REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 49 OF 2016

WAMBUA MUITHYA MUNYOKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an Appeal from Original Conviction and Sentence in **Kyuso Principal Magistrate's Court Criminal Case No. 24 of 2016** by **Hon. B. M. Kimtai (SRM)** on **08/08/16).***

J U D G M E N T

1. **Wambua Muithya Munyoki**, the Appellant, was charged with two (2) Counts of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code.** The Complainants in the 1st and 2nd Counts were **Musembi Mutio** (1st Complainant) and **Dorcas Muyathi Mutemi** (2nd Complainant) respectively.

2. Facts of the case were that on the **17th** day of **January, 2016,** the 1st Complainant was at a pub drinking alcohol with his cousins **Peter Kimanzi** and **Musembi Ndemi.** They left the pub at about **9.00 p.m.** and on reaching the river he saw the Appellant who had been at the pub but left before them. The Appellant was in company of two (2) other persons, namely **Bahati** and **Kimanzi.** The person he referred to as **Muithya** asked him to escort him to the shop to purchase a matchbox. He did but they did not buy any matchbox. They returned and **Mathuva** who had been with him and was standing near the river disappeared. He called him but there was no response. He walked on and saw three (3) people seated. He asked them who they were and one of them sought to know what he was looking for. He proceeded on, only to be followed by the three (3) individuals. He was squeezed between them hence being restricted. **Kimanzi** took the stick that he (Complainant) had. He used it to hit him on the head. **Bahati** held him on the neck while **Muithya** held his hands and legs. They took him to the river where they ordered him to surrender everything that he had. He gave them his cellphone make **ITEL,** one of them tore his pair of trousers and took **Kshs. 700/=** that he had in his pocket. He was stabbed on the neck. He lost consciousness but regained it about **3.00 a.m.** He went home. In the morning he was taken to hospital at **Tseikuru** by his relatives. The matter was to the police.

3. The 2nd Complainant on the other hand was at a fundraiser in **Kithayoni** until **10.00 p.m.** While on her way home she passed by the river where she saw three (3) men. One of them wrestled her. The other two (2) held her legs and hands and tied her. She was stabbed with a knife on her shoulder. She screamed and struggled with them until she freed herself and sought refuge at a neighbors home. PW7 **Mutua Mutemi** her father-in-law ran to the place on hearing her screams. He took her to hospital for treatment. She identified the Appellant as one of her assailants and stated that her cellphone, purse that contained **Kshs. 500/=** were taken from her.

4. When put on his defence, the Appellant opted to remain silent and stated that his relatives informed him that the trial Magistrate had been bribed by the 2nd Complainant.

5. The learned trial Magistrate considered evidence adduced and found the Prosecution's case overwhelming. He convicted the Appellant and sentenced him to suffer death.

6. Aggrieved by the conviction and sentence the Appellant appealed on the grounds that the learned Magistrate erred in convicting him without considering that he was in custody for more than 24 hours before being taken to Court; the Judgment was delivered in the absence of the Appellant; the right to submit was denied; the request to recall the 2nd Complainant for further cross examination was disregarded; The request to have the case transferred to another court was not considered; the request to have the matter heard slowly was disregarded; the questions put up by the Appellant in cross examination were not recorded; stolen property were not found in possession of the Appellant; and that he was denied the right to defend himself.

7. At the hearing the Appellant canvassed the Appeal by way of written submissions. He urged that his rights were violated having stayed in custody from the **22nd January, 2016** when he was arrested until the **1st** day of **February, 2016** when he was arraigned before Court. That the trial was not fair as he disagreed with the trial Magistrate who threatened him but did not record the threats an act that was in violation of his rights. He disputed what was recorded as having transpired at the defense stage and mitigation. That having not stated anything in his defence or mitigation was proof that the trial was not fair as envisaged by **Article 50(1)** of the **Constitution.**

8. Further, he submitted that he was not told of his right to submit after the close of the Prosecution's case and when he applied to re-call PW2 but the trial Magistrate declined to grant him that opportunity which was in breach of **Article 25(c)** of the **Constitution.** His application to have the matter transferred to another Court was disregarded.

