REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 1 OF 2017

MUSYIMI KAVELEKI ALIAS KIBONGE.....1ST APPELLANT

JACOB NZUKI MWENDWA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Mwingi Senior

Resident Magistrate's Court Criminal Case No. 517 of 2014 by Hon. K. Sambu (SPM) on 20/01/17)

J U D G M E N T

1. **Musyimi Kaveleki *alias* Kibonge** (hereinafter the 1st Appellant) and **Jacob Nzuki Mwendwa** (hereinafter the 2nd Appellant) were charged, convicted of the offence of robbery with violence and sentenced to suffer death. Aggrieved by the decision of the Lower Court they have appealed.

2. The 1st Appellant's Appeal is on grounds that: evidence adduced was full of contradictions; the person who was found in possession of the stolen items should have been charged and not treated as a prosecution witness; circumstantial evidence adduced was mere suspicion; the trial was not fair as justice was delayed and the alibi defence put up was stronger than the contradictory evidence adduced by the Prosecution. In addition to the grounds raised by the 1st Appellant, the 2nd Appellant stated that the learned Magistrate in convicting him relied on hearsay evidence advanced by the Investigating Officer; the grudge between his co-accused who was acquitted and his witness were overlooked.

3. Facts of the case were than on the **18th July, 2014** at about **9.00 p.m.,** PW1 **Samuel Maithya** was in company of his wife, PW2, **Lilian Sophia Maluki** when they were attacked by two (2) people who robbed him off a bag that contained airtime cards, two (2) Nokia Phones, Tecno Mobile Phones and cash **Kshs. 10,000/=.** They reported the matter to the police. Following investigations carried out cellphones were recovered. PW5 **James Mwaniki Musyoka** purchased a mobile phone from the 1st Appellant having been introduced by PW7 **Josephat Kathima Kyalo.** Following a report made to the police, PW9, **No. 101137 P.C. (Woman) Janet Akello** commenced investigations. She established that safaricom scratch cards that were bought by members of public from the shop of PW8, **James Wambugu Mathu** could not be used as they had been blocked by safaricom limited. It was the allegation of PW8 that he purchased the cards from an individual he could not identify who went to his shop with the cards.

4. In the course of investigations, PW7 **Josephat Kathima Kyalo** led them to PW5 **(Mwaniki)** who was in possession of a tecno tablet who mentioned the 1st Appellant as the person who sold the tecno mobile phone. A Nokia mobile phone was traced to **John Katee Kivite** who was using it in Kitui town. The stated **John Katee** was arrested to be charged with other suspects. After they were arraigned in Court and the plea taken, **John Katee** was remanded at **Waita Prison** where he encountered the 2nd Appellant who was already in custody for another offence. A production order was issued and the 2nd Appellant was produced and charged.

5. Following information received, a motor-cycle registration number **KMD 031X** make TVS was traced. PW4 **Sila Kilonzo** who was working for Cellez-r-us LTD dealers of safaricom airtime and entrusted with the stated motor-cycle was arrested but he explained that he lent it to **Jeff Denary** on the **5th August, 2014.** Through communication using his cellphone the police managed to arrest **Jeff Denary** who was charged alongside other Accused persons.

6. When put on their defence, the 1st Appellant stated that on the **20th June, 2014** while at a family function of subdividing land, **Josphat Kathuma,** his friend who had visited him disrespected him by asking him to call his niece to exchange pleasantries with him. As a result, they disagreed and **Josphat** was ordered to leave. On the **19th August, 2014** he accompanied his brother **Robert Kaveleki** to **Mwingi Town** where he requested a gentleman **John Nzeko** to go and circumcise his son, **KM** which he did. While still at home with his family members

the friend turned foe arrived. Fifteen minutes later four (4) people including a police officer **P. K. Kilasi** whom he previously had a grudge with arrived and arrested him. Subsequently he was jointly charged with **James Mwaniki.** He denied having given **Josphat Kathuma** a mobile phone to sell. He stated further that terminating charges against **Mwaniki** was a manipulation by the Investigation Officer.

