REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 11 OF 2018

DANIEL MUTHAMI SONO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an Appeal from Original Conviction and Sentence in **Kyuso Principal Magistrate's Court Criminal Case No. 284 of 2016** by **Hon. B. M. Kimtai (SRM)** on **11/04/17)***

J U D G M E N T

1. **Daniel Muthami Sono,** the Appellant, was arraigned in Court for the offence of **Robbery with Violence** contrary to **Section 295** as read with **Section 296(2)** of the **Penal Code.** Particulars of the offence were that on the **28th** day of **September, 2016,** at **Tyaa Kamuthale Location, Tyaa Sub-Location** in **Kyuso Sub-County** within **Kitui County** robbed **Charles Ngei Kaviti** of cash **Kshs. 900/=** and a mobile phone make Itel black in colour valued at **Kshs. 1,000/=** and at or immediately before or immediately after the time of such robbery strangled the said **Charles Ngei Kaviti** using a plastic string.

2. Having been taken through full trial he was found guilty, convicted and sentenced to suffer death.

3. Aggrieved, he now appeals on grounds that his rights as enshrined in **Article 49(1)** and **50(2)(m)** of the **Constitution, 2010** were not upheld; Evidence adduced was inconsistent, uncorroborated and false; there was no proper identification; **Section 107** of the **Evidence Act** and **Section 169(1)** of the **Criminal Procedure Code** were not complied with.

4. Facts of the case were that on the **28th September, 2016** the Appellant and Complainant were making bricks. Upon finishing they left going to their respective homes. While on the way, the Complainant was strangled, wrestled and money taken away from his pocket. PW2 **John Kikundi** who was coming from his parent's home saw them on the ground. The Appellant sat on the Complainant's back. Suddenly the Appellant stood and alleged that some people had attacked them but the Complainant said that he had been strangled. PW2 untied the Complainant while the Appellant ran away. The Complainant told him that he had been robbed of **Kshs. 900/=** and a cellphone. They chased after the Appellant, arrested and took him to PW5 **Charles Mwinzi,** the Assistant Chief who re-arrested and took him to the **Kamuongo AP Camp** ultimately where the Administration Police handed him over to the regular police. **No. 65517 P.C. Kennedy Kimathi** took possession of the money and cellphone that were recovered. He investigated the case and charged the Appellant.

5. Upon being put on his defence the Appellant stated that on the material date he was working with the Complainant and on finishing the work he went to town for payment. He even bought him (Complainant) alcohol. Thereafter the Complainant paid him **Kshs. 300/=,** later on he was accused of stealing from him. He was arrested and charged.

6. This is a first appellate court. As expected, I have to analyze and evaluate afresh all the evidence adduced before the lower court and draw my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. (**See Kiilu & Another vs. Republic [2005]1 KLR 174).**

7. It was urged by the Appellant that he was arrested on the **28th September, 2016** and produced in Court on the **4th October, 2016** which was in violation of his fundamental rights. In opposing the Appeal the State through learned Counsel **Mr. Mamba,** submitted that the P3 form had not been filled. That it was filled on the **3rd October, 2016. Article 49(1)(f)** of the **Constitution** provides thus:

> ***"…(1) An arrested person has the right—***
>
> ***(f) to be brought before a court as soon as reasonably possible, but not later than—***
>
> ***(i) twenty-four hours after being arrested; or***

(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;"

In the case of **Julius Kamau Mbugua vs. Republic (2010) eKLR** the Court of Appeal stated as follows:

"The alleged unlawful detention does not exonerate the appellant from the serious crime he is alleged to have committed. The breach could logically give rise to a civil remedy – money compensation as stipulated in Section 72 (6) of the former Constitution. That is the appropriate remedy which the appellant should have sought in a different forum."

It has been demonstrated by the Appellant that after his arrest he was held in custody for about six (6) days prior to being arraigned in Court; And on the date he was produced, no explanation was given as to why he was detained in custody for more than the required time. However, the Appeal cannot be allowed on that ground. The breach of the Appellant's fundamental rights that resulted was a civil wrong that should be compensated by damages.

8. It is urged that the Court contravened **Article 50(2)(m)** of the **Constitution** that provides as follows:

"(2) Every accused person has the right to a fair trial, which includes the right—

(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;"

According to the Appellant the record did not show whether the interpreter was availed to translate the language from English to Kiswahili or Kikamba. The alluded to record reads thus:

"24/3/2017

Magistrate – B. M. Kimtai – SRM

Prosecutor – Ligami – S/C

Court Clerk – Mulinge

Accused – Present

……..

7/3/2017

Magistrate – B. M. Kimtai – SRM

Prosecutor – Ligami – S/C

Court Clerk – Mulinge/Kendi

Accused – Present."

9. In the case of **Said Hassan Nuno Vs. Republic (2010) eKLR** it was held thus:

"…at each stage of the proceedings a court clerk was in attendance and we take judicial notice that one of the core duties of a court clerk is to offer interpretation services to the accused or even the court where it does not understand the language of the accused; or a witness to the case."

