REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL NUMBER 32 OF 2018

PHILLIP MUTUA KIOKO..............................APPELLANT

-VERSUS-

REPUBLIC...RESPONDENT

(An appeal against conviction and sentence before Hon. T. Nzyoki (Mr.) (Senior Principal Magistrate) in Criminal Case No. 1182 of 2016 at Siakago Law Court delivered on 29th August, 2018)

JUDGMENT

1. The appellant Phillip Mutua Kioko together with one Faith Wakere Ngare ("the 2nd accused") who is not a party to these proceedings, were charged jointly under count I with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars are that on the 11th day of November, 2016 at Siakago Town Nthawa Location of Mbeere Sub-county within Embu County, the appellant and the 2nd accused together with other persons while armed with dangerous crude weapons robbed Michael Nyaga Njuki of Kshs.900/ cash, a mobile phone make itel 1503 s/no 354859075811886 valued at Kshs. 10,000/ and immediately before or after the time of such robbery, used actual violence against Michael Nyaga Njuki.

2. The 2nd accused was charged with an alternative charge of handling stolen goods contrary to Section 322(1) as read with Section 322(2) of the Penal Code, the particulars of which were set out in the charge sheet.

3. Under count II, the appellant was charged with the offence of stealing from a person contrary to Section 279(a) of the Penal Code, the particulars being that on 22nd March, 2014 at around 2100hrs at Siakago Town Nthawa Location of Mbeere Sub-county within Embu County the appellant stole a national identity card number [...] the property of Edwin Njeru Ngai from the person of the said Edwin Njeru Ngai.

4. The appellant was alternatively charged with the offence of handling stolen goods contrary to Section 322(1) as read with Section 322(2) of the Penal Code. The particulars are that on 12th March, 2016 at Siakago Town Nthawa Location of Mbeere Sub-county within Embu County the appellant otherwise than in the course of stealing dishonestly retained national identity card number [...] the property of Edwin Njeru Ngai knowing or having reasons to believe it to be stolen.

5. At the trial, the prosecution called seven (7) witnesses while the appellant and the 2nd accused each testified. At the close of the trial, the trial court found that the prosecution had proved its case against the appellant beyond a reasonable doubt on both count I of robbery with violence contrary to Section 296(2) of the Penal Code and the alternative charge to count II of handling stolen goods contrary to Section 322(1) as read with Section 322(2) of the Penal Code. The trial court consequently convicted the appellant to death on count I and held the charge on count II in abeyance.

6. As concerns the 2nd accused, it was the finding of the trial court that the prosecution had not proved its case against her to the required standard, thereby resulting in a finding of not guilty followed by an acquittal under Section 215 of the Criminal Procedure Code.

7. Being dissatisfied with the conviction and sentence, the appellant has now appealed against the same to this court by raising the following amended grounds of appeal:

> ***(i) THAT the learned trial magistrate erred in law and fact when he convicted and passed the sentence in this case without considering that the evidence adduced was contradictory.***
>
> ***(ii) THAT the learned trial magistrate erred in law and fact when he convicted the appellant and yet failed to find that the evidence relied upon was a mere suspicion.***
>
> ***(iii) THAT the learned trial magistrate erred in law and fact when he relied on unproven allegations to convict the appellant.***

(iv) THAT the learned trial magistrate erred in law and fact when he rejected the appellant's defence.

(v) THAT the learned trial magistrate erred in law and fact when he convicted the appellant and yet failed to find that the appellant was a victim of circumstances.

8. The appellant filed written submissions while the respondent opted for brief oral submissions. On his part, the appellant submitted that the allegations raised by the prosecution witnesses were never proved at the trial.

9. The appellant argued that there were grave inconsistencies in the evidence of the prosecution witnesses and none of them placed him at the scene of the crime and that his arrest was purely the result of mere suspicion.

10. From the foregoing, the appellant urged this court to enter into a different finding in respect to his conviction and sentence.

11. In oral submissions, *Miss Ngessa* for the state indicated that she is not opposed to the appeal as relates to revision of the sentence of death issued against the appellant but urged this court to consider the seriousness of the offence coupled with the fact that the deceased was part of a gang that attacked the victim, and to apply the community protection objective and the deterrence objective pursuant to the sentencing guidelines 2016.

12. I have considered the contending submissions on appeal. It is apparent that the appeal lies against both the conviction and sentence by the trial court. I will therefore address the five (5) grounds of appeal under the two (2) heads.

13. Turning to the evidence tendered at the trial, Michael Nyaga Njuki who was PW1 and the complainant in the criminal proceedings, testified that he worked as a barber and that on the material night of 11th November, 2016 at about 8.00pm. he had closed his shop and was headed home when he was accosted by four (4) men, two of whom had torched which they shone on his face.

