



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

Coram: D. K. Kemei – J

**CRIMINAL APPEAL NO. 82 OF 2016**

**BONIFACE MULI MBELE .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being an appeal against both the conviction and sentence delivered by P. O. Ooko (Principal Magistrate) at the Mavoko Senior Principal Magistrates Court in Criminal Case 209 of 2015 delivered on 15/11/2016)*

**JUDGEMENT**

1. The Appellant herein **Boniface Muli Mbele** had been charged at **Mavoko Principal Magistrate's Court** vide Criminal Case No. **209 of 2015** for the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code. He was subsequently convicted and sentenced to death by Hon. P. Ooko vide a judgement dated 15/11/2016.

2. Being aggrieved by the said conviction and sentence the Appellant lodged the following grounds of appeal:

- (i) That the learned trial magistrate erred in law and fact by relying on evidence which was contradictory in regard to the mode of the appellant.*
- (ii) That the learned trial magistrate erred in law and fact for failing to summon essential witnesses who were present at the scene of crime.*
- (iii) That the learned trial magistrate erred both in law and fact by shifting the burden of proof to the Appellant.*
- (iv) That the learned trial magistrate erred in law and fact in failing to find that the investigations conducted were shoddy.*
- (v) That the learned trial magistrate erred in law and fact by failing to find that the Appellant's arrest and identification was out of mistake.*
- (vi) That the learned trial magistrate erred in law and fact by failing to consider the Appellant's defence.*

3. This being a first appeal the duty of this court is to re-evaluate, re-analyze the evidence adduced before the trial court and subject it to an independent scrutiny and to arrive at an independent conclusion as to whether or not to uphold the findings of the lower court. This court has also to take note of the fact that it did not hear or see the witnesses testify.

4. The particulars of the charge were that on the night of 5<sup>th</sup> and 6<sup>th</sup> April, 2015 at Mlolongo Township, Athi River Sub-County, Machakos County jointly with another not before court while armed with dangerous weapons namely, knives robbed Kelvin Mwendwa Katwa a motor vehicle registration number **KBA 202Y** make Nissan Sunny valued at Kshs. 400,000/- the property of Kelvin Mwendwa Katwa and at, or immediately before the time of such robbery used personal violence to the said **Kelvin Mwendwa Katwa**.

5. **Kelvin Mwendwa Katwa (PW.1)** was the complainant. He stated that he was a taxi driver by profession and that on the material date he was in possession of his employer's motor vehicle registration number **KBA 202 Y** make Nissan Sunny within Mlolongo Township. He was approached by a man and a lady who requested to be ferried to Pipeline Estate Nairobi at a cost of 700/= which he duly agreed. He testified that the duo later turned against him and robbed him of the car after subduing him with the use of knives. He further stated that he managed to get help and that the Appellant who was one of the passengers was arrested while his female companion managed to escape. He maintained that he had noted the Appellant's features right from the time he and the lady flagged him down at Mlolongo Township all the way until he was arrested. On cross – examination, he stated that the Appellant was arrested while still inside the stolen vehicle by G.S.U.

officers and that the stolen mobile phone was recovered from him.

6. **Joseph Muniu Kuria (PW.2)** testified that he was the owner of Motor vehicle registration No. KBA 202 Y that had been carjacked from the complainant. He stated that he proceeded to Mlolongo police station where he found his said vehicle which had a dent on the front bumper and he learnt that it had been involved in an accident with another vehicle. He positively identified the logbook to the vehicle as well as photographs. On cross-examination, he denied having known the Appellant before and that he only received the report from the person with whom he had entrusted the vehicle.

7. **Patrick Githinji (PW.3)** stated that he was alerted by PW.1 that he had been carjacked by a man and a lady who had hired him to ferry them in the taxi vehicle from Mlolongo town to Pipeline Estate in Nairobi. He stated that he had employed PW.1 to operate the vehicle as a taxi. He added that he accompanied PW.1 and PW.2 to Mlolongo police station where he saw the vehicle and he also identified the log book and photographs of the vehicle.

8. **No. 79093 PC James Olango (PW.4)** was a Scenes of Crime Officer based at Machakos. He stated that on 26/05/2015 he received four coloured enlargement photographic prints from Cpl. Rotich of CID Mlolongo police station which had been taken regarding motor vehicle KBA 202 Y. He stated that he is a gazetted scenes of crime officer vide gazette notice number 217 of 28/12/2012. He added that he certified the photographs and prepared a certificate to that effect. He produced the same as exhibits 4 (a-e) and 7 respectively.

