REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 44 OF 2019

(CORAM: F. GIKONYO J.)

JAMLECK KIRIMI KINOTI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence of Hon. J. Irura SRM in Nkubu Cr. 390 of 2016 on 29/6/2017)

JUDGMENT

1. **Jamleck Kirimi Kinoti** was charged with two counts of robbery with violence. Count I; 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 the 30th day of March 2016 at Mitunguu Market Kirende Location in Imenti South Sub county within Meru County jointly with others not before the court while being armed with dangerous weapons namely Panga, Kitchen Knife robbed Rosemary Mumbi of her mobile phone, Make Itel valued at Kshs. 1,600, cash Kshs. 520, Ikg of meat valued at 360 and Safaricom scratch card Kshs. 50. All valued at Kshs. 2,480/=.

2. Count II: 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 the 30th day of March 2016 at Mitunguu Market Kirende Location in Imenti South Sub county within Meru County jointly with others not before the court while being armed with dangerous weapons namely Panga, Kitchen Knife robbed Godfrey Mutembei of is cash Kshs. 500

3. He was tried for the offence and convicted on both counts and sentenced to death. Having been dissatisfied with the conviction and sentence he filed this appeal setting out 8 grounds in the Amended Grounds of Appeal which can be collapsed into 5;

a. That the prosecution witnesses gave inconsistent, contradictory and conflicting testimonies.

b. That the prosecution did not prove their case beyond reasonable doubt

c. That the crucial witnesses were not called before the court to ascertain the truth of this case.

d. That no identification parade was conducted to prove the allegation of the complainants

e. That the learned trial magistrate did not analyse the evidence as required.

f. That the sentence was unconstitutional.

Appellants Submissions

4. It was the appellant's argument that there was need for an identification parade as PW1 testified to the fact that she did not know the accused and that she saw him for the first time on the day that she reported the case. The identification parade would certainly prove that the appellant was the one who robbed the complainant. In support he cited the Court of Appeal in **John Mwangi Kamau v. Republic (2014) eKLR** where the court of appeal held that

"Identification parades are meant to test the correctness of a witness's identification of a suspect.

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In Gabriel Kamau Njoroge –vs- Republic (1982-1988) 1KAR 1134, this Court observed:-

> **"A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade."**

5. The appellant also argued that the light at the scene of the crime was not conducive to proper identification and the failure to analyze the light used to identify was fatal to the prosecution case. That it was necessary to test the evidence of identification and take great care and caution to ascertain whether the surrounding circumstances were favorable to facilitate proper identification. In support he cited **Maitanyi -vs- Republic, (1986) KLR 198**, where it was held,

> **"The strange fact is that many witnesses do not properly identify another person even in daylight... It is at least essential to ascertain the nature of light available. What sort of light, its size and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care? It is not a careful test if none of these matters are unknown because they were not inquired into.... See Wanjohi & Others -vs- Republic (1989) KLR 415".**

6. In his submissions the appellant added that the prosecution did not call crucial witnesses in support of their case as it was alleged that the members of the public were the ones who arrested the appellant but none of the members were summoned by the prosecution nor did they write any statements. Therefore, the prosecution gave weak evidence and the trial erred in relying on the same.

7. Prosecution did not file submissions.

Analysis and Determination

8. This being first appeal, the court is under legal obligation to re-evaluate the evidence on the record and make its own findings and conclusions except having in mind that it did not have the advantage of hearing or seeing the witnesses. See **KIILU & ANOTHER vs. REPUBLIC [2005]1 KLR 174.**

Elements to be proved

9. According to the Court of Appeal in **Ganzi & 2 Others v Republic [2005] 1 KLR** robbery with violence will be proved when one or more of the following elements is proved:

> **1. If the offender is armed with any dangerous or offensive weapon or instrument, or**
>
> **2. If he is in the company with one or more other person or persons, or**
>
> **3. If at or immediately before or immediately after the time of the robbery, he wounds, beats strikes or uses any other violence to any person.**

10. It was the prosecution's case that appellant together with two other unknown persons while armed with pangas and a knife robbed PW1 and PW2 of their various items. It is the appellant's contention that because the complainant did not know the appellant an identification parade was necessary to properly identify him. I take the view that other forms of evidence including dock identification may serve as positive identification. See the case of **Samuel Mwaura Muiruri & 2 others v Republic [2002] eKLR** where the court of appeal held that;

> **"We do not think that evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification"**

11. It was therefore up to the trial court to properly examine the evidence adduced before it and make a decision based on the facts of the case as to whether the appellant was the person who committed the offence. What evidence was adduced?

