



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL. NO. 50 OF 2014

BERNARD CHERUIYOT BETT ALIAS CHERU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Kericho Chief Magistrate's Court Criminal Case No. 640 of 2012 Hon.S. M. S. Soita (Ag. CM) dated 4th August 2014)

JUDGMENT

1. The appellant was charged with five others with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were that on the 13th day of April 2012 at Kapkawa area in Kericho West District within the Rift Valley Province jointly with others not before court while armed with offensive weapons namely pangas, arrows and clubs, robbed Edward Keiwa of two construction balloons valued at Kshs 3,000,000, cash Kshs 1,300 and mobile phone make Techno valued at Kshs 3000, all valued at Kshs 3,004,300 and at the time of such robbery, used actual violence on the said Edward Keiwa.
2. The six accused persons faced a second charge of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of this charge were that on the same date and place as in the first count, while armed with pangas, arrows and clubs, they robbed Peter Kiprotich of a mobile phone make Former valued at Kshs 3,000 and cash Kshs 23,000 all valued at Kshs 26,000 and at the time of such robbery used actual violence on the said Peter Kiprotich.
3. All the accused persons pleaded not guilty to all the charges. After a full trial, the 3rd accused, the present appellant, was convicted of the offence of robbery with violence contrary to section 296(2) of the Penal Code. He was sentenced to death.
4. Aggrieved by both his conviction and sentence, he has filed the present appeal in which he raised ten grounds of appeal. He contends that the trial court erred in several respects which, so far as I can make out as they are not very clear, can be summarised as follows.
5. First, the trial court ignored essential background facts and first report(s) written by his co-accused. Secondly, that the court erred by convicting the appellant on the contradictory evidence of the prosecution witnesses and his co-accused persons. His third ground alleges that he was convicted on the afterthought evidence adduced by his co-accused. He also challenges his conviction on the basis that some essential witnesses were not called, and that he was convicted on the basis of a 'clear unsubstantial element of charge'.
6. He further contends that the court relied on a fake medical report, and that he ignored the grudge between the appellant and the 6th accused, Andrew Kipkemoi Lelgo. He alleges further that the trial court ignored a clear conspiracy between the 2nd accused and the 6th accused against him, and further ignored his statement in his defence which was strong enough to lead to an acquittal. The appellant filed written submissions which he relied on entirely. I shall consider these submissions later in this judgment.
7. The prosecution case against the appellant and his co-accused was presented through five witnesses and was as follows. Peter Kiprotich (PW1) was a security guard with SAOS Security attached to SBI International to guard machines and vehicles. He was on duty at Kapkawa with two colleagues guarding two balloons which are used to make cement.
8. Thugs from the nearby sugar plantation attacked them. They switched off the generator and attacked them with the pangas with which they were armed. PW1 was cut on the small left finger and on the head. He was also hit on the mouth and lost a tooth. The robbers took away his phone, Former in make, and Kshs 23000 which he had received from selling land. They also took away two balloons, green in colour, belonging to the company. They carried the balloons after deflating them, on motor cycles.
9. PW1 and his colleagues called their supervisor on the phone belonging to Sankok, who had not been robbed of his phone, and they came and took them to hospital. PW1 was admitted in hospital for 4 days. He could not identify the attackers as the generator was switched off before the attack and it was dark.