14. PW1 testified that before he could speak a single word, he was strangled on the neck and knocked down by two of the men while the other two robbed him of his belongings, namely a mobile phone make itel 1503 black in colour and Kshs.900/.

15. He stated that he was left unconscious and when he came to, he went home and called someone named Emilio Kinyua who then escorted him to the police station at Siakago where he recorded a statement. The complainant further stated that he thereafter sought treatment at Mbeere District Hospital and was later issued with a P3.

16. It was the testimony of the complainant that upon request, he handed to the police the phone purchase receipt, its top cover and the phone package box.

17. The complainant stated that the following day (12th November, 2016) upon receiving a call from the police, he visited the police station and was able to identify the cell phone itel 1503 as the phone that had been stolen from him. He went on to state that he left his cell phone with the police but that he was unable to identify any of the persons who attacked him.

18. In cross-examination by the appellant, the complainant testified that he had been invited by the police to go and identify the suspects but that he refused to go.

19. Edwin Njeru Ngai who was PW2 gave evidence that on 22nd March, 2014 he was on his way home from Siakago Town at about 10.00 p.m. when he was approached by a group of men who strangled him and took his wallet containing Kshs. 1,500/ in cash and his identity card number 28211521. He further gave evidence that he raised an alarm and his landlady who was nearby came to assist but by that time, the assailants had ran away.

20. PW2 went on to state that he went to the scene of the attack the following day to look for his items but to no avail. He stated that on 24 th March, 2014 following the advice of his mother, he decided to report the matter to the police and that he was issued with a police abstract.

21. According to PW2, he did not make any further follow ups on his identity card and instead applied for a new one over two (2) years later on 30th June, 2016. He indicated that following his arrest in November, 2016 and arrival at the police station, he was informed that the appellant had been found with his identity card. The witness stated that the appellant is not known to him.

22. In cross-examination, the witness stated that he has never met the appellant at Siakago Town and restated that he was confronted by a group of men on the material date and robbed.

23. Roselyn Kagendo followed as PW3 and gave evidence that on the material date being 22nd March, 2014 she was at her house which is located near a beehive club when she heard a scream, causing her to leave the house. That on arrival at the scene which according to her is about 200 metres away from her house, she saw PW2 who indicated to her that he had been attacked by a gang but that he was unable to identify them, and that he was robbed of his wallet.

24. On being cross examined, it was the testimony of the witness that on arriving at the scene of the accident, she found that other members of the public had arrived and that she did not escort PW2 to report the matter to the police.

25. Inspector Samwel Nziu who was PW4 stated in his evidence that he was at all material times the O.I.C Crime at Siakago Police Station and that while acting on a tip off, on 12th November, 2016 at around 1630 hours he led a team of police officers to Kiandurika Village to a

rental house suspected to be occupied by persons associated with a series of robberies and housebreaking.

26. The witness stated that on knocking at the door, the appellant who was familiar to him opened the door and identified himself and that he was in the company of the 2nd accused. That upon searching the house, they were able to recover six mobile phones suspected to be stolen and further recovered from the body of the appellant a wallet bearing the identification card of PW2.

27. PW 4 gave evidence that they subsequently arrested the appellant and the 2nd accused and took them to the police station where they booked them and commenced investigations.

28. During cross-examination, the witness restated the circumstances surrounding the search and arrest of the appellant and the 2nd accused, and that there are persons who claimed ownership of the stolen phones. However, the witness acknowledged that he was not the investigating officer in the instant matter.

29. Leonard Ngari Namu being PW5 testified that he is a Senior Clinical Officer attached at Embu Level 5 Hospital and that he attended to PW1 on 11th November, 2016 and issued him with treatment notes. The witness went on to testify that PW1 indicated that he had been assaulted by unknown persons and determined that the likely weapon used in the assault were sharp nail marks.

30. In cross-examination, the witness stated that at the time he attended to PW1, it had been 30 minutes following the attack and that PW1 had a referral note issued by the police.

31. The witness who followed as PW6 was Paul Mwaniki Ndegwa. His evidence was that he worked as a Registrar of Persons at Mbeere North Sub-County Registration of Persons office at all material times and that on 27th March, 2017 he received a letter from the Director of National Registration, Mr. Kimotho. According to the witness, he was advised by the Director to collect some finger prints in respect to the appellant and he was able to confirm that both the fingerprints he tested and ID No. [...] belong to the appellant.

32. The witness further testified that at the advice of the Director, he commanded fingerprints in respect to PW2 and prepared an identification report together with other related exhibits.

