered that his security light bulb had been broken. He saw four men. They had torches and pangas. They started breaking into the house directly opposite his which belonged to PW2. The lights in PW2's house had been switched on. The assailants cut the window grill and entered the said house. PW4 was watching them from his door. The upper part of the door was made of glass. He was not able to identify any of the assailants. He however noticed that one of them was wearing a blue trouser with whitish stripes, usually worn by security guards. The assailants came out carrying several household items from the house. After the assailants left, the neighbours came out. One of the neighbours said that the robbers left the premises through the fence and not the gate. PW4 accompanied by other neighbours jumped over the fence. They found the Appellant standing near a bush. He was carrying a torch and a panga. He was wearing blue trousers with a white strip and a blue jacket. They arrested him and took him back to the plot. The complainants identified him as one of the robbers. The Appellant claimed that he had overheard screams and was coming to the plot to offer his assistance. They called police officers who later arrived and arrested the Appellant.

PW5, Joseph Mutesa, based at Ongata Rongai Police Station was the arresting officer. On 5<sup>th</sup> March 2007, he was on night patrol duty when he received a call at about 3.00 a.m. reporting a robbery. He was with Cpl Regina and the driver. They drove to the scene of crime. They found the Appellant who was being beaten by an irate mob. He escorted the Appellant to police station while his colleagues tried to locate the other assailants who had escaped. He stated that they did not recover anything from the Appellant when they arrested him apart from a torch and a panga. The Appellant told him that he was a watchman at a neighbouring plot.

PW6, Cpl. Hillary Maihu from Ongata Rongai Police Station investigated the present case. He was assigned the case on 5<sup>th</sup> March 2007. The Appellant was in custody. He visited the scene of crime. He interviewed the witnesses and recorded their statements. PW3 told him that he peeped through his window and saw the Appellant at the main gate. The other assailants were coming from the house carrying several items. The Appellant was gesturing the assailants with hands showing them which direction to use to exit the plot. PW4 stated that he saw a man wearing a stripped security guard uniform when he peeped out. PW6 testified that the two complainants were not able to identify the assailants. PW4 was among the neighbours who apprehended the Appellant. None of the stolen items were recovered from the Appellant when he was arrested.

The Appellant was put on his defence. He testified that he was employed as a watchman in Rongai. On 5<sup>th</sup> March 2007, he reported to work at 7.00 p.m. At about 2.00 a.m, he heard screams emanating from a nearby building. He blew his whistle. Shortly afterwards, tenants of the plot where the screams were emanating from came to where he was. They were looking for robbers. They met him outside the gate of the building he was guarding. They asked him what he was doing there. He told them he was employed as a watchman. They however did not believe him. They believed he was one of the robbers. They started beating him up. His employer called police officers who arrived at the scene and rescued him. They took him to Ongata Rongai Police Station. The Appellant claimed that he was implicated in the robbery because he was newly employed. The neighbours did not know him. He stated that he was arrested in possession of a panga and a torch which he used in the course of his duties as a watchman. He denied any involvement in the robbery incident.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make any comments regarding the demeanour of the witnesses (See David Agwata Achira –vs- Republic [2003] eKLR). In the present appeal, the issue for determination is whether the prosecution established the charge of robbery with violence contrary to Section 296(2) of the Penal Code to the required standard of proof beyond any reasonable doubt. This court has re-evaluated the evidence adduced before the trial court. It has also considered the rival submission made by the parties to this appeal.

It was evident from the facts of the case that the prosecution relied on direct evidence of identification by recognition to secure the conviction of the Appellant. This court has a duty to thoroughly examine the evidence on identification before confirming a conviction based on the same. In the case of Wamunga vs Republic [1989] eKLR 426 the Court of Appeal stated as under:-

*“It is trite law that 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 conviction.”*

In the present appeal, PW1, PW2 and PW3 were the identifying witnesses. The robbery took place at about 2.00 a.m. The assailants broke into PW1 and PW2’s houses. The two houses were next to each other. PW1 stated that the assailants gained entry into her house through the window. Three men entered her house. One of them remained with her husband in the bedroom. The other two men took her to the sitting room. They did not switch on the lights while inside the house. They ordered PW1 to open the main door of the house. Her security light which was right above her door was lit. The neighbours’ security lights were also switched on. The upper part of her door was made of glass. As she was opening the door, she saw the Appellant standing outside the door. He came inside the house. He was carrying a panga. PW1 described the Appellant as short and dark. He was wearing a black hat and a greenish jacket. She told the court that she recognized the Appellant as she had seen him a couple of times in the neighbourhood. This court is of the view that PW1 positively identified the Appellant. The conditions for a positive identification were present since the security lights on her door were switched on. She also gave a description of the Appellant. She recognized the Appellant since she had previously seen him in the neighbourhood.

