



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 215 OF 2019 & 153 OF 2017**

ROSE MWAJUMA .....1<sup>ST</sup> APPELLANT

DAVID CHIMBOMA WACHIRA.....2<sup>ND</sup> APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

*(An Appeal arising out of the conviction and sentence of Hon. Boko SPM delivered on 3<sup>rd</sup> November 2017 in Kibera CM Cr. Case No. 100 of 2017)*

**JUDGMENT**

The 1<sup>st</sup> Appellant, Rose Mwachuma and the 2<sup>nd</sup> Appellant, David Chimboma Wachira, were jointly charged with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 6<sup>th</sup> January 2017 at Kawangware Muslim Area within Nairobi County, while armed with an offensive weapon namely a panga, the Appellants robbed Nasiyo Maureen of cash Ksh.100,000/-, the property of Christine Wekesa, and at the time of such robbery threatened to use actual violence to the said Nasiyo Maureen. When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charges. After full trial, they were convicted as charged and sentenced to death. The Appellants were aggrieved by their conviction and sentence and have each filed a separate appeal to this court.

In their petitions of appeal, the Appellants raised more or less similar grounds of appeal challenging their conviction and sentence. They were of the view that the evidence of identification was not watertight and sufficient to sustain a conviction. They were aggrieved by their conviction stating that the evidence by the prosecution witnesses was unbelievable, illogical and full of contradictions. They faulted the trial court for improperly shifting the burden of proof to the Appellants. They took issue with the fact that the trial magistrate misdirected herself in arriving at a decision based on extraneous matters that were not in issue. The Appellants were further aggrieved that the trial court admitted into evidence a confession that fell short of the requirements provided for under **Section 25A** of the **Evidence Act**. They faulted the trial magistrate for convicting them yet the prosecution failed to discharge its burden of proof to the required standard beyond any reasonable doubt. They were aggrieved by their sentence stating that the Supreme Court in the case of **Francis Karioko Muruatetu & another vs Republic [2017] eKLR** declared the mandatory nature of the death sentence unconstitutional. In the premises, the Appellants urged this court to allow their appeal, quash their respective convictions and set aside the sentence that was imposed on them.

The two separate appeals were consolidated and heard together as one for the purpose of this appeal. During the hearing of the appeal, the Appellants presented to court written submission in support of their respective appeals. They urged the court to allow their appeal. Mr. Momanyi for the State opposed the Appellants' appeal on conviction. He made oral submission to the effect that the prosecution had established its case on the charges brought against the Appellants to the required standard of proof beyond any reasonable doubt. He averred that the Appellants, in the company of another not before court, went to PW4's house. The robbery occurred at about 8.30 p.m. They found PW1 at the said house. The 2<sup>nd</sup> Appellant held a panga to PW1's neck as the 1<sup>st</sup> Appellant and the third assailant ransacked the house. They stole Kshs.100,000/-.

Mr. Momanyi submitted that after the assailants left, PW1 raised an alarm. Neighbours came to her rescue and pursued the assailants. They managed to apprehend the two Appellants. The panga which was found in their possession was produced into evidence. PW2, PW3 and PW5 assisted in apprehending the Appellants. Learned State Counsel asserted that the Appellants were known to the prosecution witnesses who participated in their arrest. He was of the view that all the ingredients of the offence of robbery with violence were established by the prosecution. He averred that the evidence by the prosecution witnesses was cogent and corroborated in all material respect. With regard to sentence, Learned State Counsel proposed that the court reduce the Appellants' sentence to five (5) years imprisonment as no one was injured in the course of the robbery. In the premises, he urged the court to dismiss the Appellants' appeal on conviction.

The facts of the case according to the prosecution are as follows: PW1, Nasiyo Maureen, told the court that on the material day of 6<sup>th</sup> January

2017, she was home alone. She resided in Kawangware with her mother (PW4). At about 8.00 p.m., a woman came to the house and asked her where her mother was. The door was open at the time. The said woman then called two men who came into the house carrying a *panga*. They kept asking her where the money was. One of the men held a *panga* to her neck while the other man and the woman ransacked the house. They found money hidden in the cupboard. They took the money, put it in a bag and left. PW1 followed them behind while screaming “*thieves!*”. Members of the public gave chase after the robbers.

