REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 7 OF 2018

(Consolidated with High Court Criminal Petition No. 16 of 2018)

JEREMIAH OLOO ODIRA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the judgment, conviction and sentence of Hon. M. M. Wachira, Senior Resident Magistrate in Migori Chief Magistrates Court Criminal Case No. 195 of 2017 delivered on 28/03/2018)

JUDGMENT

1. **Jeremiah Oloo Odira,** the Appellant herein, was initially charged with the offence of **assault causing actual bodily harm** contrary to **Section 251** of the **Penal Code**. He denied the offence and before the trial began the charge was substituted with that of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. He likewise denied the substituted offence, was tried, convicted and sentenced to suffer death.

2. The particulars of the offence of robbery with violence were that '*On the 2nd day of March 2017 at Osogo village Kajulu I Sub-Location, West Kanyamkago Location, Uriri Sub-County in Migori County within the Republic of Kenya jointly with another not before court robbed Hezbon Oketch of cash Kshs. 42,000/= and immediately before the time of such robbery wounded the said Hezbon Oketch.*'

3. Seven witnesses testified in a bid to prove the charge. They were **Hezbon Oketch Juma,** the complainant, who testified as **PW1**. **PW2** was the wife of PW1. She was **Maurine Achieng Oketch**. **PW3** was a nephew to the Appellant and a neighbour to both PW1 and the Appellant. She was **Joanna Omondi**. Another neighbour to both PW1 and the Appellant one **Nelson Oluoch Agutu** testified as **PW4. Christine Adhiambo** who testified as **PW5** was a farmer who had jointly farmed tobacco with PW1 and was also a neighbour to the Appellant. A Clinical Officer attached to Uriri Sub-County Hospital one **Osundi Dola** testified as **PW6** and the investigating officer was **PC Stella Nduku** from Uriri Police Station who testified as **PW7**. I will for the purpose of this judgment refer to the witnesses in the sequence in which they testified.

4. It was the prosecution's case that PW1 spent in his house in the night of 01/03/2017 and 02/03/2017 with PW2 after he had been paid Kshs. 42,000/= by PW5 out of a joint tobacco farming venture. PW1 kept the money in his house as he intended to purchase a cow the following day. At around 01:00am PW1 and PW2 were woken up by some sound at the front door of their house. Suddenly, a person entered their bedroom and shone a torch on PW1. The person then attacked PW1 by cutting his hand with a panga. PW1 took his phone and also flashed the attacker whom he readily recognized as the Appellant who was his neighbour. PW1 asked the Appellant why he wanted to kill him and the Appellant cut PW1 again on his hand and his phone dropped. The Appellant asked for the money and PW1 told him where he had kept it. As the Appellant went for the money PW2 dashed out of the house and met one Boy Katete standing vigil outside their house. PW2 however ran away while raising alarm.

5. A serious struggle ensued after PW2 left between the Appellant and PW1. Neighbours began streaming to the home of PW1 as a result of PW2's screams. PW3 was the first one to arrive at the homestead. She saw the Appellant whom she knew very well holding PW1 on the ground as he wanted to cut him with a panga. PW3 flashed a torch on the Appellant and the Appellant ran away. Other neighbours then appeared and PW1 who was injured was taken to the police before he was escorted to hospital.

6. PW6 filled in and produced the P3 Form and treatment notes for PW1 as exhibits. He confirmed various injuries on PW1. PW7 investigated the case and arrested the Appellant at the police station where he had gone to seek an amicable settlement with PW1. PW7 had previously attempted to arrest the Appellant but had fled. The Appellant was then charged and at the trial PW7 produced a BAT Tobacco Purchase Slip as an exhibit.

7. When the prosecution closed its case the trial court put the Appellant on his defense. The Appellant opted to and kept silent. The Appellant was subsequently found guilty as charged, convicted and sentenced.