7. The 2nd Appellant stated that on the **18th July, 2014** he hosted his in-laws who stayed overnight as dowry negotiations took place from **8.30 p.m.** On **17th November, 2014** he was arrested at Mwingi Road Block amidst allegations that robbery cases were on rife and he had declined to be a police informer. He was later charged with robbery with violence and held at **Waita Prison** until **19th December, 2014** when he was produced in Court in the instant case. He denied the allegations that he had sold a cellphone to his co-accused **John Katee.** He urged that if indeed he had sold the cellphone to **John Katee** he could have told the Court at his first appearance. He denied allegations that there was an altercation between him and **John Katee** but alleged that he left unpaid bills at his hotel and disappeared to Nairobi.

8. The Appellants canvassed the Appeal by way of written submissions. The 1st Appellant urged that there were contradictions in evidence adduced by PW3 and PW7 as to when the sale transaction of the Ipad Tecno Tablet Mobile Phone occurred. This showed that witnesses were not straight forward as was held in the case of **Ndungu Kimani vs. Republic 1979 KLR 282** where the Court observed that:

> ***"The witness upon whose evidence is proposed to rely upon should not create an impression in the mind of the court that he is not a straight forward person or say or do something which indicates that he is a person of doubtful integrity and therefore makes it unsafe to accept his evidence."***

9. That witnesses said that the Tecno Mobile Phone was found with PW5 who was charged with handling stolen property, charges that were later dropped but no reason was given why it happened and having not been found with it he was innocent therefore his rights and fundamental freedom were violated as envisaged by **Article 27(2)** and **Article 25(c)** of the **Constitution.**

10. That the learned Magistrate fell into error by relying on hearsay evidence as the alleged circumstantial evidence against him was mere suspicion.

11. That there was delay in concluding his case which was in contravention of his constitutional rights as provided by **Article 50(2)(e)** of the **Constitution** and that his alibi defence put up which was cogent was disregarded.

12. It was the submission of the 2nd Appellant that his co-accused (**John Katee,** who was acquitted) implicated him and relying on his evidence that was full of contradictions by the Court was erroneous. That it was not clear as to which mobile phone was sold to **John Katee** who conspired with the Investigating Officer to implicate him. That the trial Magistrate was at fault by believing a guilty receiver of stolen property who was vindicated without any satisfactory explanation as to how he came to possess the mobile phone. That his alibi defence that was confirmed by his father, **Francis Mwendwa Musyimi** was disregarded for no apparent reason.

13. Further, that justice was delayed which was in violation of his fundamental rights, and by overlooking evidence adduced by the Prison Warden **Corporal Muasya** and believing that a fight erupted at the prison was a misdirection on the part of the Court.

14. The State through learned Counsel **Mr. Mamba** opposed the Appeal. He urged that following the robbery, an Ipad (phone) was recovered and the 1st Appellant identified as the person who sold it at a consideration of **Kshs. 5000/=** and he did not give any explanation as to how he came to possess it. A second phone (Nokia) was traced to **John Katee Kivite** who identified the 2nd Appellant as the one who sold it to him at **Kshs. 1,500/=** therefore was traced at Waita G. K. Prison. That the Court observed that while at the prison a commotion ensued between the 2nd Appellant and **John Katee** that almost degenerated into a fight.

15. This being a first Appellate Court, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. **(See Okeno vs. Republic (1972) EA 32).**

16. This having been a case of robbery with violence the Prosecution was duty bound to prove that:

(i) The offender was armed.

(ii) The offender was in company with one or more person or persons; or

(iii) At the time of the robbery, he wounded, beat, struck or used any other violence to any person. **(See Johana Ndungu vs. Republic Criminal Appeal No. 116 of 2005).**

17. It was the evidence of PW1 and PW2 that the attackers were two (2). One of them smashed the windscreen of the car prior to taking the bag that contained properties that PW1 lost. The Complainant was wounded. He was cut twice on the head and he sustained a fracture of the hand. This was indeed robbery with violence.