9. **No.38667 Inspector Richard Mugo (PW.5)** one of the investigating officers testified and stated that he received a report on the 6/04/2015 of a robbery with violence incident in which a suspect had already been arrested and a stolen vehicle recovered and which were at Central Police Station Nairobi. He proceeded there and re-arrested the Appellant herein and also received several items which included a lady's bag, small pouch, identity card of one Janet Muende David, pen knife, two cell phones make Techno police abstract, identity card belonging to one Awaru Moro Mohammed all of which had been recovered from the motor vehicle registration KBA 202 Y. He testified further that the complainant later turned up at Mlolongo police station where he recorded his statement as well as the complainant's employers. He went on to add that he wrote a letter to K-Rep Bank which had impounded the said vehicle after the incident as it had held its original logbook as security for loan advanced to the registered owner. He later charged the Appellant herein with the offence. He produced the items that he recovered as exhibits.

10. **No.234912 Inspector Alfred Maina (PW.6)** testified that on the night of 5<sup>th</sup> and 6<sup>th</sup> April, 2015 he was patrolling along River Road at Latema Junction when he saw two vehicles moving in the same direction and that one which was registered as KBA 202 Y make Nissan Sunny Saloon hit the other one from behind. He then alighted from his vehicle and as he headed to the accident scene the female driver of motor vehicle KBA 202 Y alighted and took off. He and his fellow officers approached the said vehicle when two men emerged from therein and one attempted to escape while the other raised alarm claiming that the person escaping was a thief. He managed to apprehend the said person who turned out to be Appellant herein. He inspected inside the vehicle where he recovered a lady's handbag, identity cards, knife among other items. He interrogated the Appellant and escorted him to Central police station for further investigations. He added that he properly identified the Appellant as there were electricity lights and he also escorted him to the police station. On cross-examination, he confirmed witnessing the accident between the two vehicles as he was only five metres away and that he saw the Appellant emerging from inside back left of motor vehicle registration number KBA 202Y and who attempted to flee but he managed to apprehend him. He confirmed that all the exhibits produced herein were recovered from inside motor vehicle KBA 202 Y. He also stated that nothing was recovered from the Appellant's pockets. On re-examination, he confirmed that the Appellant had a Techno cell phone and a police abstract at the time of his arrest.

11. The trial court established that the Appellant had a case to answer and duly put him on his own defence. He tendered a sworn testimony. His case was that on 5/4/2015 he left for his place of business at Gikomba market where he sells second hand clothes and remained there up to 4 p.m. and proceeded to Nellie's club within Nairobi to play pool games and drink beer. He stated that he left the club at around mid-night and headed to the bus stage at the junction of Latema road when he saw a large crowd of people near two vehicles that had been involved in an accident. He approached the said vehicles and advised the drivers to give way to other road users and while he engaged with them the complainant herein burst from the crowd and claimed that the Appellant was one of the robbers who had robbed him of motor vehicle KBA 202 Y and it was then that police officers arrested him and refused to listen to his protestations. He maintained that the police searched him but nothing was recovered from him. He added that he was escorted to Central Police station where his police abstract and mobile phone were picked from him but which were later erroneously mixed with other items recovered from the vehicles. On cross-examination, he stated that he had not known the complainant prior to the incident but believes that he had framed him up with people who had allegedly robbed him.

12. Parties agreed to canvass the appeal vide written submissions.

13. The Appellant's submissions mainly dwelt on contradictions in the testimonies of the witnesses and on the issue of identification. On the issue of contradictions, it was submitted that the complainant's evidence was at variance with that of PW.5 and PW.6 regarding the question whether the Appellant was arrested inside or outside motor vehicle KBA 202 Y and that some of the witnesses were not called to testify. Reliance was placed in the case of **John Kenga –vs- Republic Criminal Appeal no. 1126 of 1984 (originally criminal No. 1110, 1117/84 at Nairobi)**. On the issue of identification, it was submitted that the complainant did not positively identify the Appellant since he never engaged in any conversation with him and therefore this was a case of mistaken identity. Reliance was placed in the case of **Francis Kariuki Njiru and Another –vs- Republic [2001] eKLR** where it was held that identification must be scrutinized carefully so as to ensure that the same is positive and free from possibility of error. It was finally submitted that the prosecution's case had not been proved beyond reasonable doubt and hence the Appellant is entitled to an acquittal.

