



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CRIMINAL APPEAL NUMBER 1 OF 2018

BETWEEN

JAMES MAINA MUGWE....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Murang'a Cr. case No. 207 of 2015 delivered by Hon. A. K. Mwicigi (PM) on 5th January, 2018).

JUDGMENT

Background

1. The Appellant, **James Maina Mugwe** was charged with robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The particulars were that on the 1st day of March, 2015 at around 2300 hours at Mwirwa Village within Murang'a County, while armed with an offensive weapon, robbed **Bernard Weru Ndegwa** of cash Kshs. 14,800/= and a mobile phone make ITEL valued at Kshs. 2,000/= and immediately before the time of such robbery wounded the said **Bernard Weru Ndegwa**. He pleaded not guilty to the offence. After a full trial, he was 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.

2. The Appellants raised four (4) grounds of appeal in his amended Petition of Appeal filed contemporaneously with written submissions on 1st September, 2020. These were as follows:

- i. That the trial magistrate erred in both law and facts by convicting him on the basis of the single evidence of the complainant.**
- ii. That the trial magistrate failed to consider that the Prosecution evidence was contradictory and uncorroborated.**
- iii. That the trial magistrate erred in both law and facts by rejecting his sworn defence without considering that the prosecution did not challenge it.**
- iv. That the sentence of death by hanging was harsh and stiff bearing in mind the mitigating factors adduced before the trial court was not taken into consideration.**

Summary of Evidence

3. I am minded that this is the first appellate court whose duty is to reevaluate 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 Prosecution's case can be summarized as follows: On 1st March, 2015 at about 11.00 pm, the complainant **PW1, Bernard Weru Ndegwa** approached the Appellant, who was a motorcycle operator outside Sharks bar in Murang'a, with a request to ferry him to his home in Mwirwa Shopping Centre. There were bright and strong security lights outside the bar as well as moonlight which enabled him to see the Appellant well. After negotiations, the Appellant agreed to do the job for Kshs. 100/=. PW1 thus boarded the Appellant's motorcycle as a pillion passenger and they began their journey. When they reached at the river, the Appellant stopped the motorcycle and asked him to pay him the agreed fare. PW1 gave the Appellant Kshs. 100/=. Immediately thereafter, the Appellant took out a knife and stabbed PW1 on the face. PW1 asked the Appellant what the matter was but the Appellant hit him on the right hand causing him to fall down. The Appellant then

removed Kshs. 800/= and a mobile phone worth Kshs. 2,000/= from PW1's trouser pocket then boarded his motorcycle and left.

3. PW1 walked back to Sharks stage where he had hired the Appellant's motorcycle and informed the other motor cycle operators about what had happened. **PW2, Paul Maina Githaiga**, who was a motorcyclist operator at the same place confirmed that indeed the Appellant, whom he had known for years, was with them outside the bar waiting for passengers on the material date and time. PW2 also confirmed that he saw the Appellant leaving the stage while carrying PW1 shortly before PW1 returned while bleeding on the face.

4. PW2 and other motorcycle operators promised to help PW1 trace the Appellant and advised him to go and report the incident at Murang'a Police Station which he did on the same night at about 1.50 am. Thereafter, PW1 sought treatment at Murang'a District Hospital.

5. After robbing PW1, the Appellant went to his neighbour's house, one Peter Njoroge Mwangi's whom he offered to take out for drinks together with his girlfriend **PW3, Mary Wanjiru Mbogo**. The Appellant ferried them to Makavilla bar on his motorcycle registration number KMCQ 789A. When they got there, the Appellant gave PW3's boyfriend some money to purchase alcohol. Her boyfriend went inside to take away alcohol while she remained outside with the Appellant on the motorcycle.

6. Suddenly, two motorcycles approached them and one of the riders removed the keys to the Appellant's motorcycle. The Appellant immediately took off into the bushes and the two riders pursued him. They caught up with him about 400 metres away and brought him back to where PW3 and her boyfriend were. They entered into negotiations and the Appellant gave them some money. PW3's boyfriend asked the Appellant what had transpired and the Appellant told him that there was no problem. The people who had accosted the Appellant left him. PW3, her boyfriend and the Appellant then proceeded to Sagana where they took their drinks. As they were leaving to go back home, they met PW2 and other motorcycle operators.

7. The Appellant fled and left them stranded. The cyclists demanded to know where the Appellant had gone to. At the time, the investigating officer, **PW5, IP George Otieno** formerly of Murang'a Police Station, was headed back to the police station when he was approached by motorcycle operators near Sharks bar in Murang'a town. They informed him that a colleague of theirs had allegedly robbed a customer and was being pursued by other cyclists. PW5 proceeded to the scene at Sagana and arrested Peter Njoroge Mwangi and his girlfriend PW3. He escorted them to Murang'a Police Station for interrogation. Thereafter, PW3 and her boyfriend led the PW5 and his colleague PC Mohammed to the Appellant's house in Mathioya where they found him sleeping.