9. That he requested the trial Magistrate to hear the case at a slow pace or be granted a Lawyer but his request was declined and not recorded which was in contravention of **Article 27(1)** of the **Constitution.** He went on to argue that had he been found in possession of the stolen items, it would have firmed up the Prosecution's case. He concluded by seeking an order for a retrial.

10. In response the State through learned Counsel, **Mr. Mamba** opposed the Appeal. It was argued that the assailants of the Complainants were armed with dangerous weapons. The 1st Complainant named all his assailants. That the Appellant remained silent when put on his defence, the issue of recalling PW2 was an afterthought and there is nothing to suggest that he attempted to have the case transferred elsewhere.

11. This being a first Appeal, I am duty bound to re-evaluate and reconsider all evidence adduced at trial afresh bearing in mind that I had no opportunity of seeing or hearing witnesses who testified. I must therefore come to my own conclusions with that in mind (***see Okeno –vs- Republic [973] E.A. 32).***

12. Regarding the allegation that the Appellant was held in custody for more than the stipulated time per the requirement of the Constitution **(See Article 49(1)(f)** the charge sheet does not bear the date of the Appellant's arrest.

13. However, PW9, **No. 74758 Corporal Silvester Toroitich** stated that on the **22nd January, 2016,** the Appellant went to the police station, **Tseikuru** to see his brother **Munyoki Musee** who had been arrested by Administration Police for the offence of being in possession of bhang. Since he was a suspect per the report he had, he arrested him on the **22nd** day of **January, 2016.** Therefore having been arraigned in Court on the **1st** day of **February, 2016** he was in custody for about nine (9) days before being produced in Court. **Article 49(1)(f)** provides thus:

> ***"(1) An arrested person has the right—***
>
> ***(f) to be brought before a court as soon as reasonably possible, but not later than—***
>
> ***(i) twenty-four hours after being arrested; or***
>
> ***(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;"***

What happened was contrary to the law and in contravention of the Appellant's constitutional rights. However, this breach of right by prolonged detention in police custody which is a breach of a civil right does not entitle the Appellant to an acquittal as he has a remedy in damages of his constitutional rights **(See Julius Kamau Mbugua vs. Republic (2010) eKLR)**

14. The Appellant has faulted the trial Magistrate for not according him a fair trial and having been biased because of an alleged rift between them. **Article 50(1)** of the **Constitution** provides thus:

> ***"(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."***

15. The constitution provides for a right to fair trial not being limited **(See Article 25(c) of the Constitution).** This is a case where at the outset the Appellant denied the charge therefore the Court proceeded to hear the case as provided **(See Section 207(3) of the Criminal Procedure Code).**

16. The Court proceeded to hear the case as set out in **Section 208** of the **Criminal Procedure Code.** He had no Advocate therefore witnesses testified and he was given the opportunity to put questions to them. On the **25th April, 2016** the State had availed four (4) witnesses but the Appellant indicated that he had not adequately prepared to deal with all the four (4) but only two (2). His prayer was considered and allowed by the Court. Only two (2) witnesses testified and the case was adjourned. The Court granted him time to prepare adequately on the **9th May, 2016.** When the case came up on the **16th** day of **May, 2016,** he intimated that he was ready to proceed and the case proceeded. The matter came up twice when the clinician was not available and the Appellant did not have any objection. Ultimately the clinician testified prior to the Prosecution's case being closed.

17. After the close of the Prosecution's case the Appellant was given the opportunity to address the Court. Per what is on record, the Appellant was granted an opportunity to address the Court and he stated thus:

> ***"Accused – I have nothing to say."***

As a result the Court delivered its Ruling pursuant to the provisions of **Section 211** of the **Criminal Procedure Code** and explained the provisions of the law as provided whereafter the Appellant stated as follows:

> ***"I will give sworn … with 2 witnesses."***

And a defence hearing date was set for **20th July, 2016.** When the matter came up on the stated date the Appellant was not ready to proceed and the case was adjourned to **4th August, 2016.** On the stated date, the Appellant exercised his constitutional right. He opted to remain silent and not call witnesses. He went on to address the Court thus:

> ***"Accused:***
>
> ***I opted to remain silent since my relatives informed me that the magistrate was bribed by the 2nd complainant and was given shs. 200,000. I cannot mention names.***
>
> ***Court:***
>
> ***Accused advised to lodge his allegations to the necessary investigative body so that thorough investigations may be carried out. I find his allegation mischievous and meant to tarnish my name. I therefore state that my conscience is clear and that at no time I met any litigant in any case least to say the lady being referred to here, neither I have received any money from anyone."***

18. A Judgment was written and delivered four (4) days later, on the **8th** day of **August, 2018** in the presence of the Appellant who was sentenced forthwith. Although he alleges that he was not present the record indicates he was given an opportunity to mitigate and he did not. A warrant committing him to prison was also signed on the same date. This disapproves the allegation of the Appellant that Judgment was delivered in his absence as no warrant of arrest was issued against him.

19. In the premises, his trial was in accordance with stipulated provisions of the law. If indeed he had evidence that the learned trial Magistrate was biased having been compromised, nothing would have been easier than reporting the matter to the learned trial Magistrate's immediate supervisors or the Judicial Service Commission or Ethics and Anti-Corruption Commission. This having not been done, that particular ground of Appeal must fail.

20. It was the contention of the Appellant that he did request to be provided with a Lawyer in compliance with **Article 50(2)(a)** of the **Constitution** but his request was declined. The alluded to provision of the law provides thus:

> ***"(2) Every accused person has the right to a fair trial, which includes the right—***
>
> ***(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;"***

21. It is not in doubt that the Constitution of Kenya recognizes the right to legal representation. Being accorded the right is an integral part of the trial being fair. It is not insinuated by the Appellant that he sought to retain a Lawyer to represent him but was denied by the Court. In the circumstances the law was not contravened, consequently the trial Magistrate cannot be envisaged to have been unfair.

22. Further, the Appellant argues that he differed with the trial Magistrate for not recording questions as he cross examined the witnesses. The record shows answers to the questions he was asking witnesses were recorded. In the case of **Francis Macharia Gichangi & 3 Others vs. Republic Criminal Appeal No. 11 of 2004** the Court held that:

> ***"It is reasonably expected that an accused person who claims that his or her trial rights have been violated will at the very least raise issue with the trial court."***

23. The Appellant herein participated in the trial by cross examining the witnesses. There's no time he asked the trial Court to record questions that he was putting to the witnesses that were answered and the answers recorded. He came up with an allegation of the trial Court having been compromised after he was called upon to defend himself. The alleged violation of his right in the manner stated must be disregarded and I hereby do so.

24. The offence was committed at night. It was therefore a question of identification. PW1 stated that there was moonlight which enabled him to see and at one point in time he said he recognized the individuals by voice. This was therefore a case of visual and/or voice identification. In the case of **Choge vs. Republic (1985) KLR 1** the Court of Appeal stated as follows:

> ***"…. There can be no doubt that the evidence of voice identification is receivable and admissible in evidence and that it can, depending on the circumstances carry as much weight as visual identification, since it would be identification by recognition rather that at first sight….."***

25. In the case of **Karani vs. Republic (1985) KLR 280** it was held that:

> ***"…… Identification by voice is recognized but pointed care has to be taken to ensure that the voice recognized was that of the suspect……"***

26. In the case of **Wamunga vs. Republic (1989) KLR 426** the Court stated that:

> ***"It is trite law that where 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 or recognition were favourable and free from possibility of error before it can safely make it the basis of conviction."***

27. In the 1st Count PW1 the Complainant stated that he was drinking alcohol at a pub until **9.00 p.m.** and when he left he was in company of his cousins **Kimanzi Peter** and **Musembi Nderu** and on reaching the river he saw **Bahati Kimanzi** and **Muithya** who asked him to escort him to the shop. He did, but **Muithya** did not buy anything. When they returned **Mathuva** was standing near the river but he disappeared and as he walked on he saw three (3) people. He went on to state as follows:

> ***"I asked them who they were one of them asked whom I was looking for. I did not respond. I passed and went on with my journey there was moonlight…… The 3 men followed me I had a stick and they caught up with me and sandwiched me. I saw Kimanzi take the stick I had and hit me on the head, Bahati held me by the neck and Muithya held both my hands and legs and took me to the river where they ordered me to give all I had ….."***

