



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S. MAJANJA J.

CRIMINAL APPEAL NO. 96 OF 2018

CONSOLIDATED WITH

CRIMINAL APPEAL NOS. 101 OF 2018

BETWEEN

JUSTINE CHARLES MOGAKA1ST APPELLANT

DENNIS ANYONA2ND APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from the original conviction and sentence of Hon. R. M. Oanda, PM dated 16th March 2018 at the Magistrate's Court at Kilgoris in Criminal Case No. 1053 of 2016)

JUDGMENT

1. The appellants, **JUSTINE CHARLES MOGAKA** and **DENIS ANYONA** were charged with one count of robbery of attempted robbery with violence contrary to **section 297(2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. They were convicted and sentenced to death. The particulars of the charge facing them was that on 4th August 2016 at Majengo Estate within Kilgoris Town in Transmara West District of Narok County jointly with others not before the court while armed with dangerous weapons immediately before such attempted robbery assaulted **ANDREW MATIKO**.

2. Counsel for the respondent, Mr Otieno, conceded the appeal on the ground that the circumstance in which the incident took place were not favourable for positive identification hence the conviction was unsafe. He also pointed out that the complainant was not called as a witness.

3. Notwithstanding the concession, I must satisfy myself that the concession is well founded and in doing so I am alive to the duty of the first appellate court. It is that I am required to re-appraise the evidence and reach my own conclusions as to whether to sustain the conviction bearing in mind that I neither heard or saw the witnesses testify (*Okeno v Republic [1972] EA 32*).

4. On the morning of 4th August 2016 at about 2.00am, the complainant's wife, Mary Moraa (PW 1) testified that while she was asleep with her husband, she heard a loud bang on the door. Suddenly people entered the room and started beating them. She was able to see the 1st appellant and when she screamed all the assailants ran away. She told the court that the assailants cut the complainant with a panga and when they left he was taken to the hospital for treatment. She recalled that she tried to talk to the assailants as they wrestled with the complainant by they did not notice her. When asked by the court how she knew the appellants, she stated that when the 1st appellant had been arrested he implicated the 2nd appellant and his co-accused who were also arrested. In cross-examination, she stated that she was able to identify the 1st appellant by the torch he used.

5. Dickson Ogoro Gichana (PW 2) recalled that on the material night, he was called by the complainant who informed him that he was attacked and injured. He immediately went to the hospital where he found the complainant being treated. When he went to the complainant's home, he found PW 1 screaming that it was the 1st appellant whom she was referring to as 'Martha Karua.' Later on the complainant told him that the 2nd appellant had come to confess to him that he was involved in the robbery together with the other co-accused.

6. The investigating officer, PC James Saurei (PW 3) recalled that the 1st appellant was arrested while the 2nd appellant surrendered himself to the police and named the other co-accused who was arrested on the next day. In cross-examination, he admitted that nothing was stolen

from the complainant. Festus Kurgat (PW 4), a clinical officer at Transmara District Hospital, signed the P3 form for the complainant. He confirmed that he treated the complainant on 4th August 2016. He found him with a bloody shirt, he stitched the wounds on the arm with dressing. The wound was about 4 cm in length and he opined that the injury was caused by a panga.

7. In his unsworn statement, the 1st appellant denied the offence. He stated that on the morning of 4th August 2016 at about 7.30am, he met three people on a motorbike, they asked him to accompany them to meet someone else but he was taken to the police station instead and was later charged with the offence. The 2nd appellant also denied the offence and in his unsworn statement stated that he was called by a villager elder on 28th August 2016 and requested to go to the police station whereupon he was arrested and charged.