10. AP Ali Hassan Guyo was also engaged as a security officer with SBI International on secondment from the Administration Police. He was woken up at 2.30 a.m. on 13th April 2012 and informed that unknown people had attacked guards guarding the company's balloons at Kapkawa and taken away two balloons. He and Sergeant Rop and Sergeant Kassim proceeded to Kapkawa where they found that the balloons had been stolen and guards from SAOS injured. They proceeded to Kericho Police Station and reported the matter at around 8.00 a.m.
11. PW2 and his colleagues were given two CID officers and began investigations. They were given two names of persons who had participated in the robbery. They looked for and arrested one of them, Zenith Kiplagat (1st accused) and he told them that it was Kato (accused 2, Festo Rono) who had carried the balloons on a motor cycle. They looked for Kato, who showed them where he had taken the balloons, to the house of Andrew (6th accused, Andrew Kipkemoi Lelgo). Andrew opened the house and PW2 and his colleagues found the balloons which they took to Kericho Police Station and handed over to the police. The house where the balloons were found was locked, and it was Andrew who took out a key and opened it. The balloons were recovered at the 6th accused's house in a village deep in Samutet, where the 2nd accused, Festo Rono alias Kato, had taken the police.
12. Sergeant Rop (PW3) an Administration Police officer (AP) attached to SBI had received a call from the SAOS officers contracted to guard SBI that the guards at the SBI installation had been attacked by unknown people, and that the attackers had stolen two balloons. He had woken up Ali Hassan Guyo (PW2) and with Guyo and one Kassim, they had proceeded to Kapkawa where the balloons had been stolen.
13. PW3 confirmed that he and PW2 had received information about young men who had been seen in the area before the robbery. They had gone to Kipsitet where they had found Zenith and arrested him, and he had informed them that it was the 2nd accused who had carried the balloons on his motor cycle to the house of the 6th accused. He corroborated the evidence of PW2 that they had found the balloons at the house of the 6th accused. Like PW2, he stated in cross-examination that he did not arrest the appellant, who was the 3rd accused, but that the appellant was arrested by CID officers after he was mentioned by his co-accused.
14. Abubakar Kassim Jumbasi (PW4) was a security officer with SBI. He had also received a call on the material day at around 2.00 a.m. and informed about the robbery at SBI. He had gone to the scene with PW2 and PW3 and confirmed the theft of the two balloons, then they went to Kericho Police Station to report the matter. He went back to Kapkawa with two officers from the Kericho Police Station, Sgt Elima and PC Nyakundi and Chebet. Later on, he was informed that the balloons had been recovered and two suspects arrested.
15. PW5, PC Winrose Chebet, the investigating officer, was attached to the CID in Kericho. She had accompanied PW2, PW3 and PW4 to Kapkawa where they confirmed that two balloons had been stolen. She narrated the events as they had emerged from the evidence of PW2, 3 and 4, including the arrest of Zenith Kiplagat (accused 2). Zenith had informed the police that he had been in the robbery with the other five accused persons. They had gone to Kipsitet and found Festo (2nd accused) who led them to where the balloons had been kept.
16. They had found the balloons in the house of Andrew (6th accused), who informed them that Zenith, Festo and the appellant, who was his brother-in-law, had brought the two balloons to his house and asked them to keep them for them. He then showed PW5 and her colleagues the two balloons, which were in his kitchen. PW5 had taken the balloons away and arrested the 6th accused person.
17. PW6, Isaac Misoi, a clinical officer at Kericho District Hospital produced the P3 form in respect of Peter Kiprotich, PW1. PW1 had been examined by Yego Kirwa at the hospital. He had a cut wound on the head and a cracked left molar, and he also complained of chest pain and a painful ankle joint. Yego Kirwa had classified the degree of injury as harm.
18. PW7, Paul Masendi Magara was a store keeper with SBI. His evidence was that he had been informed that two balloons used in the construction of culverts in the road under construction by SBI had been stolen, and later that they had been recovered.
19. When placed on their defence, the 2nd accused indicated that he would give a sworn statement, while the other accused persons all elected to give unsworn statements. The 6th accused person indicated that he would call one witness.
20. Of relevance to the appellant's appeal is the sworn statement of the 2nd accused, Festo Rono Kipngeno. He stated that he was a *boda boda* rider operating between Kapkawa, Kipsitet, Samutet and Kapsait. On 12th April 2012, he had received a call at about 9.00 p.m. from a customer, Benson Cheruiyot Bett, the appellant. The appellant had told him that he had goods he needed taken from Kaitui to Samutet village, to the home of the 6th accused, Andrew Kipkemoi Lelgo, who was married to the appellant's sister. The appellant had told him that the baggage he wanted transported was a tent as they were expecting visitors the following day. The 2nd accused had gone to the scene where the luggage was. He heard the appellant call out 'Senator' and after 5 minutes return with two other people. They agreed on fare of Kshs 500/- and he took the luggage to the home of Lelgo, who accepted the luggage.
21. PW2 was arrested the following day. He was asked to identify the person to whom he took the tent. He took the police to the home of Andrew Lelgo and they were both arrested. He had not scrutinised the luggage he was hired to carry. He stated in cross-examination by the Prosecutor that the luggage he carried was wrapped in a bag. He had been called by the appellant to carry the luggage, and he had taken the luggage to the house of Andrew Lelgo.
22. In cross-examination by the appellant, he denied that he had been used by the 6th accused, Lelgo, to fix the appellant.
23. Andrew Lelgo, the 6th accused, gave an unsworn statement in his defence. He stated that on 12th April 2012, while he was sleeping, he was awakened by someone calling his wife's name. The person was the appellant, his wife's brother. The appellant informed them that his motor cycle had broken down and he wanted them to keep some luggage for him. The appellant, who was in the company of some other persons, kept the luggage, which he said was a tent, in the 6th accused's kitchen.