14. Mr. Mwangera learned counsel for the Respondent submitted that both the testimonies of PW.1 and PW.6 placed the Appellant at the scene of crime and that the complainant having ferried the Appellant from Mlolongo to Pipeline Estate and back and then being held hostage all the way to Nairobi Township where the vehicle was involved in an accident and then pointing out the Appellant to the police had positively identified the appellant as one of the robbers. It was counsel's view that all the ingredients of the offence had been proved to the required standard. Reliance was placed in the case of **Michael Davis Munyui –vs- Republic [2015] eKLR**.

15. I have considered the grounds of appeal, submissions thereon and evidence tendered in the trial court. I find that the main issues raised by the Appellant in his appeal are firstly, whether his identification was proper and secondly whether he was convicted for the offence of robbery with violence on sufficient evidence, and finally whether the sentence passed was appropriate.

16. As regards the first issue, the Appellant has taken issue with the trial magistrate's finding in convicting him on insufficient evidence. He has submitted that his case was one of mistaken identity since he had just emerged from a nearby bar and that his attention had been drawn to an accident involving two motor vehicles. The Respondent's counsel submitted that the Appellant had been positively identified by the complainant as one of the robbers who had posed as clients to him.

The courts have come up with guidelines regarding the issue of identification. In the case of **Mwaura –vs Republic [1987] KLR 645** the Court of Appeal held as follows:-

***“In cases of visual identification by one or more witnesses, a reference to the circumstances usually require a Judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light.”***

Again in the case of **Anjononi & Others –vs- Republic [1976- 1980] KLR 156** the Court of Appeal stated that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.

It has also been held in several cases that the identification at night must also be tested with greatest care using the guidelines in **Republic – Vs- Turnbull [1976] 3 ALLER 549** and must be absolutely be watertight to justify conviction. In the case of **Wamunga –Vs- Republic [1989] KLR 426** the Court of Appeal stated as follows:

***“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.”***

When it comes to the question of consideration of the evidence of a single witness on identification regard should be placed on the case of **Republic –Vs- Turnbull & Others [1973] 3 ALLER 549** where the English courts laid down the following principles.

***“..... The Judge should direct the jury to examine closely the circumstances in which identification of the accused by each witness came to be made. How long did the witness have with the accused under observations? At what distance? In what light? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?..... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”***

In the present Appeal, the complainant (PW.1) gave a chronology of the events right from the time he met the Appellant and his fellow female companion outside Mulley Supermarket within Mlolongo Township. The Complainant testified that he was a taxi operator within Mlolongo Township and was then operating motor vehicle registration No. KBA 202 Y make Nissan Sunny belonging to his employer. He stated that on the material date namely 5/04/2015 at 7.00 p.m. he was approached by the Appellant and his female companion to be ferried to Pipeline Estate in Nairobi at an agreed fare of 700/=. As he headed in the direction of Pipeline Estate the Appellant's female companion directed the complainant to re-route the vehicle to Mama Lucy Hospital to enable her check on her sister who had allegedly delivered a baby but however on arrival the complainant was directed now to proceed to Pipeline Estate only for the duo to change their minds and direct him to drive back to Mlolongo. On his way back the duo directed him to stop the vehicle briefly only for the Appellant herein to strangle his neck using his hands and then pulled him off the driver's seat and order him to lie down on the back seat while the Appellant placed a knife on his back and at the same time the Appellant's female companion took control of the vehicle which was then driven to Nairobi town where it hit another vehicle. It was then that the Appellant was arrested by a G.S.U. officer who was near the accident scene when he attempted to flee and that it was the complainant who pointed him out to the police officer. Even though the Appellant tendered an alibi defence to the effect that he had been at his workplace at Gikomba earlier in the day and later spent some time at a certain bar in Nairobi only to emerge and approach the accident scene when police arrested him, I find the said alibi did not shake the version of events as narrated by the complainant. According to the complainant, the appellant had not covered his face right from the time he met him and his female companion which enabled him to properly see and recognize his face and also stayed with him all the way from 7pm to about midnight when the Appellant was arrested. Again it was the complainant who pointed him out to the GSU officer (PW.6) leading to the arrest. The complainant had noted the clothes worn by the appellant namely black leather jacket, blue trouser and red slippers. The evidence of the arresting officer (PW.6) further strengthened the prosecution's case regarding the identification of the Appellant. Both the complainant and the arresting officer (PW.6) stated that there were security lights at the time and hence the issue of the appellant's identification was not impeded in any way and was free from error. In any case the complainant had engaged in some conversation with the Appellant when they were haggling over the fares to be paid while they were at Mlolongo Township and then they proceeded to Mama Lucy Hospital then to Pipeline Estate and then back to Mlolongo before the vehicle was rerouted to Nairobi and after the accident the Appellant was arrested as he attempted to flee. PW.6 stated on cross – examination that he saw the Appellant emerging from the back left seat of motor vehicle KBA 202 Y and attempting to flee. It is clear that the complainant had plenty of time with the Appellant and hence had no difficulties at all in identifying him. The appellant's claim that his identification was a case of mistaken identity is therefore not convincing and believable at all. The appellant has maintained that there were contradictions in the evidence of PW.1 and PW.6 regarding whether he was arrested inside motor vehicle KBA 202 Y. Indeed, the complainant stated that the Appellant was arrested from inside the car while PW.6 stated that he arrested him after he had emerged from the car and attempted to flee. Such contradiction is quite minor in any view since the manner of the appellant's arrest has been explained fully by PW.6 when he stated that he saw the appellant emerging from the left back seat of KBA 202 Y and attempted to flee and he pounced on him and arrested him while at the same time the complainant reported to him that the appellant and another accomplice had robbed him of the car. After a careful analysis of the evidence on record, I am satisfied that the Appellant was properly and positively

