REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

HCCRA NO. 72 OF 2017

GATHOGO MWANIKI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the original sentence of the Senior Resident Magistrate

Hon. R. Kefa dated 26/09/2017 in Nyeri C.M Criminal Case No. 39 of 2016.)

JUDGMENT

1. **Gathogo Mwaniki** the Appellant herein was charged with two counts of the offence of robbery with violence contrary to section 296(2)

> **Count I:** The particulars were that the Appellant on the 10th day of January 2016, at Nyeri town in Nyeri county together with others not before court being armed with a dangerous weapon namely a knife robbed **Moses Murithi Kagiri** of Kshs.500/=, LG E400 mobile phone all valued at Kshs.9,500/=.
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> **Count II:** The particulars were that the Appellant on the 9th day of January 2016 at Nyeri town in Nyeri county together with others not before court being armed with a dangerous weapon namely a knife robbed **Benjamin Gitahi Kirugumi** of Kshs.20/=, a Nokia 306 mobile phone all valued at Kshs.8,020/=.

2. He denied the charges and the matter proceeded to full hearing. The prosecution called four (4) witnesses while the defence called two (2) witnesses. Later the court found the Appellant guilty, convicted him and sentenced him to death on the 1st count while the 2nd count was held in abeyance.

3. Being aggrieved, the Appellant appealed against the judgment citing the following grounds:

> a) **That,** the trial Magistrate erred in both law and fact while relying on the adduced evidence purported by both complainants in count **1** and **2** in regard with identification at the alleged scene of crime without considering that the same was being left in doubt unsafe to base a conviction.
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> b) **That,** the trial Magistrate erred in both law and fact while basing his conviction on charges that were not adequately proved since the same rendered to a defective charge sheet a foregoing with the dates the alleged offence was committed.
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> c) **That,** the trial Magistrate lost direction while concluding that he was the right robber who was being arrested by believing the evidence of the police officer and the both complainants, without considering that it was not chase and arrest, being and that it required some descriptions of the assailant.
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> d) **That,** the trial Magistrate further lost direction while becoming influenced by the adduced evidence of the prosecution and in rejecting his defense which was not displaced by the prosecution side as per section 212 of the Criminal Procedure Code Cap 75 Laws of Kenya.

4. **Pw1 Moses Mureithi Kagiri** and **Pw2 Benjamin Gitahi Kirugumi** are the two complainants in counts **1** and **2** respectively. It was their evidence that they were in Nyeri town on the night of 9th January 2016 at 11:00 pm and were headed to Skuta where Pw1 lived. The two complainants are cousins. As they walked they found a group of five (5) men at Total petrol station near the junction of YMCA. They all told them to stand and give them what they had. Two of them approached Pw1 and Pw2 and one removed a phone L.G E400 white colour and

Kshs.400/= from Pw1's pocket. He was warned against resistance as he would be killed. The two who were with him were not armed. Pw1 pleaded with them to give them their phone sim cards.

5. One of those who robbed him wore a black coat while the other wore an orange sweater. There were security lights on along the road and he was able to see the faces of the two clearly. The one holding his phone threw his sim card at him. The two pretended to walk towards Skuta while their assailants headed towards town. After they had gone for about 50 metres Pw1 and Pw2 started following them slowly while cutting corners. Finally the group of assailants entered Viceroy pub.

6. They went to the pub and got assistance from the watchman who called an officer from Nyeri police station. The officer came and found them there. He entered the pub with them so that they could identify the assailants. Pw1 stated that he was able to positively identify one of the men who had robbed them because of the short sleeved jeans coat he was wearing. Secondly he clearly saw him as he robbed Pw2. They were unable to identify the other four. He said the Appellant is the person he had identified.

7. In cross examination Pw1 said he was able to see the Appellant well as they pleaded for the return of their sim cards. At Viceroy pub they notified motorbike riders and the watchman of their plight. While outside the pub they did not see the rest of the assailants leave the pub. In re-examination he insisted he had clearly seen the Appellant who had robbed Pw2 and he was the tallest of them all.