24. The following day, the 2nd accused went to work. He returned in the evening to find the luggage still in the kitchen. At 3.00 a.m., he was woken up by persons asking for the luggage which had been brought to his home. He got out and found that the persons asking for the luggage were police officers and the 2nd accused. He removed the luggage and was arrested and taken to Kipsitet and then to Kericho Police Station. He wrote a statement on 15th April 2012 explaining how the luggage got to his place, that it was brought by his brother in law, the appellant, whom he had a lot of respect for. He denied being involved in the robbery in which the balloons were stolen.

25. In cross-examination by the appellant, he maintained that it was the appellant and the 2nd accused who had brought the luggage to his home at 2.00 a.m. He also denied having any differences with the appellant, whom he stated he had a lot of trust in, and he had therefore not inspected the luggage on account of the respect he had for his brother in law.

26. In his unsworn defence statement, the appellant stated that he had been operating a pool table at Kipsitet. On 2nd June 2012, two strangers went to his business at around 11.00 a.m. and started asking him about his business and looking around. He was then handcuffed and taken to Kericho Police Station. He was later brought to court where he met his co-accused. He denied that he had ever associated with his co-accused and did not know about the incident until he found in the witness statements that the 6th accused had implicated him. He alleged that the 6th accused implicated him as he was his brother in law and they had a sour relationship due to the 6th accused's treatment of his sister. The 2nd accused had conspired with the 6th accused to frame him.

27. I have considered the evidence adduced before the trial court and the conclusions the trial magistrate arrived at that led to the conviction of the appellant. As the trial court found, the evidence linking the appellant to the robbery was that of his co-accused the 2nd and 6th accused. The evidence of the 2nd accused was that he had been hired by the appellant to take the balloons-referred to as 'luggage' which he did not inspect-to the home of the 6th accused. He had gone to the home with the appellant, who had been carried by another motor cycle.

28. They had left the luggage at the home of the 6th accused. The 6th accused had testified that it was his brother in law, the appellant, who had requested him to keep the luggage for him, explaining that his motor cycle had broken down.

29. The trial court observed that the only evidence linking the appellant to the robbery was the evidence of accomplices. He warned himself of the danger of relying on accomplice evidence but concluded that their evidence was forthright.

30. In determining this appeal, I consider, first, whether the prosecution evidence, but more importantly the evidence of the 2nd and 6th accused which was the basis on which the court found that the appellant had committed the offence with which he and his co-accused were charged, was contradictory. Secondly, whether there were essential witnesses who were not called. Thirdly, whether there was a problem with the charge sheet or the medical report on PW1. I need to consider also whether there was a grudge between the appellant and the 6th accused, and whether the trial court ignored a conspiracy between the 2nd and 6th accused against the appellant. Finally, I shall consider whether the trial court ignored the appellant's defence.

31. I deal first with the argument that the court relied on contradictory evidence to convict the appellant. The state argues that on the contrary, the prosecution evidence was consistent and corroborative. I note that the trial court based its conviction of the appellant on the evidence of the 2nd and 6th accused. The 2nd accused is the one who was hired by the appellant and others to ferry the stolen balloons to the home of the 6th appellant. The 6th appellant testified that he and his wife, the appellant's sister, were woken up by the appellant and asked to store some luggage for him. This luggage turned out to be the stolen balloons, which the appellant had stated was a tent.

32.. I have noted that the trial court considered that the evidence against the appellant was accomplice evidence, but nonetheless found that it was credible. In its decision in **Karanja & another v Republic[1990]KLR** the Court of Appeal held that the evidence of an accomplice required to be corroborated before the court could rely on it to convict. It further held that the corroboration which is required of such evidence is in the nature of some independent additional evidence which would render it probable that the story of the accomplice is true and that it is reasonably safe to act upon. The court further held that the corroboration evidence must affect the accused by connecting or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it.

33. In this case, I find that the evidence of the 2nd and 6th accused, though they were charged with the accused, was not really accomplice evidence. The 2nd accused was hired to carry the stolen balloons by the appellant. The 6th accused was requested by the appellant, his brother in law, to keep the balloons for him. They were involved by the appellant in the transportation and storage of the balloons which had been stolen in the robbery on the very night that the robbery occurred. I find that the statements of the 2nd and the 6th accused persons were consistent and forthright and showed that the appellant was a participant in the robbery in which the two balloons were stolen.

