IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, KIAGE & MURGOR JJ.A)

CRIMINAL APPEAL NO. 101 OF 2016

BETWEEN

REIMOND MUNENE KAMAU...….................................1ST APPELLANT

JAMES MBUGUA NDUNG'U…………………...….......2ND APPELLANT

AND

REPUBLIC …..RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Mbogholi & Achode, JJ) dated 2nd July 2013

in

HCCRA No. 418 & 419 of 2008)

****

JUDGMENT OF THE COURT

In this second appeal, ***Reimond Munene Kamau and James Mbugua Ndung'u**, **the 1st and 2nd appellants***, were charged with the offence of robbery with violence contrary to ***section 296 (2)*** of the ***Penal Code***. The particulars were that on 5th February 2008 at Naivasha market place in Naivasha district in the former Rift Valley Province, jointly with others not before the court, robbed ***A W N*** of Kshs. 7,500 and that immediately before or after the said robbery, threatened to use actual violence on ***A W N***, ***the complainant (PW1).***

The appellants also faced a further charge of attempted rape contrary to ***section 4*** of the ***Sexual Offences Act No. 3 of 2006*** and an alternative charge for the offence of committing an indecent act contrary to ***section 11 (6)*** of the same Act.

The trial magistrate having found that the offence of robbery with violence was proved, convicted and sentenced the appellant to death as prescribed by law, but acquitted them of the charges of rape and indecent act. The appellants appealed to the High Court, which upheld the conviction and sentence of the trial court.

The appellants now prefer an appeal to this Court on the grounds that the learned judges erred in law in not evaluating the whole evidence before the lower court, as is incumbent upon them as the 1st appellate court, and weigh all the evidence and draw its own inferences and conclusions, and had they done so they would have arrived at a different conclusion. It was also contended that the trial court and the High Court failed to take into account the appellants' defences.

Mr. Ntenge Marube, learned counsel for the appellants submitted that they would abandon the appellants' Memoranda of Appeal filed on 31st July 2013 and the Supplementary Grounds of Appeal filed on 1st March 2017, and would instead canvass the grounds in the supplementary of appeal filed on 14th March 2018. It was submitted that the gravamen of the appellants' appeal was that the prosecution did not prove the offence of robbery with violence; that the evidence of PW1 and 2, showed that the intention of the appellants was to remove the complaint's trousers. Counsel asserted that the courts below did not analyse the evidence of PW1, 2 and 3; that a decree had been issued which had declared that women should not wear trousers; that there was no *mens rea* on the appellants' part, and that the offence was not proved to the required standard. The available evidence showed that Kshs. 7,500 was stolen from PW 1, and therefore the court ought to have found that the appellants were guilty of simple robbery.

Counsel's next submission was that PW 1 and 2 were the only witnesses who seemed to know the appellants by name. But the two names

mentioned belonged to the 2nd appellant. It was asserted that the appellants were not properly identified. Finally counsel submitted that the trial court did not consider the appellants' defence.

In response ***Mr. Murungi,*** learned counsel for the State submitted that there were three issues, namely, whether the facts disclosed the offence of robbery with violence, whether there was an intention to rob the complainants, and whether the offence of indecent assault was proved.

Counsel informed us that he was conceding the appeal as the facts did not disclose the offence of robbery with violence, as no *mens rea* was disclosed on the appellants' part; that ***section 295*** requires that force be used to steal and retain which was not established in this case. It was submitted that the appellants attack on the complainant was for the sole purpose of removing her trousers, but when pulling her trousers down, they found money in her pocket; that the force applied was not for the purpose of stealing but to remove her trousers and to embarrass her; that the offence disclosed was one of simple robbery contrary to ***section 268*** of the ***Penal Code*** as read with ***section 275,*** and not robbery with violence.

Secondly, counsel asserted that the charge sheet was defective as the appellants were charged under ***section 11 (6)*** of the ***Sexual Offences Act*** which was repealed by Legal Notice No. 7 of 2007 and ***section 11 A*** subsequently enacted; that the defect was incurable under ***section 382*** of the ***Criminal Procedure Code.*** Such concession is of course not binding upon this Court.

The jurisdiction of this Court, is clearly defined as determining only questions of law on second appeals. See ***Joseph Njoroge vs Republic [1982] KLR 388.***

We have considered the grounds of appeal and the parties' submissions and are of the view that the issues for determination are, whether the offence of robbery with violence was established or whether this was a case of simple robbery; whether the appellants were properly identified, and whether the courts below considered the appellants' defences.