8. Pw2 gave similar evidence to that of Pw1 as to what transpired that night. He explained that it was three men who accosted him. The short one among them had a knife which he pointed at his stomach while the tallest among them removed his phone Nokia 306 from the trouser pocket. He then handed it to the 3rd person who stood next to him. The short man took a receipt of 2NK Sacco and Kshs.50/= from his shirt pocket.

9. He was able to see all this because of the security lights round. They followed the assailants and the one he identified is the Appellant who also robbed him of his phone.

10. **Pw3 No. 93541 PC Robery Mogaka** was an officer from Nyeri police station. He testified that on 10th January 2016 at around 2340 hours, he was within Majengo slums near Viceroy bar when he was confronted by Pw1 and Pw2 who reported to him how they had been robbed of two mobile phones and Kshs.500/= after being threatened with a knife. They told him they had seen one of the assailants at Viceroy bar taking beer. He accompanied them to the bar and arrested a person called Gathogo Mwaniki and took him to Nyeri police station where he booked him.

11. He did not recover anything on the person he arrested. After picking the sim cards they walked towards Skuta as the assailants walked towards town. A policeman was called by the pub watchman and he came and entered the pub with them. Inside he identified the man with the short sleeved jeans jacket. He was the tallest among the rest of the assailants and he had seen his face well. He said the person could not remember what the one arrested was wearing. He identified the person he arrested as the Appellant.

12. In cross examination he said no one called him to the plub as he just met the complainants. It was later that he met the watchman who informed him of the incident. He entered the bar with the complainants and the watchman and the complainants pointed out the Appellant.

13. **Pw4 No. 72539 PC Ferdinard Kazungu** was the investigating officer. He stated that on 10th January 2016 at around 0200hours he was on duty when the OCS Nyeri police station assigned him this case. He read the report that had been booked, recorded the statements by the complainants and visited the scene. He said from his investigations the complainants identified the Appellant as they had conversed with the assailants and never lost contact until they entered the pub.

14. In cross examination the witness indicated that there was a mistake in the dates in the charge sheet as the incident in both counts occurred on 9th January 2016. The Appellant gave out the sim cards to the complainants.

15. In his unsworn defence the Appellant stated that on 9th January 2016 he met with Kariuki Mwaniki (*brother*) and Wairagu (*friend*) at Viceroy club and they stayed there upto 11:40 pm when he was arrested by an officer accompanied by two men. The two men complained of having been robbed of their phones at 11:00 pm. He stated that at 11:00 pm he was at Viceroy club and not at the scene.

16. **Dw2 Kariuki Mwaniki** is the Appellant's brother. He stated that on 9th January 2016 he met his brother (*Appellant*) at Viceroy club around 7:00 pm and they stayed until 11:40 pm. He was surprised when the Appellant was arrested since they had been together and he never left the place.

17. In cross examination he said he had nothing to show that he was with the accused. There were many people at the club.

18. The appeal was canvassed by written submissions. Learned counsel Mr. Warutere for the Appellant relied on the homegrown grounds by the Appellant to argue the appeal. He has submitted that the conditions for identification were not favourable as it was at night and the intensity of the security lights was unknown. He wondered how only the Appellant was identified among the assailants. He referred to the case of **Abdula Bin Wendoh (1953) 20 EACA 166.**

19. Mr. Warutere submitted that the charge sheet was defective as the wrong date was stated. Pw1 and Pw2 stated that the offence occurred on 9th January 2016 yet the charge sheet showed it was on 10th January 2016. This was therefore a material contradiction.

20. He has further argued that there was no description of the Appellant given by Pw1 and Pw2. He referred to the case of **Peter Waihiga Kabiru & 2 Others –vs. Republic Nyeri Criminal appeal No. 103, 106 and 108 of 2014**. Counsel contends that the Appellant was not found with any of the allegedly stolen items and it was therefore unsafe to convict him.

21. Finally he submits that the defence by the Appellant was never considered by the court. The said defence had not been dislodged. The trial court had simply dismissed it in one sentence.

22. The appeal was opposed by the Respondent through learned counsel M/s Claire Muriithi. She has submitted that Pw1 and Pw2 identified the Appellant by the type of clothes he wore. That they had, had sufficient time to see and mark him by his physical, facial appearance and height as he was taller than the rest. It was Pw1 and Pw2 who pointed him out to the officer (Pw3) who arrested him. There was therefore no need for a description to be given.

