REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 48 OF 2014

(CONSOLIDATED WITH HCCRA NO. 49 OF 2014)

JOSEPH NJUGUNA KARANJA.....1ST APPELLANT

LAWRENCE ETELECH EKAI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No.2690 of 2012

at the Chief Magistrate's Court, Eldoret(Hon. D. Alego, PM) dated 10 March 2014)

JUDGMENT

[1] The two Appellants herein, **Joseph Njuguna Karanja** (the 1st Appellant) and **Lawrence Etelech Ekai** (the 2nd Appellant) were jointly charged before the court of the Principal Magistrate, Eldoret, in the Chief Magistrate's Court's **Criminal Case No. 2690 of 2012**, with the offence of robbery with violence, contrary to **Section 296(2)** of the **Penal Code, Chapter 63** of the **Laws of Kenya.** It was alleged that on the **14th day of June 2012**, at Eldoret Township within Uasin Gishu District in the Rift Valley Province, jointly with others not before the court, they robbed **Meshack Onyango Odhiambo** of money in cash, **Kshs. 7,200/=,** two mobile phones, make Huawei and Nokia 1100, respectively, all valued at **Kshs. 12,400/=** and that at or immediately before or immediately after the time of the said robbery, they threatened to use actual violence to the said **Meshack Onyango Odhiambo**.

[2] The 1st Appellant faced a second count of Being in Possession of Narcotic Drugs, contrary to **Section (1)(a)** as read with **Section 3(2)(b)** of the **Narcotics and Psychotropic Substances Act, No. 4 of 1994**. It was alleged that on the **20 June 2012**, at Eldoret Township in Uasin Gishu District of the Rift Valley Province, he was found in possession of 20 rolls of bhang (cannabis).

[3] The Appellants denied the allegations levelled against them before the lower court; and, after their trial, the Learned Trial Magistrate found them guilty and convicted them as charged. They were accordingly sentenced, in respect of Count I, to suffer death as by law provided; while the 1st Appellant was additionally sentenced to serve 3 years' imprisonment in respect of Count II. Being aggrieved by that decision, the Appellants separately lodged **Eldoret High Court Criminal Appeal No. 48 of 2014** and **Eldoret High Court Criminal Appeal No. 49 of 2014**; which appeals were consolidated, by order of the Court, on **24 May 2018**.

[4] The Appellants thereafter filed Amended Grounds of Appeal pursuant to **Section 350(2)(v)** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya;** leave to that effect having been granted on **28 June 2018**. Thus, the 1st Appellant thereby proffered the following Amended Grounds of Appeal:

> **[a]** That the Trial Magistrate erred in law and fact by convicting him without observing that he was not positively identified at the scene of crime;
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> **[b]** That the Trial Magistrate erred in law and fact by convicting him on a case that was not proved beyond reasonable doubt.
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> **[c]** That the Trial Magistrate erred in law and fact by convicting him on poor, contradictory and inconsistent Prosecution evidence.
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> **[d]** That the Trial Magistrate erred in law and fact by convicting him without appreciating the shoddy investigations.

[e] That the Trial Magistrate erred in law and fact by convicting him without complying with the provisions of **Article 50(2)(g)(h)** of the **Constitution**.

[f] That the Trial Magistrate erred in law and fact by condemning him to the sentence of death which is unconstitutional.

[g] That the Trial Magistrate erred in law and fact by awarding an additional 3 years' imprisonment to the death sentence.

[h] That the Trial Magistrate erred in law and fact by denying him a chance to sum up his case under **Section 210** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya**.

[i] That the Trial Magistrate erred in law and fact by relying on a single eyewitness to convict him;

[j] That the Trial Magistrate erred in law and fact by failing to observe the variance between the particulars of the principal charge and the evidence, especially as regards the alleged scene of crime.

[5] The 2nd Appellant's Amended Grounds of Appeal were more or less of a similar effect. He contended that:

[a] That the Trial Magistrate erred in law and fact by convicting him on improper identification.

[b] That the Trial Magistrate erred in law and fact by convicting him without observing that the evidence of a single eyewitness is fatal to conviction.

[c] That the Trial Magistrate erred in law and fact by convicting him on poor, contradictory and uncorroborated Prosecution evidence.

[d] That the Trial Magistrate erred in law and fact by failing to observe that the investigations were shoddy.

