



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.61 OF 2017**

*(An Appeal arising out of the conviction and sentence of Hon.E. Olwande (PM) delivered on 2<sup>nd</sup> June 2017 in Makadara Criminal Case No.3611of 2013)*

**DENNIS MARESI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Dennis Maresi was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on 1<sup>st</sup> August 2013 at Kamulu within Ruai Area in Nairobi County, jointly with others not before court, the Appellant while armed with dangerous weapons namely guns, robbed Cyprian Atuki Nyangau of Ksh.79,000/- from Mpesa, Ksh.15,000/- from the general shop and credit cards worth Ksh.15,000/- all valued at Ksh.109,000/- and immediately after the time of such robbery used actual violence to the said Cyprian Atuki Nyangau. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged and sentenced to death. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that his conviction was based on a defective charge sheet since he was charged under Section 295 and Section 296(2) of the Penal Code. He faulted the trial court for convicting him yet the prosecution failed to discharge their burden of proof to the required standard of proof beyond any reasonable doubt. He complained that the trial court failed to consider his defence in arriving at its decision. He took issue with his conviction stating that the same was based on the evidence by the prosecution which was inconsistent and full of contradictions. He was aggrieved by his sentence asserting that the same was unconstitutional. In the premises, the Appellant urged this court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, both parties filed their respective written submissions. In addition, this court heard oral submissions from Mr. Nyakundi for the Appellant and Ms. Sigei for the State. Mr. Nyakundi submitted that the charge as drafted was duplex since it contained two offences. He averred that the prosecution failed to call material witnesses to give evidence. He was of the view that the prosecution ought to have availed members of the public who arrested the Appellant in court to give evidence. He also stated that the two Administration Police Officers who allegedly rescued the Appellant from the irate mob ought to have appeared before court as prosecution witnesses. Mr. Nyakundi submitted that the complainant testified that he knew the Appellant. However, the complainant failed to mention the Appellant's name in the first report that he made to the police. He further submitted that the trial court failed to consider evidence by the defence in arriving at its decision. He asserted that the sentence meted out by the trial court was unconstitutional following the Supreme Court's decision in Francis Karioko Muruatetu & Another vs Republic [2017] eKLR. In the premises therefore, he urged this court to allow the Appellant's appeal.

Ms. Sigei for the State opposed the appeal. She asserted that the error in the charge sheet was curable under Section 382 of the Criminal Procedure Code. She submitted that prosecution established all the ingredients of the charge. She was of the view that the prosecution witnesses who were availed were able to establish the Appellant's guilt with regard to the present charge brought against him. She stated that identification of the Appellant was through recognition. The Appellant was known to the complainant for about four months prior to the robbery incident occurred. In addition, PW3 identified the Appellant as one of the people who alighted from the motor vehicle that was involved in the accident. She maintained that the prosecution proved its case to the required standard of proof beyond any reasonable doubt. With regard to sentence, Learned State Counsel submitted that the same was appropriate since the Appellant was armed with a gun. She therefore urged the court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows: On 1<sup>st</sup> August 2013, the complainant was at his shop in Kamulu Area. At about 4.00 p.m., he went outside to answer a call of nature. He heard someone enter his shop. He rushed back to the shop. When he entered the shop, he was confronted by two men. They were armed with guns. He tried to run out but the two men who were outside the shop forced

him back into the shop. He was ordered to lie down. His hands were tied behind his back. The men took cash Ksh.79,000/-. They also took Safaricom airtime cards worth Ksh.15,000/-. They afterwards poured water on him and left. Soon after the robbers had left, a customer walked into the shop. The customer saw the complainant tied up on the floor. She raised an alarm. The complainant ran out and started shouting that the men were robbers. The robbers started running.

