REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL NOS. 72 AND 72A OF 2017

GEORGE GATHERU KURIA..…..……. 1ST APPELLANT

PETER KIARIE…….2ND APPELLANT

VERSUS

REPUBLIC ……..…….…….. RESPONDENT

(Being appeals from the judgement of Hon. Temba A. Sitati, Ag. SRM, delivered on 22nd September 2014 in the Senior Magistrate's Court at Narok in criminal case No. 814 0f 2013, R v 1. Stephen Mwaura 2. George Gatheru Kuria and 3. Peter Kiarie)

J U D G EM E N T

The Appellants have appealed against their conviction and sentence of death in respect of the offence of robbery with violence contrary to section 296 (2) of the Penal Code (Cap 63) Laws of Kenya.

The two appeals were consolidated and heard as such.

For convenience the appeal of each appellant is considered separately.

Appeal of the 1st appellant- George Gatheru Kuria

In this court the 1st appellant has raised six (6) grounds of appeal in his amended petition of appeal and two grounds in his supplementary petition of appeal.

In ground 1 the appellant has faulted the trial court in convicting him on the evidence of identification when the prevailing circumstances were not conducive to positive identification. In this regard, there is evidence from three witnesses namely Zefania Muniu (Pw 2), John Kinuthia (Pw 3) and Samuel Kangangi Charles (Pw 5), who saw the first appellant at the scene of crime. Pw 2 is the complainant. Pw 2 testified that on 8th July 11.00 pm he was called by Simon Ndia from Agape church that they had arrested a thief. He then took a motor cycle and upon arrival at his house he found a man under arrest by civilians. Pw 2 then started to discuss the fate of the arrested man. It was the first appellant who was trying to convince him to drop the complaint against Mwaura. The crowd wanted to kill the arrested person, whose name was Mwaura.

Furthermore, shortly thereafter two men arrived on the scene. These two men pulled him out of the gate and asked him to discuss with them the way forward. Simon Ndia followed him. When they got out of the gate one of the two men picked a plank of wood and hit Simon Ndia on the head, which sent Simon Ndia tumbling to the ground. These two men were total strangers. It was his evidence that it was the first appellant, who hit Simon Ndia**.** Pw 2 and members of the public scampered for safety. The two men got back into the plot and dared anyone to venture at the risk of death. These two men got a chance and spirited the man, who was under arrest. This man was Mwaura, the original first accused, who jumped bail.

On 9th July 2013 Pw 2 tracked the first appellant to the stadium, where they were sleeping during the day. Pw 2 was with the appellant for about ten (10) minutes at the scene of crime. He also testified that the first appellant was not the thief, while under cross examination. Pw 2 lost about Shs 1,000/= and a cash box which was valued at Shs 200/=.

It was also the evidence of Pw 2 that there were security lights in that plot.

There was further evidence of Pw 3, who was a boda boda rider. Pw 3 testified that on 8th July 2013 at 11.00 pm he had retired from work and was watching TV. When he went out of his house he noticed that the door of Pw 2 was wide open. Pw 3 then saw Mwaura dash out of the house of Pw 2. He had known Mwaura before.

Mwaura then greeted Pw 3. When Pw 3 turned to look at Mwaura, the latter hit him (Pw 3) with fists on the chest. As a result, Pw 3 wailed; which resulted to neighbours coming out of their houses. When Mwaura hit him again, the metallic box that Mwaura carried fell down. Neighbours swarmed around him. Mwaura was forced to sit down. It was during this commotion that the two appellants arrived at the scene. The first appellant was a fellow boda boda rider. The first appellant was with the second appellant. It was his evidence that the second appellant was a sand harvester.

Further Pw 3 continued to testify that the first appellant pulled Muniu out in a bid to persuade him to drop his complaint. The first appellant suddenly took a wooden plank and hit pastor Simon Ndia on the head. The pastor fell down. It was his further evidence that the wooden plank had been placed against the wall apparently in readiness for use. The two appellants then spirited Mwaura. As Pw 3 and other members of the public scampered in different directions. The second appellant flushed a sword and used it to scare off the tenants. The appellants took away the money and spirited Mwaura away. The next day, Pw 3 and Pw 2 spotted Mwaura and the first appellant having a nap at the stadium area. The second appellant was arrested during a police swoop.

While under cross examination, Pw 3 testified that he personally knew the first appellant and that the first appellant was not the housebreaker and thief. Pw 3 also testified that the second appellant did not break into the house of the complainant (Pw 2), but that the second appellant arrived later. Finally, Pw 3 testified that he knew the second appellant personally as a person who used to transport sand.

In addition to the foregoing witnesses the prosecution called Samwel Kangangi Charles (Pw 5). Pw 5 is a tint-maker for cars. The evidence of Pw 5 is that on the material day he heard commotion outside his house. He went out of his house, but within the plot. He found Mwaura, whom he knew as a scrap metal dealer assaulting John. Mwaura immediately told him (Pw 5) that he had not stolen anything. As at that time Pw 5 saw Mwaura holding a small metallic cash box.

Pw 5 then sked Mwaura why he was holding the said small metallic cashbox. Immediately, pastor Simon emerged from his house and asked Mwaura why he was holding cashbox of Simon. Instead of responding to the question, Mwaura made a phone call and within a few minutes the second appellant arrived at the scene followed by the first appellant.

The second appellant asked Pw 5 whether or not a man of the stature of Mwaura could steal such a small cash box. The second appellant became hostile and a result an exchange of words ensued. This first appellant was a feared man. The first appellant threw pastor Simon outside the gate and he thereafter hit him with a plank of wood. It is the second appellant who gave the first appellant the plank of wood with which he hit pastor Simon. As a result, pastor Simon passed out.

It was the evidence of Pw 5 that both appellants were his friends. It was also his evidence that it was the second appellant who carried off the small cash box.

The other witness called by the prosecution was Samwel Irungu Ndia (Pw 6), who is the brother of Simon Ndia. Acting upon information that he received, he went to the scene of crime and found Simon Ndia bleeding profusely. He took him to Narok district hospital and thereafter he was transferred to Kenyatta National hospital, where he died.

There is also the evidence of No. 72828 Cpl Paul Sitienei (Pw 7), who was the investigating officer. It was his evidence that on 9th September 2013 at 10.00 am, when Pw 1 and Pw 2 went to Narok police station to follow up on a report of robbery and killing they had made at the station. Pw 7 then perused the OB entry No 5/9/7/13 at 3.49 am. According to the report one Stephen Mwaura and others had attacked John Kinuthia as he went to answer a call of nature at 11.00 pm. At that time John Kinuthia (Pw 2) stumbled upon Mwaura emerging from the deceased's house carrying a stolen cash box. Kinuthia complained of being punched upon demanding Mwaura's unusual activities.

Neighbours joined in the fray and nearly lynched Mwaura for the theft of the money box. Mwaura then made calls to his accomplices who came to his rescue. In the process of rescuing Stephen (Mwaura), the two accomplices killed the owner of the money box. The two reportees named the accomplices as the two appellants. The reportees told him that the first appellant is the one who hit Simon Wanjau on the head with a plank of wood. The civilians could not intervene as one of the accomplices brandished a panga. They then carried off the cash box.

Simon Wanjau was taken to Narok district hospital and was later transferred to Kenyatta national hospital where he died while undergoing treatment. Pw 7 then produce the postmortem report of Simon Wanjau as exhibit CX 2.

While under cross examination, Pw 7 testified that the second appellant was arrested during a routine police patrol and swoop in Narok town. The second appellant had been arrested for being drunk and disorderly. Thereafter he was charged with robbery as a result of one Kangangi explaining the role of the second appellant in the robbery.

Pw 7 further testified that John Kinuthia's house is directly opposite the house of Zephania Muniu. Pw 7 also testified that directly above the house of Muniu there was a security lamp and there was a security lamp in the middle of the plot. Pw 7 after visiting the scene of crime drew a sketch plan that was put in evidence as exhibit cx 3. All the three lights were functioning when the robbery committed.

In response to the foregoing evidence, the first appellant made an unsworn statement denying the charge. He further stated that he was arrested at Narok stadium where he had gone to dry his tents.

This is a first appeal. As a first appeal court, I have re-assessed the entire evidence adduced at trial. I have also considered the submissions of the first appellant and the many authorities he cited in support of his appeal. As a result, I find that the first and second appellants were positively identified by Pw 2, Pw 3 and Pw 5. Pw 2, Pw 3 and Pw 5 knew both appellants before this incident. This was therefore a case of recognition of both appellants and not identification. Although it was at night, there was strong security light at the scene of crime. Both appellants were in close proximity to the witnesses when they were persuading PW 2 to drop the complaint. The discussion took about ten (10) minutes. These are the factors that favoured recognition. I therefore find that the appellants were positively recognized. The authorities

cited by the first appellant are distinguishable from the instant appeal. I therefore find no merit in ground 1 and I hereby dismissed it.

In ground 2 the first appellant has faulted the trial court for convicting him when there was no evidence that he robbed the complainant. In this regard, the evidence is that it is Mwaura, who stole the small cash box in which there was an estimated Shs 1,000/=. These money was the property of Zefania Muniu (Pw 1). Mwaura was a co-accused of both appellants in the lower court, but he jumped bail and now he is on the run. John Kinuthia (Pw 3), saw Mwaura dash out of the house of Pw 2. He had known Mwaura before. Mwaura then greeted Pw 3. Pw 3 then turned to look at Mwaura. As a result, Mwaura then hit Pw 3 in the chest and Pw 3 wailed. Neighbours responded and surrounded Mwaura. A commotion ensued. During the commotion the two appellants arrived at the scene and proceeded to rescue Mwaura. They took with them the small cash box.

Furthermore, while under cross examination Pw 3 testified that he personally knew the first appellant and that the first appellant was not the housebreaker and thief.

In view of the foregoing evidence, it is clear that Mwaura and the two appellants had planned and jointly acted to rob the complainant (Pw 1). In terms of section 21 of the Penal Code, the appellants had a common intention to rob Pw 1. In the execution of that common intention each of the two appellants had a party to play. Mwaura who jumped bail played his party by taking the money of the complainant from his house. The two appellants played their part by rescuing Mwaura from members of the public who wanted to lynch him. Again in view of this evidence, in law the two appellants are principal offenders and are not accessories after the fact to the offence of robbery. The actions of one appellant are deemed to be the actions of the co-appellant. It is therefore clear that both appellants were executing a common purpose namely committing the instant robbery. The two appellants did not disassociate themselves from the robbery committed by Mwaura. Instead they jointly participated in the robbery. See *Solomon Mungai & Others v Republic (1965) EA 782 in* respect of common intention generally.

I therefore find no merit in ground 2, which I hereby dismiss for lacking in merit.

In ground 3 the first appellant has faulted the trial court in failing to find that the investigations were not properly conducted and this had the effect of vitiating the strength of the prosecution case. The evidence of No. 72828 Cpl Paul Sitienei (Pw 7), who was the investigating officer was that two reportees (Pw 1 and Pw 2) had gone to see him in respect of the robbery which they had reported at the police station. As a result, Pw 7 visited the scene of crime on 12/7/2013 and drew a sketch plan (exhibit Pcx 3). He then interviewed the reportees who told him that they knew both appellants. Pw 7 also saw the security lights at the scene of crime, which were functional at the material time. Pw 7 then proceeded to record witness statements, after which he charged both appellants with the instant robbery.

I have re-assessed the evidence of investigations. As a result, I find that the investigations were properly conducted and that they are also credible.

I therefore dismiss ground 3 for lacking in merit.

In ground 4 the first appellant has faulted the trial court in failing to find that the prosecution evidence was full of contradictions and was uncorroborated. I have perused the prosecution evidence. As a result, I find that there are no material contradictions in the prosecution evidence. As regards, the issue of uncorroborated evidence I find that the evidence of Pw 2, Pw 3 and Pw 5 mutually corroborates each other as regards the visual recognition of the two appellants at the scene of crime. In the circumstances, I find no merit in ground 4 and is hereby dismissed.

In ground 5 the appellant has faulted the trial court in basing its judgement on the speculation and this resulted in injustice to him. I find no merit in this ground as the conviction of the first appellant is based on the recognition evidence of Pw 2, Pw 3 and Pw 5, which I find is credible and cogent. I therefore dismiss ground 4 for lacking in merit.

In ground 6 the appellant has faulted the trial court in law in dismissing the defence evidence without giving any cogent reasons. I find that the trial court disbelieved the defence evidence after finding the prosecution evidence through Pw 2, Pw 3 and Pw 5 was cogent, credible and overwhelming as against the first appellant. I therefore find no merit in ground 5 and I hereby dismiss it.

