



REPUBLIC OF KENYA

IN THE HIGH COURT KENYA AT MERU

CRIMINAL APPEAL NO.119B OF 2018

JOHN MUNYOKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement of Hon.E.Mbicha(Mr)

SRM in Meru CMC CRC No.1934 of 2015 delivered on 17th July 2018)

JUDGEMENT

1. The Appellant was found guilty, convicted and sentenced to suffer death for the offence of robbery with violence contrary to Section 296(2) of the Penal Code.
2. The particulars of the offence were that John Munyoki on the 30th day of September 2015 at Kanyori bridge in Meru town Imenti North Subcounty within Meru County jointly with another not before the court robbed Kelli Kanyua Kabiti of a mobile phone make Tecno and cash Ksh.200 all valued at Ksh. 11,700 and immediately before such robbery used actual violence to the said Kelli Kanyua Kabiti.
3. The Appellant was aggrieved by the conviction and sentence and filed a petition with the following grounds of appeal:
 - a. That the learned Magistrate erred in matters of law and fact by failing to note that the evidence adduced by the prosecution witnesses was not water tight to warrant death sentence.
 - b. That the learned trial Magistrate erred in matters of law and fact by failing to note that Section 296(2) is unconstitutional according to the Supreme Court Judgement delivered on 14th December 2014.
 - c. That the learned trial Magistrate erred in matters of law and fact by not noting that the prosecution did not prove its case beyond reasonable doubt.
 - d. That the learned trial Magistrate erred in matters of law and fact by failing to note that the prosecution evidence was contradicting uncorroborated and inconsistent.
 - e. That the learned trial Magistrate erred by matters of law and fact by failing to note that no weapon or any object used by the Appellant at the scene according to the evidence of the complainant to support the ingredient of robbery.
 - f. That the learned trial Magistrate erred by matters of law and fact by failing to note that the medical report was not produced before court to support the allegation of complainant to prove robbery with violence.
 - g. That the learned trial Magistrate erred by matters of law and fact by failing to note that no independent witness adduced by the prosecution to prove the allegations of the complainant and his wife.
 - h. That the trial Magistrate erred by matters of law and fact by failing to note that no exhibit brought before court to support the allegations.
 - i. The learned Magistrate erred by matters of law and fact to note that the Appellant was not given the proceedings in time to help him to prepare his defence which is prejudicial to the Appellant
 - j. The Appellant sought that he should be supplied with the proceedings and judgement of the trial court to draft a more cogent

grounds.

4. The Appellant prayed that the appeal be allowed, sentence set aside and his conviction quashed.

5. The Memorandum of Appeal was filed on 6th September 2018. Subsequently the Appellant filed fresh grounds of appeal together with his written submissions upon directions being taken in court for hearing of the appeal by way of written submissions.

6. In the fresh grounds of appeal the Appellant had the following to say:

a. That the trial Magistrate erred in matters of law and fact by failing to note that no exhibit was adduced before court to support the allegation of the complainant.

b. That the trial Magistrate erred in matters of law and fact by relying on the evidence of single identification.

c. That the trial Magistrate flouted in matters of fact and law by convicting the Appellant on evidence that lacked requisite standard of beyond reasonable doubt.

d. That the trial Magistrate erred in fact and law by relying on evidence of a few witnesses and failing to note that the vital witness was not summoned before the court to support the allegation of the complainant that he is the one who supported PW2 to arrest the Appellant.

e. The learned trial Magistrate erred in both law and fact by rejecting the Appellant's defence without giving cogent reasons

7. The Appeal was canvassed by way of written submissions

8. The Appellant argued that the offence of robbery with violence was not proved because there was no weapon used during the alleged robbery. He also submitted that the evidence of PW2 on identification was not clear since he was 150 meters away and that in line with the case of **Oluoch vs Republic 1985 KLR**, the conditions favouring a correct identification were difficult. The Appellant argued further that the ingredients of the offence of robbery with violence were not proved beyond reasonable doubt by the prosecution as the complainant was not injured and she did not see the Appellant with any weapon.

