REPUBLIC OF KENYUA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 49 OF 2011

KYALO MUYOKI MWINDA……..……..……..…APPELLANT

VERSUS

REPUBLIC…….……..……..RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 389 of 2010 of the Chief Magistrate's Court at Malindi – D.W. Nyambu, PM)

JUDGEMENT

1. This is a rehearing of the appeal pursuant to the order of the Supreme Court in the case of **Republic v Karisa Chengo & 2 others [2017] eKLR**.

2. The Appellant Kyalo Muyoki Mwinda was convicted of the offence of robbery with violence and sentenced to death. Being aggrieved he has filed this appeal against both the conviction and sentence on the grounds that the trial court erred in law and fact in relying on the contradictory evidence of the prosecution to convict him and in finding that he was identified when no identification parade was carried out as the Appellant was unknown to the witnesses. Further, that the trial court erred in law and fact in meting out the death sentence despite the charge being incurably defective.

3. In his written submissions, the Appellant urged that the evidence of the prosecution witnesses was contradictory. He pointed out that PW1 Elina Stephen Nzai had testified that the stolen money was not recovered only to state later that it was. PW1 also stated that during the robbery she saw two people but the watchman at the gate told her that there was a third one. PW1 later stated that she saw the third person. PW3 Lawrence Taita Chengo the watchman stated that he saw three people leaving on a motorcycle but PW7 Police Constable Noah Kiplagat stated that he apprehended only one person.

4. It was further submitted that the allegation that the motorcycle bore bullet marks was not proved. There was no evidence from a ballistics expert to prove that the damage to the motorcycle was due to bullets. There is also no proof of the allegation that the Appellant told PW7 that he was hired to ferry the gun to the scene of crime. In addition, the driver and conductor of the matatu allegedly used to intercept the Appellant were not called as witnesses though they were crucial witnesses.

5. The Appellant also submitted that none of the prosecution witnesses mentioned the point at which they saw the registration number of the motorcycle. PW3 never stated that he saw the registration number of the motorcycle which is affixed to the back of the motorcycle. The Appellant pointed out that PW3's testimony was that when the alleged robbers approached him and pointed a gun at him he ran away and PW1 was in a room at the time. It was the Appellant's case that he was blocked by a matatu hence he veered off the road and that he did not run away. He also submitted that he was not linked to the scene and nothing was recovered on him.

6. The Respondent in summary submitted that the conviction was safe as the case had been adequately proven.

7. This being a first appeal the responsibility of this court is to reconsider, re-*analyse and re-evaluate the evidence which was before the trial court and reach its own conclusion - see* ***Okeno v R [1972] E. A. 32*** and John Mwangi Kamau v Republic [2014] eKLR.

8. *Further, it* must be remembered that this court in its appellate jurisdiction ought not to interfere with a finding of fact by the trial court that had the advantage of observing the demeanour of the witnesses as they testified, *unless the finding of fact was based on no evidence or on a misapprehension of the evidence or the trial court acted on the wrong principles* - see ***Chemagong v Republic [1984] KLR 611*** *and* ***Gunga Baya & another v Republic [2015] eKLR.***

9. *The Appellant together with another, who as per the record is still at large and has never been apprehended, were charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars being that on 25th March, 2010 at Kurawa*

Krystaline Company in Malindi, they robbed Elina Stephen Nzai of Kshs. 69,121.00 and at or immediately before or immediately after the said robbery wounded Elina Stephen Nzai.

> *9. The issues arising are whether or not the evidence of the prosecution witnesses was contradictory, whether or not the Appellant was positively identified as one of the perpetrators and if the conviction is affirmed, resentencing in light of the Supreme Court decision in* ***Francis Karioko Muruatetu & another v Republic [2017] eKLR***.

10. This being a criminal case, the onus lay on the prosecution to prove its case beyond reasonable doubt. The prosecution had a duty to prove the ingredients of the offence and the identity of the robbers.

11. *The Court of Appeal restated the ingredients of the charge of robbery with violence in* ***Suleiman Kamau Nyambura v Republic [2015] eKLR*** *as follows:*

"The case of Johanna Ndung'u vs Republic - Criminal Appeal No. 116 of 2005, (unreported) ***sets out the ingredients of robbery with violence pursuant to*** Section 296 (2) ***of the Penal code as follows:***

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

12. The Court also held that:

> ***"Proof of any one of the ingredients of robbery with violence is enough to sustain a conviction under Section 296 (2) of the Penal Code."***

13. The Court added that:

> ***"In addition, and what is crucial in a criminal trial is also the requirement to prove in addition to there being one of the set out ingredient of robbery with violence is the need to positively identify the assailant/s in question."***

14. The prosecution's case was that PW1 at 1.30 p.m. was at the cash office which also serves as a storeroom. She had received Kshs. 70,000.00 from her boss to pay off the workers. She had just paid three of them and remained with Ksh.69,121.00 when somebody knocked at the door. Assuming it to be a worker in need of something from the store, she opened only to be accosted by a short thin man who hit her causing her to fall down and stuck a gun to her neck. Another man, who was tall, fat and black also gained access to the office and they made away with all the remaining money and locked her in the room. She sounded the alarm by shouting and the workers waiting for their wages gave chase but the robbers managed to escape.

15. It was PW1's testimony that she remained in the office and when the boss arrived she informed him of the incident. PW1 also stated that the security man at the gate informed her that the persons who made the getaway were three and that she saw the motorcyclist through the window. The tall man had whistled and the motorcyclist picked them.