12. **PW1 ROSEMARY MUMBI** in her testimony told the court that she recalls that on 30/3/2016 she had been sent to the shop. She boarded a *boda boda* to Mitunguu. As she went to buy the goods she asked Mutembei to escort her to Makandune. They went on foot and when they got near the Methodist church they met three people who asked them where they were going. The three were carrying pangas and a sack but she did not see what was inside. The accused had a knife and together with his accomplices they started attacking them. The accused hit her on the head and demanded that she gives him what she had. He then removed an itel mobile phone which was in her pocket. He also took 1 kg of meat worth Kshs. 360 and credit worth Kshs. 50. He gave the items to his accomplices and told them to rape her. Mutembei managed to escape and she started running while screaming. The people who were in the church then came to her rescue. They caught the accused who was still holding the knife. The reverend called the police who later came and arrested the accused. The other two were not arrested. She was able to see the accused using the light from the nearby church. She added that the people she met at night were not known to her as it was the first time she saw him.

13. **PW2 GODFREY MUTEMBEI** told the court that he recalls that on 30/3/2016 PW1 came to his house and asked him to escort her. He agreed and set out but when they reached near the Pentecost church they met 3 people armed with pangas and knives. The accused was armed with a knife. The three attacked him and the accused removed Kshs 500 from his pocket whilst the other two were struggling with PW1. The accused hit him on the face. He managed to free himself and he ran while screaming. The other two managed to escape and some people from the nearby church came to their rescue.

14. **PW3 PC TOM ONYANCHA** recalled that on 30/3/2016 at about 8.30 pm he was at the station as the duty officer and he was together with PC Jackson Mutundu. He received a call from a member of the public who informed him that there was a robbery near the Methodist Church at Mitunguu. When they got to the scene they found that the members of the public had arrested the accused. The two complainants narrated what happened and when he conducted a search at the scene he recovered a handle of the kitchen knife. They arrested the accused who has now been charged before the court.

15. **DW1 JAMLICK KIRIMI** in his defence told the court that he recalled that 30/3/2016 he went to look for work in the morning and got work for cutting bananas. He worked till 7.30 pm and went home to rest. On the way he met some people near a church and they asked if he had met with anyone and he said he had not. The group was being led by the complainant and she told the people that he was the one who had robbed her. The police were called. They proceeded to the scene and the police used torches to recover the knife handle. He was then arrested and charged before this court.

16. There is no doubt that the appellant was at the scene of crime on the material time. Except the appellant stated that he was on his way home when, upon reaching the Methodist church, he met with a group of people led by PW1; and then PW1 told said the group of people that he is one of the people who attacked her. The appellant also urged that there was no sufficient light to identify him. The testimony of PW1 was that there was sufficient light from the nearby church. Under the light, she identified the appellant as one of their attackers. She still held to the handle of the knife the appellant had during the robbery. PW3 produced this handle as Exhibit 1. From the evidence adduced, immediately after the robbery, PW1 identified the appellant as one of the persons who attacked and robbed them. The group of people from the church also responded immediately PW1 and PW2 screamed and they apprehended the appellant immediately. These events were so spontaneous and strange that the appellant was in very close vicinity immediately the robbery took place. PW1 was categorical that the people from the church apprehended the appellant and found him still holding a knife. Her evidence was corroborated by PW3 who conducted a search of the scene and recovered the handle of the knife.

17. I am aware that the appellant urged that none of the members of the public who arrested him was called as a witness. But, failure to call a witness is not fatal to the prosecution's case unless the evidence of such witness is the core of the case or would be adverse to the prosecution's case. In any event, adverse inference that the evidence of persons who were not called as witnesses is made where evidence adduced is barely adequate. In this case, there is sufficient evidence to prove that the appellant armed with dangerous weapons and in company of two other people robbed the complainants. He also used violence on the complainants during the robbery. Accordingly, I find that the prosecution proved their case beyond reasonable doubt. Accordingly, the appeal on conviction fails and is dismissed.

On sentence

18. The case of **Francis Karioko Muruatetu & Aonther v. Republic [2017] eKLR** set a new path; laws which fetter the discretion of the court in sentencing are unconstitutional, and made the following guiding observations;

> **"Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right.**
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> **……**
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> **Having laid bare the brutal reality of the mandatory nature of the sentence under Section 204 of the Penal Code, it becomes crystal clear that that Section is out of sync with the progressive Bill of Rights enshrined in our Constitution specifically; Articles 25 (c), 27, 28, 48 and 50 (1) and (2)(q)."**

19. Progressive and purposive approach mandated by the Constitution demands that the principle emerging in Muruatetu case that a law which ties court's hands in sentencing by prescribing a mandatory sentence is unconstitutional should apply to all cases falling in that category. Consequently, I am inclined to adopt this progressive approach in this case and I therefore set aside the death sentence imposed on the appellant. In lieu thereof, I sentence the appellant to 25 years' imprisonment with effect from 29/6/2017 when the appellant was first sentenced.

Dated, signed and delivered at Milimani this 7th day of May 2020

F. GIKONYO

JUDGE

Representation: -

Counsel for the state – Mr. Maina

Appellant acting in person