After sometime, PW1 was called to ascertain whether the people who had been apprehended by members of the public were her assailants. They had apprehended one man and a woman. PW1 stated that she could identify the robbers since the house was well lit when the robbers gained entry. She identified the 1<sup>st</sup> Appellant as the female assailant and the 2<sup>nd</sup> Appellant as the man who held the *panga* to her neck. She stated that the 1<sup>st</sup> Appellant had a *leso* wrapped around her chest. She identified the said *leso* in court. PW1 testified that the stolen money belonged to her mother. She stated that the Appellants were not known to her prior to the robbery incident.

PW2, John Gathara, was a resident of Kawangware. He told the court that on 6<sup>th</sup> January 2017, at about 9.00 p.m., he was at his house when he heard someone shouting “*thieves!*”. When he peeped through his balcony, he saw a woman who had been apprehended by members of the public. He went to the scene and discovered that the woman who had been apprehended was the 1<sup>st</sup> Appellant. She was his neighbour, and was well known to him. She was calling out his name asking for help. PW2 stated that there was also another group that had apprehended a young man (2<sup>nd</sup> Appellant). They were beating him. There was a *panga* on the ground. PW2 tried to rescue the 2<sup>nd</sup> Appellant. In the process, the 1<sup>st</sup> Appellant ran away and escaped. PW2 interrogated the 2<sup>nd</sup> Appellant who denied taking the money. The 2<sup>nd</sup> Appellant informed them that the 1<sup>st</sup> Appellant had the money. They went to look for the 1<sup>st</sup> Appellant in her house but they did not find her. They found her at a neighbour’s house. She denied stealing the money. PW2 escorted her to the village elder’s office where she was picked up by police officers from Muthangari Police Station.

PW3, Boniface Ambani, worked in a club located in Kawangware. PW1’s mother, Christine, was his colleague. He was at work on the material day of 6<sup>th</sup> January 2017. At about 9.00 p.m., he heard the said Christine calling out his name. She was asking for his help to apprehend a woman that had just robbed her. When he stepped out he saw 1<sup>st</sup> Appellant who was running away. She had some money in her hand. He immediately started running after her. The 1<sup>st</sup> Appellant ran into the plot where she lived. She however did not enter her house, but instead ran to her neighbour’s house. PW3 locked the said house from the outside so as to trap the 1<sup>st</sup> Appellant inside. Members of the public came to the house. He showed them the house where the 1<sup>st</sup> Appellant had ran into. PW2 got into the house and apprehended the 1<sup>st</sup> Appellant. PW3 stated that the 1<sup>st</sup> Appellant was known to him as he had seen her around the estate. The 2<sup>nd</sup> Appellant was not known to him prior to the material day of the robbery.

PW4, Christine Wekesa, is PW1’s mother, and the owner of the money that was stolen. It was her testimony that she was at work on the material day of 6<sup>th</sup> January 2017. At about 8.00 p.m., her neighbour came and informed her that a robbery had taken place at her house. When she went outside, she saw a woman running away from the direction of her house. She was not carrying anything. The neighbour informed her that she was one of the robbers. She immediately called PW3 and requested him to pursue the robber. PW4 went to her house and discovered that the assailants had stolen some money that she had kept in her cupboard. The money comprised of coins worth Ksh.20,000/- and notes worth Ksh.80,000/-. Her daughter, PW1, was in the house when the robbery occurred. She went to the village elder where the Appellants, after their apprehension, were being held. They were escorted to the police station where she reported the robbery.

PW5, Francis Wesonga, stated that he was at his house on the material day when he heard screams emanating from his neighbour’s house. It was about 8.00 p.m. He got out of the house and saw two people chasing after one of the robbers. He joined in the chase. They were able to apprehend the 2<sup>nd</sup> Appellant. The 1<sup>st</sup> Appellant was also apprehended. The 1<sup>st</sup> Appellant told PW5 that the 2<sup>nd</sup> Appellant was not a thief. She begged them to let him go. As the 1<sup>st</sup> Appellant was being apprehended, a *panga* fell from her *leso*. She however managed to escape. They escorted the 2<sup>nd</sup> Appellant to the village elder. The 2<sup>nd</sup> Appellant told them that he was with the 1<sup>st</sup> Appellant at the complainant’s house. PW1 also identified the 1<sup>st</sup> and 2<sup>nd</sup> Appellants as the assailants who robbed her.

PW6, Robert Owino, was PW4’s neighbour. On 6<sup>th</sup> January 2017, at about 8.20 p.m., he was outside his house when he saw three young men and a lady standing at PW4’s door. He stated that there was sufficient electric light that enabled him to identify the said people. He identified the 1<sup>st</sup> Appellant as the woman who was standing outside PW4’s house. He went back to his house. A few minutes later, he heard someone screaming and shouting “*thieves!*”. He immediately ran out and met with the 1<sup>st</sup> Appellant who was running away. She had a *leso* wrapped around her body. He managed to apprehend her. She was carrying a handbag and a *panga* which fell out from her *leso* when he apprehended her.