On cross examination he stated thus:

> ***"I have known you for long. I have no business dealings with you. You used to do boda boda business. Incident happened at night, I reported to the police. You were with Peter Kimanzi and Bahati. I was with Mathuva. I asked who they were since I did not know them but recognized their voice."***

28. From the evidence of PW1, the Appellant was known to him. He did identify him visually and by voice. PW1's evidence was corroborated by that of PW3 **Peter Kimanzi** who was with him at the bar. He had seen the Appellant leave the bar with **Kimanzi** and **Bahati.** They followed them and caught up with them. **Mathuva** asked PW1 to escort him. As they went back he (PW3) and **Musembi** (PW4) walked on. Along the way they were surrounded by the Appellant, **Kimanzi** and **Bahati.** The Appellant chased after **Musembi** while **Kimanzi** and **Bahati** who were armed with knives surrounded him. The Appellant returned and told his two (2) accomplices to leave him as he knew him and they obliged. On cross examination he stated that they were clan mates and he had known him since his childhood. He was able to recognize him by aid of the moonlight and having seen him earlier on at the pub.

29. PW4 **Musembi Ndelo** confirmed in material particulars what was stated by PW1 and PW3. He was familiar with the Appellant having known him for three (3) years.

30. On the material night at **10.00 p.m.** or thereabout he was woken up by PW1 who was bleeding from a fresh wound. Ultimately he sought medical attention and was issued with a P3 form. PW10 **Vicky Nzomo** the clinician who examined him found him having sustained multiple cuts on the neck and face and thorax. She classified the degree of injury sustained as harm.

31. On the 2nd Count, PW1, the Complainant identified her assailants as her neighbours **Kimanzi, Bahati** and **Muithya** the Appellant herein. In particular, she stated that the Appellant stabbed her with a knife. On being injured she ran to the house of PW7 **Mutua Mutemi** her father-in-law who took her to hospital. She was later examined by PW10 who found her having sustained injuries. She had a cut wound on the neck and a human bite on the lower limb. The clinician filled a P3 form in her regard and adduced it in evidence.

32. In the circumstances the learned trial Magistrate did not err in reaching a finding that evidence of the Complainants of recognition was free from any possibility of error.

33. With this kind of evidence it was imperative for the Appellant to give an explanation of what transpired. Having opted to remain silent the evidence was not shaken.

34. Ingredients of the offence of robbery with violence were set out in the case of **Oluoch vs. Republic (1985) KLR** where it was stated as follows:

> ***"(i) The offender is armed with any dangerous or offensive weapon or instrument; or***
>
> ***(ii) The offender is in the company with one or more other person or persons; or***
>
> ***(iii) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person."***

35. The Appellant with his accomplices were armed with offensive weapons that they used to stab both Complainants at the time of the robbery. These were indeed incidents of robbery with violence.

36. The learned trial Magistrate having found the Appellant guilty on both counts sentenced him to suffer death on Count 1 while the 2nd Count the sentence was held in abeyance as provided by law.

37. The Appeal is against both conviction and sentence. The principle upon which an Appellate Court can interfere with the sentence of a Lower Court were enunciated in the case of **Ogolla s/o Owour vs. Republic (1954) EACA 270** as follows:

> ***"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)." See also Omuse - v- R (supra) while in the case of Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-***
>
> ***sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing***

the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)"

38. The Supreme Court of Kenya in the case of **Francis Karioko Muruatetu & Another vs. Republic (2017) eKLR** held that the mandatory nature of a death sentence in capital offences is unconstitutional.

39. From the foregoing the Appeal stands dismissed on conviction but I do allow it on sentence. The sentence imposed by the trial Magistrate is therefore set aside and substituted as follows:

Count 1 – The Appellant shall serve **10 years imprisonment.**

Count 2 – The Appellant shall serve **10 years imprisonment.**

Sentences shall run concurrently, with effect from the date of conviction in the Lower Court.

40. It is so ordered.

Dated, Signed and **Delivered** at **Kitui** this **19th** day of **November, 2018.**

L.N. MUTENDE

JUDGE