In analysing whether the offence of robbery with violence was established, the trial court stated thus;

> ***"It has been established through evidence that the accused persons and two (2) others not before the court stole Kshs. 7,500 from the complainant. Although their initial intention was not to steal they used force immediately before the time of stealing by trying to strip the complainant. They were also more than one when they tried to steal this money. These two (2) are ingredients of robbery with violence. Therefore the charge of robbery with violence has been established against the two (2) accused persons."***

On its part the High Court stated;

> ***"16…if it is shown and accepted by the court that at the time of robbery the offender is in company with one or more person or persons then the offence under subsection (2) is proved and a conviction thereunder must follow.***
>
> ***17…With regard to the third set of circumstances, there is no mention of the offender being armed or being in the company of others. The court is not required to look for either of these two ingredients. If the court finds that at or immediately before or immediately after the time of the robbery the offender wounded, beat, struck or used any other violence to the victim or any person (not necessarily the complainant or victim of theft) then it must find the offence under subsection (2) proved and convict accordingly.***
>
> ***"18. In the present case, the appellants were in the company of two others when they set upon the complainant and although there is no evidence that they were armed, they used violence to undress her and to take the money from her. This satisfies the second and third set of circumstances under section 296 (2) of the Penal Code."***

In other words, both the courts below were satisfied that the prosecution had demonstrated to their satisfaction, that the offence of robbery with violence was proved to the required standard, and that the appellants had violently robbed PW 1.

The findings of the courts below notwithstanding, the appellants' contention is that the circumstances of the case do not point to the commission of the offence of robbery with violence, as the ingredients of the offence were not proved. At worst, they claim, this was a case of simple robbery, since the appellants did not at the outset intend to rob PW 1. All they intended to do was to remove her trousers, and that it was whilst doing so, that they robbed her of money found in one of her trouser pockets.

To determine whether this was a case of robbery with violence or simple robbery, it becomes incumbent upon us to begin by setting out the facts of the case.

Section 296 (2) of the Penal Code provides;

> ***"If the offender is armed with any dangerous or offensive weapon or instrument, or is in the 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."***

In the case of ***Simon Materu Munialu vs Republic Criminal Appeal 302 of 2005, [2007] eKLR,*** this Court defined the ingredients for robbery with violence thus;

> ***"…the ingredients that the Appellant and for that matter any suspect before the court on a charge of robbery with violence in which more than one person takes part or where dangerous or offensive weapons are used or where a victim is wounded or threatened with actual bodily harm or occasioned actual bodily harm is section 296(2) of the Penal Code".***

It will be observed that it is not a requirement that all the elements must be proved. The offence is proved if one of the elements is satisfied.

When the evidence is considered in its totality, the trial court and the High Court concurrently found that the appellants were properly charged with the offence of robbery with violence and that the ingredients of the offence under ***section 296 (2)*** of the ***Penal Code*** were met.

It is patently clear that, immediately before robbing PW1, the two appellants together with others not before the court, violently removed PW 1's trousers, and robbed her of Kshs. 7,500 that they took from her trousers pocket. The verbal threat to remove her trousers, and the subsequent violent removal of the trousers, satisfied the violent intent, so that the element of violence as contemplated by ***section 296 (2)*** of the ***Penal Code*** was attained.

The offence having been proved to the required standard, we find that the conviction was safe, and the assertion that this was a case of simple robbery could not be said to arise. This ground therefore fails.

Turning to the issue of identification, this was not raised in the appellants' grounds of appeal, but was only raised during the submissions. But in answer to this issue, in their defence both appellants did not deny that they were in the Naivasha market on the material day, or that they were known to PW1. They went so far as to state that they would usually carry her goods for her. Therefore the question of mistaken identity did not arise and we find that this issue is without merit.

On the complaint that the courts below did not consider the appellants' defences, we do not agree that this was in fact the case. The judgment of the trial court clearly outlined their defence, while the High Court evaluated their defences, thus;

> ***"The appellants themselves admitted that they were known to the complainant and had offered porterage services to her for many years at the Naivasha market. They also placed themselves at the scene of the offence on the material date and time. It is noted that the issues raised at the defence stage about money owed to the appellants by PW 1 for services rendered to her, or a sack of potatoes taken from her by the 1st appellant to pay himself were never put to her in cross examination."***

It is evident that the appellants' defence did not in any way dislodge the prosecution's case, and we therefore find that this ground is without basis. Finally, on the contention that the charge sheet was defective because it indicated the wrong provision for the offence of rape, since the appellants were acquitted of the charge of rape, we consider this to be a non issue.

That said, and all issues considered, we find that the appeal is without merit, and is hereby dismissed.

The only issue that remains for our consideration is the sentence imposed by the trial court and upheld by the High Court in view of the decision of the Supreme Court in the case of ***Francis Karioko Muruatetu & Another vs Republic*** ***SCK Pet. No. 15 of 2015 [2017] eKLR*** which declared the mandatory sentence unconstitutional. We order that this matter be referred back to the High Court to determine the appropriate sentence applicable in the circumstances of this case, as this will allow the appellants an opportunity to contest the sentence imposed by the High Court to this Court should the need arise.

It is so ordered.

Dated and delivered at Nairobi this 12th day of October, 2018.

M. WARSAME

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR