



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 104 OF 2016

(BEING AN APPEAL FROM THE DECISION OF HON. P. BIWOTT IN CRIMINAL CASE NO. 5392 OF 2015 AT KITALE DATED 2ND NOVEMBER 2016)

ANTONY SIMIYU WEKESA.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellant was charged with the offence of **Attempted Robbery contrary to Section 297(2) of the Penal Code**. The particulars of the charge were that **on the 16th day of November 2015 at Hamisi farm in Endebbes ward within Transzoia County jointly with others not before court armed with dangerous weapons namely a slasher and iron bar, attempted to rob VINCENT SITIAVAI MWAMBI of 70 Kgs of shelled maize valued at Kshs. 1,788 and at the time of such attempt assaulted the said VINCENT SITIAVAI MWAMBI.**
2. The second count was **assault causing actual bodily harm contrary to Section 251 of the Penal Code**. The particulars of the charge were that on the 16th day of November 2015 at Hamisi farm in Endebess ward within Transzoia County jointly with others not before court unlawfully assaulted GILBERT WANYONYI NYONGESA thereby occasioning him actual bodily harm.
3. The Appellant was convicted and sentence to suffer death on the first count and the second count held in abeyance. He has filed this appeal which he has raised several grounds, the substance of which is that there were no sufficient reasons that led him to be convicted as the case was not proved beyond any shadow of doubt. He has also argued that he was not supplied with the witness statements to enable him prepare adequately for the case.
4. At this juncture it shall be necessary to summarise the evidence as presented during trial before looking at the merits or otherwise of the appeal.
5. **PW1 ELPHAS NDUBU ABASI** testified that on the night of 16th/17th November 2015 he was in his house when he got a phone call from his watchman saying that he needed help. He called his neighbour to alert the KPR and asked them to rush to the scene. He was later called and told that they had arrested one of the robbers and his two watchmen who got injured in the process had been taken to the hospital. The robber arrested had also been taken by the police.
6. **PW2 GILBERT WANYONYI WEKESA** testified that PW1 was his brother. He called him at around 11.00 p.m and informed him of a robbery that was taking place in his farm. He rushed to the scene using his motorcycle. He found men who ordered him to switch off his motorcycle lights and they proceeded to attack him by use of a slasher until he lost consciousness. When he regained his consciousness he found one of the robbers, the Appellant, had been arrested.
7. The appellant was picked by the police while he was taken to Kitale District hospital for treatment. He was later issued with a p3 form which was filled and he identified the same in court.
8. When cross-examined by the appellant he said that he identified him courtesy of the lights from his motorcycle as well as a torch which he had. He said also that when he regained his consciousness the Appellant had been arrested with the slasher he had used to cut the witness.
9. **PW3 CALEB WAFULA NYONGESA** testified that he was guarding PW1 maize at Aradi farm that night when at around 11.00 pm on 16th November 2015 they were attacked by armed people who were 4 in number. He said that while they attacked PW2 he rushed to the maize farm to call PW1, PW2 as well as the police. He saw PW2 coming and he was pinned down by the assailants and he rushed to help him.

10. In the melee he managed to arrest the Appellant who was among the robbers while the rest escaped. Members of the public later came as well as the police officers who took the appellant away. He said that the Appellant had worn his jacket inside out.

11. When cross examined by the appellant he said that the rest of the robbers took off with PW2 motorbike and they dropped the maize they had stolen.

12. **PW4 VINCENT SITIAVAI** testified that on the 16th November 2015 he was guarding maize with PW3 when they were attacked by robbers who were armed with metal bars and slashers. They were about 6 in number and they arrested the appellant who was among them. He was hit on the head with a metal as well as his right hand. The Appellant was taken to Matisi police station and he was taken to Kitale District hospital for treatment. He was later issued with a P3 form which he identified in court.

13. On cross examination he said that the robbers stole 7 bags of maize but left them 20 metres away. He said that they managed to recover one slasher from the Appellant.

14. **PW5 ABDALLA MAKOKHA** a KPR from Matisi testified that he got a report of an attack on his neighbour and he rushed to the scene. They found him injured and had managed to arrest one of the robbers. They took the suspect to Kitale police station.

