REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 126 OF 2018

(CORAM: F. GIKONYO J)

JOSPHAT MUTWIRI.....APPELLANT

-versus-

REPUBLIC.....RESPONDENT

(This being an appeal from the conviction and sentence of Hon. S.M. Mungai C.M in Isiolo CR case 448 of 2016 on 6/9/18)

JUDGMENT

1. The appellant was charged with the offence of Robbery with Violence, contrary to Section 295 as read with section 296 (2) of the Penal Code. The particulars of the offence are that on 9/8/2016 at around 5.00 pm at Ngambera area within Isiolo county, robbed JAMES MUTHURI MWIRIGI of a motor cycle registration number KMDS 081F make DAYUN worth Kshs. 89,000 and at the time of such robbery wounded the said JAMES MUTHURI MWIRIGI.

2. On the second count he was accused of attempted Murder contrary to Section 220 (a) of the Penal Code and the particulars of the offence is that JOSPHAT MWITWIRI on 9/8/2016 at around 5.00 pm at Ngambera area within Isiolo County, attempted unlawfully to cause the death of JAMES MUTHURI MWIRIGI by hitting him severally on the head with a metal rod.

3. He was tried for the offences and convicted on the charge of robbery with violence and sentenced to death. Having been dissatisfied with the conviction and sentence he filed this appeal setting out 9 grounds which can be collapsed into 4;

> **q. That the learned trial magistrate erred in both law and fact by failing to find that the prosecution case was full of contradiction and inconsistencies.**
>
> **b. That the learned trial magistrate erred in both law and fact by failing to consider the fact that there was an existing grudge between the appellant and complainant.**
>
> **c. That the learned trial magistrate erred in both law and fact by failing to find that the prosecution did not prove its case beyond reasonable doubt.**
>
> **d. That the learned trial magistrate erred in both law and fact by convicting the appellant to suffer death without observing that the same death penalty was unconstitutional.**

Appellant's submissions

4. The appellant in his submissions argued that after analysis of the evidence presented they formed the opinion that it was insufficient, uncorroborated and did not support the charges. The charge sheet was amended more than 4 times showing that the prosecution was not sure if the appellant was the one who committed the said offence. The complainant in addition testified that he owned motorbike registration No. KM 05 081F but did not produce any ownership documents. The complainant testimony that the appellant hired the services of his boda boda and as he was taking him home the appellant shouted that there were armed robbers and he was hit and fell unconscious but then continued to say that the appellant sat on him and started plucking off his teeth with a knife. It was his argument therefore if the complainant was unconscious how then did he see the appellant plucking his teeth? PW2, PW3 never witnesses the crime. PW6 never went to the scene nor did he investigate anything.

5. It was the appellant's defence that he was arrested on 14/8/2018 when he met PW2 and PW3 to ask for his money. The court therefore did not consider that there was an existence of a grudge between the complainant's family and the appellant. The trial court eventually convicted the appellant by relying on a single witness as no one witnessed the complainant being attacked, and convicting him to death as a mandatory

sentence is unconstitutional. According to him, the trial court did not consider that he was a first time offender.

Submission by the State

6. Vincent Maina, senior prosecution counsel argued that the appellant was convicted on the first count of robbery. They cited **CRIMINAL APPEAL 66/1984 JACKSON OLUOCH & ANOR V. REPUBLIC** that robbery with violence is committed in the any of the following circumstances;

> **a. The offender is armed with any dangerous or offensive weapon or instrument, or**
>
> **b. The offender is in company with one or more other 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.**

7. PW1 in his evidence stated that he was a boda boda rider within Isiolo town and that on 9/8/2016, he was approached by the appellant around 4.00pm to ferry him to Mutuatuu and along the way the appellant attacked him with a metallic road twice on the head whereby he fell down. He went on to hit him on the neck and started plucking his teeth with a knife and he managed to remove 7. He thereafter stabbed him on the head and chest and left him for dead. He stole the motorcycle and the complainant spent a total of 5 days in the bush before being rescued by good Samaritans. The injuries suffered were corroborated by PW4 Dr. Daudi Dabaso who assessed them as grievous harm. PW2 the complainants father corroborated the fact that the complainant disappeared on 9/8/2016 and was found in Isiolo Hospital on 14/8/2016. The identification carried out by PW5 was positive on the appellant and in addition the serious injuries occasioned on the complainant by the appellant amounting to grievous harm; were inflicted in order to rob him of the motorbike. Therefore, it was his argument that the case was proved beyond reasonable doubt.

DETERMINATION

Court's Duty

8. As first appellate court; I should evaluate the evidence and come to own conclusions except I am reminded that I neither saw nor heard the witnesses. See: **KIILU & ANOTHER vs. REPUBLIC [2005]1 KLR 174**. In this exercise, the court is not beholden or compelled to adopt any particular style. What must be avoided however is mere rehashing of evidence as was recorded or trying to look for a point or two which may or may not support the finding of the trial court. Of greater concern should be to employ judicious emphasis and alertness, have an eye and an ear for subtleties of evidence adduced so as not to miss the grace and power of the testimony of witnesses and the applicable law. Such style insists on simplicity in writing and keeping as close as possible to the words used in the testimony recorded. Ultimately, little difficulty or none at all will be experienced in making the overall impression of the evidence, facts and the law applicable. I shall so proceed.