In his submissions, the first appellant has faulted the trial court for failing to assign an advocate for his defence and this violated his right to a fair trial for the right to counsel is provided for in article 50 (2) (h) of the 2010 Constitution of Kenya. It is important to point out that the right to an advocate is not absolute. In other words, it is not automatic. Furthermore, the record of the proceedings shows that the first appellant conducted an effective cross examination. In the circumstances, I find that there has been no failure of justice by lack of legal representation. I therefore dismiss this submission for lacking in merit.

In his supplementary ground of appeal, the appellant has faulted the trial court in imposing the death sentence upon him, which is unconstitutional. The first appellant cited decision of the Supreme Court in *Francis Muruatetu and Another v Republic [2017] e-KLR,* in support of his case. This decision held as unconstitutional the automatic imposition of the death penalty upon conviction in respect of a capital charge. Furthermore, it held that trial courts now had discretion to impose a non-death penalty after considering all the relevant circumstances.

The first appellant, before being sentenced to death was allowed to mitigate. In his mitigation, the first appellant told the court he was an orphan and married with children. Additionally, he also told the trial court that he was the first born.

In sentencing the first appellant the trial court stated that: "*Each convict is hereby sentenced to death as provided for by law."*

I have considered the mitigation of the appellant. I have also taken into account that the first appellant was a first offender.

I have also taken into account that a life was lost in the course of the robbery.

Furthermore, I have borne in mind the provisions of article 50 (2) (p) of the 2010 Constitution which direct that an accused is entitled to amongst other fair trial rights, the right to: "*to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed sentence for the offence has been changed between the time that the offence was committed and the time of sentencing; and*."

In re-assessing the proper sentence to be imposed I have been guided by the foregoing constitutional provisions; since the decision in *Francis Muruatetu and Another v Republic*, has changed the law as regards the death penalty by giving the court a discretion to impose a non-death penalty. It should not be forgotten that the trial court imposed the death penalty, which was mandatory as at that time and cannot be faulted for doing so.

After considering all of the foregoing matters, I find that the death penalty was not proper and I hereby set it aside. In its place, I now sentence the first appellant to a sentence of life imprisonment.

Appeal of the 2nd appellant – Peter Kiarie

In his unsworn statement, the second appellant denied the charge. He stated that he was arrested in a police swoop for being drunk and disorderly. He also stated that while in cells, he was informed that he killed Ndia. He finally stated that the charge against him was framed.

The 2nd appellant has raised six (6) grounds in his amended petition of appeal. His grounds of appeal are similar to those of the first appellant except grounds 5 and 6. I will therefore only deal with these two grounds as the findings in the first appeal fully apply to the second appeal in all the other grounds.

In ground 5 the 2nd appellant has faulted the trial court in misconstruing the circumstances of his arrest from the police cells, where he was held on a charge of being drunk and disorderly and it was therefore wrong to convict him of the instant offence of capital robbery. There is ample evidence that the 2nd appellant was held in police cells on a charge of being drunk and disorderly. Upon investigations by No. 72828 Cpl Paul Sitienei (Pw 7), it was found that he participated in the instant robbery. As a result, he was charged with the offence of robbery and was subsequently convicted of it. I therefore find no merit in this ground which I hereby dismiss for lacking in merit.

In ground 6, the 2nd appellant has faulted the trial court for rejecting his defence of alibi without giving cogent reasons. I find that the 2nd appellant was positively recognized by Pw 2, Pw 3 and Pw 5 as one the robbers on the material date, whose evidence of recognition was overwhelming. In the circumstances, I find that the trial court was entitled to reject the alibi defence of the 2nd appellant. I therefore find no merit in ground 6 and I hereby dismiss it.

In the premises, I hereby dismiss the 2nd appellant's appeal against conviction.

As regards sentence, I hereby set aside the sentence of death for the reasons advanced in respect of the first appellant's appeal in respect of sentence.

The 2nd appellant like the first appellant is hereby sentenced to life imprisonment.

Judgment signed, dated and delivered at Narok this 10th day of June, 2020 vide video link with both appellants and Ms. Torosi for the respondent.

J. M. Bwonwong'a.

J U D G E

10/6/2020