16. PW2 Chengo Hare Kombe confirmed that he saw a man run out of the office when the distress calls came. He then gave chase but the man pointed a pistol at him and he lay down. Another man who was near PW2's parked motor vehicle whistled and the two left on a motorcycle with a motorcyclist. He knew neither of them. PW2 called for help and told the guard not to allow them to pass but a pistol was pointed at the watchman and he hid. One of the robbers alighted and opened the gate and they left. PW2 called a friend called Martin at Kanagoni to call police officers who were stated about 1½ from the camp and ask them to stop a motorcyclist ferrying two passengers. They then proceeded to the police base where they found the motorcyclist had been apprehended.

17. The security guard, PW3 Lawrence Taita Chengo confirmed that a motorcycle ferrying two pillion passengers headed his way as soon as the distress calls came. He made attempts to stop them but one passenger alighted and pointed a pistol at him and he walked away in fear.

18. PW4 Kasila Venedal the manager of *Kurawa Krystaline Company testified that he had been informed of the incident.*

19. PW9 Administration Police Constable Geoffrey Wekesa Nicholas was called on the material day at 1.30 pm about the robbery. He was informed of three men on a motorcycle. He went to the road whereby a motorcycle with only the motorcyclist passed after defying his stop orders. PW9 therefore got into a matatu and they gave chase. He shot at the motorcycle and hit the seat. The rider had diverted into the bush. The bike fell over and PW9 arrested the Appellant.

20. PW7 Police Constable Noah Kiplagat investigated the matter. He also established that the owner of the motorcycle was PW5 Phoebe Wanja and a sale agreement was produced. PW5 indicated that the person who hired the motorcycle from her friend Zakayo was unknown to her and the said person was never found after the incident.

21. As per the witnesses, there was a pistol and the very nature of which the court ought to take judicial notice that it is a dangerous weapon which was pointed at PW1, PW2 and PW3 as a form of threat. There was more than one robber and PW1 was wounded as per the evidence of PW8 Ibrahim Abdulahi, a clinician, who produced a P3 form filled on 16th April, 2010 indicating that PW1 sustained injuries to the

lumber region. These are all the hallmarks of a robbery that is executed with violence.

22. The evidence reveals that two robbers made an escape and only the motorcyclist was arrested. The three were found to have common intention. Common intention is defined in Section 21 of the Penal Code as follows:

> **"Where two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such purpose an offence is committed of such nature that its commission was a probable consequence of such purpose, each of them is deemed to have committed the offence."**

23. As the motorcyclist aided and abetted the two robbers he was rightly charged as one of the robbers based on common intention. The Court of Appeal in **Njoroge v Republic [1983] KLR 197** stated that:

> **"If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavors to effect the common assault of the assembly ..... Their common intention may be inferred from their presence, their actions and the omission of either of them to disassociate himself from the assault."**

24. The Court of Appeal relying on the English case of **Republic v Turnbull and others [1976] 3 All ER 549** has always warned of the need to treat evidence of identification with utmost care for a witness may be honest but mistaken. In **Marikus Oduor Otieno & another v Republic [2012] eKLR; Criminal Appeal 46 & 47 of 2009 (Kisumu)**, the Court of Appeal cited with approval its decision on this principle of law in **Joseph Ngumbao Nzano v Republic [1982] 2 KAR 212** as follows:

> ***"It is possible for a witness to believe genuinely that he had been attacked by someone he knows very well and yet be mistaken. So the possibility of error or mistake is always there whether the case be of recognition or identification……"***

*25. The Court also went ahead and cited its case in **Cleopas O. Wamunga v Republic, Criminal Appeal No. 20 of 1989** where it held that:*

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

26. The identity of the perpetrator was given by the evidence of PW1 who stated that the day before the robbery the motorcyclist and the other two had come to the office to enquire about buying scrap metal. Hence she was able to recognise him at the AP's office where he had been confined after his arrest. PW2 and PW3 also claimed to have seen him during the robbery and hence could identify him at the AP's office.

27. It is the correct position that no identification parade was carried out and PW1, PW2 and PW3 also gave evidence of dock identification as part of their identification evidence.

28. PW1, PW2 and PW3 got to the AP's office the same day they reported the matter and PW1 indicated that she did so at 3.00 p.m. where they found the motorcyclist. PW9 had within that time apprehended the motorcyclist. It was not too long after the incident. An identification parade was no longer of any use as the witnesses had seen the Appellant immediately after his arrest.

29. Like the trial court I find the Appellant's claim that he was arrested as he was coming back from dropping a customer unbelieveable. He never explained how he came into possession of PW5's motorbike. He also defied attempts to stop him and was arrested after he diverted into a bush.

30. As for the claim by the Appellant about the defectiveness of the charge, I find that the charge and the particulars were clearly drawn as to enable the Appellant to understand the nature of the offence and the charge he faced. He was not prejudiced. In **Kilome v Republic [1989] eKLR** it was held that:

> **"The paramount consideration is whether there was prejudice occasioned to the accused in putting up his defence because of the words used."**

31. In the circumstances I find that the case against the Appellant was proved to the required standards and the charge was not defective. His appeal on conviction therefore fails and is dismissed.

32. As for the appeal on sentence, I find that in line with the decision of the Supreme Court in **Francis Karioko Muruatetu** (supra), the Appellant is entitled to a consideration of his mitigation so that this court can impose an appropriate sentence.

33.The Appellant in mitigation had stated that his wife, children and parents depended on him. I note that the injuries sustained were minor and the stolen amount of money was not a large amount. In the circumstances, I set aside the death sentence imposed on the Appellant and substitute the same with fifteen years imprisonment from 9th March, 2012 being the date of his sentence. Otherwise the appeal fails and the same is dismissed.

Dated, signed and delivered at Malindi this 14th day of February, 2019.

W. KORIR,

JUDGE OF THE HIGH COURT