REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 93 OF 2017

BETWEEN

FRANCIS NJUGUNA NDUGIRE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An Appeal from the original conviction and sentence in the Senior Principal Magistrate's Court at Kigumo Cr. Case No. 456 of 2013 delivered by Hon. A. Mwangi (SRM) on 19th December, 2017).

JUDGMENT

1. The Appellant, **Francis Njuguna Ndugire** and his co-accused Evanson Ndugire who died in prison were charged with robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The particulars were that on the 7th day of April, 2013 at Gachocho village in Kigumo sub-county within Murang'a County, they jointly robbed **Irungu Paul Ng'ang'a** Kshs. 10,000/= and immediately before the time of such robbery wounded the said **Irungu Paul Ng'ang'a.** They both pleaded not guilty to the offence. After a full trial, they were convicted of the offence and sentenced to suffer death. Being dissatisfied by his conviction and sentence, the Appellant preferred the instant appeal to this court.

Grounds of Appeal

2. The Appellant raised seven (7) grounds of appeal in his Amended Petition of Appeal filed on 3rd September, 2020. These were that:

> ***i. The learned magistrate erred in law and fact by failing to consider the evidence on record.***
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> ***ii. The learned magistrate erred in law and fact by allowing change of charge of assault to robbery with violence belatedly and without following due process and without consideration.***
>
> ***iii. The learned magistrate failed to look at the whole case judiciously.***
>
> ***iv. The accused criminal rights were violated in particular Article 49(f) of the Constitution.***
>
> ***v. The learned magistrate erred in law and fact by failing to consider the surrounding circumstances and family dispute.***
>
> ***vi. The learned magistrate erred in law and fact by basing the conviction on a single eye witness who was the wife of the complainant.***
>
> ***vii. The sentence was too harsh in the circumstances.***

Summary of Evidence

3. I am minded that this is the first appellate court whose duty is to re-evaluate the evidence and make independent conclusions. See: **Okeno v Republic (1972) EA,32** and **Kiilu &Another v Republic (2005)1 KLR, 174**. I thus summarize the evidence adduced as follows.

4. The complainant, **PW1, Irungu Paul Ng'ang'a,** and the Appellant's co-accused (hereafter "**Evanson**") were step brothers while the Appellant is his nephew. On 7th April, 2013 at about 5.30 pm, PW1 left his home to go and buy iron sheets for his daughter who had sent them Kshs. 10,000/= for the said purpose. While on his way, Evanson and the Appellant approached him while hurling insults at him. PW1 stepped aside to let the Appellant pass but the Appellant who had a panga started throwing blows at him. He also saw Evanson rushing

towards him while holding a small sword and a walking stick. Evanson hit him on the left side of his waist with the walking stick while the Appellant hit him with a panga on his upper back. PW1 screamed as the Appellant lay on him and took the money out of his pocket.

5. His wife, **PW2, Winnie Wanjiru,** was splitting firewood at the time when she heard him screaming. PW2 rushed to the scene while screaming. She saw Evanson and the Appellant hit PW1 but they left him when they saw her. PW2 escorted PW1 home but the Appellant followed them with a panga while insulting them claiming that they had bewitched them. The Appellant also asked PW1 to get out so he could kill him. PW2 reported the incident at Gachocho Police Station. Thereafter, she escorted PW1 to the hospital where he was treated.

6. PW1 denied there being a dispute between them and/or ever differing with Evanson over their father's land. On her part, PW2 stated that she did not relate well with Evanson as he had been convicted for assaulting her and sentenced to serve a non-custodial sentence. PW2 also confirmed that their land was separate from that of the accused persons.

7. PW3, James Mwangi K, a Clinical Officer from Kigumo Sub-County Hospital produced PW1's P3 form which was filled on 6th May, 2013 by one Joseph Mathenge, whom he had worked with at the facility but was deceased. PW1 complained of back pains on examination. The approximate age of injuries at the time of treatment was the same day. The probable weapon causing the injuries was a blunt object and the degree of the injury was classified as harm.