18. The Complainant and his wife did not identify their attackers. However, following investigations carried out, a mobile Tecno Tablet black in colour with a blue cover was recovered, a Nokia Mobile Phone X1 and some safaricom scratch cards were also recovered. These exhibits were not recovered in possession of the Appellants but evidence led was that they did possess them prior to disposing of the same. Evidence led having been circumstantial in nature. In the case of **Musili Tulo vs. Republic (2014) eKLR** the Court of Appeal discussed the issue as follows:

> ***"It follows that the evidence linking the appellant to that offence is circumstantial. We must therefore closely examine the***

evidence on record, not only as our normal duty as the first appellate court to arrive at our own conclusions, but also to ascertain whether the recorded evidence satisfies the following requirements:-

i. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

ii. Those circumstances should be of a definite

iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

19. In determining the matter the learned trial Magistrate considered the applicability of the doctrine of recent possession. Circumstances under which the doctrine are applicable were considered in the case of **Isaac Ng'ang'a Kahiga alias Peter Nganga Kahiga vs. Republic (2006) eKLR** where the Court of Appeal stated thus:

"...it is trite that before a court can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive identification of the property as that of the complainant. Thirdly that the property was stolen from the complainant and lastly that the proof as for time as has been stated over and over again, will depend on the easiness with which the stolen property can move from person to the other."

20. I have aforefound that the robbery was committed. It is not in dispute that some items were recovered, namely a Tecno Tablet black in colour with a blue cover and a Nokia Phone XI. In his testimony PW1, the Complainant adduced in evidence receipts issued for the phones that were stolen. This was proof that the cellphones were positively the property of the Complainant and they were stolen from him on the fateful date of the robbery.

21. With respect to the 2nd Appellant he was not identified as one of the robbers. However, it is alleged that his co-accused who was acquitted **John Katee Kivite** mentioned him as the one who sold to him the Nokia cellphone. PW9, the Investigating Officer stated that the investigations that were carried out enabled them to reach **John Katee Kivite** who was in possession of the cellphone. The explanation he gave was that he bought the cellphone from his co-accused, the 2nd Appellant herein. **John Katee Kavite** was the Appellant's co-accused, therefore an accomplice. In the case of **Nguku vs. Republic (1985) KLR 412** the Court of Appeal held that:

"In dealing with evidence of an accomplice the court should first establish whether the accomplice is a credible witness and then look for some independent evidence as corroboration connecting the accused person with the offence."

22. The case mounted against the Appellant was the Prosecution's case.

23. The obligation to adduce evidence that would prove the allegations against the Appellant lay with the Prosecution. **Section 107** of the **Evidence Act** provides thus:

"(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

24. In the case of **Republic vs. David Ruo Mjambura & 4 Others (2001) eKLR** it was stated as follows:

"It is our cardinal principle of law that in a criminal case the legal onus is always on the prosecution to prove the guilt of an accused person, and the standard of proof is proof beyond reasonable doubt. The burden of proof therefore lies on the prosecution through out to prove the guilt of an accused."

25. In the case of **Muiruri vs. Republic (1967) EA 542, 545** the Eastern Court of Appeal held that:

"... If at the close of the prosecution's case a prima facie case has not been made out the accused person is entitled to be acquitted. We do not consider that Section 151 was designed, nor should it be used, to empower the trial court immediately after the prosecution has closed its case to call witness in order to establish the case against the accused, except, possibly, when the evidence is of a purely formal nature. The onus is on the prosecution to prove its case and the Criminal Procedure Code provides that an accused shall be acquitted if at end of the prosecution's case this has not been done. We would here refer to several decisions of this court on the question as to whether an appeal court should sustain a conviction when a prima facie had not been made out at the close of the case for the prosecution but where the defence has been called for and had then called evidence establishing the guilt of the accused. In particular we refer to the decision of this court in Karioki vs. Republic (1934) 1 EA CA 160, Republic vs. Kinanda Bin Mwaisuma (1939) 6 EA CA 105 and D M Patel vs. Republic (1951) 18 EA CA 188. We also considered the various English cases on which these decisions were based, and also a later case of Republic vs. Abbott (1955) 2 ALL ER 899.