[e] That the Trial Magistrate erred in law and fact by failing toobserve the variance between the particulars of the charge and the tendered evidence.

[f] That the Trial Magistrate erred in law and fact by passing the sentence of death which is inconsistent with the Constitution.

[g] That the Trial Magistrate erred in law and fact by convicting him on a case that was not proved beyond reasonable doubt.

[h] That the Trial Magistrate erred in law and fact by rejecting his *alibi* defence without giving cogent reasons for so doing.

[i] That the Trial Magistrate erred in law and fact by convicting him and yet the lead leading to his arrest was not proved.

[6] On the basis of the foregoing grounds, the Appellants prayed that their appeal be allowed, the conviction quashed, and the death sentence set aside. They urged the appeal by way of written submissions, which were filed herein along with his Amended Grounds of Appeal**.** Their argument was that the evidence of identification, being dock identification, was worthless and therefore ought not to have been relied on by the trial court. They posited that this was a case of mistaken identity. They cited the case of **Kiarie vs. Republic [1984] KLR 739** to support their argument that it is possible for a witness to be honest and yet mistaken. It was further their submission that the trial court failed in its duty to subject the evidence of the Complainant to serious scrutiny in line with the guidelines set out in **Wamunga vs. Republic [1989] KLR 424**; **Turnbull & Others vs. Republic [1976] AllER 544**; **David Masinde & Another vs. Republic [2004] eKLR,** and **Gabriel Kamau Njoroge vs. Republic Cr. App. No. 149 of 1986.**

[7] In addition to identification, the Appellants took issue with the quality of evidence adduced before the lower court, terming it poor, contradictory and inconsistent; and that the investigation was itself shoddily done. Thus, their submission was that the evidence did not prove the offences charged beyond reasonable doubt. The Appellants also took issue with the death sentence imposed on them, arguing that it is unconstitutional from the standpoint of **Articles 25(c)** and **50(2)(p)** of **the Constitution**. They relied, *inter alia*, on the case of **Muratetu vs. Republic [2017] eKLR** in urging the Court to allow their appeal, quash their conviction and set aside the sentence imposed on them by the lower court.

[8] On behalf of the State, the appeal was opposed by **Ms. Oduor**, vide her oral submissions made herein on **26 July 2018.** Her position was that the offence occurred in broad daylight at around 11.00 a.m. and therefore the evidence of identification was credible. She was of the view that the investigations were well conducted and that the evidence of the witnesses was consistent and well corroborated; and that the sentence of death was lawful and cannot be said to be unconstitutional. She urged for the dismissal of the appeal.

[9] I have carefully considered the Appellant's Grounds of Appeal, the written and oral submissions made herein. I have also perused the lower court record with a view of re-evaluating the evidence to satisfy myself that the conviction and sentence of the Appellant was premised on sound evidence as required, this being the first appeal. (see **Okeno vs. Republic [1972] EA 32).** The evidence placed before the lower court by the Prosecution was from two witnesses, namely, the Complainant, **Meshack Odhiambo Onyango (PW1)** and the Investigating Officer, **PC Steven Mliti (PW2).**

[10] The evidence of the Complainant, then a student at **Chepkoilel University College**, was that on **14 June 2012**, he was in the company of a friend of his called **Sammy Mwangi** next to Asis Hotel in Eldoret Town. He was interested in purchasing a lap top computer and the said **Sammy Mwangi** had introduced him to the 2nd Appellant who allegedly had a computer to sell. While there, the 2nd Appellant signaled

some people and all of a sudden, he was seized, thrown down and that in the ensuing struggle, he was robbed of his two mobile phones, make Nokia 1100 and Huawei and **Kshs. 7,200/=** in cash. He reported the incident to **Eldoret Police Station**. Then on the **20 June 2012**, his friend **Sammy** called him and informed him that he had spotted the assailants at the same place, near **Asis Hotel**. They accordingly notified the police, the two Appellants were identified to the Police and were accordingly arrested. The Complainant added that, on being searched by the Police at the scene of arrest, the 1st Appellant was found in possession of 20 rolls of bhang which were produced before the lower court as **Prosecution's Exhibit No. 1.**

[11] PW2 confirmed that on **14 June 2012**, the Complainant went to Eldoret Police Station and made a report that he had gone to Asis Hotel to buy a lap top computer, but that he was assaulted and robbed of his money and two mobile phones. He further testified that, on the **20 June 2012,** the Complainant took them to the scene and there identified the two Appellants as some of those who robbed him; and that on being searched, the 1st Appellant was found in possession of 20 rolls of bhang. He escorted the two to the police station and sent samples of the bhang to the Government Chemist for analysis. He produced the Report of the Government Chemist as the **Prosecution's Exhibit No. 2** before the lower court.