8. The offence of attempted robbery under **section 297(1)** of the **Penal Code** is proved when any person with intent to steal anything, at immediately before or immediately after the time of the assault, uses, threatens to use actual force on any person or property in order to obtain the thing intended to be stolen or to prevent or overcome any resistance to it being stolen. Under **section 297(2)** of the **Penal Code**, the offence becomes attempted robbery with violence when the attempt is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person

9. From the totality of the evidence, the prosecution proved all the elements of robbery with violence. The testimony of PW 1 established that the assailants came into the shop where they were sleeping. I have no doubt that they entered into the shop with intent to steal. They were three in number and one of them was armed with a panga with which he assaulted the complainant. The question is whether the appellants were identified as part of the assailants.

10. The appellant challenged the conviction on the ground that the complainant was not called as a witness. In **Bukenya & Others v Uganda [1972] E.A. 549**, the former Court of Appeal for East Africa held that the prosecution has a duty to call all the witnesses necessary to establish the truth even though their evidence may be inconsistent; that the court itself had the duty to call any person whose evidence appears essential to the just decision of the case and that failure to call such a witness would entitle the court to make an adverse inference that the said would have evidence favourable to the defence. However, **section 143** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** provides that, in the absence of any requirement by provision of law, no particular number of witnesses shall be required for the proof of any fact. Taking the general principle established by precedent and the provision of the **Evidence Act**, I hold the position that the prosecution need not call all witnesses who may have information on a fact. Failure to call a witness will only be fatal if the evidence presented by the prosecution is insufficient to sustain a conviction and contains gaps which could have been filled by a witness who was not available.

11. In this case, there was nothing on the record and nothing emerged from the evidence of the witnesses or indeed in cross-examination that would cast doubt on the testimony of PW 1 who was present when the attempted robbery took place. Further nothing emerged that would cause the court to make an adverse inference from the absence of the complainant. PW 1 was able to see the 1st appellant. She explained that she was able to see him with the torch she had. Given the close proximity and the time the appellant struggled with the complainant, I have no doubt that he was positively identified. This was not merely a case of identification of a stranger but one of recognition. She stated that she knew the 1st appellant as 'Martha Karua' and when she was cross examined by the co-accused she stated that she recorded her statement and only named "Martha Karua" as the assailant she identified. Her testimony was corroborated by PW 2 who confirmed that when he went to the complainant's home, he found PW 1 shouting the name of "Martha Karua" as one of the people who attacked her. I am therefore satisfied that the 1st appellant was positively identified at the scene of the incident and accordingly the conviction against him is affirmed.

12. The 2nd appellant was not identified by PW 1. He was arrested after he was implicated by another co-accused. The evidence against him was that of an accomplice and could not support a conviction without corroboration. Further the statements made by a co-accused in custody which amounted to a confession were inadmissible unless the law was complied with. In short, the conviction against the 2nd appellant cannot stand and his conviction is quashed.

13. The only issue left therefore is the sentence of death imposed on the 1st appellant. Under **section 297(2)** of the **Penal Code**, a mandatory sentence of death is prescribed but since the decision in **Francis Karioko Muruatetu v Republic**, the mandatory death penalty is no longer mandatory hence the duty of the court is to find an appropriate sentence hence the court has to turn to **section 389** of the **Penal Code** that prescribes a general penalty for inchoate offences. It provides as follows:

Any person who attempts to commit a felony or a misdemeanour is guilty of an offence and is liable, if no other punishment is provided, to one-half of such punishment as may be provided for the offence attempted, but so that if that offence is one punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years.

14. Thus the maximum sentence to which an accused can be sentenced in the case of an offence punishable by death is 7 years' imprisonment. In this case, the 1st appellant was a first offender but the offence was serious to the extent that the complainant was injured with a panga. I therefore impose a sentence of 5 years imprisonment.

15. I affirm the 1st appellant's conviction and allow the appeal only to the extent of the sentence of death which I hereby quash. The same is substituted with a sentence of **5 years' imprisonment** to run from **9th August 2016**.

16. I allow the appeal of the 2nd appellant. I quash his conviction and sentence. He is set free unless otherwise lawfully held on a separate warrant.

DATED and DELIVERED at KISII this 2nd day of APRIL 2019

D.S MAJANJA

JUDGE

Appellants in person.

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions for the respondent.