15. **PW6 P.C SIMON KIRUI** from Endebbes police station testified that they got a report on 17/11/2015 of the attack and they went to the farm. They found officers from Matisi police post who had already arrived at the scene and one of the suspects arrested. The injured had been taken to the hospital. A slasher had been recovered from the suspect which had been used to attack the victims. He produced the same. He recorded the statements from the witnesses thereafter and charged the Appellant.

16. **PW7 DR. CHARLES NGUGI MACHARIA** from Endebbes District hospital examined the complainants and filled their respective P3 forms. Both of them had injuries inflicted by use of a sharp object and he classified them as harm. He produced the said P3 forms.

17. When placed on his defence the Appellant gave unsworn statements denying the charges. He said that on 16th November 2015 at around 9.00 pm he was walking home when he was confronted by 3 people who assaulted him. The watchmen also got involved and he was arrested and the police who were on patrol took him to Matisi at 12.00 midnight. He was later taken to Endebbes on 17/11/15. He was interrogated and later charged with the offence which he continued to deny.

ANALYSIS AND DETERMINATION.

18. The primary responsibility of this court at this juncture is to re-evaluate the evidence afresh and come up with an independent findings noting that it did not have the benefit of conducting the trial at the lower court and therefore seeing the witnesses' demeanour like the trial court. See **OKENO REPUBLIC (1972) E. A. 32.**

19. The evidence surrounding the question of how the Appellant was arrested is very critical herein. Although the appellant said in his unsworn defence that he was simply walking home, the same was not tested via cross examination. The evidence of the witnesses clearly showed that he was arrested at the scene. His evidence unfortunately was not subjected to cross examination and therefore was not of much probative value. It is not possible therefore to ascertain where he was heading to that particular night.

20. Further the weapon he used to injure the complainants namely a slasher was found in his possession and the same was produced as evidence.

21. The injuries inflicted upon the complainants was during the robbery incident and nowhere else. At any rate the appellant was recognised by PW2 as he flashed his motorcycle lights on the assailants who included the appellant.

22. He also submitted that he was not accorded adequate time to prepare for trial by not being provided with witness statements but the record does not show that he had any difficulty in conducting his case. There was cross examination of the witnesses all through as well as the fact that he conducted his defence very well.

23. Its therefore not true that the case against the Appellant was not proved. The provisions of section 297(2) of the Penal Code, namely, that the offender was armed with dangerous weapons, in company of more than one person and in the process assaulted the Complainants occasioning serious bodily injuries were proved in the circumstances.

24. Consequently, this court does not find merit in this appeal and the same is hereby dismissed.

25. On the question of sentencing, the court shall take the view considered by the Supreme Court in the case of **FRANCIS MURUATETU & ANOTHER V.REP. 2016**. This position was amplified by the Court of Appeal in the case of **JARED KOITA INJIRI V. REPUBLIC (2019) eKLR ...** the said court stated that;

“This then leaves the question of the sentence. Arising from the decision in Francis Karioko Muruatetu & Another vs Republic, SC Pet. No. 16 of 2015 where the Supreme Court held that the mandatory death sentence prescribed or the offence of murder by section 204 of the Penal Code was unconstitutional. The Court took the view that;

“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 that the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances

but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under the Article 25 of the Constitution; an absolute right.”

In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis.

The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy.

Needless to say, pursuant to the Supreme Court decision in Francis Karioko Muruatetu & Another vs Republic (supra), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court.”

26. Taking the above perspective, this court takes the view that considering the circumstances and the injuries occasioned by the appellant and his group of robbers meted upon the complainants the death sentence passed against the appellant is hereby set aside and substituted with an **imprisonment of 10 years for the first count and 5 years for the second count. Both sentences shall run concurrently from the date of the lower court judgement that is 2nd day of November 2016.**

27. Orders accordingly.

Dated, signed and delivered via zoom at Kitale this 4th day of June, 2020.

H. K. CHEMITEI

JUDGE

4/6/2020