



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CORAM: D. S. MAJANJA J.

CRIMINAL APPEAL NO. 9 OF 2017

BETWEEN

KELVIN ODIEKI MOCHAMA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. J. Mwaniki – PM

dated 13th April 2016 at the Principal Magistrate's Court

at Keroka in Criminal Case No. 291 of 2013)

JUDGMENT

1. The appellant, **KELVIN ONDIEKI MOCHAMA**, was charged, convicted and sentenced to death for 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 as follows;

On the 4th day of April 2013 at Keroka township in Masaba North District within Nyamira County, jointly with others not before court robbed CON of his two mobile phones make Nokia 1600 and Bird, ignition key of motorcycle, driving licence, remote control of motorcycle radio all valued at Kshs. 15,000/= and immediately after the time of such robbery used actual violence to the said CON.

2. Cliff Ongeo Nyakundi (PW 1) recalled that on 3rd April 2013 at about 7.00 p.m, he was approached by an Administration Police Officer at Magombo and asked to take the appellant to Rigoma. He took the appellant to Rigoma but the appellant requested that he be returned to Keroka to New Star Bar and Restaurant where he was looking for a certain lady. He assisted the appellant to look around and after a while the appellant hit him on the head and he fell down. The appellant with another person tied him with ropes, stole his Nokia and Bird phones, Kshs. 3000/= and the key to the motorbike.

3. After the appellant and his accomplice took off, he managed to untie himself and go back to New Star where he found his motorbike. He found the watchman there and asked for the person he had been with. The watchman assisted him look for the appellant. They found him at the bar and arrested him. They recovered Kshs. 500/=, motorbike keys and the Bird cell phone.

4. Tom Gekonge (PW 2), a watchman at New Star recalled that on the material night, PW 1 came to where. He assisted PW 1 unties his himself, He recalled that PW 1 described the attacker. PW 2 then told him that a man who had described himself as police officer had booked a room. PW 2 went with PW 1 to search for the assailant and found him at the bar where they recovered a Bird mobile phone, Kshs. 500/= and a motorbike key.

5. Another watchman, Zephania Gekonge (PW 3), testified that he was working with PW 2 and he recalled that PW 2 told him that a person had been attacked and that they were looking for the assailant. He accompanied PW 1 and PW 2 to look for the assailant and when PW 1 spotted the assailant and they arrested him. He confirmed that they recovered the Bird phone which PW 1 identified as his.

6. Corporal Joseph Chirchir (PW 5) recalled that on the night of 4th April 2013, he was called by his Commanding Officer and asked to proceed to New Star where a robbery had taken place. He proceeded there and found the appellant had been detained by two watchmen, PW

2 and PW 3 in presence of PW 1. He took possession of the money recovered, the Bird mobile phone and the ignition keys.

7. After reporting the incident PW 1 went to the hospital for treatment. Joel Ongero (PW 4), a clinical officer at Kijauri Hospital examined PW 1 on 4th April 2013. He noted that PW 1 had a swollen and bruised neck. He opined that the injury was afflicted by a blunt object. He classified the injury as harm.

8. When called to make his defence, the appellant elected to remain silent.

9. 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***).

10. I have appraised the entire evidence as required by the first appellant court and I am satisfied that the prosecution proved the offence of robbery with violence. In his testimony, PW 1 confirmed that he was attacked by the people who tied him up and stole his mobile phone, money and motorbike key. The fact that he was injured was corroborated by PW 4.

11. The issue in this case is whether the appellant was identified as the assailant. The incident took place at about midnight in circumstances that were difficult for positive identification. 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.

12. The appellant and PW 1 had been together from the time he took him to Rigoma DO's office and then to Keroka where they started looking for the appellant's lady friend after PW 1 parked this motorbike at New Star. In my view, this was sufficient time for both the appellant and PW 1 to interact and thus negative any possibility of mistaken identity.

13. After the attack, PW 1 went back to the hotel described the appellant to PW 2 who had seen him come to the hotel. PW 2 and PW 3 helped him in arresting the appellant. I am satisfied that given the chain of events, the appellant was clearly identified as the assailant and arrested close to the scene where PW 1 had been attacked.

14. In addition, the appellant was found with PW 1's mobile phone and motorbike key which PW 1 identified as his. The appellant did not give an account of how these items came to his possession or indeed lay claim to them.

15. The prosecution case hinged on the credibility of the testimony of PW 1, PW 2 and PW 3. Their testimony was mutually corroborating and there was no hint of a grudge or *aminus* against the appellant in the evidence. Considering the chain of events from the time PW 1 was attacked and the appellant arrested and found with the PW 1's phone and motorbike key, I am satisfied that the prosecution proved its case beyond reasonable doubt. The conviction is affirmed.

16. I set aside the sentence of death imposed on the appellant following the Supreme Court decision in ***Francis Karioko Muruatetu & Another v Republic SCK Pet. No. 15 OF 2015 [2017] eKLR*** and the Court of Appeal decision in ***William Okungu Kittiny v Republic KSM CA Criminal Appeal No. 56 of 2013 [2018] eKLR*** declaring the mandatory death penalty unconstitutional. I call upon the appellant to make his mitigation.

DATED and DELIVERED at KISII this 1st day of NOVEMBER 2018

D.S MAJANJA

JUDGE

Appellant in person.

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