33. PC Evans Kimutai who was PW7 stated that he was at all material times attached to DCI Marakwet West Police Station Division and that on 12th November, 2016 he witnessed the appellant and the 2nd accused being brought into custody in relation to the various stolen mobile phones.

34. The witness further stated that upon conducting a physical search on the appellant, he recovered an identity card belonging to PW2 who by then had similarly been arrested and placed into custody but was later released and treated as a witness.

35. PW7 testified that he recorded the statement of PW2 and further contacted PW1 who visited the police station and identified one of the stolen phones as belonging to him and further availed proof of ownership.

36. PW7 also stated that the appellant and the 2nd accused were previously unknown to him, and went ahead to produce the various documents and items as exhibits 1-24.

37. In cross-examination, the witness stated that he was not present at the time of arrest of the appellant and the 2nd accused and that the complainant had indicated that he had been unable to identify his assailants.

38. The witness further stated that the appellant was arrested on suspicions based on a report made by an informer and on the basis that various items that were stolen, including the items belonging to PW1 and PW2 were found in the custody of the appellant.

39. The trial court vide its ruling delivered on 27th June, 2018 found that the prosecution had established a prima facie case against the appellant and the 2nd accused, thereby putting them on their defence.

40. The appellant on his part gave evidence that on 12th November, 2016 he went to the market in the morning to deliver miraa, where he stayed until 11.45 a.m. at which time he returned to Siakago Town. He further gave evidence that he later met up with the 2nd accused who accompanied him to his rented house and that while he was there, he had a knock on the door.

41. The appellant narrated that upon opening the door, he was met by four (4) police officers who arrested him and the 2nd accused, further informing him that they wanted to conduct a search of the house.

42. The appellant gave evidence that they were escorted to Siakago Police Station where the police officers took away his wallet and mobile phone, among other personal documents. The appellant stated that he had no knowledge of the charges preferred against him.

43. In her evidence, the 2nd accused essentially echoed the version of events told by the appellant.

44. Upon close of the hearing, the learned trial magistrate found that as concerns count I of the charge the prosecution had brought evidence to show that the appellant was in recent possession of the cell phone robbed from PW1 and in so doing, had proved the main charge of robbery with violence

45. The learned trial magistrate however reasoned that in respect to count II concerning PW2, the doctrine of recent possession would not apply given the time that had passed between the loss of PW2's identity card and its recovery. Suffice it to say that the learned trial magistrate found that there is evidence against the appellant to support the alternative charge to count II of retaining the stolen identity card belonging to PW2 since the appellant had prior knowledge when he dishonestly retained the identity card and the said card was found in his possession at the time of his arrest.

46. In the end, the learned trial magistrate determined that the prosecution had proved against the appellant the charge of robbery with violence contrary to Section 296(2) of the Penal Code under count I and the offence of handling stolen goods by retaining contrary to Section 322(1) and (2) of the Penal Code under count II and sentenced the appellant to death. The learned trial magistrate having found that the prosecution had not proved its case against the 2nd accused, acquitted her under Section 215 of the Criminal Procedure Code.

47. It is established that the appellant herein was charged with two counts: count I was the charge of robbery with violence contrary to Section 296(2) of the Penal Code whereas count II was the offence of handling stolen goods by retaining contrary to Section 322(1) and (2) of the Penal Code.

48. Upon careful re-evaluation of the evidence presented before the learned trial magistrate, I note that the learned trial magistrate took into consideration the evidence placed before him, including the defence of the appellant. There is nothing to lead me to conclude that he overlooked the defence of the appellant in making his determination on the case.

49. As concerns the merits of the case and in respect to count I being the main charge of robbery with violence contrary to Section 296(2) of the Penal Code, the learned trial magistrate applied the doctrine of recent possession in convicting the appellant. The doctrine of recent possession presupposes that where an accused person is found to be in the possession of an item that was recently stolen, then in the absence of any reasonable explanation as to how the accused came to obtain the item, it is presumed that he or she either stole the item or received the item from the thief.

50. The above doctrine can be drawn from the case of **Jumanne Mohamed Hassan v Republic [2005] eKLR** cited by the learned trial magistrate and where the Court of Appeal reasoned thus:

> ***"Where an accused person is found in possession of recently stolen property and in the absence of any reasonable explanation to account for his possession a presumption of fact arises that he is either the thief or a receiver (see ANDREA OBONYO v. R [1962] E.A. 542 at page 549."***

51. I will also borrow from the case of **Joseph Njenga Ngethe v Republic [2013] eKLR** similarly cited by the learned trial magistrate and where the Court of Appeal laid out the principles associated with the doctrine of recent possession as follows:

> ***"…to invoke the doctrine of recent possession, the prosecution must prove beyond reasonable doubt each of the following four elements:***
>
> ***(i) That the property was stolen,***
>
> ***(ii) That the stolen property was found in the exclusive possession of the accused,***
>
> ***(iii) That the property was positively identified as the property of the complainant and***
>
> ***(iv) Possession was sufficiently recent after the robbery."***

52. Noting the above, from my re-examination of the evidence tendered at the trial, I concur with the reasoning of the learned trial magistrate that the doctrine of recent possession would apply to the present circumstances and as relates to PW1 since the prosecution was able to establish that the mobile phone 1503 s/no 354859075811886 in specific was stolen; that it was found in the possession of the appellant; that PW1 subsequently made a positive identification that the mobile phone belonged to him and which statement was supported by evidence by way of a receipt and the packaging box for the phone produced in court; and that the possession occurred fairly recently from the time of the robbery.

53. More importantly is the fact that the appellant did not offer any explanation as to how he came to be in possession of the stolen goods, neither did he disclose who gave them to him.

54. In the premises, I am in agreement with the reasoning of the learned trial magistrate that going by the doctrine of recent possession, the prosecution had proved the main charge against the appellant on count I. Consequently, I see no reason to interfere with the finding of the learned trial magistrate on that count.

55. In regards to the alternative charge to count II of handling by retaining contrary to Section 322(1) and (2) of the Penal Code, having found that the learned trial magistrate was correct in convicting the appellant on the main charge hereinabove, I find that there was no need for a conviction on the alternative charge. Resultantly, I hereby quash the conviction entered into by the learned trial magistrate on the alternative charge.

56. Having determined so, it is upon me to address the second limb to the appeal, touching on the sentence meted out to the appellant. It is clear from the record that upon conviction, the learned trial magistrate considered the mitigating and aggravating factors before sentencing the appellant to death.

57. It is not in dispute that the charge of robbery carries a mandatory death sentence.

58. Be that as it may, under the current constitutional dispensation, it is a requirement that mandatory minimum sentences be considered in light of Article 27 of the Constitution (on equal protection before the law) as read with clause 7 of the Transitional and Consequential Provisions which provides thus:

> ***"All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution."***

59. The above position was advanced by the Supreme Court in the now renowned case of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** where it rendered itself thus:

> ***"Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights, and in the same vein Article 25(c) of the Constitution elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse.***
>
> ***Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right."***

60. In essence, the Supreme Court in the above-cited case held that the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional and further held that mandatory sentences interfere with the right of an accused person to a fair trial. In my view, this would extend to the offence of robbery with violence which carries a similar mandatory sentence of death.

61. Further to the foregoing, the Court of Appeal in the case of **Evans Wanjala Wanyonyi v Republic [2019] eKLR** succinctly stated that:

> ***"…we are of the view that, the constitutionality of the mandatory minimum sentence meted out to the appellant raises a question of law. This Court in Christopher Ochieng – v- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011 and in Jared Koita Injiri – v- R, Kisumu Criminal Appeal No. 93 of 2014 considered legality of minimum mandatory sentences under the Sexual Offences Act… In this appeal, guided by the merits of the Supreme Court decision in Francis Karioko Muruatetu & another – v- Republic (supra) and persuaded by the decisions of this Court in Christopher Ochieng – v- R (supra) and Jared Koita Injiri – v- R, Kisumu Criminal Appeal NO. 93 of 2014 in relation to sentencing, we are convinced and satisfied that the enhanced mandatory 20-year term of imprisonment meted upon the appellant by the learned judge cannot stand."***

62. It is therefore evident that mandatory sentences impede the constitutional right to a fair trial since they take away the discretionary power of the courts and hinder them from adequately considering mitigating factors.

63. Going by the above, it is apparent that the learned trial magistrate ought to have applied the principles set out in **Francis Karioko Muruatetu** (supra) in awarding his sentence. Had he done so, I am convinced that he would not have issued the mandatory death sentence. Consequently, I am inclined to disturb the award of sentence served upon the appellant.

64. At the point of sentencing, the prosecution indicated that the appellant is a first offender. In his mitigation, the appellant stated that he did not steal and that his arrest came as a shock to him.

65. Upon weighing the mitigating factors against the aggravating factors surrounding the offence and in a bid to act as a deterrent, I find that a sentence of 20 years will suffice.

66. In the end therefore, the appeal succeeds in respect to the sentence on the main count of robbery with violence. The sentence of death on the main charge is hereby set aside and is substituted with a sentence of 20 years set to run from 29th August, 2018 being the date of the original sentence.

Dated, signed and delivered at NAIROBI this 23rd day of October, 2020.

…………………….

L. NJUGUNA

JUDGE

In the presence of:

………………………………. for the Appellant

………………………………. for the Respondent