



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBERS 109 & 110 OF 2017

(CONSOLIDATED)

BETWEEN

DANIEL KIMATHI KIRIAMBEL.....1ST APPELLANT

PIUS MWITI KIBWAYI.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence dated 21st September, 2017 by Hon. Sogomo G., Senior Resident Magistrate in Tigania Senior Resident Magistrate's Court Criminal Case NO. 1642 of 2009)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGEMENT

Introduction

1. The two appellants were tried and found guilty and convicted of **two counts of robbery with violence contrary to section 296 (2) of the Penal Code**. The particulars of Count I are that on the 21st day of November, 2009 at Kathithini market in Tigania East District within Eastern Province, jointly with others not before court robbed JOHN KAMUKU MULI [of] a mobile phone make Nokia Series and cash Kshs 800/= all valued [at] Kshs 16,800/= and at or immediately before or immediately after the time of such robbery wounded JOHN KAMUKU MULI. In Count II, the two appellants are alleged to have robbed MARTHA FAITA JOHN of a mobile phone make Nokia N-93 Series valued at Kshs 11,000/= and at or immediately after the time of such robbery threatened to use actual violence to the said MARTHA FAITA JOHN.

2. Upon conviction, the appellants were each sentenced to suffer death as by law established. The sentence of death in respect of Count II was, and correctly so, held in abeyance. It has been held by courts that a man can die only once and not twice, so that where the first death sentence is executed, it would be useless to continue holding another death sentence on the head of a man/woman who has already died.

The Appeal

3. Both appellants were dissatisfied with the entire judgment of the Learned Trial Court and accordingly filed their respective appeals, being 109 and 110 of 2017. For convenience, and because the appeals arise from the same case, the two appeals were consolidated by an order of this Honourable Court issued on 6th September, 2018. The consolidated appeal thus proceeded under CRA Number 109 of 2017.

4. The appellants' grounds of appeal are similar save for the name. On the day of the hearing of the appeal the appellants filed similar amended supplementary grounds of appeal as follows:-

1. That, the Learned Trial Magistrate erred in matters of law by failing to note that the circumstances at the scene of crime did not warrant a positive identification/recognition for the illumination used when the incident took place could not make it possible for anyone to identify anybody at that particular hour.

2. That, the Learned Trial Magistrate erred in matters of both law and fact by failing to note that the complainant planted the

issue to the appellant because his brother was killed during the tribal clash that erupted between the two tribes sometimes before the incident.

3. That, the Learned Trial Magistrate erred in both law and fact by failing to note that the appellant's name was not recorded, booked or indicated anywhere on record after the incident, despite the complainants claiming that they identified him at the scene of crime.

4. That, the Learned Trial Magistrate erred in both law and fact by failing to note that the evidence adduced before court lacked merit and was not sufficient to sustain a secure conviction.

5. That, the Learned Trial Magistrate erred in both law and fact by not noting that the witnesses' testimonies were contradicting inconsistency and uncollaborating.(sic)

6. That, the Trial Magistrate erred in both law and fact in failing to note that the area was insecure due to tribal clashes between Tigania, Kamba and Tharaka and so the attackers could have been the tribal culprits.

7. That, the Trial Magistrate erred in both law and fact by failing to note that there was no any independent evidence from any independent body or party.

8. That, the Trial Magistrate erred in both law and fact by not noting that the appellant's name was not booked at the O.B. report that was made at the police station by the complainants, despite them claiming that they knew him since childbirth.

9. That, the prosecution did not prove their case beyond reasonable doubts that it was the appellant who got involved in the said offence.

5. The appellants pray that their appeals be allowed, convictions quashed and sentences set aside.

6. This being a first appeal, this court is under a duty to reconsider all the evidence on record, analyze it and evaluate it afresh with a view to reaching its own conclusions in the matter, only remembering that in its appellate jurisdiction, the court has not opportunity of seeing and hearing the witnesses who testified during the trial. This caution means that this court has to tread carefully in determining whether or not to interfere with any findings of the Learned Trial Court, which are based on the demeanor of witnesses. It is also worthy of note that unless it is clear to the appellate court that the Learned Trial Court failed to appreciate the principles of law or completely misapprehended the evidence, the judgment of the Learned Trial Court should be left intact. Generally see Okeno -vs- Republic (1972) EA 32.

The Prosecution Case

7. The prosecution called 5 witnesses from whose testimonies, the prosecution case is as follows: At about 7.00 p.m. on 21st November, 2009, John Kamuku Muli who testified as PW2 (John), a UN worker with APEX in Juba South Sudan, was walking to his home at Gatithini area from Gatithini market. He was in the company of his wife, MARTHA FAITA JOHN, PW1 (Martha). As John and Martha walked in the cool of the evening they encountered 7 people who had tied their shirts on their heads. They ordered the two of them to stop. John was ordered to lie down as the group asked for money and phones. The 7 men were armed with pangas and arrows. The couple handed over their phones. The men also took sugar, cooking fat, vegetables and a lesso which Martha was carrying. Some Kshs 400/= (four hundred) had been tied on the lesso.

