REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CRIMINAL APPEAL NO. 36 OF 2015

DENIS MAINGE SAMMY.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the judgment in Criminal Case *No. 318 of 2014 at Kandara by C. Kithinji, Resident Magistrate, dated 9th March 2015]*

JUDGMENT

1. The appellant was convicted for *robbery with violence* contrary to section 296 (2) of the **Penal Code**. He was sentenced to *suffer death*.

2. He was also convicted on two other counts of *assault causing actual bodily harm* contrary to section 261 of the code. He was sentenced to serve *one year* imprisonment on each count; the sentences to run *concurrently*.

3. The particulars of the robbery were-

> "On 24/7/2014 at Muruka Trading Centre in Kandara District Murang'a County jointly with others not before court while armed with dangerous weapons namely pangas, robbed Peter Kinuthia Jesse Kshs 9500, a Sony DVD valued at Kshs 3000, 4 bottles of allsops beer and immediately after the time of such robbery wounded Annah Wambui Nyoike."

4. The particulars of counts II and III were that on the same date at Kibuu Village, Kandara District, he jointly with others not before court assaulted *Geoffrey Guthia Macharia* and *Francis Guchu Kiberenge* causing them actual bodily harm.

5. The petition of appeal raises *five* grounds. I will compress them into four: Firstly, that the appellant was not positively identified; secondly, that there was no proof of possession of stolen property; thirdly, that the appellant's arrest had nothing to do with the crime; and, fourthly, that his defence was disregarded.

6. At the hearing of the appeal, learned counsel for the appellant, *Ms. Kilonzo*, relied on written submissions filed on 30th January 2019. The core of the submissions is that the robbery was at night; and, that the conditions were unfavorable to a positive identification.

7. Learned counsel submitted that PW1 and the appellant were strangers which discounted his claim that he identified the appellant. In addition, he did not give the police the description of the appellant. Furthermore, no identification parade was carried out.

8. Learned counsel further submitted that there was no evidence of violence; and, that no stolen items were recovered from the appellant. In a nutshell, she contended that the conviction was unsafe.

9. The Republic contests the appeal. The position of the State is that all the ingredients of the offence were proved.

10. This is a first appeal to the High Court. I have *re-evaluated* all the evidence on record and drawn *independent* conclusions. I remain cognizant that I neither saw nor heard the witnesses. ***Njoroge v Republic*** [1987] KLR 19, ***Okeno v Republic*** [1972] E. A. 32.

11. PW1 was Peter Kinuthia. He was at his pub. He saw a person armed with a rifle enter through the main door. He was wearing a jungle jacket. The armed stranger was followed by another thug armed with a panga. A third thug made his way through the back door. The first thug then ordered everyone to lie down.

12. PW1 said the pub was well lit with fluorescent tubes; and, that he clearly saw the three attackers. He said that the appellant is the person

who entered last through the back door. PW1 escaped from the bar because he feared that the robbers would identify him as the owner of the business.

13. PW1 said that he described the appellant to the police. The police responded. He later learnt that some suspects were arrested at the quarry, a kilometer from his home. He said the thugs stole a DVD player, Kshs 9500, an extension cable and four bottles of beer.

14. PW2 was Paul Muchina. He saw two people enter the club. One moved to the front and another stayed at the door. The first to enter was dressed in police uniform. The robbers ordered the patrons to lie down. He crouched on his belly and escaped through a banana plantation. He telephoned an Administration Police Officer about the attack.

15. PW3 was Francis Guchu. He was alerted by screams from his mother (PW5). He opened the door and saw three thugs. They cut him on the head and finger. He screamed. Geoffrey Gathia (PW7) and other members of the public responded. They chased the thugs towards the quarry. The thugs fell into the quarry and sustained serious injuries.

16. Hannah Wangui (PW4) was an employee at PW1's bar. Thugs entered the premises and ordered everyone to lie down. She said there was light at the pub. The robbers demanded money. She showed them the cash box. They collected the money and left. She never looked at them.

