



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CONSOLIDATED CRIMINAL APPEALS NOS. 16 & 18 OF 2015

STEPHEN MUNENE NJERU.....1ST APPELLANT

INYASIO NJIRU NGARI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the decision of E. M. Kagoni, Senior Resident Magistrate,

Kangema, in Criminal Case No. 318 of 2014 dated 1st April 2015]

JUDGMENT

1. The appellants were convicted for *robbery with violence* contrary to section 296 (2) of the **Penal Code**. They were sentenced to *suffer death*.

2. The particulars were-

“On 5th August 2014 at Godo Stage along Kangema-Kiria-Ini Road in Mathiyoa Sub-County within Murang'a County jointly robbed Ibrahim Muthee Irungu Kshs 5,000 and immediately before the time of such robbery strangled the said Ibrahim Muthee Irungu.”

3. The 1st appellant *irregularly* filed two petitions being numbers 16 and 19 of 2015. The latter petition was struck out; and, the former was *consolidated* with petition number 18 brought by his co-accused (the 2nd appellant).

4. The main grounds taken in the consolidated appeals can be compressed into four: Firstly, that the appellants were not positively identified; secondly, that the evidence of the complainant was not corroborated; thirdly, that the 2nd appellant was convicted solely on the basis of evidence of an accomplice or negative inference; and, fourthly, that the money and knife were not recovered.

5. At the hearing of the appeal, learned counsel for the appellants, *Mr. Omondi*, relied on written submissions filed on 29th September 2017. The core of the submissions is that the robbery was at night; and, that the complainant did not know the appellants. In particular, he was unable to identify the 2nd appellant. Since no identification parade was conducted, he submitted that it was unsafe to convict the appellants on the evidence of a single identifying witness.

6. The Republic contests the appeal. The position of the State is that *all* the ingredients of the offence were proved. Regarding identification learned Prosecution Counsel submitted that the complainant ferried the two appellants on his *boda boda*; that he identified the 1st appellant when they haggled over the fare; and, that the 1st appellant implicated the 2nd appellant. Although the knife used in the attack was not recovered, a piece of cable used to strangle the complainant was produced in evidence.

7. Learned Prosecution Counsel added that the appellants failed to rebut or explain possession of the cable and a suspicious key. I was implored to dismiss the appeal.

8. 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.

9. PW1 was the complainant. He is a *boda boda* cyclist. On the material day, at 8:30 p.m., he was hired by two men to transport them to Waitihaka. It was a ruse: the two turned out to be thugs who robbed him.

10. The material part of his testimony went as follows-

“I went to Gakira stage to pick customers as usual. Met two men who asked me to take them to Waitihaka. My motorcycle is registration number KMCY 299U. Agreed that they pay Kshs 250 which they were to pay upon reaching Waitihaka. At Mihuti they gave me 20/- and asked me to buy them cigarettes. Did so and proceeded with the journey.

“Along the way Accused 1 asked me to stop but I refused. He managed to press the stop button. Lost control of the motorcycle and landed in a ditch. We struggled with the men. They strangled me and robbed me Kshs.5,000/- which I had. They then left. Was rescued by a Good Samaritan whose name I cannot recall. I was not able to talk. Requested the Good Samaritan to dial a number on my cell phone. He called Baba Mwangi. He quickly came to the scene and took me to hospital at Kiriaini.

“When I was discharged I was informed that there are [sic] men who had been arrested. Went to where the men were and was able to identify Accused 1. He offered to take us to where his accomplice was. He took us to Accused 2.”

11. The other key witness was Mishack Mwangi (PW3). He is the area Sub-Chief. He was alerted of the robbery. He went to Kiairathe Shopping Centre. He found *boda boda* cyclists who had arrested the 1st appellant. He said the 1st appellant led them to his accomplice who was hiding in the home of PW5. He did not recover anything from the 2nd appellant; but the 1st appellant *“had a key which could ignite many motor cycles”*. He escorted the two suspects to Kangema Police Station. He gave the key to the police.

12. PW5 had given refuge to the 2nd appellant. He testified that-

“[I] heard someone knock...it was Njeru [2nd appellant] whom I knew. He told me that he was with Munene [1st appellant] and were being pursued by bodaboda operators. He requested me to accommodate him. After about 10 minutes the Sub-Chief came and asked me to open the door. Got in and arrested Njeru and asked me to sleep.”

13. The clinical officer (PW8) examined the complainant. He found that his neck was *“swollen all round and he could not swallow saliva”*. He filled in the P3 form 26 days after the incident. He said the complainant was treated at Kiria-Ini Hospital as per the treatment notes (exhibit 10). He assessed the degree of injury as *harm*.