8. PW4, Corporal Elijah Yator of Kigumo Police Station took over the investigation from PC Bushienei after the latter was transferred to Kangema Police Station. He stated that the initial charge was assault causing bodily harm but after carefully perusing the file, he noted that PW1 had been robbed of Kshs. 10,000/=. He therefore amended the charge to robbery with violence. PW4 further stated that initially, only the Appellant had been charged but PW1 complained to Kituo cha Sheria and Evanson was charged too.

9. Upon being placed on his defence, the Appellant opted to remain silent and not call any witnesses.

Analysis and determination

10. The Appeal was dispensed with by way of oral submissions presented through the Zoom video conferencing platform. The Appellant was represented by learned counsel, Mr. Kimwere whilst learned State Counsel Ms. Gichuru appeared for the Respondent. Upon carefully re-evaluating the evidence on record and considering the parties' respective submissions, I find that there are only two issues for determination namely; whether the prosecution proved its case beyond a reasonable doubt; and whether the sentence imposed was harsh.

Whether the prosecution established the offence of robbery with violence

11. On this issue, Mr. Kimwere submitted that the trial court failed to consider that this was a land dispute involving family members and not a case of robbery with violence.

12. According to Ms. Gichuru however, all the elements of the offence of robbery with violence as spelt out under **Section 296(2)** of the **Penal Code** were accordingly established.

13. It is trite law that theft accompanied by proof of any of the ingredients set out in **Section 296 (2)** of the **Penal Code** suffices to found a conviction for the offence of robbery with violence. These are:

> ***a) The offender is armed with a dangerous or offensive weapon or instrument; or***
>
> ***b) The offender is in the company of one or more person or persons; or***
>
> ***c) If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any personal violence to any person.***

14. According to the evidence on record, PW1 was attacked by two people who had a panga and a walking stick respectively. The two attackers beat him up with the said weapons and he sustained injuries for which he sought treatment at Kigumo Sub-County Hospital as per the P3 form produced in evidence. Further, one of the attackers took out Kshs. 10,000/= from PW1's pocket during the attack. The incident was reported at Kangema Police Station. In the premises, I find that the evidence on record established the offence of robbery with violence.

15. I now grapple with the question of whether the Appellant was positively identified as one of the attackers. From the record, it is clear that identification was by way of recognition which is considered more satisfactory and reliable than identification of a stranger because it depends upon the personal knowledge of the assailant. (See **Anjonon & Others v Republic [1980] eKLR).** The Appellant was well known to PW1 and PW2 as he was PW1's nephew. Further, the incident took place at 5.30 pm in broad daylight. I am therefore satisfied that the Appellant was positively identified as one of the two assailants.

16. Counsel for the Appellant faulted the prosecution for failing to call other independent witnesses to corroborate PW1 and PW2's evidence. He argued that this was merely a family dispute involving land. Further, counsel questioned PW1 and PW2's evidence that the money that was stolen was to be used to buy iron sheets. He argued that it was highly unlikely that PW1 was going to buy iron sheets on a Sunday evening at 5.00 pm as alleged. Mr. Kimwere also questioned how no one offered to help PW1 yet the incident happened during in broad daylight.

17. In my view, the arguments by counsel are merely speculative and not backed up by any evidence. On the other hand, even if there was indeed a family dispute between the parties, it did not warrant the Appellant and his deceased father to aggravate the situation by committing a crime when there were other amicable ways of settling the dispute.

18. Further, it was clear from PW1 and PW2's uncontroverted evidence that only PW2 went to rescue PW1 when he screamed for help. It was therefore not necessary to call any other independent witness to prove something that they did not see or hear. In any event, it trite that the prosecution is not obligated to call a superfluity of witnesses to prove a fact. (See **Section 143 of the Evidence Act (Cap 80) Laws of Kenya** and **Bukenya & Others V Uganda (1972) EA 549**).

19. It was also counsel's contention that PW1 and PW2's evidence were inconsistent and contradictory. He noted that PW1 did not state that he fell down upon being attacked but PW2 mentioned that PW1 fell down. He pointed out that PW1's evidence that Kshs. 10,000/= was removed from his pocket was inconsistent with PW2's statement in which she only stated that they did not find the money. Further, counsel noted that PW1 said that the Appellant had a panga but PW2 did not state whether the Appellant was carrying any weapon.