34. The appellant challenges his conviction on the basis that the trial court ignored his defence. I note that the trial court considered his contention that he was framed, and that the 2nd and 6th accused conspired against him. The trial court observed that there was no evidence of a conspiracy between his two co-accused. The trial court noted specifically that the 2nd accused had no time from his arrest to conjure up such an elaborate conspiracy against the appellant. I am unable to find an error on the part of the trial court in these conclusions.

35. The appellant further argues that he was convicted yet essential witnesses were not called. I note that in his written submissions he argues that his sister, the 6th accused's wife, should have been called as a witness, but does not show how her evidence could have assisted in weakening the prosecution case.

36. The state did not submit on this point.

37. The appellant has also complained that the trial court erred by convicting him on an 'unclear substantial element' of the charge. The state

responds that the charge was clear as it contained the statement and particulars of the charge, and that the appellant understood the charge, pleaded to the charge and participated actively in the trial by cross-examining each and every witness. The appellant's submissions do not bring out exactly the manner in which the charge sheet was unclear, neither did the appellant elaborate on it in his oral submissions at the hearing. However, having considered the charge sheet, I am unable to find any defect that would vitiate the trial or conviction of the appellant.

38. The appellant also complains that the court relied on a fake medical report. I note, however, that PW6, the clinical officer, testified that his colleague had examined PW1 and had completed the P3 form which showed the injuries sustained by PW1. He also produced the P3 form as an exhibit. He confirmed that PW1 had been treated in Kericho District Hospital following the robbery in which he was injured. Again, the appellant did not address this ground in his written submissions, and I am unable to fault the reliance on it by the trial court.

39. The appellant alleges that there was a grudge between him and the 6th accused. He alleges that the 6th accused used the 2nd accused to frame him. In his written submissions, he questions the reliability of the 6th accused, whom he notes had been arrested for failing to appear in court. While the state argues that this issue was not brought up in the course of the proceedings, I note that the appellant did allege that there was a grudge between him and the 6th accused, allegedly for the manner in which the 6th accused treated his wife, the appellant's sister. However, I note that the trial court considered this issue. The trial magistrate found that it was the 2nd accused who took the police to the home of the 6th accused, and who testified that it was the appellant who had hired him to take the stolen balloons to the home of the 6th accused. The trial court further found that the 2nd accused had had no time, from the time he was arrested, to concoct the case against the appellant.

40. Having considered the prosecution evidence and the defences of the appellant's co-accused, I am constrained to agree with the trial court. The statements of the 2nd and 6th accused persons point to the appellant as the person, who, with others, hired the 2nd accused to take the stolen balloons to the home of the 6th accused. The 2nd accused was arrested soon after the robbery. There is no indication that he communicated with the 6th accused to conspire against and frame the appellant. I find that the trial court made no error in reaching the decision that the appellant was involved in the robbery in this case.

41. The appellant argues that the trial court ignored his defence. I note, however, that the trial court did consider the defence, which was essentially an allegation that he was framed by the 2nd and 6th accused persons. Having found that there was no evidence of a conspiracy between the 2nd and 6th accused, and noting that the unsworn statements of the two were forthright and pointed at the appellant as the person who, first, hired the 2nd accused to take the stolen balloons to the home of the 6th accused and secondly, requested his sister and brother in law to keep the stolen balloons for him, I find that the trial court properly made a finding that the appellant was guilty of the offence of robbery with violence. He was in recent possession of the balloons on the same night as the robbery, and he hired the 2nd accused to take them to the home of the 6th accused. He could not have been in possession of the stolen items on the same night after they were stolen in a robbery unless he had been involved in the robbery.

42. In his written submissions, the appellant departs almost entirely from the grounds of appeal set out in his petition of appeal. Instead, he raises 3 grounds: the first with respect to the constitutionality of the death penalty in light of the decision of the Supreme Court in **Muruatetu**; the second on the consistency and sufficiency of the prosecution evidence, which I have already addressed; and third, that the court failed to comply with sections 211 and 169(1) of the Criminal Procedure Code. The state did not address itself to the first and third grounds, the reason perhaps being that the submissions in which they are set out were served at the hearing of the appeal.

43. I will deal first with the alleged violation of section 169(1) and 211 of the Criminal Procedure Code. Section 211 provides as follows:

(1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).

44. I note that on 27th January 2014, after the close of the prosecution case, the record indicates that the trial court explained section 211 of the CPC to the accused, and they all, except the 2nd accused, elected to give unsworn statements and call no witnesses. The 2nd accused elected to give sworn evidence. The appellant argues that it was not enough for the trial court to record that the section was explained to the accused persons. He alleges that his rights were violated with respect to the provisions of section 211 CPC, but from the record, it is evident that the trial court complied with the legal requirements set out in the section. This additional ground, in my view, therefore has no merit.