identified as one of the robbers who had robbed the complainant of his motor vehicle registration number KBA 202 Y on the material date.

17. As regards the second issue, it is the Appellant's contention that the case had not been proved against him beyond reasonable doubt. It was further his case that none of the exhibits were recovered from him and that no inventory was made by the arresting officer. It was finally his contention that his alibi defence was not considered by the trial court.

It was the submissions of the Respondent that all the ingredients of the offence were established by the prosecution and hence the conviction and sentence ought to be upheld.

Section 296(2) of the Penal Code provides as follows with respect to the offence of robbery with violence;

***“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 it at or immediately before or immediately after the time of the robbery, he wounds, beats or strikes or uses any other personal violence to any persons, he shall be sentenced to death.”***

In establishing the above elements, the prosecution was under duty to prove the element of theft which is a key component for the offence of robbery with violence since the same is an aggravated form of theft as the robber's intention is mainly to steal the property of the victim. The above elements of the offence of robbery with violence were elaborated by the Court of Appeal in Ganzi & 2 others –vs- Republic [2005] IKLR and in Johana Ndungu vs Republic Criminal appeal No. 116 of 2005 (unreported) to be as follows:

***(i) If the offender is armed with any dangerous or offensive weapon or instrument; or***

***(ii) If he is in the company with one or more other person or persons; or***

***(iii) If at or immediately before or immediately after the time of the robbery, he wounds, beats or strikes or uses any other violence to any person.***

It is trite that proof of any one of the above ingredients of robbery with violence is enough to base a conviction of robbery with violence under section 296(2) of the Penal Code as was held in Oluoch –vs- Republic [1985] KLR 549.