8. The Appellant woke and threatened to harm PW5 with a knife. PW5 warned him that he would shoot him and the Appellant surrendered himself. PW5 noted that the Appellant's timberland boots were stained with blood and thus recovered them as exhibits. Further, the Appellant had Kshs. 9,000/= in cash notes of Kshs. 1,000/= each which he could not explain how he came about their possession. PW5 arrested him and escorted him to the police station alongside the exhibits recovered from him as well as the subject motorcycle. The owner of the motorcycle went to the police station and informed PW5 that he had given the motorcycle to the Appellant to operate with. Further, the owner of the plot where the Appellant was found sleeping also confirmed that the Appellant was his tenant.

9. Upon learning of the Appellant's arrest, PW1 immediately proceeded to Murang'a Police Station and identified the Appellant as the person who had robbed him. PW5 recorded his statement and issued him with a P3 form.

10. PW4, Linus Muturi Kaburu, a Clinical Officer in charge at Murang'a Hospital examined PW1 on 13th March, 2015 for purposes of filling the P3 form. He noted that PW1 had a stab wound on the left eye brow though the eyeball was intact. He also had a tender right shoulder region and minor bruises on the right knee. He opined that the most probable weapon used was a sharp object as the cut had sharp edges. The wound had been stitched in the minor theatre by a Dr. Mwangi. He classified the degree of injury as harm. PW4 produced PW1's P3 form and treatment card in evidence.

11. After the close of the prosecution case, the court ruled that the Appellant had a case to answer and was accordingly put on his defence. He gave a sworn statement in which he denied committing the offence. He stated that on 1st March, 2015 at about 5.00 pm, he was working at Mla Chake Hotel at Weiteithie in Thika when he received a call from his brother Kiragu that their mother had passed on. He travelled home in Murang'a that evening and arrived at about 7.00 pm then decided to go and have a drink. After finishing his first bottle, he was joined by his friend James Njoroge and a lady with whom they continued drinking until he got drunk. On leaving the bar, his said friend carried him on his motorcycle, took him to his house and locked him up there. He blacked out as soon as they got off the motorcycle and only came to the following morning.

12. The police went to his friend's house where he had slept and alleged that he had stolen money. They took his Kshs. 8,000/= which was his four months' salary paid at the hotel where he was working. He was then arrested, escorted to Murang'a police station and booked in. While in custody, the friend who had carried on the motorcycle asked him why he had been arrested. He told him that he did not know the offence he had committed. His friend was later released under questionable circumstances. He denied owning a motorcycle, ever being a motorcycle operator or knowing PW2 who said that they worked together as such. He also stated that he did not challenge PW1's evidence because he was confused. In his view, the offence was committed by his friend who later framed him for the same.

Analysis and determination

13. The Appeal was canvassed by way of both oral and written submissions. The Appellant filed his written submissions on 1st September, 2020 and appeared in person during the oral hearing of the case. The Respondent on the other hand was represented by learned State Counsel, Ms. Gichuru who made oral submissions. 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 proper.

14. In determining this issue, the court is enjoined to first consider whether the evidence on record establishes the offence of robbery with violence. The Appellant contended that the elements of the offence were not established since he was charged alone and the weapon

allegedly used by PW1's attacker was not found in his possession.

15. Section 296(2) of the Penal Code sets out the essential ingredients of the offence, any of which is sufficient to prove it, as follows:

- a. The offender is armed with any dangerous and offensive weapon or instrument; or
- b. The offender is in the company with one or more other person(s); 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

16. PW1's evidence was that he was robbed by the Appellant whom he had hired to ferry him home at night on his motorcycle as a pillion passenger. Further that upon reaching at the river, the Appellant took out a knife and stabbed him on Appellant also hit him on the face. The the right hand causing him to fall down then stole his Kshs. 800/= and a mobile phone worth Kshs. 2,000/= from PW1's trouser pocket. The injuries that PW1 suffered therefrom were corroborated by the P3 form adduced in evidence by PW4. The P3 Form indicated that PW1 had a stab wound on the left eye brow, a tender right shoulder region and minor bruises on the right knee. PW4 opined that the most probable weapon used was a sharp object as the cut had sharp edges. PW5 confirmed that PW1 reported the incident at Murang'a Police Station on the material night. In the premises, I am satisfied that two elements of the offence of robbery with violence were sufficiently established.