[12] In his defence, the 1st Appellant told the lower court that he was selling bhang for a living and that on **21 June 2012**, he was selling bhang as usual around **Eagles Hardware** when police officers went there and arrested him. He denied having robbed the Complainant as alleged. The 2nd Appellant on his part stated that he was arrested on **20 June 2012** at Asis car wash where he was then working, and that he was charged and tried jointly with the 1st Appellant, a person hitherto unknown to him, for the offence of robbery with violence. He denied the charge.

[13] In respect of the offence of robbery with violence, **Section 295** of **the Penal Code,** stipulates that 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. Further to that provision, **Section 296(2) of the Penal Code**, the provision pursuant to which the Appellant was charged, provides that:

> **"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 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."**

[14] Hence, the Prosecution was under obligation to prove any of the following key ingredients of the charge:

> **[a]** That the Appellants were armed with a dangerous or offensive weapon or instrument; or
>
> **[b]** That they were two or more persons; or
>
> **[c]** That immediately before or immediately after the time of the robbery, they wounded, struck or used any other personal violence against the Complainant;

[15] From the evidence adduced by the Prosecution before the lower court, there is no dispute about the Complainant's assertion that he was intent on purchasing a second hand computer; or that his friend, one **Sammy Mwangi**, had offered to introduce him and did introduce him to a vendor. He thus told the lower court, which evidence was uncontroverted, that he went to the area near Asis Hotel inEldoret Town for that purpose. There is credible evidence to demonstrate that, no sooner had the two arrived at their rendezvous than the attack occurred. In his narration of exactly what happened at the crime scene, the Complainant told the lower court that:

> **"...I was thrown down and they started struggling me. They took my two phones Nokia 1100 and Huawei. I had 7,200/- in my pocket. It was Accused 1 & Accused 2 who took the phones and my money from my pockets. They told me if I made noise they would kill me, so I kept quiet. They ran away. My friend was still with me. Later we went and made a report to the police station..."**

[16] Clearly therefore, there was no evidence that the offenders were armed with dangerous or offensive weapons or instruments. Likewise, it was not demonstrated beyond reasonable doubt that immediately before or immediately after the time of the robbery, the Complainant was wounded, struck or beaten. It is understandable therefore that no medical evidence was adduced in proof of assault. However, the particulars of Count I alleged that the offenders were more than two in number; an aspect that was adverted to by the Complainant when he stated that the perpetrators of the robbery threatened to kill him if he made any noise.

[17] Clearly therefore, an essential ingredient of the offence of robbery with violence was proved before the lower court, noting that proof of any one of the ingredients set out in **Section 296(2)** of the **Penal Code** was sufficient.(See **Suleiman KamauNyambura vs. Republic [2015] eKLR)**. Hence, the only issue to consider herein is whether the two Appellants were properly and sufficiently identified as being some of the people who committed the offence.

On the Question of Identification

[18] It is manifest from the lower court record that the Complainant was the only identifying witness. Although he was accompanied by one **Sammy Mwangi**, who he said was a friend of the 2nd Appellant's, and the person who introduced him to the 2nd Appellant, the lower court was told that the said **Sammy Mwangi** was murdered shortly after the incident in unclear circumstances. Hence, this was a case of identification by a single witness; and as has been stated before such evidence requires careful scrutiny because mistakes can be made, albeit in honesty. That is why, in **R. vs. Turnbull & Others [1973] 3 AllER 549,** it was held that:

> **"...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?"**

[19] Similarly, in **Wamunga vs. Republic [1989] KLR 426**, the same principle was restated thus:

> **"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."**

[20] Although the Complainant had no prior knowledge of the Appellants, there is no dispute that the incident took place in broad daylight. According to **PW1**, the incident occurred at about 11.00 a.m. near Asis Hotel in Eldoret Town. He unhesitatingly told the lower court that he was able to see the Appellants as they robbed him of his mobile phones and money. **PW2** augmented that evidence by stating that he was led to the scene on **20 June 2012** and the two Appellants pointed out to him by the Complainant in the presence of **Sammy Mwangi** (now deceased) for purposes of arrest, which happened only 5 days or so after the robbery incident.

