IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 147 OF 2017

CORAM: D.S. MAJANJA J.

BETWEEN

TIMOTHY GIKUNDI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of

Hon. E. Mbicha, SRM dated 16th November 2017

at the Chief Magistrate's Court at Meru

in Criminal Case No.921 of 2016)

JUDGMENT

1. The appellant, **TIMOTHY GIKUNDI,** was charged, convicted and sentence to death for the offence of robbery with violence contrary to **section 296 (2)** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. The particulars of the charge were that on 15th March 2016 at Kiathandi Village, Runogone Location in Meru Town, Imenti North District within Meru County while armed with a dangerous weapon namely a panga, he robbed **H K** of Kshs. 2,300/- cash, two handbags containing personal documents and a sword all valued at Kshs. 3,800/- and immediately before or immediately after such robbery used actual violence on the said **H K**.

2. 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 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)**.

3. In this case there is no doubt that a robbery took place on the night of 15th March 2016. H K (PW 1) was asleep in her house when she was woken up by a person wielding a panga and a torch who demanded money and proceeded to cut her with the panga. Her grandchild, S M (PW 2) who was in the house at the same time, testified that she saw the assailant who demanded money from PW 1 but did not injure her. Both of them raised alarm and in due course the neighbours came to assist them after the assailant had ran away. PW 1 sought treatment at Meru Level 5 Hospital and the P3 form was produced by Dr Charles Muchangi (PW 3), the doctor who examined her on 22nd March 2016. He observed that PW 1 had a deep cut wound on the right side of the forehead bruises on the left side of the face, tenderness on the upper back posteriorly and bruised right upper arm. He concluded that the type of weapon used was sharp and blunt.

4. Corporal Vincent Dado (PW 5) confirmed that he received PW 1's report of the robbery at Kianderu Police Patrol Base. He issued the P3 form and noted that the appellant could not be found until 1st May 2016 when he was arrested and a jacket recovered in his house which PW 1 and PW 2 identified as being the jacket he was wearing on the night he carried out the attack. A Scenes of Crime Officer, Gabriel Kosgey (PW 6) took photographs of PW 1's house and produced them in court.

5. The appellant denied the offence in his testimony. He stated that between 1st March 2016 and 30th April 2016, he was working in Nanyuki and that on 1st May 2016, while he was at the local market, he was arrested. The appellant's mother, Mary Kinatore (PW 2) supported the appellant's case that he went to work in Nanyuki.

6. 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**). Having evaluated the evidence, I am satisfied that the offence of robbery with violence was committed as PW 1 was attacked and her cash and personal items stolen. Her testimony was supported by that of PW 2 and her injuries confirmed by PW 3. The photographs produced by PW 4 show that the assailant entered the house by breaking into the wooden wall.

7. The single and substantial issue in this case is whether the appellant was identified as the person who attacked PW 1. The incident took place at about 3.00am in obviously difficult circumstances. In ***Wamunga v Republic*** **[1989] KLR 424** the Court of Appeal warned that:

> **[W]here the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely be the basis of a conviction.**

8. 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 ***Maitanyi v Republic*** **[1986] KLR 198** and ***R v Turnbull*** **[1967] 3 ALL ER 549)**. The Court of Appeal was categorical in ***Kiarie v Republic*** **[1984] KLR 739**, that reliance on such evidence of identification must be *"absolutely watertight"* to justify conviction.

9. It is also accepted in law that evidence of recognition is stronger than that of identification because recognition of someone known to one is more reliable than identification of a stranger (see ***Anjononi & Others v Republic*** **[1980] KLR 59**). But in ***Wanjohi & 2 Others v Republic*** **[1989] KLR 415**, the Court of Appeal held that, "recognition is stronger than identification but an honest recognition may yet be mistaken."

10. The testimony of PW 1 was that the assailant broke into the room and woke her up, he had a torch and a panga. She described the torch as having a lot of light and that she recognised him as he demanded to be given the money which she had withdrawn from MPESA. PW 2, who was also in the same room, confirmed that she woke up when she heard PW 1 scream and saw the appellant with a panga and torch, which she described as one with a wide head and producing a lot of light.

11. I am satisfied that PW 1 and PW 2 were able to see the appellant using the torch light which the appellant was using while attacking PW 1 and demanding money. Further, the level of interaction and time of interaction while the appellant was making demands and threatening to kill her was sufficient time in the confines of the small room and the proximity to each other were all circumstances favourable for positive identification. But this was not a case of identification of a stranger. The appellant was well known to both PW 1 and PW 2. PW 1 testified that she had known him for 2 years as he used to pass her home and talk to her children. PW 2 also told the court that she knew the appellant as she used to see him and talk to him while going to and coming from school. The appellant also admitted that he knew PW 1.

12. In addition to the evidence of identification at the scene, PW 5, the investigating officer, testified that when PW 1 reported the incident she mentioned that it was the appellant who attacked her. He also told the court that the appellant disappeared from the village and was arrested when PW 1 led him to arrest the appellant when he returned to the village.

13. The appellant proffered an alibi in his defence. The law is settled that an accused person who raises the defence of alibi does not assume the burden of proving it. It is sufficient if the alibi raises reasonable doubt as to whether or not the accused was at the scene of the crime (see ***Kiarie v Republic*** **[1984] KLR 739).** This means that the burden always remains with the prosecution to prove that the accused committed the crime under trial.

14. When considered alongside the evidence of recognition by PW 1 and PW 2 and the fact that appellant disappeared from the village after the incident, the proffered defence undermines the appellant's case. PW 1 and PW 2 were clear that the appellant would be seen in the village and nothing was suggested to them in cross-examination that he was working elsewhere. His defence is consistent with his disappearance until the time he was arrested after being identified by PW 1. His mother, DW 2, could tell whether the appellant could have attacked PW 1 on the material night.

15. From the totality of the evidence, I am satisfied that the recognition of the appellant by PW 1 was safe and free from the possibility of error. Her testimony was supported by that of PW 2 who was also present at the scene. She named the appellant to the police in the first instance and actually led to his arrest when he re-appeared in the village after disappearance. Moreover, the jacket he was wearing on the night he attacked PW 1 was identified by PW 1 and PW 2. I therefore affirm the conviction.

16. Following the Supreme Court decision in ***Francis Karioko Muruatetu & 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 therefore set aside the sentence. I therefore call upon the appellant to make his mitigation.

DATED and DELIVERED at MERU this 17th day of October 2018.

D.S. MAJANJA

JUDGE

RULING ON SENTENCE

I have considered that the appellant attacked a 72 year old woman whom he knew. Although he pleads for leniency, the assault was vicious and taking all factors into consideration, I sentence the appellant to twenty (20) years imprisonment.

DATED and DELIVERED at MERU this 17th day of October 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.