23. On identification counsel referred to the case of **Cleophas otieno Wamunga –vs- Republic (1989) KLR** where the Court of Appeal observed that:

> "*Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant."*

24. It was her submission that the incident occurred at night and there were security lights along the road at the scene. That they talked to each other as Pw1 and Pw2 pleaded to have their sim cards back. They did not lose sight of the Appellant and the four others.

25. On the issue of a defective charge sheet she submits that it was an omission which did not prejudice the Appellant nor cause any miscarriage of justice. She submits that the same is curable under section 382 of the Criminal Procedure Code.

26. Counsel has further submitted that the offence of robbery contrary to section 296(2) of the Penal Code was established through the evidence of Pw1 and Pw2. Further that the alleged contradiction in the evidence of Pw1 and Pw2 and the arresting officer was so minor and did not weaken the prosecution case.

27. On the defence of alibi counsel referred to section 309 of the Criminal Procedure Code which provides:

> "*If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.*

She further referred to the case of **Athunam Salim Athuman –vs- Republic (2016) eKLR** where the Court of Appeal observed as follows:

> "*The principle has long been accepted that an accused person who wishes to rely on a defence of alibi must raise it at the earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the alibi".*

28. She argued that the Appellant introduced the *alibi* defence for the first time in his defence. That the prosecution was not able to cross examine him to clarify or impeach the alibi defence. She admits that

the prosecution did not adduce any evidence to rebut the evidence of Dw2. This to her was however not fatal. That the trial court rightfully found the defence to have been a mere denial. On sentence she has submitted that the **Francis Karioko Muruatetu** case did not outlaw the death sentence.

Analysis and determination

29. The duty of the first appellate court is to re-analyse and reconsider the evidence tendered before the trial court with a view to arriving at its own independent conclusions. See **Okeno –vs- Republic (1972) E.A 32 & Kiilu & Another –vs- Republic (2005) I KLR 174**.

30. The same was reiterated in the case of **David Njuguna Wairimu –vs- Republic (2010) eKLR** where the Court of appeal stated:

> ***"That the duty of the 1st appellate court is to analyze and re-evaluate evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the circumstances of the case come to the same conclusions as those of the lower court. It may rehash those conclusions as those of the lower court. We do not think that there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."***

31. I find the main issue for determination before this court to be whether the conviction is sustainable on the strength of the evidence adduced in the trial court. I will first have to determine whether the offence of robbery with violence was proved.

32. The ingredients of robbery with violence are set down in section 296(2) of the Penal Code as follows:

Punishment for robbery

> *(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.*
>
> *(2) 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 if, at or immediately before or immediately after the time of the robbery, he wounds, beats strikes or uses any other personal violence to any person, he shall be sentenced to death.*

Thus in determining whether the ingredients of the offence of robbery with violence are proved the court must consider, the evidence on the theft, the number of assailants, or whether they were armed with a dangerous weapon or whether the victim was injured or threatened with injury. See **Odhiambo & Another –vs- Republic (2005) 2 KLR 176.**

33. In **Suleiman Kamau Nyambura –vs- Republic (2015) eKLR** the Court of Appeal held:

> *"Proof of any of the ingredients of robbery with violence is enough to sustain a conviction under section 296(2) of the Penal Code. See **Oluoch –vs- Republic (1985) KLR 549"***

34. In the instant case there is credible evidence that the assailants were five (5) in number when Pw1 and Pw2 were attacked hence executed a common intention. It must however first of all be established that there was theft of the items complained of.

35. Pw1 and Pw2 said each of them lost a phone plus cash money. Pw1 lost Kshs.500/= while Pw2 lost Kshs.20/=. In his evidence Pw1 said this at **page 9 lines 10-12:-**

> *"My cousin by the name Benjamin Gitahi Kirugumi arrived at 11:00 pm. We did not have money for fare so we decided to walk. We started walking on foot heading towards Skuta".*

36. After stating all this Pw1 turns out to say he was robbed of Kshs.500/= while Pw2 says he was robbed of Kshs.50/= while the charge sheet states it was Kshs.20/=. The question is where this money came from when they could not even afford fare to take them home from the stage.