8. It is that conviction and sentence which solicited this appeal. The Appellant mounted the appeal in person by filing a Petition of Appeal which raised five grounds of appeal as follows: -

(a) That I did not plead guilty to the charge herein

(b) That the trial court sentencing me harshly on mere grudges between me and the complainant.

(c) That the trial court failed to consider that the ingredients of the offence herein was not proved to the required standards.

(d) That the trial court did not evaluate the evidence tendered by the prosecution from the first report made at the police station by the complainant.

(e) That the trial court did not warn itself on the dangers of convicting and sentencing somebody on an incident which was done at night and since there was no clear identifications/recognition as per evidence tendered by the prosecution.

9. Soon after filing the appeal the Appellant filed **Constitutional Petition No. 16 of 2018** challenging the constitutionality of the sentence. When this Court became aware of the Petition it called for the file and heard it together with the appeal. The two matters are subject of this judgment.

10. The appeal and the Petition were canvassed by way of written submissions on the part of the Appellant as the State made an oral response. In a nutshell, the Appellant mainly contended that the charge was not proved and that the evidence was riddled with contradictions. He also challenged the constitutionality of the sentence.

11. In response Counsel for the State submitted that the charge was clearly and certainly proved and conceded that the sentence was unconstitutional and that the Appellant be re-sentenced.

12. This being a first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. Republic (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. Republic (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

13. In discharging the foregone duty, I have carefully read and understood the proceedings and judgment of the trial court as well as this appeal. I will endeavor to deal with the following issues: -

(a) The identification of the assailant;

(b) Whether the offence was proved as required in law: and

(c) Other issues raised by the Appellant.

I will consider each of the above issues singly.

(a) **On the identification of the assailant: -**

14. PW1 clearly narrated the events that took place in the night of 01/03/2017 and 02/03/2017. He stated that when the intruder found his way into his bedroom, he shone his phone's flashlight and saw him. He recognized him as the Appellant who was his neighbour and whom they even prayed together. That, the two talked and even wrestled and PW1 was certain that he was dealing with the Appellant.

15. The evidence of PW1 was corroborated by PW2 and PW3. PW2 who was sleeping with PW1 confirmed that indeed she saw the attacker inside the house when PW1 shone the phone light on him and as the attacker struggled with PW1. She also heard the attacker demanding money from PW1. PW2 recognized the attacker as the Appellant whom she so well knew. As PW2 ran away while screaming PW3 rushed to the homestead of PW1 and found the attacker still struggling with PW1. PW1 had been held on the ground as the attacker wanted to cut him with a panga. PW3 flashed a torch light on the attacker and the attacker ran away. PW3 managed to clearly see the attacker as the Appellant who was their neighbour and knew him too well.

16. As the incident took place at night this Court is duty-called to carefully weigh the evidence of identification by recognition and ensure that there was no likelihood of mistaken identity on the Appellant. The principles to guide this Court in such a situation are well settled. The Court of Appeal in the case of **Wamunga vs Republic (1989) KLR 426** stated as under; -

"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 were favourable and free from possibility of error before it can safely make it the basis of conviction."

17. It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction. In **R –vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

> ***"... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?.... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

18. Weighing the evidence of PW1, PW2 and PW3 against the foregone legal guidance, it comes to the fore that the recognition of the Appellant as the attacker was not in error. I therefore find and hold that it was the Appellant who was the assailant.

(b) <u>Whether the offence was proved in law:</u>

19. The Appellant was convicted of the charge of robbery with violence. The starting point is the legal provision. The offence of robbery with violence is a creation of **Sections 295** and **296(2)** of the Penal Code. For clarity purposes I reproduce the sections as tailored: -

> "***295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.***
>
> ***296(2). If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."***

20. From the foregone legal provisions, it can be seen that the offence of robbery with violence is made up of two parts. The first part is the **robbery** and the other part is the **violence**.