9. The Appellant also pointed out the contradictions in the evidence of the prosecution in terms of dates and value of the alleged stolen phone and also in terms of the number of assailants that allegedly attacked the complainant. He argued that such evidence cannot secure a safe conviction. He said that PW1, PW2 and PW4 were not credible witnesses and their evidence cannot be relied upon. The Appellant relied on the holding in **John Barasa Vs Republic Criminal Appeal No.22 of 2005 High Court of Kenya at Kitale** the **case of Bunkrish padya Vs Republic (1993)EACA**.

10. The Appellant also argued that the charge sheet was defective on account of the fact that PW4 told the court that the incident occurred on 27th September 2015 but the charge sheet indicated that it happened on 30th September 2015. He relied on the cases of **Achoki Vs Republic (2000) 2EA283**, **Yosefu and Another Vs Uganda 1960 EA236** and **Stanley Muriuki Vs Republic [2016] eKLR**.

11. The Appellant submitted further that since the person who assisted PW2 to arrest him was not called to testify there was possibility of mistaken identity as there is no evidence that the complainant described to PW2 who had robbed her of the phone. He also argued that the sentence meted on him was excessive harsh and unconstitutional as the mandatory death sentence was declared unconstitutional in the ruling of the Supreme Court in **Francis Karioko Muruatetu in Petition 15 and 16 of 2016**.

12. The Respondents on the other hand filed their submissions and argued that the Appellant was in the company of another person when they robbed the complainant and therefore the Prosecution had proved its case beyond reasonable doubt for the offence of robbery with violence. It was submitted that there was no mistaken identification of the Appellant as the complainant screamed when she was attacked and PW2 who had just parted ways with her turned back her and started chasing the thief and was assisted by members of the public to arrest the Appellant herein. It was also submitted that the Prosecution's evidence was solid and without any contradictions and that the appeal should be dismissed and the conviction and sentence be upheld.

13. This being a first appeal, this Court is, as a matter of law, enjoined to analyze and re-evaluate afresh all the evidence adduced before the lower court and to draw own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424.”

14. I have considered the evidence in the trial court for the prosecution and the Appellant as well as the judgement of the trial Magistrate and the offence having occurred during the day and the Appellant having been arrested by PW2 with the assistance of other members of the public a short distance away from the scene of the offence. I do find that he was properly identified as the one who together with another attacked

the complainant and robbed her of her phone and Ksh. 200. In order to commit the offence it is the Appellant who grabbed her by the neck to prevent her from screaming but never the less she managed to scream and this made PW2 turn back and pursue the assailant. The complainant said she met the Appellant and his companion and was therefore able to identify him positively. PW2 also said that he continuously saw the Appellant and his companion as they were running away from the scene without being obstructed and he was assisted by members of the public to arrest him.

15. The Appellant on arrest was subjected to mob injustice because of having committed the offence against the complainant.

16. This court therefore finds that the Appellant robbed the complainant although he was not found with any weapon at the time of arrest and the complainant did not sustain injuries that could make her seek medical attention.

17. Concerning the conviction, I do however find that the gravity of the offence was not such that a conviction under Section 296(2) of the Penal Code should have been found suitable. For that reason, it is the view of this court that the Appellant should have been convicted for the offence of robbery under Section 296(1) of the Penal Code. This court is also in agreement with the Appellant that following the decision in **Francis Karioko Muruatetu Vs Republic in Petition Nos 15 and 16 of 2015** the trial court was under the obligation to consider the Appellant's mitigation, circumstances and gravity of the offence and consider whether to mete out any other sentence other than the death sentence as it is no longer mandatory.

18. The appeal therefore succeeds partly to the extent that the conviction and sentence for the offence of robbery with violence is set aside and substituted with the offence of robbery under Section 296(1) of the Penal Code and the Appellant sentenced to serve 2 years' imprisonment with effect from 17th July 2018.

HON.A. ONGINJO

JUDGE

JUDGEMENT DATED AND DELIVERED AT MERU VIA SKYPE THIS 21ST DAY OF MAY 2020 DUE TO THE PRESIDENTIAL DIRECTIVES ISSUED ON 15TH MARCH 2020 AND SUBSEQUENTLY ON 7TH APRIL 2020 DUE TO COVID-19 PANDEMIC.

HON.A. ONGINJO

JUDGE