37. Secondly, despite alleging that they possessed mobile phones which were stolen, there was no evidence adduced to show that they owned any mobile phone /phones. The sim cards that were allegedly removed from their phones were returned to them. The same were not produced before the trial court to prove that they were used in their phone/phones. It was the duty of the prosecution through their witnesses Pw1 and Pw2 to show that indeed they had cash money and the phones complained of.

38. I would have stopped at that but I think there are a few other issues I wish to point out. The complaints in the first and second count arose from one incident. It is therefore surprising that count I talks of 10th January 2016 while count II talks of 9th January 2016. Both Pw1 and Pw2 told the court that the incident occurred on 9th January 2016.

39. Pw4 the investigating officer told the court there was an error on the dates in the charge sheet. Despite all these pointers to the need for amendment of the charge sheet both the prosecution and the trial court remained silent and did nothing.

40. Section 214 of the Criminal Procedure Code provides:

> ***(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:***
>
> ***Provided that -***
>
> ***(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;***
>
> ***(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.***
>
> ***(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.***
>
> ***(3) Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary.***

41. The learned trial Magistrate in her judgment did not say anything about the variance in the dates in the charge sheet despite their clear appearance in the particulars cited by her. The Respondent cannot therefore hide under section 382 for the cure of the omission. An

amendment of the charge sheet should have been done soon after Pw1's or Pw4's testimony.

42. The next issue is on identification of the Appellant. The evidence is clear that the Appellant was not known to Pw1 and Pw2. So this was a case of visual identification and not recognition. None of the allegedly stolen items were found on him. In the case of **Francis Kariuki Njiru and 7 Others –vs- Republic (2001) eKLR** the Court of Appeal stated that:

> *"The law on identification is well settled and this court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered. Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police a the earliest opportunity or at all.*

43. In **Anjononi & Others –vs- Republic (1976 – 1980) KLR 1556** at **1568** the Court of Appeal stated as follows:

> ***"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."***

44. Further, in the recent case of **Eric Oduor Odhiambo & Another –vs- Republic 2019 eKLR** the Court of Appeal clarified that:

> ***"Of importance is the caution in Anjononi & Others –vs- Republic (1976) – 1980) 1 KLR 1566, that although recognition of an assailant is more satisfactory than identification of a stranger, the possibility of someone making a genuine mistake even in recognition of someone known to him particularly in circumstances that are not favourable for identification cannot be rules out, and therefore there is need to test and weigh the evidence of identification."***

45. In the instant case Pw3 testified that he was within Majengo slums near Viceroy bar when he was confronted by Pw1 and Pw2. Being a police officer and being in the area where the incident is said to have occurred he should have told the court about the lighting in the area. Was it true as Pw1 and Pw2 said the streets had security lights on? Further, Pw1 said despite his being robbed by two of the assailants he was busy observing what was being done to Pw2 and he identified the Appellant.

46. Both Pw1 and Pw2 said they were able to identify the Appellant because of his height and what he was wearing i.e.

> *"a short sleeved jeans coat/jacket."*

This item was very key in the identification of the Appellant. When he was flashed out of Viceroy pub he is said to have been still wearing this short sleeved jeans coat/jacket, because that was part of the identification mark. Where did it go to? It was never identified or even produced in court as an exhibit.

47. It must be remembered that this was identification of a stranger in circumstances where the witnesses had no time to give a description to the police. It was the evidence of Pw1 and Pw2 that all the five assailants entered Viceroy pub. They never saw any of them leave the pub. However when they entered they were only able to identify the Appellant yet the others were there. If they were using the same light to identify them why were they not able to identify the rest of the assailants?

48. They pointed out the special feature of the short sleeved jeans coat/jacket to be what made the Appellant's appearance to be unique. Production of this item would have unlocked the puzzle. Failure to avail it did a blow to the prosecution case.

49. After doing an analysis of the evidence and the law, I find that the conviction of the Appellant is not sustainable on the evidence

adduced herein. I find merit in the appeal which I hereby allow. The conviction on both counts is quashed and the sentence set aside.

50. The Appellant shall be released forthwith unless otherwise lawfully held under a separate warrant.

Orders accordingly.

Dated and signed this 10th day of November 2020, in open court at Makueni.

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H. I. Ong'udi

Judge