REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 177 OF 2017

GEORGE WAINAINA NDUNGU...APPELLANT

VERSUS

REPUBLIC...RESPONDENT

CONSOLIDATED WITH

HCCRA NO. 145 OF 2017

GODFREY GITANGA KARITE..APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(Being an appeal against conviction and sentence from original criminal case file No. 4354 of 2009 by Hon. Court SRM L. W. Gicheha at Thika Law Courts dated 10th September 2010)

JUDGMENT

1. In this consolidated appeal, **George Wainaina Ndun'gu** shall be referred to as the **1st appellant** while **Godfrey Gitanga Karite** shall be referred to as the 2nd Appellant.

2. The appellants were jointly charged with the offence of Robbery with Violence contrary to **Section 296(2) of the Penal Code** on the 16th September 2009.

After a full trial, they were convicted and sentenced to death.

This appeal is against both the conviction and sentence and primarily on based on issues of:

(a) Identification/ recognition

(b) contradictory and uncorroborated evidence

(c) Defence evidence not considered.

3. Both appellants filed Amended grounds of appeal and written submissions on the 12th February 2018 and supplementary grounds of appeal on the 14th June 2018.

They sought to rely on their submissions, and oral highlights.The respondents tendered oral submissions in opposition to the appeal.

4. As the first appellate court, it is my duty to and re-analyse the evidence adduced before the trial magistrate and come up with my own findings and conclusion. I am however warned that I never saw or heard the witnesses testify – **Republic -vs- George Anyango Anyang & Dennis Odul Cr. App. No. 53 of 2016(2016) e KLR.**

5. For an offence under **Section 296(2)** to be proved, three ingredients must be demonstrated and proved thus,

(a) The offender is armed with any dangerous and offensive weapon or instrument or,

(b) The offender is in the company with one of more person or person, or

(c) At or immediately before or immediately after the time of the robbery the offender wounds, beats,strikes or uses other person violence to any person.

6. The above was stated by the **Court of Appeal in Mohamed Ali -vs- Republic (2013) e KLR,** among others and further proceeded to render **that proof of any one of the above ingredients is sufficient to establish on offence under Section 296(2) Penal Code.**

7. **<u>Identification by recognition</u>**

This is the gravamen of the appeal. It is trite that a court ought to approach evidence of visual identification with care and caution as stated by the Court of Appeal in the case **Antony Muchai Kibuika -vs- Republic (2013) e KLR.**

8. The principles of identification/recognition were stated in the case **Simiyu & Another -vs- Republic (2005) 1 KLR 192** that:

> ***"In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that descriptions are matters of the highest importance of which evidence ought always to be given first of all by a person or persons who gave the description and purport to identify the accused and then by the person or persons to whom the description was given."***

9. The particulars of the offence was that on the 6th day of September 2009 at Railway crossing Ruiru Township within Thika District of Central province while armed with dangerous weapons namely a panga and a knife robbed Simon Karanja Mwangi of Kshs.7,600/= mobile phone make L6 – Motorolla all valued at Kshs.11,700/= and at the time of robbery threatened to use actual violence to Simon Karanja Mwangi.

10. **PW1** Simon Karanja testified that on the material day about 4.00a.m. at the Ruiru railways crossing as he went to work was accosted by three men, who beat him and cut him on the head with a panga and robbed him of the money. It was his further evidence that he identified them using a security light from Kenya Railways as people he knew. That after reporting at the police station and treatment at the hospital, and as he went home, he met the robbers again.

11. He testified that the 2nd appellant had the *panga* while 1st appellant had a stick and another who was not arrested had a knife. He testified that he then went back to the police station and led the police officer (**PW2**) to where he met them. They were arrested after about two hours, at 7.00a.m at a bar (2nd appellant) and 1st appellant at the stage.

On cross examination by the appellants, the complainant was categorical that he knew the robbers before the incident and so could recognise them as having seen them at Ruiru town where they lived.

12. It was his evidence that at the police station soon after the robbery, he made a report and stated that he knew the people who attacked him, did not give their names but could identify them.

13. **PW3** PC Patrick Kibere testified that he was lead by the complainant to arrest the robbers but nothing was recovered. He produced the P3 form and treatment card – MFI 2 and MFI 13 – He stated that the complainant did not give names or description of the robbers but only that he could identify them, as he knew them. **PW4** a clinical officer produced the P3 Form showing the injury the complainant sustained on the head, multiple cut wounds, his eye and thumb filled five hours after the incident – (PExt 1 and 3).