45. The appellant also alleges violation of section 169(1) of the CPC. Section 169 deals with the contents of judgments and provides that:

(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the

decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.

46. The appellant submits that he had explained the bad blood that had existed between him and the 6th accused who used all means to fix

him. Having considered the defence statements of the appellant's 2nd and 6th co-accused in which they explained how they were involved in the transportation, on the part of the 2nd accused, and the storage, on the part of the 6th accused, of the stolen balloons, I am unable to find any basis for the appellant's reiteration of this ground. In any event, I can find no violation of his rights by the trial court in so far as the provisions of section 169(1) of the CPC are concerned.

47. I now turn to the final argument raised in this appeal. The appellant argues as the first ground in his written submissions that the trial court erred in sentencing him to death which violated his constitutional rights in light of the *Muruatetu* decision.

48. I note that after he was convicted, the appellant was allowed to mitigate. He stated that he was pleading for leniency, and that he was surprised he had been convicted. The court found, however, that there was only one sentence permitted by law, and it pronounced the death sentence on the appellant.

49. The appellant was sentenced on 4th August 2014. His conviction predates the decision of the Supreme Court in **Francis Karioko Muruatetu & Others vs Republic Supreme Court Petition No. 15 of 2015**, on which he bases his final argument against his conviction and sentence.

50. In its decision in *Muruatetu*, the Supreme Court held that the mandatory nature of the death penalty contained in section 204 of the Penal Code was unconstitutional. While the death penalty is not per se unconstitutional, imposing the death sentence without considering mitigating factors or extenuating circumstances violates the right to a fair trial guaranteed under Article 50 (2) of the Constitution. I believe that the effect of this decision is to give courts the discretion, where the sentence prescribed by law for an offence is the death penalty, to consider mitigating factors and other extenuating circumstances and determine whether the person convicted of the offence merits the death penalty.

51. Justice (Prof.) Joel Ngugi considered the question of sentencing in robbery and murder cases subsequent to the *Muruatetu* decision in the case of **James Kariuki Wagana v Republic [2018] eKLR**. He observed as follows:

“32. The law of the land as it stands today, therefore, is that the maximum penalty for both murder and robbery with violence is the death penalty but the Court has discretion to impose any other penalty that it deems fit and just in the circumstances.

33. In light of this, I will, therefore, proceed to determine the appropriate sentence. First, it is true that all the elements for the offence of robbery with violence were proved. However, there are no truly aggravating circumstances which would lift this case to the scales of the death penalty. Death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder. That is not the case here. While force was used, one cannot say here that the Appellant used excessive force; and neither did he unnecessarily injure the Complainant during the robbery. He was not armed with any offensive weapon.

34. In his mitigation, the Appellant submitted that he was a first offender and that he was youthful and had a young family to take care of. I have taken these mitigating circumstances into consideration. I, therefore, sentence the Appellant to fifteen years for the conviction for robbery with violence. Given that “simple” robbery under section 296(1) of the Penal Code attracts a minimum sentence of fourteen years imprisonment, it seems logical that the minimum sentence for robbery with violence should begin at fifteen years imprisonment. Since there are no aggravating circumstances to take the crime here to the realm of heinous robbery with violence beyond the ingredients of the crime, it is fair and proportionate to give the minimum sentence logically possible. In my view, that is fifteen years imprisonment.

52. I agree with the sentiments expressed by my brother Prof. Ngugi J in the above decision. While the offence of robbery with violence and murder will continue to attract the death penalty as this is the penalty prescribed by law, the court has discretion to consider an accused persons mitigation and the circumstances of the case, and impose a lesser penalty if the circumstances so warrant.

53. In this case, the appellant was convicted of the offence of robbery with violence. In the course of the robbery, as emerged from the evidence of PW1, the robbers were armed with pangas bows and arrows, and they injured the security guards who were deployed in the premises. While violence was used in the course of the robbery, I am not satisfied that it rises to the level that would call for the imposition of the death penalty on the appellant.

54. While I am not satisfied that the appellants has any merit and I accordingly dismiss it, I am satisfied that there is some merit to the appeal against sentence. I hereby set aside the sentence of death imposed on the appellant and substitute therefore a term of imprisonment for 20 years.

55. The appellant has a right of appeal in 14 days.

Dated and Signed this 7th day of March 2019

MUMBI NGUGI

JUDGE

Dated Delivered and Signed at Kericho this 9th day of April 2019

GEORGE DULU

JUDGE