PW2 stated that she did not know the Appellant prior to the robbery incident. She however described the two assailants who were in her house. She stated that one of the robbers was brown in complexion and had tied a scarf on his head which was red and white. The other assailant was short and dark in complexion. He was wearing a black hat. This description matched the description of the Appellant given by PW1. PW2 was able to identify her assailants as they switched on the lights in her house. Her house was a single room. She therefore had a good look at the assailants as they carried items from her house. The assailants also harassed her for more money for about five (5) minutes. She was therefore able to positively identify them due to the close proximity and the use of electric lights in her house which had been switched on. Her evidence corroborated PW1’s evidence of identification of the Appellant.

PW3 also lived in the same plot as PW1 and PW2. He stated that his house was close to the main gate. On the material night, he heard people screaming. He peeped through his window. He saw the Appellant outside holding a panga and a torch. He was signaling the other assailants not to exit using the gate but instead exit through a hole that was on the fence. He stated that the security light outside his door was lit. The Appellant was standing approximately five (5) meters away from his house. He recognized the Appellant since he had seen him before in the neighbouring plot where he was employed as a watchman. Conditions favouring positive identification were present in this case. The Appellant was in close proximity to PW3’s house. His security lights had been switched on. PW3’s identification of the Appellant was by recognition. The Appellant was also known to PW3. He had seen the Appellant for about a month prior to the robbery incident. The Appellant had been employed as a watchman in the next plot.

This court is of the opinion that the evidence of recognition by PW1 and PW3 was reliable. The description of the assailants given by PW2 corroborated PW1's testimony. In addition, the Appellant was apprehended by PW4 in a nearby bush that was next to the fence of the plot. He was arrested in possession of a panga and a torch. The Appellant in his defence did not deny that he was employed as a watchman in a neighbouring plot. He stated that he was on duty that night. He heard screams from a nearby plot. Shortly thereafter, the tenants of the said plot came outside looking for robbers. They met him at the gate of the building he was guarding and arrested him. The Appellant's defence was displaced by the evidence of PW4, who apprehended the Appellant next to the fence of the plot where the robbery occurred. They recovered a panga and a torch from the Appellant when he was arrested. The Appellant in his defence admitted that he was arrested in possession of a panga and a torch which he claimed that he had in the course of his work as a watchman. He stated that he was framed due to jealous neighbours. No evidence was adduced to show the existence of any prior grudge between the prosecution witnesses and the Appellant for them to frame him of the present charges.

Although the Appellant denied being part of the gang that robbed the complainant, from this court's re-evaluation of the evidence adduced, it was clear to this court that the prosecution established to the required standard of proof beyond any reasonable doubt that indeed the Appellant was positively identified as being a member of the gang that robbed the complainant. The evidence of identification that was adduced by the prosecution witnesses, especially PW1 and PW3 was watertight. That evidence was of recognition rather than mere identification of a stranger. The Appellant was known to the said witnesses prior to the robbery incident. The Appellant was employed as a watchman in a neighbouring plot prior to the robbery incident.

In the premises therefore, this court holds that the prosecution was able to establish, to the required standard of proof beyond any reasonable doubt, the charge of robbery with violence contrary to Section 296(2) of the Penal Code. The ingredients of the charge of robbery with violence were established. The Appellant, in company of others, while armed with dangerous weapon namely pangas, robbed the complainants, and in the course of the robbery threatened to use violence on the complainants. The Appellant's appeal against conviction therefore lacks merit and is hereby dismissed.

On sentence, following the recent Supreme Court decision in the case of Francis Karioko Muruatetu & Another vs Republic [2017] eKLR, this court has jurisdiction to relook at the sentence of the Appellant to determine whether the death sentence that was meted on him was deserved or another sentence ought to be imposed. In the present appeal, it was clear to this court that, taking into consideration the entire circumstance in the case, that the death sentence that was meted on the Appellant was not deserved. This court has been guided by the guidelines issued by the Supreme Court in the above case. The Appellant was a first offender. In addition, none of the complainants were harmed during the robbery. The Appellant has spent close to thirteen (13) years in custody since he was charged before the trial court. That period is equivalent to twenty (20) years imprisonment, if remission is to be taken into consideration. In the premises therefore, the death sentence that was imposed on the Appellant is set aside. This court is of the view that the total period that the Appellant has been in lawful custody is sufficient punishment. In the premises therefore, the custodial sentence of the Appellant is commuted to the period served. He is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

**DATED AT NAIROBI THIS 4<sup>TH</sup> DAY OF FEBRUARY 2020**

**L. KIMARU**

**JUDGE**