21. **Robbery** is committed when a person steals anything capable of being stolen and immediately before or after the theft the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto. Two things must therefore be proved for the offence of robbery to be established: **<u>Theft</u>** and **<u>the use of or threat to use actual violence.</u>**

22. On the other hand, the offence of **robbery with violence** is committed when robbery is proved and further if any one of the following three ingredients are established: -

> ***(a) The offender is armed with any dangerous or offensive weapon or instrument, or***
>
> ***(b) The offender is in the company of one or more other person or persons, or***
>
> ***(c) The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person.***

23. In this case there is credible evidence that the attacker used actual violence on PW1. There is uncontroverted evidence of the injuries PW1 sustained. The P3 Form and the treatment notes vouched for that. The injuries were occasioned by a panga which was seen by PW1, PW2 and PW3. I find that the weapon used being a panga in the circumstances of this case was a dangerous weapon.

24. As to whether there was theft, there is as well evidence to that end. PW1 narrated so well that he had money with him. It was Kshs. 42,000/= and he explained how he had received it. PW5 confirmed that she indeed gave PW1 the money during the day before the attack. The money was taken by the Appellant while armed and was never recovered. It is therefore reasonable and believable that PW1 lost that money in the attack and that constitutes theft.

25. The upshot is that all the ingredients of the offence of robbery with violence were proved.

(c) <u>Other issues raised by the Appellant:</u>

26. The Appellant further contended that there were contradictions and inconsistencies on the record especially the evidence of PW1 and PW2. I have carefully addressed my mind to the record and noted the minor discrepancies. The same were adequately explained and reconciled by the trial court which I wholly agree with. Indeed, the same were of a minor nature and cannot be said to have adversely affected the final finding of the court. In so finding, I echo the words of the Learned Judge in **<u>R -vs- Pius Nyamweya Momanyi, Kisii HCRA No. 265 of 2009 (UR)</u>** when he stated thus: -

> ***"...It is trite law that minor discrepancies and contradictions should not affect a conviction."***

In any event the provisions of **Section 382** of the **Criminal Procedure Code Cap. 75 of the Laws of Kenya** safely come into play.

27. As to whether **Section 211** of the **Criminal Procedure Code** was complied with, the record speaks for itself. The Appellant was placed

on his defence and all the available options in law explained. He then opted to remain silent. I cannot therefore fault the trial court on that position.

28. The Appellant was hence rightly found guilty and convicted. The appeal on conviction is hereby dismissed.

29. The Appellant also contended that the sentence was unconstitutional. I have looked at the sentencing proceedings where the court held that there was only one sentence prescribed in law and that was the death sentence. By taking such an approach the trial court fell into error since the legal position has by now changed courtesy of the Supreme Court in **Francis Karioko Muruatetu & Another v. Republic (2017) eKLR**. The Supreme Court, rightly so, found and held that the mandatory nature of the death sentence in capital offences is unconstitutional since mitigation is an important congruent element of fair trial. I hereby allow the appeal on sentence and set the death sentence aside. For avoidance of doubt the Petition is as well allowed.

30. The Supreme Court remitted the matter to the High Court being the trial and sentencing court for purposes of sentence re-hearing. I have no doubt that such remain the only reasonable way forward as the sentencing court will receive appropriate submissions from the prosecution and the defence and can even call for Victim Impact Assessment Reports prior to the sentencing.

31. One thing which I must clarify is that although the decision in **Francis Karioko Muruatetu** (supra) was on a murder case, the position changes not in the case of robbery with violence cases since **Section 296(2)** of the **Penal Code**, Cap. 63 of the Laws of Kenya provides the only sentence on conviction to be a death sentence.

32. The upshot of the foregone analysis is that the appeal is dismissed on conviction and allowed on sentence only. The matter is hereby remitted to the Chief Magistrate's Court at Migori for hearing on sentence only and on priority basis.

It is so ordered.

DELIVERED, DATED and **SIGNED at MIGORI this 23rd day of November 2018.**

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Jeremiah Oloo Odira the Appellant in person.

Mr. Kimanthi, Senior Principal prosecution Counsel instructed by the Office of the Director of Pubic Prosecutions for the State.

Evelyne Nyauke – Court Assistant