



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 38 OF 2015

DAVID OKOTHAPPELLANT

VERSUS

REPUBLICRESPONDENT

(An appeal from the conviction and sentence in Msa CM CR. Case No. 2077 of 2013 (Hon. I. Ruguru Ag. SRM) delivered on 30/1/15)

J U D G M E N T

1. **David Okoth (“the Appellant”)** was charged with the offence of robbery with violence contrary to *section 295 as read with section 296(2) of the Penal Code*. It was alleged that on 29th August, 2013 at the Likoni Matatu terminus in Mombasa District in the Mombasa County, jointly with others not before court, the appellant robbed Issa Ahmed Abdille of his phone make Nokia X2 valued at Kshs.6,000/-, cash Kshs.3,000/-, Nokia mobile battery valued at Kshs.500/-, mobile earphones, a ring and a bungle valued at Kshs. 1,000/- all valued at Kshs.10,000/- and immediately before the time of such robbery used actual violence on the said Issa Ahmed Abdille.
2. The appellant denied the charge, was tried and was found guilty and convicted of the offence and sentenced to suffer death. He has now appealed to this court against the conviction and sentence.
3. This being first appellate court, the court is enjoined to re-appraise and evaluate the evidence afresh and come to its own independent findings and conclusions. In so doing, the court must have in mind that it did not have the advantage of seeing the witnesses. **(See Okeno v. Republic [1972] EA)**.
4. On 29th August, 2013 at about 8 pm, **Issa Ahmed Abdille (PW1)** alighted from a matatu at Likoni ferry terminus and started to walk towards Mama Ngina Drive. He was then accosted by two people. One of them whom he identified as the appellant held his neck and they dragged him towards the caves near the ocean. The two were joined by two other people whereby they searched his pockets and robbed him of various items set out in the charge sheet.
5. Luckily, a good Samaritan passing by madethe attackers to leave him and take to their heels. The good Samaritan helped the complainant overpower the appellant and took him to the Likoni Police Post. A mobile phone Nokia X2 was recovered from the appellant. The complainant was issued with a P3 form and he went to Coast General Hospital where he was examined and treated. He later made his statement to the police.
6. **PW2 Stephen Kiilu Matolo**, a member of community policing recalled how on the material day at about 9 pm he received information that someone had been attacked and dragged to the caves near the ocean. He accompanied other three men and set to the scene. On arrival, two men run away but they succeeded in apprehending the appellant whom they arrested and took to the police.
7. **PW3 Dr. L. Ngone** told the court how he attended to the complainant on 30th August, 2013 at the Coast General Hospital. He filled the P3 form and assessed the degree of injury as harm.
8. **PW4 Julius Gisemba** investigated the case and at the time based at the Port Police Station. He recalled receiving information from the Likoni Ferry Police patrol base on the material day that there was a suspect in custody who needed to be escorted to the police station. He went there at about 11.30pm and took custody of the appellant. He also found the complainant at the post who informed him that the appellant and others had robbed him of the things itemized in the charge sheet.
9. The following day he recorded statements from the complainant and **PW2**. Except the mobile phone, all the other items were not recovered as they were taken away by the appellant’s accomplices.
10. In his defence, the appellant stated that on the material day, he was from his work place at Blue room when he boarded a Likoni bound matatu at GPO. Unfortunately, he stepped on the complainant’s feet who threatened him. When they alighted at the Ferry, the complainant

started beating him and he defended himself. The complainant told the crowd that had milled around that he had robbed him. The community policing came and took him to the Ferry Police Booth.

11. The appellant set out grounds of appeal which can be summarized as; ***the trial court erred in returning a conviction on unproved charge and that his defence was not considered.***

12. Both parties filed their respective submissions which the court has duly considered. The principal submission of the appellant was that the sentence of death meted out on him by the trial court was illegal and unconstitutional. He relied on the decision of the Supreme Court of Kenya in **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR**. He further submitted that the prosecution evidence was contradictory, that the charge was not proved to the required standard and that his defence was not considered.

13. On her part, **Ms. Mwaura**, Learned prosecutor submitted that the charge was proved to the required standard; that the sentence was legal since the appellant's defence and mitigation had been considered. She however, submitted that the court should reconsider reducing the sentence from one of death to imprisonment of between 30 and 40 years.

14. On the insufficiency of the evidence, the record shows that the complainant testified that he was attacked by two assailants who included the appellant. That he held onto the appellant throughout the struggle until help came. **PW2** came and found the two struggling whereby they arrested the appellant and surrendered him to the police. There was lighting at the time. The complainant and the appellant remained together at the ferry police post until **PW4** came from Port Police to take the appellant into custody.

15. As to what was stolen, the complainant was consistent and remained firm on what was stolen from him. The prosecution evidence remained unshaken throughout. To my mind the ingredients of the offence were fully proved to the required standard.

16. As regards the appellant's defence, he told the court that he alighted from the Likoni bound matatu whereby the complainant set upon him as they had quarred inside the matatu. The record shows that the trial court considered that defence and in view of the unshaken evidence of the prosecution, properly rejected it. In this regard, all those grounds of appeal fails.

17. However, the court noted that the appellant was charged under both section 295 and 296 (2) of the Penal Code.

That made the charge duplex. In **Joseph Njuguna Mwaura & 2 others -v- Republic [2013] eKLR** the Court of appeal observed: -

“The offence of robbery with violence is totally different from the offence defined under section 295 of the Penal Code, which provides that any person who steals anything, and at, or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or to property in order to steal. It would not be correct to frame a charge for the offence of robbery with violence under section 295 and 296 (2) as this would amount to a duplex charge.”

18. In the cases of **Mwaniki -v- Republic [2001] eKLR** and **Paul Katana Njuguna -vs- Republic [2016] eKLR** the Court of Appeal was of the view that of the duplicity if the charge did not cause any prejudice, the defect is curable under **section 382 of the Criminal Procedure Code**. In the present case, there was no evidence that the appellant suffered any prejudice. He seems to have known from the outset the case he was facing. The error is therefore excusable.

19. The appellant contended that the sentence of death meted out him was illegal on the authority of the **Francis Muruatetu Case**. Nothing could be further from the truth. The Supreme Court of Kenya did not declare the death sentence illegal of unconstitutional, it is the mandatory nature of that sentence that was declared unconstitutional as it removes the discretion of a court in sentencing.

20. The record shows that the appellant was not a first offender. He had a previous conviction of three months in Criminal Case No. 2078 of 2014. The appellant told the court that he had nothing to offer in mitigation. The court noted that demeanor and meted out the death sentence as per law provided.

21. The prosecutor urged the court to reduce the death sentence to one of imprisonment between 30 and 40 years. I note the gravity of the offence and that what was robbed of the complainant were items valued about Kshs.10,000/-. Although the complainant sustained some injuries, they were not serious. There were no weapons used although the appellant was in the company of others. Further, the appellant was not given any bond during the trial. He remained in custody ever since he was charged on 2nd September, 2013.

22. In view of the foregoing, I dismiss the appeal on conviction. I allow the appeal on sentence and set aside the death sentence and replace the same with a sentence of seven (7) years imprisonment. The sentence will run from the date the sentence was passed on 31st January, 2015.

It is so ordered.

DATED and **DELIVERED** at Mombasa this 6th day of September, 2019.

A. MABEYA

JUDGE