Elements to be proved

9. The prosecution bears the burden of proof. It must prove its case beyond reasonable doubt the elements of crime of robbery with violence in section 296(2) of the Penal Code. The section provides as follows: -

> **(1) ……..**
>
> **(2) 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.**

10. On examination of the record the testimony of PW1 who was also the complainant was clear that he was a boda boda rider and on 9/8/2016 he met the appellant who requested for his services i.e. to transport him on his boda boda to his home. On the way, the appellant shouted that there were robbers nearby. PW1 clearly stated that he saw no one around. The accused the hit him on the neck with a wire rod. When he fell down the appellant sat on him and started to pluck his teeth with a knife and managed to take out 7. Then he stabbed him on the head and chest and left him for dead. The appellant took his motorbike and sped off.

11. He remained in the bush for five days and when he regained consciousness he managed to get to a road where he was assisted by good Samaritans and taken to Isiolo General Hospital. The injuries he sustained were confirmed and corroborated by the testimony of PW4 who assessed the degree of injury as grievous harm. PW2 who is the father to the complainant confirmed that he realized that his son went missing on 9/8/2016 as he was not at the stage where he conducted his business. They were later told that the complainant was seen in Isiolo Hospital.

12. When put in his defence the appellant told the court that on 14/8/2016 he left Kula Mawe at 7.00 am and headed to Kambi ya juu. At Kambii ya juu he met the complainants father and Koome his son. PW2 went ahead to ask him for his money but when he asked for time to look for money they told him to accompany them to Kambi ya juu police camp where he was arrested. He denied that he robbed the complainant and the case herein was brought against him because there was a grudge that existed between the complainant family and the appellant over payment of 4,500.

13. The appellant in his testimony did not deny requesting for boda boda services from the complainant on the material date. I see no explanation as to what happened when the alleged thieves attacked them. He was the last person with the complainant before good Samaritans took him to hospital. Nothing dislodges the fact that the appellant and the complainant were together at the scene on the material

day. The appellant merely stated that the complainant's family held a grudge against him because he had not paid a sum of Kshs. 4,500 which he had borrowed from them. This defence is neither here nor there and does not have any foot on which to stand. It is merely intended to infuse confusion in the case. The evidence adduced is cogent and withers such afterthought. I find no merit in the defence.

14. The prosecution proved the appellant was armed with a dangerous or offensive weapon or instrument, and at or immediately before or immediately after the time of the robbery, he wounded the complainant. He caused him serious injuries and stole his motor bike.

15. At this juncture, I am able to tackle the appellant's claim that the court laid too much reliance on the testimony of one witness on identification. On this subject, the Court of Appeal for Eastern Africa in **ABDALLA WENDO vs. R [1953] 20 E.A.C.A 166** held that: -

> **"Subject to certain exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification, were difficult. In such circumstances what is needed is other evidence whether it be circumstantial or / direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."**

16. See also RORIA vs. REPUBLIC[1], the Court of Appeal for East Africa held that:-

> **"A conviction resting entirely on identity invariably causes a degree of uneasiness, ……..**
>
> **That danger is of course greater when the evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld. It is the duty of this court to satisfy itself that in all the circumstances it is safe to act on such identification."**

17. Be that as it may, this is a case of identification by recognition and circumstances were not difficult ones. The appellant was known to the complainant and evidence show they were together at the scene. Also evidence show that the appellant positively identified the appellant as the person who hit him and pulled seven teeth from his mouth using a knife. Therefore, in light of the above the lower court was correct in its finding on identification.

On sentence

18. The appellant relies on the Supreme Court decision in the case of **FRANCIS KARIOKO MURUATETU & ANOTHER vs. R& ANOTHER[2].** I wish however to dispel a misplaced notion which seems to emerge from the appellant's submissions that the Court declared death sentence to be unconstitutional. I am aware the debate on whether to out-law death penalty is rife in Kenya. I am also aware that the president has been computing death sentences into life sentence. That notwithstanding, the Court did not outlaw death penalty. Death penalty is still lawful sentence in Kenya and may be imposed in appropriate cases. The principle established in the MURUATETU case is that a mandatory sentence limits and takes away the discretion of the court in sentencing, thus, any provision of the law that does that is unconstitutional to the extent that it provides for a mandatory sentence. Therefore, it is the circumstances of this case which should determine the appropriate sentence herein.

19. The appellant set out with a person he knew upon what looked to be an honest *boda boda* transport business, but with an outrageous ambition or intent to cause the gravest possible hurt to a fellow human being. The appellant then set upon the unsuspecting complainant with brutal force and violence; hit him with a metal rod, sat upon him on the ground and removed 7 teeth using a knife, and also stabbed him further. This is such a beastly act and reminds of the *ruffians or Mohocks* of the yore as they were called about whom it was written:

> ***''…..The particular talents by which these misanthropes are distinguished from one another consist in the various kinds of barbarities which they executed upon their prisoners[3]…...***

20. So also in sentencing will the barbarities executed upon a victim of robbery determine the appropriate sentence; death or other sentence as may be appropriate in the circumstances of the case. In this case, I have set out the manner the robbery was executed. The force and barbarity of removing a person's teeth from the mouth using a knife without any form of anesthesia is most painful and inhuman. This was after hitting him with an iron rod on the neck. Add also, that he stabbed him further with a knife on the head. These circumstances justify imposition of death sentence as the appropriate sentence. However, I take judicial notice of the fact that the president has commuted death sentences into life sentence. Accordingly, I set aside the death sentence and impose a life sentence.

21. In the upshot, I find the Appellant's appeal on conviction to be without merit. Except, he will now serve a life sentence for the offence committed.

22. It is so ordered

Dated, signed and delivered at Milimani Nairobi this 21st day of APRIL 2020

F. GIKONYO

JUDGE

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