17. Like I said, PW5 was the mother of PW2. As she unlocked the padlock to her kitchen, she was confronted by five strangers. She screamed. Her son, PW3 responded. The assailants cut him with a panga. Her grandson (PW7) intervened and hit one of the attackers with a piece of wood. The two chased the thugs towards the quarry.

18. In the meantime, she kept screaming which attracted members of the public. She said the appellant was among the attackers; but she could not tell the number of the robbers since they had torches.

19. PW6 was Martin Kariuki Mwangi. He is a clinical officer at Kandara Sub-County Hospital. He examined Geoffrey Gathia Macharia (PW7) and Francis Guchu Kiberenge (PW3). He assessed their injuries as *maim*. He produced their respective P3 Forms. They are dated 21st October 2014

20. Geoffrey Gathia Macharia (PW7) told court that he heard about the robbery at the pub. Later on the same night at about 10.00 p.m. he heard his grandmother (PW5) screaming. He left with a piece of wood and his dog. He found the thugs attacking PW3. He got hold of one thug. One of the thugs cut him on the leg and hand. The public responded to the screams from his grandmother. He said one of the thugs wore a black jacket. The thugs ran towards the quarry. They fell inside. One died from the fall; two survived and were arrested by the police.

21. The last witness was Police Constable Eric Omondi of Kandara Police Station. On 24th July 2014 at around 21:00 hours, his senior briefed him about the incident. He and a colleague went to the scene and interviewed the bar patrons. He also learnt that the thugs had gone into Kibuu area. They proceeded to the area. They found members of the public pursuing some thugs towards the quarry.

22. The thugs were cornered and jumped into the quarry. One died; the other two sustained multiple injuries. John Mwanzia is the one who died at the quarry. The other was John Wambua who was wearing a police jungle jacket. He died on arrival at the hospital. The appellant was also hospitalized and recovered from his injuries.

23. PW8 produced the jungle jacket, panga, and homemade gun. He also produced a rough sketch of the quarry, 3 empty *Allsops* beer bottles, and the identity cards of the deceased.

24. I have then considered the substance of the defence. The appellant denied committing the offence. He said that on 24th July 2014, he left home at around 5:00 p.m. for Kabati. He was going to deliver eggs to an unnamed customer. He worked until 8:30 p.m.

25. He then took a ride on a *boda boda* to Kibuu village. He was dropped off near the quarry. It was very dark. He then heard some screams. The screams waned. Along the foot path he met with four strangers. They ordered him to sit down, searched his pockets, and took his phone and money. They hit him on the head and he lost consciousness. He came to in prison.

26. A number of matters arise from that evidence. The first question is whether *all* the ingredients of the offence of *robbery with violence* were established. Section 296 (2) of the **Penal Code** provides-

> "If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death"

27. There were *three* robbers. They were *armed* with dangerous or offensive weapons including a home-made *gun* and a *panga*. They stole money, Sony DVD and beers. All the key elements of the offence were present.

28. The next key question relates to *identification* of the appellant. In ***Kiarie v Republic*** [1984] KLR 739, the Court of Appeal held-

> "It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction."

29. In **Maitanyi v Republic** [1986] KLR 198 at 201, the Court of Appeal delivered itself as follows-

> "It must be emphasized that what is being tested is primarily the impression received by the single witness at the time of the incident. Of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, State counsel and defence counsel. In the absence of all these safeguards, it now becomes the great burden of senior magistrates trying cases of capital robbery to make these inquiries themselves. Otherwise who will be able to test with the "greatest care" the evidence of a single witness?"

30. When I juxtapose those authorities against the evidence, I find as follows. There were *two* separate *scenes* and *sets* of offences. The incidents took place almost an *hour* apart.

31. The first scene is the robbery at the *Westgate Bar*. It was at around 9:00 p.m. The bar was well lit by fluorescent tubes. Of the three witnesses at the bar, only PW1 identified the *three* thugs. His testimony was as follows-

> "I was at Westgate Bar. I was watching TV. I was near the main door. I saw someone come in; he was holding a rifle. We looked at each other….another person came in through the rear door. The first guy who came in, the one with a rifle ordered everyone to lie down….one of the three guys was wearing a jungle jacket. The person who died was wearing the jungle jacket."