8. When John appeared like he was not readily giving out money and his phone he was threatened by having an arrow pointed at him. Fearing for his life John gave out Kshs 800/= which he had on him. He also gave out his new Nokia phone valued at Kshs 16,800/=. Martha's Nokia phone was valued at Kshs 11,000/=.

9. As John remained seated on the ground 2 of the 7 robbers got hold of Martha and ordered her to go with them to the forest to give them money but she told them she did not have it. A struggle ensued between Martha and the 2 robbers who were immediately joined by the other 5. Once all the 7 robbers were with Martha, they agreed that they should leave the couple alone since the couple had given them money and phones. The robbers then left John and Martha who proceeded home.

10. Once at home John and Martha informed the neighbours of the incident. The neighbours assisted them to contact the police through Gatithini AP Post in Tharaka North District. Number 95049730 APC Anthony Ileri of Gatithini AP Post received the report from John at about 9.00 p.m. on the same 21st November, 2009. According to APC Ileri, John gave him the names of the persons who had attacked him and Martha. John gave the attackers as Daniel Kimathi, Pius Mwiti and a second Mwiti. Though APC Ileri stated he had written the names on a piece of paper he did not seem to have recorded those names in the Occurrence Book. AP Ileri arrested both appellants using the information given to him by John.

11. On the 24th November, 2009 the two complainants, John and Martha, accompanied by AP officers from Kunati AP camp went to Mikinduri Police Station and reported the incident. Number 85887 PC James Aswani received the report. John and Martha were also accompanied by the two appellants herein after the two had been apprehended. PC Aswani entered the details of the report in the Occurrence Book before he took statements from John and Martha and carried out further investigations into the matter.

12. PC Aswani issued Martha with a P3 form following her report that she had been slapped once on the forehead with a panga. Two days later, PC Aswani visited the scene which was near Kiebeni AP Post. PC Aswani testified that John and Martha had told him they were able to identify their attackers, all of whom were their neighbours whose names he gave as Mwiti, Daniel, Kiburi Pius Kimathi and Daniel Kiriambei. According to PC Aswani, the two appellants were arrested 2 days after the incident.

13. Martha attended Miathene District Hospital where she was attended to by Martha Njeri, a clinical officer at Miathene District Hospital, who testified as PW4 (Njeri). On examination Njeri found that Martha had sustained soft tissue injuries during the attack, which included swollen tender head. By this time Martha had already been treated at Mikinduri Sub-district Hospital. Njeri testified that the injuries suffered by Martha had been inflicted by a blunt object.

The Defence Case

14. At the close of the prosecution case the appellants were found to have a case to answer. The first appellant, Daniel Kimathi Kiriambezi gave a brief sworn statement in which he confirmed that John and Martha were well known to him since they lived in the same area with him. He told the court he did not know anything about the allegations that were made against him. In cross examination, he stated that on 21st November, 2009, he was at home with his wife and children. The first appellant did not call any witnesses.

15. The second appellant also gave sworn evidence and confirmed the complainants were well known to him. He denied robbing them and alleged that on 23rd November, 2009, while he was selling samosas at Kathithini market he was arrested on allegations that he was selling food without the required medical licence. Upon arrest he was taken to the police station where he found the first appellant. It was while at the police station he was informed the two of them were partners in crime. He also testified that in the year 2008, John's brother Munyaka was killed during clashes between the Tharakas and Kambas, as a result of which John vowed to teach him a lesson after he (second appellant) had been arrested.

16. When put through cross examination, the second appellant alleged that he was at home with his aged mother when the alleged incident took place. He also stated that both John and Martha were not present when he was arrested. He did not call any witness.

The Submissions

17. The appellants filed their written submission. They both submitted that neither of them was properly and positively identified due to difficult circumstances, the offence having taken place around 7.00 p.m. on the material day. First of all it was submitted it was dark and secondly that the time which both John and Martha spent with the assailants was too brief for them to clearly see the appellants even if the appellants were known to them. They further contended that John and Martha who alleged to know both of them should have given the full names of the assailants with their first report.

18. The appellants also challenged the prosecution evidence against them for being inconsistent and contradictory especially with regard to the date and time of the alleged offence. On the basis of the above complaints each of the appellants urged the court to allow the appeal, quash the conviction and set aside the sentence.

19. The appeal was opposed by Mr. Patrick Namiti prosecution counsel. It was counsel's contention that each of the two appellants was properly identified through recognition since there was no dispute that the appellants knew the complainants and the complainants also knew them for upwards of 15 years. Counsel also submitted that since the ordeal took more than 20 minutes, there was sufficient time for the complainants to recognize the appellants whom they knew and particularly because the appellants had not disguised their faces.

20. As regards the issue of whether the ingredients of the offence of robbery contrary to section 296 (2) of the Penal Code were proved, counsel submitted that the attackers who were more than two in number were armed with pangas, bows and arrows, as well as runguns. Further that during the robbery money was stolen from John while Martha was injured as confirmed by Njeri. Counsel urged this court to confirm both conviction and sentence.