14. In their unsworn evidence, the appellants denied committing the offence.

The 1st appellant denied knowledge of the 2nd appellant and the complainant prior to the incident, and that he was a student at Ruiru.

The 2nd Appellant too denied committing the offence as charged.

15. I have earlier in this judgment stated the ingredients that ought to be satisfied for conviction on the offence under **Section 296(2) Penal Code** to be sustained, and the safeguards that the court ought to be aware of in admitting evidence of identification on recognition.

16. The Court of Appeal in **Norman Ambich Miero & Henry Kisinja Anjili -vs- Republic in Cr. App No.279 of 2005 (2012) e KLR,** citing the **English case of Turnbull & Others (1976) 3 ALL ER 549** rendered that the court must consider factors such as the distance between the witness and the suspect when he had him under observation and the length of time the witness saw the suspect, and the lapse of time between the date of the offence and the time the witness identified the suspect to the police.

17. In this case the complainant was aided by the Kenya Railways security lights at the railway crossing where the robbery took for about 10 minutes and a report made to the police soon thereafter, and within less than three hours met the assailants as he went home from the hospital and upon a report to the police. The arrest was effected by 7.00a.m., within the three hours. It cannot be a coincidence that the complainant met the people he claimed to have robbed him twice in such a short period. In my view the complainant knew and could recognise them upon seeing them despite not knowing their names.

18. Circumstances of the identification was such that no possibility of an error could have occurred.

It is also curious that the appellants never cross examined the complainant on the matter of recognition/identification.

In that regard, and upon re-evaluating the entire evidence, I am satisfied that the appellants were properly identified as the assailants and agree with the trial court that there was no miscarriage of justice at all.

19. **Contradictory and inconsistent Evidence**

The complainant (**PW1**) testified that he had been robbed of Kshs.7,600/= and a Motorola phone. **PW2** the investigating officer stated that he was investigating robbery of Kshs.10,600/=. In the charge sheet, amount of money alleged to have been stolen was Kshs.7,600/=.

Does the difference in the amount of money stated above prejudice the appellants?

Would that difference make the charge sheet defective in terms of **Section 214(1) of the Criminal Procedure Code?**

Was there a necessity for the charge sheet to be amended or altered in view of the circumstances?

20. Having considered the evidence against the charge sheet, variance with the money stolen is not so material in my view to result to a defect in the charge. The material fact is that the complainant was robbed of money and a mobile phone and that during the said robbery, or thereafter, violence was used on him.

21. I do not find any unsatisfactory circumstances in the manner the appellants were arrested. They were pointed to the police officer (**PW4**) by the complainant who had recognised them, not once but twice, within a period of three hours. It was not suggested by the appellants that there existed bad blood between them and the complainant which would have lead him to fabricate and stage manage the robbery.

22. I am also satisfied that the appellants defence was considered by the trial court. The two appellants placed themselves at Ruiru town at the time of robbery. Their denial of the offence was not supported by any other evidence save to deny having been involved.

An opportunity was accorded to the appellants to defend themselves. I find no breach of the rules of natural justice and right to be heard in terms of **Article 50 of the Constitution.**

For the foregoing, I find the appeal against conviction without merit. The conviction is upheld.

23. The appellants were sentenced to death as per the law provided – Section 296(2) of the Penal Code. However, in 2017, The Supreme Court in the **Francis Karioko Muruatetu & Another -vs- Republic, SCK Pet No.15 of 2917(2017) e KLR,** declared the death penalty unconstitutional and gave the courts discretion to pass any other sentence due regard to mitigating factors and circumstances. It did not however outlaw the death sentence and it remains legal under **Article 26(3) of the Constitution.**

24. I have considered mitigation by both appellants before the trial court and submission on the subject before me.

I have taken into account the subject of the robbery which was Kshs.7,600/= and the type of injury inflicted upon the complainant.

I have also considered cases where the courts have exercised their discretion in sentencing – **Moses Kinyua Muchai -vs- Republic HCCRA No.142 of 2017, HCCRA No.13/2018 Benjamin Kemboi -vs- Republic, and Wycliff Wangusi Mafura -vs- Republic (2018) e KLR.**

25. In exercise of my discretion and upon consideration of factors stated, I substitute the death sentence meted on the appellants with imprisonment.

I note that the appellants have already served close to nine years imprisonment since the sentence on the 10th September 2010. In my view that is sufficient sentence for the offence, under the circumstances.

Unless otherwise lawfully held, the appellants are set free.

Dated, signed and Delivered at Kiambu this 20th Day of September 2018.

J.N. MULWA

JUDGE