14. I have then considered the substance of the defence. The 1st appellant gave an *unsworn* statement-

“I recall 5/8/2014. Spent the day picking tea. In the evening I came to Kangema town to buy some clothes because I had been paid. Stayed in town till late at about 9 p.m. On my way home a motor cycle with two pillion passengers came and stopped in front of me. The passengers demanded to know where I was coming from. The motor cyclist (PW6) robbed me my phone (Skyfone) and cash kshs.1,600/-. They forced me to board the motorcycle and took me to a place I did not know. They attacked me and beat me badly and took me to Kangema Police Station.”

15. The 2nd appellant also denied the offence. His brief *unsworn* statement went as follows-

“I am a shamba boy. I know the charges I am facing. I was heading from Gakira when I was arrested by motorcyclists who beat me and took me to Kangema Police Station. I did not commit the offence.”

16. 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”

17. There were two robbers. They were *armed* with a knife and a cable. They attacked and injured the complainant in the course of the robbery. They stole some money. The cable used in the attack was recovered shortly thereafter from one of the appellants. It is immaterial that the Kshs 5,000 or the knife was not recovered. I find that *all* the key elements of the offence were present.

18. The next key question relates to *identification* of the appellants. 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.”

19. 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?”

20. The offence took place at *night*. The conditions of identification were less than ideal. However, there are *four* factors that point to a *positive identification* of the 1st appellant. Firstly, the complainant and the 1st appellant were not complete strangers. The complainant used to see the 1st appellant at Kirima. Secondly, it is the 1st appellant who negotiated the fare with the complainant. Thirdly, the appellants gave the complainant Kshs 20 to purchase cigarettes for them at Mihuti. Fourthly, the 1st appellant was arrested shortly after the incident; and, the complainant identified him as one of the two robbers.

21. A combination of all those four factors leaves no doubt that the 1st appellant was *positively* identified as the robber who used a cable to strangle the complainant.

22. The learned trial magistrate was alive to the dangers of convicting on the evidence of a single identifying witness. I wholly agree with his conclusion that-

“In this case the complainant was identifying a person whom he was able to recognize thus reducing further risk of mistaken identity. He was called to come and confirm whether the man [1st appellant] who had been arrested by PW6 and fellow motorcyclists was the same man who had robbed him”

23. I also concur with the trial court that there was no further need for a police identification parade. It is instructive that PW6 and other riders confronted the 1st and 2nd appellants at Kanyenyaini. The 1st appellant had a cable and an ignition key that could start a motorcycle engine. When the complainant was rescued by PW6, he had clearly stated that he was strangled using a cable.

24. I will now turn to identification of his accomplice. The complainant admitted that he did *not* recognize the 2nd appellant. He said the 2nd appellant attempted to stab him with a knife. However, the complainant was wearing two jackets; and, the knife did not penetrate his body.

25. The 2nd appellant was implicated by the 1st appellant. This was accomplice evidence. But it was *corroborated* by two pieces of evidence. Firstly, the 2nd appellant went to *hide* in the house of PW5. He told PW5 that he was with *Munene* (the 1st appellant) and were being pursued by *boda boda* riders. Secondly, PW3 recovered from the residence a black leather jacket which the complainant said was worn by one of the attackers.

26. I thus concur with the learned trial magistrate that the 2nd appellant was the second pillion passenger who perpetrated the robbery. The 2nd appellant escaped when he was confronted by PW6 and other riders at Kanyenyaini. He first sought refuge from PW4 who declined to open for him. He was finally accommodated by PW5. I draw an unfavourable *inference* from that conduct.

27. From the *direct* and *circumstantial* evidence, I entertain no doubt that the two appellants were the robbers. It is immaterial that the knife that was used in the attack; or, the money was not recovered. The statements of defence proffered by both appellants were a sham and bogus. I find that all the elements of *robbery with violence* were proved beyond reasonable doubt. The appeal against conviction is *dismissed*.

28. I will now 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]

29. 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.

30. The appellants were *first offenders*. They were granted an opportunity to mitigate but they both wasted it by continuing to protest their innocence. The appellants were armed with a knife and a cable. The 1st appellant used the cable to strangle the complainant. The degree of injury was *harm*. Justice is better served by a long prison term.

31. The sentence of *death* is *set aside*. I sentence each of the appellants to serve *twenty (20) years* imprisonment. For the avoidance of doubt, the term of imprisonment shall take effect from 17th February 2015, the date of the *original* conviction and sentence.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 16th day of July 2019.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Both appellants.

Mr. J. Kimwere holding brief for Mr. Nzavi for the appellants.

Ms. R. Gichuru for the Republic.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.