PW6 further testified that one of his neighbours was able to apprehend the 2<sup>nd</sup> Appellant who was also one of the robbers. The two robbers were later escorted to the village elder. Police officers came to the village elder’s office and arrested them. PW6 stated that the 1<sup>st</sup> Appellant was known to him since she used to visit his neighbour who was a pastor. She also lived in the same neighbourhood. He however did not know the 2<sup>nd</sup> Appellant. He stated that when he apprehended the 1<sup>st</sup> Appellant, she was pleading with the members of the public to release the 2<sup>nd</sup> Appellant.

PW7, PC Simiyu Manyone, from Muthangari Police Station, was the investigating officer in this case. It was his testimony that on the material day of 6<sup>th</sup> January 2017, he was out on patrol duty together with his colleague CPL. Muthuya. At about 9.00 p.m., they received a call from a village elder at Kawangware who informed them that two people suspected of having committed a robbery had been apprehended and were being held at his office. They proceeded to the village elder’s office. The Appellants, who were the two suspects, were accused of having stolen Ksh.100,000/- from the complainant. Upon interrogating the witnesses, they discovered that the Appellants went to PW4’s house where they found PW1. They threatened her with a *panga* and forced her to show them where the money was. They stole Ksh.100,000/-. PW1 told them that the lady who robbed her had a *leso* wrapped around her body. The *leso* and a *panga* were availed by the members of the public who apprehended the two robbers. PW7 produced the *leso* and the *panga* into evidence.

The 1<sup>st</sup> Appellant was put on her defence. She gave sworn evidence. She stated that she resided in Kawangware. On 6<sup>th</sup> January 2017, at about 9.00 p.m., someone from the village elder's office came to her house. He told her that the village elder had asked to see her. She went to the village elder's office. When she arrived, members of the public started assaulting her. Police officers came to the scene and arrested her. She was taken to Muthangari Police Station. They did not inform her the reason for her arrest. She was later arraigned before the trial court. She stated that the 2<sup>nd</sup> Appellant was unknown to her. She denied the charges brought against her.

The 2<sup>nd</sup> Appellant also gave sworn evidence. He stated that on the material day of 6<sup>th</sup> January 2017, he was at a car wash where he was employed. He left at about 8.00 p.m. When he reached Kamunganga area, he saw a crowd of people approaching his direction. They apprehended him and started asking him where his accomplices were. They physically assaulted him and took him to the village elder's office. Few minutes later, the 1<sup>st</sup> Appellant was brought in. He stated that she was not known to him. The complainant came to the office and accused them of robbing her. Police officers came and escorted them to Muthangari Police Station. At the police station, the police officers beat him. They forced him to sign a statement. He was later arraigned before the trial court.

This being a first appeal, it is the duty of this court to re-evaluate and reconsider the evidence adduced before the trial court before reaching its own independent determination, whether or not to uphold the decision of the said court. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore give comment regarding the demeanours thereof. (See Njoroge vs Republic [1987] eKLR). In the present appeal, the issue for determination by this court is whether the prosecution proved its case on the charge of robbery with violence contrary to Section 296(2) of the Penal Code, brought against the Appellant, to the required standard of proof beyond any reasonable doubt.

This court has carefully re-evaluated the evidence adduced before the trial court as well as the Appellants' respective defence statements. This court has also considered grounds of appeal and written submission made by the Appellants, as well as oral submission made by Mr. Momanyi for the State. It was evident from the facts of the case that the prosecution relied on direct evidence of identification and the arrest of the Appellants to secure the conviction of the Appellants. The robbery occurred at about 8.00 p.m. PW1 told the court that she was alone in the house when the 1<sup>st</sup> Appellant came in. The door was unlocked. She stated that the 1<sup>st</sup> Appellant had a *leso* wrapped around her body.

The 1<sup>st</sup> Appellant asked her where her mother was. She called two men who came in the house. The 2<sup>nd</sup> Appellant, who was one of the two men, was holding a *panga*. He held the *panga* to her neck. They asked her to show them where the money was. The 1<sup>st</sup> Appellant and the third assailant ransacked the house. They found money in the cupboard. They took the money and put it in a bag. As soon as they left, the complainant raised an alarm. She followed them outside screaming "*thieves!*". Members of the public managed to apprehend the 1<sup>st</sup> and 2<sup>nd</sup> Appellants a short distance from the house. She identified them as the robbers who robbed her in the house. PW1 stated that the electricity light in the house enabled her to positively identify her assailants.