32. Up to that point, the only person clearly identified or described by PW1 was the thug in a jungle jacket (now deceased). PW1 said the appellant was the third person who entered through the rear door. He did *not* describe him in detail. When cross examined he said-

> "I recognize your face. I saw your face. The same way I saw you is the same way you were described after being found in the quarry….I saw you the same way you look now"

33. The appellant and PW1 were strangers. PW1 feared for his life and escaped. The *dock identification* was worthless. But the appellant is the *same* thug who was cornered an *hour* later by the public and jumped into the quarry. He was in a *black jacket* as confirmed by PW3 and PW8. PW1 saw the appellant moments later in the *police vehicle*. PW1 *positively* identified the appellant as the person who was in the company of two accomplices who robbed the bar. The fact that he was not in possession of the loot is immaterial.

34. I concur with the finding of the learned trial magistrate that the *unsworn* statement by the appellant was bogus. The appellant was properly convicted of *robbery with violence* contrary to section 296 (2) of the **Penal Code.** I will revisit the matter of the *sentence* shortly.

35. The next scene was at Kibuu village at about 10:00 p.m. It relates to the assaults on PW3 and PW7. From the evidence of PW3 and PW7 they suffered cuts from a *panga*. Their injuries were corroborated by PW6. The clinical officer assessed the degree as *maim*. I find that the ingredients of the offence of *assault causing actual bodily harm* were established.

36. The key question again is whether the appellant was positively identified as the person who assaulted the complainants. The person who first saw the thugs was PW5. She said there were *5* of them. Since only three were found in the quarry, it was her evidence that two escaped. It was at night. There is no evidence of lighting outside her kitchen door.

37. PW3 and PW7 responded to her screams. PW3 did not identify any of the attackers. In his evidence in chief he said he saw three assailants wearing police uniforms. In cross examination he said:

> "I could not see them since it was dark. I did not recognize any of them. I did not see the people after they were removed from the quarry."

38. PW7 on the other hand only recognized the appellant when he was retrieved from the quarry. He said one of the thugs was in a black jacket. He stated in cross examination

> "I recognized you since you were put [sic] in a quarry. I saw you even before you got into the quarry. You came home in the dark hence I could not see you. I recognized you when you were removed from the quarry."

39. Applying the test in ***Maitanyi v Republic*** [1986] KLR 198 at 201, I find that PW3, PW5 and PW7 did *not* positively identify the appellant. It follows that the conviction on two counts of *assault causing actual bodily harm* was unsafe. The conviction and sentence on counts II and III are *set aside*.

40. I will now to turn to the sentence of death. Until recently, the offence attracted the *mandatory* sentence of death. But the Supreme Court in ***Francis Karioko Muruatetu & another v Republic*** Petition 15 & 16 of 2015 [2017] eKLR held as follows-

> "The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution." [Emphasis added]

41. This court on a first appeal *may* review the sentence. ***William Okungu Kittiny v Republic***, Court of Appeal at Kisumu, Criminal Appeal 56 of 2013 (2018) eKLR. The sentence imposed on an offender must be *commensurate* to his moral blameworthiness. ***Macharia v Republic*** [2003] 2 E. A. 559.

42. The appellant is a *first offender*. The appellant was granted an opportunity to mitigate but he wasted it by continuing to protest his innocence. The appellant and his accomplices were armed with a home-made gun and *panga* but did not injure anyone at the *Westgate Bar*. In this case, justice can only be served by a long prison term.

43. The upshot is that the appeal on *conviction* and *sentence* for *assault* under counts II and III succeeds. The appeal against conviction for *robbery with violence* is *dismissed*.

44. The sentence of *death* is however *set aside*. I sentence the appellant to serve *fifteen (15) years* imprisonment. For the avoidance of doubt, the term of imprisonment shall take effect from 9th March 2015, the date of his *original* conviction and sentence.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **MURANG'A** this 12th day of June 2019.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

The appellant.

Ms. B. Kilonzo for the appellant.

Ms. R. Gichuru for the Republic.

Ms. Dorcas, Court Clerk.