[21] It was the contention of the Appellants in their written submissions, that it was imperative for the Prosecution to demonstrate that, in his initial report to the Police, the Complainant gave a description of the culprits and for an identification parade to be arranged to afford the Complainant an opportunity to pick out the Appellants. I however find no merit in that argument, granted that the circumstances hereof did not lend themselves to such a course of action. The Appellants, whose names were hitherto unknown to the Complainant, were arrested on the **20 June 2012** upon the intervention of the Complainant. Having been arrested in the presence of the Complainant, the conduct of an identification parade would have been superfluous.

[22] It is now trite that a fact in issue, such as identification, may be proved by the testimony of a single witness. (see **Abdulla Bin Wendo & Another vs. Regina [1953] 20 EACA 166** and **Roria vs. Republic [1967] EA 583)**. Hence, the Complainant was a competent and credible witness on whose evidence the lower court was entitled to rely notwithstanding that he was the only eye witness. Thus, no misdirection can be attributed to the lower court in that respect.

On the alleged Contradictions and Inconsistencies in the Prosecution Case

[23] Regarding the submission by the Appellants that the Prosecution case was riddled with contradictions and inconsistencies, the points taken had to do with the evidence that the incident occurred at Asis Hotel while the particulars were that the incident occurred in Eldoret Town; and that the amount of cash stolen, according to **PW1**, was **Kshs. 7,200/=** while **PW2** made reference to **Kshs. 8,000/=.** A consideration of the evidence shows however that these are non-issues. **PW1** stated clearly that the incident took place next to Asis Hotel; and there is no denying that the said hotel is in Eldoret Town; a fact which the lower court was entitled to take judicial notice of. The particulars of the charge were unambiguous just as the evidence in support of it with regard to the *locus in quo*. Similarly, in mentioning the amount of **Kshs**. **8,000/=, PW2** was clear in his evidence that that was the agreed price of the second hand lap top computer that the Complainant was interested in purchasing. Nowhere in his evidence did **PW2** state that the Complainant was robbed of **Kshs. 8,000/=.**

[24] Accordingly, there is absolutely no merit in the argument that the evidence of the Prosecution witnesses was contradictory. In any event, in ***Philip Nzaka Watu vs. R* [2016] eKLR,** the Court of Appeal expressed the view that:

> ***"...it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."***

[25] Similarly, although the 2nd Appellant argued that his alibi defence was not considered, it is manifest from the record that no such defence was raised. Indeed, in his unsworn statement of defence, he placed himself at the scene and said that that was his usual place of work. The foregoing being my view of the matter, it is my conclusion that there was credible evidence to support the charge of robbery with violence as set out in Count I in the Charge Sheet filed before the lower court against the two Appellants; and that that evidence proved the Appellants' culpability beyond reasonable doubt. The Appellant's conviction cannot therefore be faulted.

On the Constitutionality of the Death Penalty

[26] In challenging the death sentence that was meted out on them, it was the contention of the Appellants that the Learned Trial Magistrate erred in law and fact by passing the sentence of death which is inconsistent with the Constitution. They relied on the case of **Muruatetu & Others vs. Republic** (supra) to buttress this argument. I however have no hesitation in dismissing that argument for the reason that **Section 296(2)** of the **Penal Code** does explicitly provide for the death sentence. Moreover, **Article 26(3)** of the **Constitution** recognizes that a person can be deprived of life if authorized by written law. More importantly, in the **Muruatetu Case,** which the Appellants relied on, the Supreme Court did acknowledge that:

> **"[66] It is not in dispute that Article 26 (3) of the Constitution permits the deprivation of life within the confines of the law**."