PW5 and PW6 lived in the same plot as the complainant. PW6 told the court that he saw a woman and two young men standing outside the complainant's house moments before the robbery occurred. He stated that there was sufficient light from the security lights which enabled him to positively identify the assailants. He testified that the 1<sup>st</sup> Appellant, who was known to him, was the woman who was standing outside the complainant's house. PW6 went back inside his house. A few minutes later, he heard someone screaming "*thieves!*". He rushed outside and met with the 1<sup>st</sup> Appellant who was running away. He pursued her and apprehended her. He stated that the 2<sup>nd</sup> Appellant was also apprehended by another neighbour (PW5). PW6 stated that the 1<sup>st</sup> Appellant had a *leso* wrapped around her body. When he apprehended her, a handbag and a *panga* fell from her clothes.

PW5, who lived in the same plot as the complainant, testified that he was inside his house when he heard someone screaming. He rushed outside and saw two people chasing after the 2<sup>nd</sup> Appellant. He joined in the chase. They managed to apprehend him. The 1<sup>st</sup> Appellant had also been apprehended. The 1<sup>st</sup> Appellant spoke to him in *luhya* language, pleading with him to release the 2<sup>nd</sup> Appellant. PW5 stated that a *panga* fell from the 1<sup>st</sup> Appellant's body. She however managed to escape. He escorted the 2<sup>nd</sup> Appellant to the village elder's office.

PW2 was at his house when he heard screams outside his compound. When he went outside, he saw the 1<sup>st</sup> Appellant who had been apprehended by members of the public. The 1<sup>st</sup> Appellant was known to him. The 1<sup>st</sup> Appellant called out his name requesting for his help. The 2<sup>nd</sup> Appellant had also been apprehended by members of the public. They were beating him. As he tried to rescue the 2<sup>nd</sup> Appellant from the irate mob, the 1<sup>st</sup> Appellant escaped. The 2<sup>nd</sup> Appellant told them that the 1<sup>st</sup> Appellant had the stolen money. PW3 saw the 1<sup>st</sup> Appellant running from the members of the public after she had escaped. He pursued her. She ran to the plot where she lived. She however did not enter her house. She ran into her neighbour's house. PW3 locked the door of the said house from outside. PW2 came and took the 1<sup>st</sup> Appellant from the said house and escorted her to the village elder's office.

From the above evidence, the 1<sup>st</sup> Appellant was placed at the scene of crime by PW1 as well as PW6, who saw her standing outside the complainant's house moments before the robbery occurred. PW6's evidence of identification was by recognition. He stated that there was sufficient light from the security light which enabled him to identify the 1<sup>st</sup> Appellant. He stated that the 1<sup>st</sup> Appellant was known to him since she lived in the same neighbourhood. She also used to visit a pastor in their plot. Further, PW6, who apprehended the 1<sup>st</sup> Appellant, met with her running away from the complainant's house. He did not lose sight of the 1<sup>st</sup> Appellant until her apprehension. When the 1<sup>st</sup> Appellant escaped from the members of the public, PW3 chased after her and locked her in the house in which she had hidden. PW2 extracted her from the said house and escorted her to the village elder's office. The 1<sup>st</sup> Appellant was well known to PW2, PW3 and PW6. They all lived in the same neighbourhood.

Further, when the 1<sup>st</sup> Appellant was apprehended, a handbag and a *panga* fell from her body. PW1 stated that the assailants were armed with a *panga*. She also testified that the lady who robbed her had wrapped a *leso* around her body. The prosecution witnesses who apprehended the appellants stated that the 1<sup>st</sup> Appellant had a *leso* wrapped around her body. The said *panga* and *leso* were produced into evidence. The evidence of the prosecution witnesses was consistent and corroborative. This court is of the view that the circumstances favouring positive identification were present in this case. The 1<sup>st</sup> Appellant was positively identified and placed at the scene of crime.

With regard to the 2<sup>nd</sup> Appellant, PW5 who lived in the same plot as the complainant, apprehended the 2<sup>nd</sup> Appellant. He testified that when he came out of his house, he saw two people chasing after the 2<sup>nd</sup> Appellant who was fleeing from the scene. He joined in the chase and managed to apprehend the 2<sup>nd</sup> Appellant. He stated that he did not lose sight of the 2<sup>nd</sup> Appellant until his apprehension. When the 2<sup>nd</sup> Appellant was arrested, the complainant identified him as the assailant who held a *panga* to her neck. As earlier stated, the complainant testified that there was sufficient electricity light at the house which enabled her to identify the assailants.

