REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 3 OF 2020

DAVID MUTUA MATUVA.....APPELLANT

=VRS=

THE REPUBLIC.....RESPONDENT

{Being an appeal against the Judgement of Hon. D. A. Orimba – Ag. SPM Thika dated and delivered on the 3rd day of April 2013 in the original Thika Chief Magistrate's Court Criminal Case No. 2770 of 2011}

JUDGEMENT

The appellant is on death row having been convicted and sentenced to death for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. The offence is alleged to have been committed on 14th June 2011 at a place called Mbingoni in Yatta District within Machakos County. His appeal is against both the conviction and sentence and is premised on 5 grounds namely: -

> **"1. THAT, the learned trial Magistrate erred in law and fact in returning a finding of culpability on my part in a case wholly dependent on circumstantial evidence without corroboration.**
>
> **2. THAT, the trial court erred in law and in fact by failing to appreciate that the Prosecution's case was not only insufficient but fabricated, speculative, conjecture, discredited, inconsistent in material particulars, and lacked probative value.**
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> **3. THAT, the learned trial Magistrate erred in law and fact by failing to find that the Prosecution witnesses narrations of evidence were unbelievable and illogical.**
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> **4. THAT, the learned trial Magistrate erred in law and fact in basing the judgement on insufficient evidence of recent possession.**
>
> **5. THAT, the trial court erred in law by not giving my defence, which plausibly underpinned the doubtful circumstances circumventing my mode of arrest and identification in violation of the rules of natural justice."**

Briefly the facts of the case were that on the material day at about 11am the complainant was waiting for customers at a taxi rank within Matuu Township when he was introduced to the appellant by another taxi driver who testified in the trial court as Pw3. He agreed to carry him and so the appellant boarded the taxi saying that he wanted to be driven to his home to pick his ATM card. The complainant agreed to ferry him at a price of Kshs. 300/= and they left the taxi rank and drove towards a place called Ivumbiini but when the appellant directed the complainant to a compound with a deserted house the complainant became suspicious. The appellant is said to have drawn a knife and aimed it at the complainant who got hold of it in the process sustaining a cut in the hand. In the ensuing struggle the complainant sustained injuries on the head and shoulder and his vehicle Registration No. KBJ 699X was damaged. When the complainant demanded to know why the appellant was attacking him his alleged reply was that he wanted the car. It was then that the complainant switched off the engine, thrust the car key, his mobile phone and wallet which had Kshs. 500/= and two ATM cards to him and fled for his life. The complainant testified that the car had a "cut out" and he knew that the appellant would not restart it. He stated that he got out of the car as the appellant was rummaging through the wallet. It was his evidence that as he jumped out the appellant stabbed him on the thigh causing him to bleed profusely. He however did not stop but ran away screaming to a woman who was nearby who gave him her mobile phone to call his wife. He was then taken to Matuu District Hospital by good Samaritans and after that he reported the matter to Matuu Police Station. The appellant is said to have been arrested at the scene by members of the public and handed over to the police. Investigations commenced. The appellant who had been taken into custody is said to have drawn a map which led the complainant to the place where his stolen phone and wallet containing ID card, ATM card and Insurance card were recovered. The knife the appellant had allegedly used to wound the complainant was also recovered. The appellant was then arraigned in court. The recovered items were identified by the appellant and were all produced in evidence. The prosecution also produced a confession recorded by Superintendent of Police Kiambu (Pw6) and a P3 Form.

In his defence, the appellant conceded that he knew Boniface Kyalo (Pw3) and that on the material day he approached him at the taxi rank as he wanted to be driven to his house to collect an ATM card which he had forgotten there. He confirmed the complainant's evidence that it

was Kyalo (Pw3) who introduced him to the complainant. He also confirmed that the two of them embarked on the journey once they agreed at a fare of Kshs. 300/. He however stated that along the way the complainant started complaining of the distance and stopped and demanded to be paid Kshs. 600/ but that he convinced him to take Kshs. 500/. He stated that when they finally reached his home he gave the complainant a Kshs. 500/ note and demanded to be given 200/. He stated that the altercation begun when the complainant refused with the 200/ and he (the appellant) became furious and when the complainant slapped him he retaliated. He stated that the complainant detained him in the vehicle and even cut him on the left arm with a knife and when he called neighbours to help him the complainant ran away. He stated that because his clothes were soaked in blood he went to his house and changed and then left to graze his cattle. He stated that it was while he was in the grazing field that he was apprehended by a group of people who later handed him over to the police. He stated that he was taken to hospital where he was treated before he was taken to court and charged with this offence. He vehemently denied that he robbed the complainant and contended that it was the complainant who left the car at his home. He also denied he did a map that led to the recovery of the complainant's alleged stolen items.

At the hearing of this appeal the appellant relied on written submissions to which Prosecution Counsel Mr. Ongiro responded orally.