In the present case, the complainant gave the chronology of events right from the time he was flagged down by the Appellant and his female companion seeking to be ferried to Pipeline Estate in Nairobi. The complainant was then outside Mulley Supermarket Mlolongo Township. He gave a vivid description of the Appellant and his companion both of whom engaged him in conversation throughout the journey until they turned back after which the duo carjacked him of his vehicle and bundled him to the back seat while the appellant's female companion took control of the wheel while the Appellant placed a knife on his back and kept watch as the vehicle was driven to the Central Business District of Nairobi town. As fate would have it, the robbers met their Waterloo when the vehicle was involved in an accident when it hit another from behind. The Appellant's female companion managed to slip out while the Appellant was not lucky as he was arrested by a G.S.U officer on night patrol. The arresting officer (PW.6) stated that he saw the Appellants emerging from motor vehicle KBA 202 Y and arrested him as he attempted to escape and further his suspicions were confirmed when the complainant pointed him out as one of the robbers. The arresting officer managed to recover the weapon namely a pen knife and a bag ostensibly belonging to the appellant's female companion who had escaped. The said handbag contained several items such as ID card for the Appellant's companion one Janet Mwendu as well as mobile phones. The complainant stated that the appellant had strangled him on the neck and bundled him onto the back seat where he kept guard while placing a knife on his back throughout the journey from Kapa bus stage to Nairobi. It is noted that the complainant did not seek treatment ostensibly because in his view he was not harmed by the robbers and hence the absence of a P.3 form. However, this notwithstanding, I find the first two ingredients of the offence namely that the Appellant was in company of another person and in possession of a dangerous weapon namely a knife were established by the prosecution. It is clear that the intention of the Appellant and his companion was to steal the complainant's motor vehicle KBA 202 Y and which they executed when they seized control of the same from the complainant and were then escaping when unfortunately, they were involved in an accident which led to the arrest of the Appellant. The evidence of the complainant and the arresting officer (PW.6) clearly placed the appellant at the scene of crime. The Appellant's alibi defence was an afterthought and did not shake the evidence of the prosecution. His arrest was not as a result of mistaken identity since as pointed out above, he was positively identified as one of the robbers. The weapon together with the other items were produced as exhibits by the investigating officer (PW.5). The Appellant's conduct in ejecting the complainant from the driver's seat and threatening him with a knife left no doubt that his intention together with that of his female companion was to steal the motor vehicle KBA 202 Y and that they did succeed in their mission only for the same to be thwarted by a stroke of fate when the vehicle was involved in an accident. It is therefore my finding that the essential elements of the offence of robbery with violence were proved beyond reasonable doubt and in particular the theft of the complainant's properties. The conviction arrived at by the learned trial magistrate vide a considered judgement was quite safe and I see no reason to disturb the same. Hence the Appellants ground of appeal lacks merit.

18. As regards the last issue on the sentence, it is noted that the trial court imposed a sentence of death upon the Appellant since that was the appropriate sentence provided for under section 296(2) of the Penal Code. However the Supreme Court in Francis Karioko Muruatetu & Another –vs- Republic [2017] eKLR has declared mandatory death sentence as unconstitutional and proceeded to issue some guidelines regarding matters involving sentences of this nature as follows:

***“Remitting the matter back to the High Court for the appropriate sentence seems to be the practice adopted where the mandatory death penalty has been declared unconstitutional. We therefore hold that the appropriate remedy for the Petitioners in this case is to remit this matter to the High Court for sentencing. It is prudent for the same court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the Petitioners ... In the meantime, existing or intending petitioner's with similar cases ought not approach the Supreme Court directly but await appropriate guidelines for disposal of the same. The Attorney General is directed to urgently set up a framework to deal with sentence re-hearing of case relating to the mandatory nature of the death sentence which is similar to that of the Petitioners in***

*this case.”*

It would follow from the above decision of the Supreme Court that this court can either proceed to receive mitigating submissions or send the matter to the trial court for the same. I am of the view that this court can proceed to deal with the issue of sentence since it is seized with this matter on appeal. It would not be appropriate to only deal with the issue of conviction and then leave out the issue of sentence to be handled by another court as it would convolute the process. The Supreme Court’s decision aforesaid has given this court the mandate to deal with the issue of sentencing. In all other criminal appeals this court has the jurisdiction to deal with the aspects of conviction and sentence at the same time. Consequently, I find it is appropriate that this court deals with the issue of sentence upon receipt of mitigating submissions thereon from the Appellant.

19. In the result, the conviction of the Appellant on the offence of robbery with violence contrary to section 296(2) of the Penal Code is upheld. However, the sentence of death imposed is hereby set aside. The appropriate sentence shall be imposed upon the Appellant presenting his plea in mitigation.

Orders accordingly.

**D. K. Kemei**

**Judge**

**SENTENCING**

I have considered the mitigation by the Appellant. The robbery incident led to the complainant almost losing his vehicle. Although he lost a few items the vehicle was recovered almost immediately. I note the Appellant has been in custody since 6/04/2015. I will take this period into account. I hereby sentence the Appellant to fifteen (15) years imprisonment from the date of arrest namely 6/04/2015.

Orders accordingly.

Read, signed and delivered in open court at **Machakos** this **20<sup>th</sup>** day of **July, 2020**.

**D. K. Kemei**

**Judge**