When the 2<sup>nd</sup> Appellant was apprehended, the 1<sup>st</sup> Appellant who had also been apprehended, was begging the members of the public to release the 2<sup>nd</sup> Appellant. This evidence was corroborated by PW6. This goes to show that the two Appellants knew each other. PW5 did not lose sight of the 2<sup>nd</sup> Appellant as he was running away from the scene of crime until he apprehended him. PW2 who rescued the 2<sup>nd</sup> Appellant from the irate mob stated that the 2<sup>nd</sup> Appellant told him that the 1<sup>st</sup> Appellant had the bag with the money. This court is of the view that the 2<sup>nd</sup> Appellant was also positively identified as one of the assailants who robbed the complainant.

Although the Appellants denied robbing the complainant, their *alibi* defences were displaced by the corroborative evidence of the prosecution witnesses. The 1<sup>st</sup> Appellant claimed that she was at her house on the material day. She stated that she did not leave her house the whole day. However, the evidence of PW2, PW3, PW5 and PW6, who all knew the 1<sup>st</sup> Appellant prior to the robbery incident, established that the 1<sup>st</sup> Appellant was one of the assailants. PW1 and PW6's testimonies placed the 1<sup>st</sup> Appellant at the scene of crime. The 1<sup>st</sup> Appellant was therefore not telling the truth when she stated that she never left her house on the material day. The 1<sup>st</sup> Appellant was also economical with the truth when she told the court that she did not know the 2<sup>nd</sup> Appellant, and that she only saw him in court for the first time. She was therefore not a truthful witness.

The 2<sup>nd</sup> Appellant stated that he was on his way from work when he was accosted by a mob who accused him of robbery. However, the evidence of PW5 displaced his defence. PW5 saw the 2<sup>nd</sup> Appellant running away from the scene of crime. He chased after him and apprehended him. He never lost sight of the 2<sup>nd</sup> Appellant until his apprehension. PW2, who stated that the 2<sup>nd</sup> Appellant was known to him prior to the robbery incident, testified that when he rescued the 2<sup>nd</sup> Appellant from the irate mob, the 2<sup>nd</sup> Appellant told him that the 1<sup>st</sup> Appellant was the one who had the stolen money.

From this court's re-evaluation of the evidence adduced, it was clear to this court that the prosecution established to the required standard of proof beyond any reasonable doubt that indeed the Appellants were positively identified as being members of the gang that robbed the complainant. The evidence of identification that was adduced by the prosecution witnesses was watertight. That evidence was of recognition rather than mere identification of a stranger. The Appellants' respective defence statements were displaced by the evidence of the prosecution witnesses who were able to give a clear, cogent and credible narration from the time the complainant was robbed to the time the Appellants were apprehended.

In the premises therefore, this court holds that the prosecution was able to establish, to the required standard of proof beyond any reasonable doubt, the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The ingredients of the charge of **robbery with violence** were established. The Appellants, in the company of another, while armed with dangerous weapon namely a *panga*, robbed the complainant, and in the course of the robbery threatened to use violence on the complainant. The Appellants' appeal against conviction therefore lacks merit and is hereby dismissed.

On sentence, following the recent Supreme Court decision in the case of **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR**, this court has jurisdiction to relook at the sentence of the Appellants to determine whether the death sentence that was meted on them was deserved or another sentence ought to be imposed. In the present appeal, it was clear to this court that, taking into consideration the entire circumstance in the case, that the death sentence that was meted on the Appellants was not deserved. This court has been guided by the guidelines issued by the Supreme Court in the above case. This court is of the considered view that the circumstance of this case calls for a custodial sentence.

Both Appellants were first offenders. They were remorseful and prayed for leniency. This court also notes that no one was injured during the course of the robbery. However, the complainant was threatened with a *panga*, which is a dangerous weapon. In the premises therefore, the death sentence that was imposed on the Appellants is set aside and substituted by a sentence of this court. Each Appellant is sentenced to serve five (5) years imprisonment with effect from today's date. This court has taken into consideration the period that the Appellants were in pre-trial detention and the period they have spent in prison prior to the hearing and determination of this appeal. It is so ordered.

**DATED AT NAIROBI THIS 1<sup>ST</sup> DAY OF JULY 2020**

**L. KIMARU**

**JUDGE**