20. Respectively, I do not agree with counsel's submissions since my perusal of the record revealed that the evidence tendered by PW1 and PW2 was cogent, consistent and corroborative. This ground therefore lacks merit.

21. Finally, counsel submitted that the amendment of the charge from assault to robbery with violence was done without any justification. He argued that since PW4 had not conducted any investigations, he had no authority to amend the charges. On her part, Ms. Gichuru submitted that PW4 was a credible witness as he had been briefed about the case by his predecessor. On the issue of the amendment, she stated that the magistrate noted that there was no ulterior motive in PW4's decision to amend the charge sheet from assault to robbery with violence.

22. Section 214 of the **Criminal Procedure Code** provides as follows regarding amendment of charges:

> ***"(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."(Emphasis added).***

23. My understanding of the above is that the provision allows for the amendment of the charges by the prosecution with leave of court at any time before the close of the prosecution's case. Where that is done, the altered charge must be read to the accused so that he can plead afresh. Thereafter, the accused may exercise his right to demand that all or any of the witnesses be recalled to give evidence afresh or for further cross-examination on the aspect introduced to the charge through the amendment.

24. In the instant case, the charge was amended even before the hearing begun. The amended charge was read and explained to the Appellant and his co-accused and they both pleaded not guilty to it. Thereafter, they were both given an opportunity to cross examine the witnesses. In my view therefore, there was no malice on the part of PW4 in amending the charge to reflect the offence which was supported by the evidence on record. What was then paramount was that the prosecution discharged its duty of proving the amended charges beyond a reasonable doubt: an obligation they ably executed.

25. Finally, counsel submitted that the trial magistrate failed to appreciate that remaining silent was a form of defence. In response, Ms. Gichuru submitted that although that was a right, it did not shake the prosecution case.

26. The right to remain silent and not testify during proceedings is a constitutional right envisaged under **Article 50 (2) (1) of the Constitution of Kenya 2010.** It is one of the components of a fair trial and as such should not be considered as an admission of guilt on the part of an accused person. In such circumstances, the court's duty is only to determine whether the prosecution has proved its case against such an accused person to the required standard which is beyond all reasonable doubts.

27. I have perused the trial court's judgment and do not agree with Mr. Kimwere that the learned trial magistrate did not appreciate the Appellant's aforesaid right. In contrast, the trial court was convinced that the prosecution proved the offence against the Appellant beyond any reasonable doubt. Mr. Kimwere's submissions are therefore without basis.

28. The upshot is that I am satisfied that the prosecution proved the offence to the required standard, hence the Appellant's conviction was safe. The same is therefore upheld accordingly.

Whether the sentence was proper.

29. At the time when the Appellant was sentenced, the only sentence available for the offence of robbery with violence was death which would then be commuted to life imprisonment. However, the Supreme Court decision of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** declared the mandatory nature of the death sentence unconstitutional. This opened a window of relief for convicts who had been sentenced to suffer death and had exhausted all avenues of appeal to return to court for resentencing. This has also given courts an opportunity to exercise their discretion in sentencing persons convicted of this offence based on the circumstances of each case.

30. I have considered the aggravating factors in this case namely the seriousness of the offence and the fact that the Appellant was armed

with a dangerous weapon which he used to injure PW1. I have also taken note of the mitigating factors being that the Appellant was a first offender and a close relative as well as neighbour of PW1. Upon carefully weighing the aggravating and mitigating factors, I find that the circumstances of the case did not justify the death sentence imposed by the trial court. I accordingly set aside the death sentence and substitute it with the period already served. I order that the Appellant be forthwith set free unless otherwise lawfully held. It is so ordered.

DATED AT MURANG'A THIS 3RD DAY OF DECEMBER, 2020.

G.W.NGENYE-MACHARAI

JUDGE

In the presence of:

1. Appellant in person.

2. Mr. Waweru for the Respondent.