The previous decisions of this court do not in any way detract from the fact that the law requires a trial court to acquit an accused person if a prima facie case has not been made out by the prosecution. If an accused person is wrongly called upon for his defence then this is an error of law. On appeal, however, an appeal court has to examine the case a whole and to consider all the evidence produced at the trial court, and in accordance with the provision of Section 346 of the Code, will not reverse a conviction on account of any error by the trial court unless such an error has in fact occasioned failure of justice.

In this case the trial Magistrate was wrong in law in not acquitting the Appellant when at the close of the case for the prosecution no prima facie case had been made out. The position was in no way altered as a result of the evidence given by the appellant; there was still no sufficient evidence upon which he could be convicted."

26. This is a case where at the close of the Prosecution's case no iota of evidence was adduced in respect of the 2nd Appellant having been connected with the offence. Evidence adduced by the Investigating Officer that following interrogation of **Katee** he stated that the 2nd Appellant had given him the mobile phone, at that stage was hearsay and inadmissible.

27. The fact that the police charged **Katee** jointly with the 2nd Appellant was evidence that they did not believe him. The Investigation Officer did not state if at the outset he had any witness. In his defence he stated that he bought the cellphone in the presence of **Maluki** and he paid **Kshs. 1,500/=.** On cross examination he denied having notified the Court at the outset that the 2nd Appellant sold him the mobile phone. He denied having escorted **Maluki** to record the statement with the police. **Katee** called a witness known as **Moses Mwaniki Kilonzi** who testified that he was present when the 2nd Appellant sold to him the cellphone. On cross examination he denied having disclosed to the CID that he was a witness to the sale or having been taken by **John Katee** to record a statement. What was also not clarified is if he was the same person as **Mr. Maluki** or if he was different.

28. It was alleged that after **Katee** was arraigned in Court and answered charges, on being taken to prison he encountered the 2nd Appellant and they had an altercation. The learned trial Magistrate was of the view that there was sufficient evidence to indicate that there was a commotion between the two when they were admitted in the same cell **No. 4** at the **G. K. Prison.** Two (2) prison warders were called to testify by the Accused, **Katee. No. 28727 Corporal Joseph Muasya** denied the allegation of an altercation having occurred between the two and stated that **Katee** was moved because **Cell No. 4** was congested. **No. 26651 Corporal Benard Mutisya** stated that he was a stranger to the allegation as his duties entail issuing of uniforms to inmates perse. It was alleged by the 2nd Appellant that **Katee** framed him up because of a grudge that existed between them. Whether or not it was the case, this is a matter where the 2nd Appellant was wrongly called upon to defend himself. Evidence of his accomplice which was not cogent could not have been a basis of his conviction. This was complicated by the fact that the Investigation Officer, PW9 opined that the accomplice seemed to have a mental problem. The trial Court was of the view that this was not the case. The opinion was formed without any medical examination being conducted. Consequently, there was no concrete evidence on record to corroborate the allegations of the co-accused who was acquitted. In the premises it was not safe to convict the 2nd Appellant.

29. Regarding the 1st Appellant, a Tecno Tablet was found in actual possession of PW5 who testified that he purchased it from the 1st Appellant in the presence of PW4 and PW7 who described the 1st Appellant as his regular customer, who requested him to find him a buyer and he managed to get PW5. The burden was therefore upon the Appellant to explain how he came to be in possession of the tecno tablet that was stolen from the complainant on the fateful night.

