



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAMIRA**

**CORAM: D.S. MAJANJA J.**

**CRIMINAL APPEAL NO. 15 OF 2016**

**CONSOLIDATED WITH CRIMINAL APPEAL NO. 52 OF 2016**

**BETWEEN**

**ERIC NYAMONGO KONGO.....1<sup>ST</sup> APPELLANT**

**ANDREW MAGUTU ONDIEKI.....2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from the original conviction and sentence of Hon. J. Mwaniki – PM dated 10<sup>th</sup> May 2016 at the Principal Magistrate’s Court at Keroka in Criminal Case No. 871 of 2015)*

**JUDGMENT**

1. The appellants, **ERICK NYAMONGOKONGO** and **ANDREW MAGUTU ONDIEKI** were charged with robbery with violence contrary to **section 296(2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the charge facing them was as follows;

*On the 26<sup>th</sup> day of June 2015 at Kijauri town in Borabu Subcounty within Nyamira County jointly with others not before court while armed with dangerous weapons namely panga and rungus robbed GEOFFREY MATUNDA GEKONGE of one TECNO mobile phone valued at Kshs. 3500/= and cash Kshs. 14,800/= and immediately before such robbery wounded the said GEOFFREY MATUNDA GEKONGE.*

2. Following their conviction, the appellants were sentenced to death thus precipitating this appeal. In their detailed petitions of appeal and written submissions, the appellants contend that the offence of robbery with violence was not proved, that they were not identified as the assailants and that their respective defences were not considered.

3. As this is a first appeal, I am required to re-appraise the evidence and reach my own conclusions bearing in mind that I neither heard or saw the witnesses testify. In order to proceed with this task, I will outline the evidence as it emerged before the trial court.

4. On the evening of 26<sup>th</sup> June 2015, the complainant Geoffrey Matunda (PW 1) and Clinton Orina (PW 2) were together. PW 1 recalled that while walking he met four people and was able to identify the appellants who passed them. The 1<sup>st</sup> appellant hit him from behind with a club while the 2<sup>nd</sup> appellant stabbed him on the head. Others joined then robbed him of his Techno Phone and Kshs. 14,800/=. He told the court that it was not very dark and the lights by a nearby church were on. He lost consciousness following the incident.

5. PW 2 recalled that he was able to see the 2<sup>nd</sup> accused with a panga while the 1<sup>st</sup> accused had a small axe. He also knew the appellants who were working in the area. He told the court that after they had hit PW 1 and he had fallen in a ditch, they started removing money from him.

6. PW 1 was later taken to Kaplong Hospital where he was admitted for three weeks. Before his admission, he was examined by Samson Gichaba, a clinician, on 31<sup>st</sup> June 2015 who noted that he had deep cut wounds on the head, cut wound on the mouth and a broken tooth. He opined that the injuries were caused by a sharp and blunt object. He classified the injuries as harm.

7. The Investigating Officer, PW 5, Corporal Alphonse Akumu told the court that PW 1’s mother reported to the station on 27<sup>th</sup> June 2015

that he had been assaulted on the previous day and had been admitted to hospital. He issued a P3 form to PW 1. He testified that he later arrested the appellants when PW 1 knew.

8. Agnes Kwamboka, PW 3, a business lady and member of the community policing was informed of the incident on 26<sup>th</sup> June 2015 at about 8.00pm. She proceeded to the scene of the incident but did not find PW 1 but she saw blood stains which led to the 1<sup>st</sup> appellant's house.

9. In their respective defences, the appellants denied the offences. The 1<sup>st</sup> appellant in his sworn testimony stated that he knew the complainant. He told the court that he was arrested on 8<sup>th</sup> July 2018. He recalled that he had been instructed to evict the complainant who told him he would suffer for it. The 2<sup>nd</sup> appellant told the court that the complaint was his neighbour and that on 11<sup>th</sup> July 2015, the complaint gave him money to give false evidence in court but he declined to record a statement with the police when he was arrested. He was thereafter charged.

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 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. I am satisfied that the offence of robbery with violence was committed as PW 1 was attacked by more than one person, armed with rufungus and pangas and was severely beaten while his Techno phone and money were stolen. His injuries were confirmed by PW 3.

12. What is in issue is whether the appellants were identified as the assailants. This was an incident that took place late in the evening. PW 1 testified that it was not dark and there were lights from a nearby church. The appellants were not strangers to PW 1 and they in fact admitted as much in their defence. They passed by PW 1 in close view before they assaulted him. In addition to the clear evidence of recognition, PW 2 also testified that he knew them and saw them while PW 5 stated that when PW 1 reported the incident he knew them. The totality of this evidence leaves no doubt that the appellants were clearly identified as the assailants.

13. As regards the defence of the 1<sup>st</sup> appellant, the issue of a grudge was not put to PW 1 in cross-examination. Likewise, the allegation of being paid off was not put to PW 1 and the investigating officer. The appellants' respective defences were an afterthought given that both of them admitted that they knew the complainant.

14. The appellants raised the issue that there was variance in the evidence particularly by PW 4 who stated that he examined PW 1 on 31<sup>st</sup> June 2015 yet the incident took place on 26<sup>th</sup> June 2016. I do not view this as an inconsistency as 31<sup>st</sup> June 2015 is the day PW 1 was examined for purposes of filling in the P3 form. He had been admitted to hospital on the day of the assault, was unconscious and could not report the incident immediately and proceed for examination.

15. I am satisfied that the prosecution proved beyond reasonable doubt that the appellants were the persons who committed the act of robbery with violence. I therefore affirm the conviction.

16. The appellants were sentenced to death. As the mandatory death penalty was declared unconstitutional (see ***Francis Karioko Muruatetu & Another v Republic SCK Pet. No. 15 OF 2015 [2017] eKLR*** and ***William Okungu Kittiny v Republic KSM CA Criminal Appeal No. 56 of 2013 [2018] eKLR***), I set aside the sentence and call upon the appellants to make their mitigation.

**DATED and DELIVERED at KISII this 9<sup>th</sup> day of NOVEMBER 2018.**

**D.S MAJANJA**

**JUDGE**

**RULING ON SENTENCE**

I have considered that the appellants are young men, they are remorseful for what they did and pray for leniency. I also note that the offence was serious and it calls for a higher sentence. Taking all factors into consideration, I sentence **ERICK NYAMONGO** and **ANDREW MAGUTU ONDIEKI** to twelve (12) years imprisonment to run from 14<sup>th</sup> July 2015. Right of appeal explained.

**SENTENCE READ in open Court this 9<sup>th</sup> day of November 2018.**

**D.S MAJANJA**

**JUDGE**

Appellant in person.

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.