The complainant saw the Appellant running ahead of the four assailants. They were running towards a vehicle next to the road. It was blue in colour. One of the assailants ran through an alley and made good his escape. The Appellant opened the vehicle. The assailants got in the vehicle. The Appellant also got in the car and sat on the rear passenger seat. They drove off. There were two Administration Police Officers at the scene. The complainant together with the police officers boarded motorcycles that were on the scene and followed the assailants' getaway car. When the getaway vehicle was about 2 kilometres from the scene, it collided with another vehicle. The assailants alighted from the vehicle. They ran in different directions. Members of the public managed to apprehend the Appellant. The other assailants made good their escape. Two police officers rescued the Appellant from the irate mob. The Appellant was taken to Ruai Police Station. The complainant stated that the Appellant was known to him prior to the robbery incident. The Appellant was overseeing a construction site which was next to the complainant's shop. The Appellant was one of his customers. He also stored several items for the Appellant at his shop.

PW2 Cpl. Stephen Munumba and PW4 PC Paul Wasike were on duty at Ruai Police Station on the material day of 1<sup>st</sup> August 2013. They received information that a suspect had been arrested along Kangundo Road and was about to be lynched by a mob. They went to the scene. They found the Appellant had been apprehended by Administration Police Officers. Two vehicles had collided at the scene. One of the vehicles belonged to PW3 Jane Wanjiru Kaingati. The other vehicle was the assailants' getaway car. It was a Toyota Corolla registration number KBE 146M, blue in colour. The Administration Police Officers informed PW2 and PW4 that the occupants of the blue Toyota Corolla were involved in a robbery. PW4 who was the investigating officer, recorded the statements from the witnesses. The complainant informed him that the assailants robbed him of cash Ksh.79,000/- as well as airtime worth Ksh.15,000/-.

PW3 Jane Wanjiru Kaingati was driving along Kangundo Road on the material day at about 4.00 p.m. She saw an oncoming motor vehicle that was being driven erratically. The said car moved from its lane to her lane. She had no time to take evasive action. The two cars collided head on. After the accident, PW3 saw men getting out of their vehicle. The Appellant was among them. They all ran in different directions. Members of the public managed to apprehend the Appellant.

When the Appellant was put to his defence, he testified that on the material day of 1<sup>st</sup> August 2013 he was at Kamulu where he was overseeing a construction site belonging to his mother. His mother sent him to cover the window and door spaces of the building to prevent people from accessing the unfinished building. After he had finished the work, he started walking towards Ruai direction. He saw a crowd of people at a stage known as Acacia. There was also an accident involving two vehicles at the scene. He suddenly heard gun shots. People started running in different directions. He also ran away for his own safety. After a few meters, he was surrounded by armed men. They arrested him and took him to a police officer who was at the scene. He tried to explain to them that he was overseeing a construction work in that area but they instead handcuffed him. Police officers from Ruai Police Station arrived at the scene. They escorted him to Ruai Police Station. He was later charged with the present offence. He stated that he knew the complainant by the name "Mogaka". He used to assist them with storage space for their construction tools. The Appellant denied having any part in the robbery as narrated by the complainant. His testimony was corroborated by the testimony of his mother DW2 Charity Wanjira Njagi who testified that on the material day she had sent the Appellant to Kamulu to undertake some work on her behalf.

This being a first appeal, this Court is mandated to re-evaluate the evidence presented before the trial court afresh. The Court of Appeal in the case of Gabriel Kamau Njoroge –vs- Republic (1982 – 88) 1 KAR 1134 stated this on the duty of the first Appellate court:

*"It is the duty of the first Appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, but bearing in mind always that it has neither seen or heard the witnesses and make due allowance for this."*

In the present appeal, the issue for determination is whether the prosecution established the charge of robbery with violence contrary to Section 296(2) of the Penal Code to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the evidence adduced before the trial court. It has also considered the rival submission made by the parties to this appeal. **It was evident from the facts of the case that the prosecution relied on direct evidence of identification by recognition to secure the conviction of the Appellant. This court has a duty to thoroughly examine the evidence on identification before confirming a conviction based on the same. In the case of Wamunga vs Republic [1989] eKLR 426 the Court of Appeal stated as under:-**