10. The record indicates that a Court Clerk was in attendance and the duty of a Court Clerk is to interpret. Having been present it is common knowledge that he discharged his duty of interpretation to the parties and Court. **Mulinge** was present at the outset when the plea was taken and the interpretation was in Kamba/Kiswahili/English. At the point of defending himself **Mulinge** was the Court Interpreter and the Appellant communicated in Kikamba. That being the case the Appellant's rights were not violated.

11. It is contended that evidence adduced was inconsistent and uncorroborated. In particular, that the Complainant stated that the Appellant used a wire to strangle him and also said that he used a string that had a handkerchief. That PW2 said that he (Appellant) was found in possession of **Kshs. 900/=** and a phone while PW3 stated that the phone was found at the scene of the incident. He also pointed out the discrepancy regarding the denomination of the currency.

12. In the case of **Twehangane Alfred vs. Uganda (2003) UG CA 6** it was held that:

"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions

unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

13. The contradictions alluded to were minor. There is no suggestion that there was a deliberate intention to lie therefore the substance of the case herein was not affected.

14. The Appellant faced a charge of robbery with violence. Ingredients constituting the offence of robbery with violence were stated in the case of **Johana Ndungu vs. Republic CRA 116/1995** thus:

"In order to appreciate properly as to what acts constitute an offence under Section 296 (2) of one must consider the subsection in conjunction with Section 295 of the PC. The essential ingredient of robbery under Section 295 is use of or threat to use actual violence against any person or property at or immediately after to further in any manner the act of stealing. Thereafter, the existence of the afore described ingredients constituting robbery are presupposed in the three sets of circumstances prescribed in Section 296 (2) which we give below and any one of which if proved will constitute the offence under the subsection:

1. If the offender is armed with any dangerous or offensive weapon or instrument; or

2. If he is in company with one or more other person or persons; or

3. If at or immediately before, or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person."

And in the case of **Dima Denge Dima & Others vs. Republic Criminal Appeal No. 300 of 2007** it was stated thus:

"the elements of the offence under Section 296 (2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence."

15. In the instant case the Appellant was not armed with any offensive weapon and was not in company of another, but he wrestled the Complainant and strangled him. As a result of the act, the Complainant sought medical attention. He was examined by PW6 **David Mbithi,** a Clinical Officer who found him having sustained injuries around his neck, bruises on the right lateral side below the jaw and had a red eye. The injuries he sustained were assessed as harm. This was proof of use of violence upon the Complainant in the Course of the act. Evidence of the Complainant that his attacker was the Appellant was corroborated by that of PW2 who found him sitting on the Complainant's back. The Appellant alleged that they had been attacked but acted by running away, a conduct that betrayed him. He was pursued and found in possession of a cellphone and cash that the Complainant identified as his. In the case of **Muneni Ngumbao Maingi vs. Republic (2006) eKLR** the Court of Appeal observed that:

"The word "robbed" is a term of art and connotes not simply a theft but a theft preceded, accompanied or followed by the use of threat or use of actual violence to any person or property in order to obtain or retain stolen property."

This was a case of robbery accompanied by violence.

16. **Section 107** of the **Evidence Act** provides thus:

"(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

It is apparent that the Prosecution which came up with allegations against the Appellant proved the same.

17. **Section 169(1)** of the **Criminal Procedure Code** provides as follows:

"(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."

The learned Magistrate framed four (4) issues for determination and proceeded to comply with the law by determining each point and thereby came up with reasons for the decision that he reached. Therefore, that ground of Appeal fails.

18. From the foregoing I find the trial Court having not fallen into error. In the circumstances, the Appeal against the conviction is devoid of merit. Therefore, I dismiss it and affirm the conviction.

19. Regarding sentence, in **Francis Karioko Muruatetu & Others vs. Republic, Petition No. 15 & 16 of 2015** the Supreme Court held thus:

"“[71]. As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

(a) age of the offender;

(b) being a first offender;

(c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender;

(h) any other factor that the Court considers relevant.

[72] We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process. This notwithstanding, we are obligated to point out here that paragraph 25 of the 2016 Judiciary Sentencing Policy Guidelines states that:

"25. GUIDELINE JUDGMENTS

25.1 Where there are guideline judgments, that is, decisions from the superior courts on a sentencing principle, the subordinate courts are bounded by it. It is the duty of the court to keep abreast with the guideline judgments pronounced. Equally, it is the duty of the prosecutor and defence counsel to inform the court of existing guideline judgments on an issue before it."

20. In the circumstances, I set aside the sentence imposed and substitute it with sentence of **15 years imprisonment** which will be effective from the date of conviction and sentence by the trial Court.

21. It is so ordered.

Dated, Signed and **Delivered** at **Kitui** this **12th** day of **June, 2019.**

L. N. MUTENDE

JUDGE