



REPUBLIC OF KENYA
IN THE HIGH OF KENYA AT NYERI
CRIMINAL APPEAL NO. 15 OF 2011

HOSEA GUANDARU KARANJA.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Appeal against conviction and sentence in Nyeri CM.CR.C.No.730 of 2010 from the judgment of the Hon.D.O.Ogembo (PM) delivered on the 08/02/2011)

JUDGMENT

1. The appellant, **Hosea Guandaru Karanja**, was initially charged with the offence of Robbery contrary to **Section 296(1)** which was later substituted on the 19/07/2010 with the offence of Robbery with violence contrary to **Section 296(2)** of the **Penal Code**.

FACTS

2. The complainant **Samuel Karanja Gwandaru (PW1)** who is the father of the appellant told the trial court that on the 13th July, 2010 at about 11am the appellant grabbed him by the neck and whilst holding a panga angrily demanded money from the complainant on pain of death; the appellant then searched **PW1's** pockets and took Kshs.1000/-; **PW1's** screams for help attracted his daughter (**PW2**), a passerby (**PW4**) and a neighbor (**PW3**) who answered his distress call and came to his rescue; the appellant upon seeing these people fled into the banana plantation;

3. The appellant was later arrested, tried, was convicted and sentenced to the mandatory death sentence; being aggrieved by the conviction and sentence, the appellant filed a Petition of Appeal dated the 11/02/2011 and a Supplementary Petition of Appeal dated the 24/11/201; the grounds of appeal are as hereunder summarized:-

- (i) The essential elements of the charge were not proved beyond reasonable doubt;
- (ii) The appellant was denied the right to legal representation pursuant to Article 50(2)(h) occasioning the appellant substantial injustice;
- (iii) The appellant was not positively identified;
- (iv) The mandatory death sentence imposed was unconstitutional and was also harsh and excessive in the circumstances.

4. At the hearing hereof the appellant was represented by Learned Counsel Mr Wasuna and Ms Gicheha represented the State; both Counsels made oral presentations; hereunder are the parties respective rival

submissions;

APPELLANTS' SUBMISSIONS

5. Counsel for the appellant made the following submissions;

(i) The charge was for robbery with violence; violence and theft are essential ingredients of the offence which were not proved beyond reasonable doubt; the evidence was hearsay and was uncorroborated;

(ii) Article 50(2)(h) of the Constitution 2010 provides for legal representation for capital offences; the trial court failed to find that the appellant required legal representation; an injustice occurred due to his lack of representation;

(iii) The appellant was not positively identified;

(iv) The mandatory death sentence was in contravention of the appellant's right under Article 6 of the Constitution;

6. The appellant prayed that the appeal be allowed and the conviction quashed and sentence be set aside.

RESPONDENTS SUBMISSIONS

7. Counsel made the following submissions in response to the submissions made by Counsel for the appellant;

(i) The essential ingredients of the offence were proved through the testimony of **PW1**; the prosecution only needed to prove one ingredient of the offence; which was that the appellant whilst armed with a panga used violence and threatened to kill **PW1**; **PW1's** evidence was corroborated by the evidence of **PW2**, **PW3** and **PW4** who answered **PW1's** distress call and they all testified to finding the appellant holding down **PW1** whilst armed with the panga;

(ii) The burden of proof never shifted to the appellant; it was not disputed that there was an altercation between **PW1** and the appellant; it is also not in dispute that **PW1** was felled by the appellant; **PW1** narrated how he was attacked and his evidence was corroborated by that of **PW2**, **PW3** and **PW4**; the prosecution witnesses were candid in their evidence which was not shaken in cross-examination;

(iii) The appellant was positively identified by **PW1**, **PW2** and **PW3**; the prosecution proved its case beyond reasonable doubt;

(iv) **On legal representation-** that the incident occurred on the 13/07/2010 and the trial commenced in July, 2010; the Constitution was promulgated in August 2010 and the Legal Aid Act 2016 which provides for legal representation was not applicable retrospectively; Counsel submitted that the appellant had not demonstrated the substantial injustice occasioned due to lack of representation which was not automatic as one has to qualify;