*"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."*

According to the complainant, the robbery took place at about 4.00 p.m. at his shop. He was accosted by four robbers; two of them were inside the shop and two others outside the shop. The Appellant was among the four assailants. Immediately after the assailants left the shop, a customer walked in. She raised an alarm after she saw the complainant tied up on the floor. The complainant got up and started shouting that the men were robbers. The assailants ran away. The complainant stated that he saw the Appellant running with the assailants. One of the assailants disappeared into an alley. The remaining assailants together with the Appellant ran towards the road. They boarded a getaway car.

The complainant testified that he saw the assailants enter a blue Toyota Corolla which was the getaway car. He informed two administration police officers who were at the scene of the robbery. The administration police officers together with the complainant hired motorcycles to assist them pursue the getaway motor vehicle. The motorcycles were in hot pursuit of the getaway motor vehicle. They did not lose sight of the motor vehicle. About 2 kilometres from the scene of the robbery, the getaway motor vehicle was involved in a collision with a motor vehicle driven by PW3. PW3 testified that while driving on her lane, she saw an oncoming vehicle which was being driven erratically. It was

being driven in her lane. She tried to take evasive action but in vain. The two motor vehicles collided. She saw a group of men who included the Appellant get out of the motor vehicle. They ran in different directions. Members of the public pursued the Appellant, apprehended him and brought him to the scene of the accident. At that time, the complainant and the two administration police officers had arrived at the scene. The complainant was able to identify the Appellant as one of the robbers who had robbed him.

Although the Appellant denied that he had robbed the complainant or that he was part of the gang that robbed the complainant, from this court's re-evaluation of the evidence adduced, it was clear to this court that the prosecution established to the required standard of proof beyond any reasonable doubt that indeed the Appellant was positively identified as being a member of the gang that robbed the complainant. The evidence of identification that was adduced by the prosecution witnesses, especially the complainant was watertight. That evidence was of recognition rather than mere identification of a stranger. The Appellant was known to the complainant prior to the robbery incident. The Appellant used to keep construction tools at the complainant's premises prior to the robbery incident.

After the robbery incident, the complainant, with the assistance of the two administration officers, gave chase and were able to apprehend the Appellant after the getaway motor vehicle was involved in an accident. There was no doubt that PW3 saw the Appellant emerge from the getaway car after it was involved in an accident with her motor vehicle. The Appellant's denial that he was not in the motor vehicle is not worth of credit taking into consideration the testimony of the complainant who was able to give a clear, cogent and credible narration from the time he was robbed to the time of the Appellant's arrest.

In the premises therefore, this court holds that the prosecution was able to establish, to the required standard of proof beyond any reasonable doubt, the charge of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The ingredients of the charge of robbery with violence were established. The Appellant, in company of others, while armed with dangerous weapon namely a gun, robbed the complainant, and in the course of the robbery used violence on the complainant. The Appellant's appeal against conviction therefore lacks merit and is hereby dismissed.

On sentence, following the recent Supreme Court decision in the case of **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR**, this court has jurisdiction to relook at the sentence of the Appellant to determine whether the death sentence that was meted on him was deserved or another sentence ought to be imposed. In the present appeal, it was clear to this court that, taking into consideration the entire circumstance in the case, that the death sentence that was meted on the Appellant was not deserved. This court has been guided by the guidelines issued by the Supreme Court in the above case. This court is of the considered view that the circumstance of this case calls for a custodial sentence. In the premises therefore, the death sentence that was imposed on the Appellant is set aside and substituted by a sentence of this court. The Appellant is sentenced to serve ten (10) years imprisonment with effect from today's date. This court has taken into consideration the period that the Appellant was in pre-trial detention and the period he was in prison prior to the hearing and determination of this appeal. It is so ordered.

**DATED AT NAIROBI THIS 7<sup>TH</sup> DAY OF MAY 2019**

**L. KIMARU**

**JUDGE**