I have considered the grounds of appeal and the rival submissions fully but as the first appellate court I have a duty to reconsider and evaluate the evidence in the trial court so as to arrive at my own independent conclusion while bearing in mind that I did not see or hear the witnesses who testified ***(See Okeno v Republic [1972] EA 32).***

As provided under **Section 296 (2) of the Penal Code** robbery with violence is committed when a thing is stolen in any of the following circumstances: -

(a) The offender is armed with any dangerous and offensive weapon or instrument; or

(b)The offender is in company with one or more other person or persons; or

(c) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person.

Section 296 (2) must be read together with **Section 295 of the Penal Code**. In this case there is evidence beyond reasonable doubt that an encounter took place between the complainant and the appellant. In his defence, the appellant admitted that he hired the complainant's taxi to take him to his house. He confirmed the complainant's testimony that he (the appellant) had said he was going for an ATM card which he had left at home. The complainant and the appellant gave different versions of what transpired along the way with the complainant alleging that the appellant attacked and robbed him of his properties and the appellant contending that it was all a misunderstanding arising from the complainant's demand for fare other than that which had been agreed upon. Being faced with these two versions this court is left to make a determination of which of them is true. Having evaluated the evidence by both sides carefully I am satisfied that the version by the complainant is more plausible and that therefore the appellant was correctly charged and subsequently convicted for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code.

The issue of identification and violence are all confirmed by the appellant's own defence the appellant having admitted that he travelled in the complainant's taxi up to his home and he also having admitted that he was engaged in a ***'fight"*** with the complainant. That **"fight"** settles the issue of violence. The complainant's evidence that he sustained injuries on the head, leg and hand was corroborated by Dr. Mwana Khalif (Pw4) who testified orally and produced a P3 Form. The injuries in respect of the appellant were alleged to have been inflicted by a mob but not by the complainant. In his defence he told the court that he was apprehended by a group of people hence making it likely that it is those people rather than the complainant who assaulted him. The other evidence that proved the charge against him beyond reasonable doubt was adduced by the police officers who confirmed that the complainant's vehicle was found at his home. Its key was in the ignition. This confirmed the complainant's evidence that he tactfully switched off the engine because he knew the appellant could not restart the car as it had a ***"cut out".*** The wallet and mobile phone stolen from the complainant were recovered at the scene and there is proof beyond reasonable doubt that the appellant led to the recovery of those items. I am satisfied that he drew a map which led the police and the complainant to the recovery of those items. That in my view was not in violation of his right under **Article 50 (4) of the Constitution**. It is clear from the evidence that he drew the map voluntarily after asking for the complainant's forgiveness. Moreover, even were that evidence to be excluded there is other evidence that proves the charge against him beyond reasonable doubt. His allegation that the complainant attacked him for demanding his change is not convincing because it was he himself who told the court that at the time he left his house he only had Kshs. 60/ in coins and Kshs. 500/ in form of a note and that he left the Kshs. 500/ note on a table in his house. It was also his evidence that when he reached the bank he realized he had forgotten his ATM card at home. Clearly therefore he did not withdraw any money from the bank and having left the Kshs. 500/ note at home he could not have had Kshs. 500/ or any money at all at the material time. His allegation that they fought because he gave the complainant Kshs. 500/= but the complainant refused to give him 200/ cannot therefore be believed. In his confession which I find was taken in accordance with the **EVIDENCE (OUT OF COURT CONFESSIONS) RULES 2009** he admitted that he had a knife and that he used it to stab the complainant. He also admitted that he took the complainant's phone, car keys and everything he had in his pocket. The prosecution need not have called witnesses other than those it called to prove its case as **Section 143 of the Evidence Act** provides that no particular number of witnesses shall be required for the proof of any fact and as was held in the case of **Bukenya & others v Uganda [1972] EA 549** cited with approval by the Court of Appeal in **John Irungu v Republic [2016] eKLR,** this is not one of the cases in which an adverse inference can be drawn as the evidence adduced sufficiently proved the prosecution's case.

The judgement delivered by the trial Magistrate fully satisfied the provisions of **Section 169 of the Criminal Procedure Code** and the appellant's defence was taken into consideration when arriving at the decision. Nothing therefore turns on ground 2. In the premises I find no merit in the appeal against conviction and it is dismissed.

As regards the sentence, it is correct that in the case of **Francis Karioko Muruatetu & another v Republic [2017] eKLR** the Supreme Court declared the mandatory nature of the death sentence unconstitutional and opened up such cases for resentencing. It is on record that despite the appellant's plea in mitigation the trial Magistrate sentenced him to death because it was mandatory to do so. The sentence ought not to stand. I have considered the nature and circumstances of the offence, the fact that the accused was a first offender and his plea in

mitigation and I find that a sentence of thirty (30) years imprisonment will suffice. The sentence shall be computed from the date the appellant was sentenced by the lower court.

Signed and dated this 28th day of October 2020.

E. N. MAINA

JUDGE

Judgement dated and delivered Electronically via Microsoft Teams on this 9th day of November 2020.

MARY KASANGO

JUDGE