(v) **On the mandatory sentence-** the death sentence is the only sentence provided by the law; there is no alternative sentence for the offence of robbery with violence; therefore there was no violation of the appellant's right;

8. Counsel prayed that the appeal be dismissed as it lacked merit; and that the conviction and sentence be upheld.

REJOINDER

9. The evidence should reinforce all elements of the charge not just the altercation but also that of the theft;

10. Even though the Constitution and the Act were not in force the trial court ought to have given the appellant legal representation owing to the weight of the charge and sentence;

ISSUES FOR DETERMINATION

11. After taking into consideration the forgoing submissions made by the appellant and those of the Counsel for the State, this court has framed the following issues as set out hereunder for determination;

(i) Whether to the prosecution proved its case to the desired threshold;

(ii) Whether to substitute the charge; to a minor cognate offence.

ANALYSIS

12. This being the first appellate court it is incumbent upon this court to re-consider and re-evaluate the evidence and arrive at its own independent conclusion always keeping in mind that it did not have an opportunity to see nor hear the witnesses. Refer to the case of **Okeno vs Rep (1972) EA. 321.**

Whether the prosecution proved its case to the desired threshold; Whether to substitute the charge; to a minor cognate offence.

13. **On identification;** the incident is said to have occurred at 11.00am which means the incident took place in broad daylight; the appellant was the complainants son and **PW2s** brother and was a person well known to both of them; the evidence of **PW3** was that he had known the appellant since he (the appellant) was a young boy;

14. This court finds no need to interfere with the trial courts finding that it was indeed the appellant who had attacked **PW1;**

15. **On whether the prosecution proved its case to the desired threshold;** Section 296(2) of the Penal Code sets out the key ingredients that constitute a robbery with violence; one such ingredient being that the offender uses or threatens to use actual violence to any person immediately before or immediately after the time of the robbery.

16. The evidence of **PW1** was that the appellant grabbed him and felled him to the ground and whilst holding the panga threatened to kill him; and the trial court in its judgment made a finding that the evidence of **PW1** was well corroborated by that of **PW2, PW3** and **PW4;** in that they saw **PW1** lying down on the ground and the appellant holding him down whilst wielding a panga and also heard the appellant saying that he would kill **PW1;**

17. The prosecution witnesses tendered evidence to prove that the appellant was armed with a dangerous weapon and threatened to use actual violence upon **PW1;**

18. The complainants evidence was that he was robbed of Kshs.1000/- however no mention is made by any of the prosecution witnesses to corroborate this fact; there is also no evidence of any injuries sustained by the complainant; therefore even though there is sufficient evidence to support a conviction for the offence of robbery with violence; it is this courts considered view that the incident may have arisen from a family spat between **PW1;**

19. There is also sufficient evidence to support a conviction for a lesser cognate offence of assault with intent to steal contrary to Section **298** of the Penal Code; in the circumstances and in exercise of the powers conferred to this court by Section 354 of the Criminal Procedure Code this court finds that this is an ideal case for the substitution of the offence to a minor cognate offence leading also to the substitution

of the conviction and sentence.

FINDINGS AND DETERMINATION

20. For the forgoing reasons this court makes the following findings;

21. This court finds that there is sufficient evidence on record to prove a lesser offence of assault with intent to steal contrary to Section **298** of the Penal Code;

22. In exercise of this courts powers conferred by Section 354 of the Criminal Procedure Code the conviction for the offence of robbery with violence is hereby quashed and substituted with a conviction for assault with intent to steal contrary to Section **298** of the Penal Code;

23. Section 298 provides for a sentence of five (5) years for a person found guilty of the felony of assault with intent to steal; the appellant's mandatory death sentence is hereby set aside and substituted with a term of five (5) years; the appellant was convicted on the 8/02/2011 which then means that the appellant has served his term in full;

24. The appellant to be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly

Dated, Signed and Delivered at Nyeri this 16th March, 2017.

HON.A.MSHILA

JUDGE