30. As correctly found by the learned trial Magistrate he failed to offer any explanation of how he came to possess the tablet. In his line of reasoning he came up with an alleged grudge that existed between him with PW7 which did not appear to be valid and the trial Magistrate did not fall into error in dismissing it as having not been reasonable and concluded that he could only be in possession of it having stolen it in the course of robbery.

31. It is urged that the Appellant's rights were violated and in particular as enshrined in **Article 50(2)(b)(e)** of the **Constitution** which provide thus:

"(2) Every accused person has the right to a fair trial, which includes the right—

(b) to be informed of the charge, with sufficient detail to answer it;

(e) to have the trial begin and conclude without unreasonable delay;"

32. In the case of **Joseph Ndungu Kagiri vs. Republic (2016) eKLR** the Court cited the case of **Natasha Singh vs. CB (2013) 5 SCC 741** where it was held that:

"Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized."(Emphasis added)

33. In the instant case it is contended that the Appellants rights were violated because he suffered for more than two (2) years in prison as his case was being heard. It is an Accused person's right to have a case heard and concluded without any reasonable delay. Reasonableness here will depend on each case. This is a matter where the case was heard initially by a Magistrate who was transferred prior to the succeeding Magistrate who concluded it taking over. The perceived delay was caused by the lengthy cross-examination by all the five (5) Accused persons. There was no time the Appellant or his co-accused accused the trial Magistrate of delaying the matter. Therefore, that ground of Appeal fails.

34. From the foregoing the Appeal against the 2nd Appellant succeeds. The conviction against him is quashed and the sentence set aside. He shall be released forthwith unless otherwise lawfully held.

35. With respect to the 1st Appellant, the Appeal fails. The conviction against him is therefore affirmed.

36. With regard to sentence, he was sentenced to suffer death. In the case of **Francis Kariako Muruatetu & Another vs. Republic Petition No. 15 & 16 of 2015** the Supreme Court held that:

> ***"48. 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 Article 25 of the Constitution; an absolute right.***
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> ***49. With regard to murder convicts, mitigation is an important facet of fair trial. In Woodson as cited above, the Supreme Court in striking down the mandatory death penalty for murder decried the failure to individualize an appropriate sentence to the relevant aspects of the character and record of each defendant, and consider appropriate mitigating factors. The Court was of the view that a mandatory sentence treated the offenders as a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death thereby dehumanizing them.***
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> ***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.***
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> ***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.***
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> ***53. If a Judge does not have discretion to take into account mitigation circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualize the circumstances of an offence or offender may result in the undesirable effect of 'overpunishing' the convict.***
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> ***58. To our minds, any law or procedure which when executed culminate in termination if life, ought to be just, fair and reasonable. As result, due process is made possible by a procedure which allows the Court to assess the appropriateness of the death penalty in relation to the circumstances of the offender and the offence. We are of the view that the mandatory nature of this penalty runs counter to constitutional guarantees enshrining respect for the rule of law.***
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> ***59. We now lay to reset the quagmire that has plagued the courts with regard to the mandatory nature of Section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the Penal Code, unfair thereby conflicting with Articles 25 (c), 28, 48 and 50 (1) and (2) (q) of the Constitution.***
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> ***60. Another aspect of the mandatory sentence in Section 204 that we have grappled with is its discriminate nature; discriminate in the sense that the mandatory sentence gives differential treatment to a convict under that Section, distinct from the kind of treatment accorded to a convict under a Section that does not impose a mandatory sentence."***

The trial Court gave the Appellant the opportunity of mitigating. He stated that he was a married man with three (3) children. However, he was not remorseful. He continued to deny the allegations and expressed his intention to appeal. I have taken those facts into consideration and the nature of injuries that were suffered by the Complainant which were serious. In the premises I set aside the death sentence that was imposed and substitute it with **15 years imprisonment** to be effective from the date of conviction.

37. It is so ordered.

Dated, Signed and Delivered at Kitui this 24th day of April, 2019.

L. N. MUTENDE

JUDGE