17. The next issue is whether the Appellant was positively identified. On this issue, the Appellant submitted that he was merely a victim of mistaken identity. He argued that PW1 could not have identified his assailant since he did not know any of the motorcycle riders. He contended that PW2's evidence that PW1 was carried by the person who was next to him was an afterthought. He also contended that PW3's evidence that he went to their house at 11.00 pm which was the same time when PW1 was allegedly robbed shows that PW3 was untruthful and dishonest. Further, he stated that PW4 and PW5's evidence was purely hearsay which cannot be a basis for his conviction. Additionally, the Appellant submitted that the prosecution did not prove that the money recovered from him indeed belonged to PW1. He also stated that it was not proved that the timberland boots recovered in the house where he was arrested belonged to him and/or that the house was his.

18. In rebuttal, Ms. Gichuru submitted that the evidence led by the prosecution was overwhelming. She argued that PW1 identified the Appellant with the help of the security light outside Sharks Bar and they were at close proximity when he boarded the motorcycle. She also noted that PW1's evidence was well corroborated by the evidence of other prosecution witnesses.

19. It is not in dispute that the robbery occurred at night at around 11.00 pm. PW1 testified that there was bright security light outside the bar where he hired the Appellant's motorcycle. He stated that he took some time negotiating with the Appellant on the fare payable at the motorcycle stage while at close proximity. This evidence was corroborated by PW2 who had known the Appellant for about six years prior to the incident and who had packed his motorcycle next to the Appellant's on the material night. PW2 confirmed that he indeed saw PW1 negotiating with the Appellant and leaving the stage with him on his motorcycle.

20. Although there was no eye witness at the scene of robbery, no doubt there were other inculpatory facts that corroborated PW1's direct evidence that he was robbed by the Appellant. Inculpatory facts are defined as evidence that shows, or tends to show a person's involvement in an act, or evidence that can establish guilt (see. **Black's Law Dictionary, 9th Edition**). In the case of **Sawe v Republic [2003] eKLR** the Court of Appeal stated as follows:

“In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden, which never shifts to the party accused.”

21. Foremost, PW3 stated that when the Appellant took her and her boyfriend out for drinks that night, the Appellant fled when they were accosted by other motorcycle riders. This evidence was supported by PW2 who testified that the Appellant fled when he saw them at Sagana. Further, there was consistent evidence from PW2, PW3 and PW5 that PW2 and her boyfriend led the police to the Appellant's house in Mathioya where he was found sleeping after fleeing to escape arrest. PW5 noted that the Appellant's timberland boots were stained with blood whose origin he could not explain. Further, the Appellant had Kshs. 9,000/= in cash notes of Kshs. 1,000/= each which he could not explain how he possessed them.

22. In addition, PW5's uncontroverted evidence was that the owner of the subject motor cycle went to the police station and informed him that he had given the motorcycle to the Appellant to operate with as a motorcycle (bodaboda) rider. Again, PW3's testimony that the Appellant was their neighbour was also corroborated by PW5's testimony that the owner of the plot confirmed to him that Appellant was his tenant. In the premises, I am satisfied that the circumstantial evidence clearly pointed to the Appellant as the person who robbed PW1 on the material night.

23. The Appellant further contended that the trial court failed to consider his defence which was not challenged by the prosecution. In response, Ms. Gichuru argued that the Appellant's defence did not shake the strong prosecution case. The Appellant's defence was full of mere denials and the allegation that the money found in his possession was his four month's salary from his alleged hotel job was an afterthought which cannot be believed. Furthermore, there being no evidence of a grudge between him and his alleged friend, his claim that he was framed cannot stand. In the premises, his contention that the trial court unfairly rejected his defence is unfounded and lacks merit.

24. In the upshot, I find that the prosecution proved the case against the Appellant beyond any reasonable doubt. His conviction was therefore safe and is accordingly upheld.

What is the appropriate sentence in the circumstances of this case?

25. As at the time of sentencing, the trial court was under the assumption that the death penalty prescribed under **Section 296(2)** of the **Penal Code** was the only available punishment for the offence of robbery with violence. Indeed, this was the position for a long time until the Supreme Court decision of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** which declared the mandatory nature of the said death penalty unconstitutional. This was because it denied courts the discretion to determine an appropriate sentence depending on the circumstances of each.

26. The Appellant herein was a first offender. It is also recorded that part of the money robbed from PW1 was recovered. It is therefore my view that the death sentence imposed by the trial court was manifestly harsh. The I set it aside and substitute with a five (5) year jail term from the date of arrest which was on 2nd March, 2015. It is so ordered.

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

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Appellant in person.

2. Mr. Waweru for the Respondent.