



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 119 OF 2017

CORAM: D.S. MAJANJA J.

BETWEEN

SAMUEL MICHUBU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon.A.G.Munene, SRM dated 25th July 2017 at Chief Magistrate's Court at Maua in Criminal Case No. 129 of 2013)

JUDGMENT

1. The appellant **SAMUEL MICHUBU** and his co-accused were charged with the offence of robbery with violence contrary to **section 296 (2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. It was alleged that on 10th January 2013 at Laare Village, Antuambui Location, Igembe North District of Meru County, the appellant jointly with others not before court while armed with a dangerous weapon namely a panga robbed **STEPHEN NKUNJA** of miraa valued at Kshs. 8,000/= and immediately after the time of the incident he used violence against the said **STEPHEN NKUNJA**. The appellant was convicted and sentenced to death. He now appeals against conviction and sentence.

2. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see ***Okeno v Republic [1972] EA 32***).

3. Stephen Nkunja (PW 1) testified that he had been employed as a watchman to guard miraa. On 10th January 2013 at about 2.30am, he was on his duties when he spotted two people plucking miraa. He shone the torch and saw one of them and got hold of him. The other person came at him with a panga and tried to cut him but in the course of blocking him, he was cut three times. The assailants ran off but not before he had recognised the appellant as one of them. Some elders who were nearby responded and came with torches and gave chase while other people who were at a funeral joined in and pursued the assailants until they caught up with the appellant and he was taken to Laare Police Station. PW 1 was later treated and issued with a P3 form. He recalled that the attackers had harvested some miraa which was never recovered.

4. Patrick Kobia (PW 2) recalled that on the material night he was at a clan meeting when he heard someone screaming, "Mwizi, Mwizi." He recognised that it was PW 1 shouting, he joined the group looking for the thieves and they followed footprints that led to a home where there was a funeral. They arrested the appellant after he was identified by the people in that home who noted that he had just arrived.

5. Richard Michubu (PW 3) was one of the people attending his uncle's funeral vigil on the material night when the appellant came running while being chased by clan members together with PW 1 who had been cut on his hand. The youths arrested the appellant and escorted him to the Police Station after the clan members said they were looking for him.

6. James Mithika (PW 4), a Clinical Officer at Laare Maternity and Nursing Home, examined and treated PW 1 and prepared the P3 form. He confirmed that PW 1 had sustained a deep cut wound about 4 inches on the left palm, cut wound on the left middle finger and an injury on the left forearm. He opined that the probable weapon used was sharp. He assessed the degree of injury as grievous harm.

7. The Investigating Officer (PW 5) recalled that at about 10.00am, PW 1 was brought to Laare Police Station on suspicion of stealing from PW 1's farm. He stated that the value of the stolen miraa was about Kshs. 8,000/-.

8. In his defence, the appellant denied the charge against him. He decided to make submissions on the evidence instead.

9. The thrust of the appellant's case is that the prosecution did not prove its case beyond reasonable doubt. The thrust of his appeal is that he was not identified as the person who stole from the farm PW 1 was guarding.

10. The offence of robbery with violence under **section 296(2)** of the *Penal Code* is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at or immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see *Dima Denge Dima & Others v Republic NRB CA Criminal Appeal No. 300 of 2007 [2013] eKLR*, *Oluoch v Republic [1985] KLR 549* and *Ganzi & 2 Others v Republic [2005] 1 KLR 52*).

11. Having evaluated the evidence, I am satisfied from the testimony of PW 1 and PW 2 that a robbery took place. There was a gang of people stealing miraa from the farm PW 1 was guarding and in the course of stealing, one of the assailants inflicted violence on PW 1 with a panga causing him to suffer several injuries which were confirmed by PW 4.

12. The key issue in this appeal is whether the appellant was identified as one of the assailants. The incident took place at night in admittedly difficult circumstances. This calls for careful examination of the evidence to exclude the possibility of mistaken identity. Such evidence must be watertight before a court can return a conviction (see *Abdalla Bin Wendo & Another v R [1953] 20 EACA166*, *Wamunga v Republic [1989] KLR 42* and *Maitanyi v Republic [1986] KLR 198*). Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him (See *R v Turnbull [1967] 3 ALL ER 549*). These requirements are, however, relaxed when dealing with the case of recognition because, "*recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other*" (see *Anjononi & Others v Republic [1980] KLR 59*). However, even in such cases, the court must bear in mind that even where parties had prior or close relationship, mistakes can still be made in identification hence the court must still exercise a level of caution.

13. This was a case of recognition rather than identification of a stranger. PW 1 testified that he knew the appellant as he used to visit his friends who trade in miraa. PW 1 told the court that he had a torch which he shone at the assailants when they came towards him. The fact that he was able to grab one of them when the other one came to cut him with a panga means they were close enough for him to recognise the appellant. These circumstances were, in my view, favourable for the positive recognition.

14. PW 1's testimony is augmented by the fact that after PW 1 raised alarm he gave chase to the assailants. PW 2 and PW 3 both testified that the appellant ended up at the funeral where he was arrested. The totality of the evidence is that the appellant was duly recognized as one of the assailants who came to steal miraa when PW 1 was assaulted. I affirm the conviction.

15. Following the Supreme Court decision in *Francis Karioko Muruateru & Another v Republic SCK Pet. No. 15 OF 2015 [2017] eKLR* declaring the mandatory death sentence for the offence of murder unconstitutional and the subsequent case of *William Okungu Kittiny v Republic KSM CA Criminal Appeal No. 56 of 2013 [2018] eKLR* where the Court of Appeal applied the *Muruatetu* decision *mutatis mutandis* to the provisions of **section 296(2)** of the *Penal Code*, I set aside the sentence and call upon the appellant to make his mitigation.

DATED and DELIVERED at MERU this 5th day of June 2018.

D.S. MAJANJA

JUDGE

RULING ON SENTENCE

The appellant's conviction has now been affirmed. He prays for leniency as he has young children. The nature of the offence is serious and having considered that he was a first offender, I sentence **SAMUEL MICHUBU** to **fifteen (15) years** imprisonment. Right of Appeal explained.

DATED and DELIVERED at MERU this 5th day of June 2018.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Kiarie, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.