[27] And at Paragrapah 69 of the Judgment, the Supreme Court made it clear that:

> **"For the avoidance of doubt, *this decision does not outlaw the death penalty*, which is still applicable as a discretionary maximum punishment."**

It is therefore my finding that the sentence of death that was imposed by the Learned Trial Magistrate on the Appellants was passed in accord with the relevant provisions of the Constitution as read with **Section 296(2)** of the **Penal Code.**

[28] The foregoing notwithstanding, the Appellants argument and reliance on **the Muruatetu Case** did raise the question, which this Court cannot ignore, as to whether or not, in retrospect, they were accorded a fair trial in view of the mandatory death penalty that was imposed on them by the trial court. The record shows that though they were given an opportunity to address the court in mitigation, the same did not count for anything on account of the understanding then that penalty of death as prescribed under **Section 296(2)** of the **Penal Code**was mandatory. In this connection, the Supreme Court, at Paragraph 66 has since clarified matters in the following manner:

> **"We are unconvinced that the wording of that Article permits the mandatory deathsentence. The pronouncement of a death sentence upon conviction is therefore permissible only if there has been a fair trial, which is a non-derogable right. A fair hearing as enshrined in Article 50 (1) of theConstitution must be read to mean a hearing of both sides. A murder convict whose mitigationcircumstances cannot be taken into account due to the mandatory nature of the death sentence cannotbe said to have been accorded a fair hearing."**

[29] Similarly, at Paragraphs 51 and 52 of the **Muruatetu Judgment**, the Supreme Court held that:

> **[51] The dignity of the person is ignored if the death sentence, which is final and irrevocable is imposed without the individual having any chance to mitigate. We say so because we cannot shut our eyes to the distinct possibility of the differing culpability of different murderers. Such differential culpability can be addressed in Kenya by allowing judicial discretion when considering whether or not to impose a death sentence. To our minds a formal equal penalty for unequally wicked crimes and criminals is not in keeping with the tenets of fair trial.**
>
> **[52] We are in agreement and affirm the Court of Appeal decision in *Mutiso* that whilst the Constitution recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed. We also agree with the High Court's statement in *Joseph Kaberia Kahinga* that mitigation does have a place in the trial process with regard to convicted persons pursuant to Section 204 of the Penal Code. It is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness.**

[30] In the premises, and considering the circumstances in which the offence in Count I was committed and the fact that the Complainant was not beaten or wounded, I would be inclined to give the Appellants the benefit of the aforementioned jurisprudential developments and alter the nature of the sentence meted out on the Appellants from death to imprisonment for a term of 20 years pursuant to **Section 354(3)(a) (iii)** of the **Criminal Procedure Code.**

[31] As for Count II, there appears to be no complaint in connection with either the conviction and sentence. The 1st Appellant conceded before the lower court that he was found in possession of 20 rolls of bhang; and that he was peddling bhang for a living. The 20 rolls of bhang were produced before the lower court as exhibits along with a Report from the Government Chemist's Department confirming that the exhibits were examined and found to be cannabis, which falls under the First Schedule of the **Narcotic Drugs and Psychotropic Substances (Control) Act, 1994.** Accordingly, the 1st Appellant's conviction and sentence in respect of Count II cannot be faulted. The same is hereby upheld and confirmed.

[32] The Appellant complained however, and rightly so, that it was improper for the Trial Magistrate to add the 3 years' imprisonment imposed in respect of Count II to the death sentence that had been passed against him for Count I. It is now trite that it is inappropriate to combine the death sentence with imprisonment. Hence, in **Moris Otieno Oduor vs. Republic [2011] eKLR,** for instance, the Court of Appeal was explicit that:

> **"...This Court has stated times without number that where there is a conviction for a capital offence combined with other non-capital offences and a death sentence is imposed on one count, the proper thing to do is to leave the other sentence in abeyance pending appeal or execution of the death sentence..."**

However, having reduced the death sentence to 20 years' imprisonment, this argument is no longer tenable, save to add that the sentences for Count I and II in respect of the 1st Appellant shall run or be deemed to run consecutively.

On Compliance with Section 210 of the Criminal Procedure Code:

[33] The lower court record does show that no submissions were made by the Defence pursuant to **Section 210** of the **Criminal Procedure Code, Chapter 75 of the Laws of Kenya.** It however does not show that the Appellants expressed the wish to do so and were denied the opportunity. In the premises, there is no basis for the supposition that the Appellants were denied their right to make submissions of no case to answer as posited by them.

[34] In the result, I find no merit in the Appellants appeal against conviction. The sentences imposed on themin respect of the two Counts were altogether lawful and save for the substitution of the death sentence with imprisonment of the two Appellants for 20 years in respect of Count I, I would dismiss the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 24TH DAY OF JANUARY, 2019

OLGA SEWE

JUDGE