Issues for Determination

21. After a careful analysis of the evidence and submissions, three issues arise for determination:-

- a. Whether a robbery took place on 21st November, 2009 and whether the same was proved to the required standard.*
- b. Whether the appellants were properly identified as being among the robbers.*
- c. Whether the sentence of death was justified.*

Analysis and Determination

a. Whether a robbery took place on 21st February, 2009 and if so were the appellants identified at the scene.

22. From the prosecution evidence by John and Martha, I am satisfied that the couple was attacked as they walked home from the market at around 7.00 p.m. on 21st November, 2009. The attackers forced the two of them to give them money and phones. Martha gave out her Nokia phone valued at Kshs 11,000/= plus cash of Kshs 400/= which was tied onto a lesso into which she had wrapped her shopping. John was also relieved of his Nokia mobile phone valued at Kshs 16,800/= plus Kshs 800/= in cash. John and Martha did not consent to their items being taken away by the attackers who numbered 7 in number and who were armed with pangas and arrows. The attackers had also removed their shirts and wrapped them around their heads.

23. Section 295 of the Penal Code defines robbery in the following terms:

“295. 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 property in order to obtain or retain the thing stolen or to present or overcome resistance to its being stolen or retained is guilty of the felony termed robbery.”

24. The only sticky point is whether the appellants were positively identified at the scene. According to Martha, the time of the attack was 7.00 p.m. According to her testimony she said, **“I know both the two accused as they are my neighbours. Accused 1 home is about 1 km from my home. Accused 2 home is about 2 km from my home. I reported the matter at Mikinduri police station..... I gave the police their names..... I received report they had been arrested about 3-4 days later.”**

25. Later in cross examination, Martha stated: **“I gave the names of the attackers at Mikinduri police station. I gave the names after about 4 days.....The officer did not ask me the names of the attackers. They asked my husband. He gave them the names of the attackers while at home.”** From her earlier testimony when John and Martha got home after the attack, they called police who then came to their home at 10.00 p.m., on the same day, whereupon John gave the names of the attackers before he and Martha accompanied the officers back to the AP Camp.

26. Further in her evidence in cross examination, Martha stated, **“I saw 1st accused at the scene. He is the one who ordered my husband to sit down.”** With regard to the presence of the 2nd appellant at the scene, Martha testified thus on cross examination, **“I recognized some of the attackers. You are one of those who held my hands and told me to go home and give you money. I have known you for more than 4 years as you are my neighbour. I told the police that the attackers were Mwititi.”** In re-examination, Martha stated, **“My husband gave the names of the attackers while at home. I was near when he gave the names.”**

27. On his part, John gave the following account of who he saw at the scene”-

“The 1st accused is the one who pointed the arrow at me. I handed over to him the cash and mobile phone. I have known accused since childhood. I am the one who called the AP..... I told the AP officers that I had identified Kimathi and Pius among the 7 robbers.” Later John stated, **“I said that I gave the names of five suspects to the police i.e. Daniel Kiriambi Pius Mwititi, Joel Ndanya and Kiburi Munyua.”**

28. When John was cross examined by the second appellant (who was 2nd accused) he stated, **“I did not mention your names as some of the suspect who led PW1 away. I was hit on the eye and ear. I identified the 1st accused, you and Kiburi. I identified you at the scene, it is not true I came to think of the suspects while at home. Witness referred to statement. It shows that I said I could identify two of the suspects.”**

29. It is my considered view that the cumulative effect of John’s and Martha’s evidence is that the two appellants were at the scene and that they participated in robbing the complainants in this case. I am satisfied that the testimonies of the complainants were firm and remained unshaken even in the face of the appellants alibi defences which were properly rejected.

b. Whether the charge of robbery contrary to section 296 (2) of Penal Code was proved

30. **Section 296 (2) of the Penal Code** provides that the offence of robbery with violence is proved in any one of the following circumstances:-

(2) 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.

31. I am satisfied from the evidence on record that the charge in the instant case was proved in more than one way. The attackers were seven in number, they were armed with dangerous weapons namely pangas, bows and arrows, they threatened to shoot John with an arrow when the first appellant herein pointed the arrow at him when John was not quick enough to let go of his phone and money and also hit him on the eye and ear. The robbers also stole money and mobile phones from their victims. It is noteworthy that the prosecution did not have to prove all the above mentioned circumstances, but as it turned out, the prosecution proved all the circumstances mentioned under section 296 (2) of the Penal Code.

32. Consequently the appeal on conviction fails. With regard to sentence the Supreme Court in **Karioko Muruatetu and another -vs- Republic (2017) eKLR** stated that though the death penalty is still in the statute books, it is unconstitutional, and that it need not be the only sentence that a court, which has wide discretion to impose any sentence can mete out to an accused convicted of a capital offence.

33. The above being the position, I hereby set aside the death sentence and direct that the appellants herein give their mitigation before they are sentenced afresh.

It is so ordered.

Judgment written and signed at Kapenguria

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Meru on this 21st day of November, 2018

F. GIKONYO

JUDGE