REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL APPEAL NO. 4 OF 2017

COSMAS KIPYEGON ALIAS MORGAN KIPKORIR KOECH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Kericho Chief Magistrate's Court

Criminal Case No. 247 of 2015 (Hon. J.R. Ndururi (PM) dated 17th January 2017)

JUDGMENT

1. The appellant, **Cosmas Kipyegon alias Morgan Kipkorir Koech** was charged in Kericho Chief Magistrates Court Criminal Case No. 247 of 2015 with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were that on the 12th day of January 2015, at about 8:00 p.m at Tegat village in Kipsolu location within Kericho County, jointly with another not before court, he robbed Ezekiel Cheruiyot Talam of one mobile phone make Motorolla 113 valued at Kshs. 2,600 and immediately after the time of the robbery beat the said Ezekiel Cheruiyot Talam.

2. The appellant pleaded not guilty to the offence and after a full trial, was found guilty as charged and sentenced to death.

3. Aggrieved with both his conviction and sentence, he filed the present appeal in which he raised three grounds of appeal in his Petition of Appeal filed in court on 23rd January 2017. He alleges in his first ground that the trial court erred by convicting him on the basis of unsafe, uncorroborated, contradicting and inconsistent evidence. He contends in his second ground that the trial court erred in both law and fact by convicting him without considering that the alleged exhibit was not found and the court relied on 'non-evidential exhibit.' His third ground was that the trial court erred by convicting him yet no identification (parade) was conducted as required by law.

4. At the hearing of his appeal, the appellant presented to the court and the state his written submissions together with Amended Grounds of Appeal containing three grounds. In his first ground in the Amended Grounds of Appeal, he alleges that the court erred by failing to consider that the prosecution evidence against him was inconsistent and insufficient and was full of speculation and a conspiracy against him. He contends in his second ground that the trial court failed to note that section 165 of the Evidence Act was contravened with respect to him, and it was his intention to impeach the entire evidence of PW1 on the basis of section 163(1) of the Evidence Act. He submitted in this regard that he would seek to impeach the evidence of PW1 and PW2 who had conspired against him.

5. His third ground in the Amended Grounds of Appeal relates to his sentence. He contends that the trial court erred by convicting him and sentencing him to death on the basis of a trial that was conducted contrary to the provisions of Article 50(2)(b)(c) and (j) and Article 25(c) of the Constitution.

6. This is a first appeal and I am accordingly under a duty to re-evaluate the evidence presented before the trial court and reach my own conclusion. In doing so, I bear in mind that I have neither seen nor heard the witnesses, which the trial court had the advantage of doing-see **Okeno v Republic (1972) EA 32**.

7. The prosecution evidence presented before the trial court was as follows. Ezekiel Talam (Ezekiel, PW1), the complainant, was on his way home from Tegat Tea factory shops at about 8.00 p.m. on 22nd January 2015 when he met the appellant and one Gilbert Kiprono. He had a torch which he shone on them, and he recognised them as they were neighbours whom he knew well. The two were armed with stones and the appellant hit him on the face with a stone while his accomplice kicked him in the back. Ezekiel had a phone, a Motorolla C138 in his shirt's left breast pocket. The appellant and his accomplice tore the breast pocket of his shirt and took the phone which he had bought at Kshs. 2,250.00 on 13th November 2006. He identified the receipt issued to him on his purchase of the phone, which was produced as exhibit 1. Ezekiel also had some Kshs. 5,000 in the same pocket but the appellant and his accomplice did not take it. When he was attacked, he

screamed and Jeremiah Mursoi (PW2) rescued him. His attackers ran away.

8. Ezekiel recovered the torn pocket of his shirt the following day. His phone was never recovered. He reported the incident at the Sosiot Police Station and sought treatment at the Sosiot Health Centre.

9. Jeremiah Kipkoskei Mosonik (Jeremiah, PW2) was on his way home from Keplanigwet on 12th January 2015 at about 8:00 p.m. On reaching Kipkoyian Polytechnic, he heard someone screaming and rushed to the scene. When he got to the scene, he found two people attacking a person. He flashed his torch at them and recognized the appellant. He then shouted *'Apulei'* which in Kipsigis meant 'nephew'. He was referring to the appellant, who, according to Jeremiah, was his nephew as his grandmother came from PW2's village.

10. PW2 also recognised the other attacker, whom he referred to as Gilbert. He saw the appellant holding Ezekiel's breast pocket. When he shouted *'Apulei'* both the appellant and his accomplice fled. He found that Ezekiel, whom he recognsed as *'Mwalimu'*- the complainant was a school teacher- had been injured on his forehead and right leg. The following day, he and the complainant went back to the scene and found the torn breast pocket at the scene of the attack.

11. Joshua Kibet Bonget (referred to in the record as PW4, though it appears he was the third prosecution witness), a registered clinical officer, produced the P3 form (exhibit 3) completed in respect of the complainant. He had examined the complainant two days after the attack and found that he was in a fair general condition. He, however, had a bruise on his forehead and a swelling on the right side of his face. He was also complaining of pain on the back and bruises on both knees.

12. PW4, No. 85903 P.C **Paul Mwangangi** attached to the Sosiot Police Station, was the investigating officer. He produced the shirt pocket (P exhibit 2) and the complainant's phone receipt (P exhibit 1). He had interrogated the complainant and the complainant had repeated his statement as set out in the police file.

13. After the close of the prosecution case, the appellant was placed on his defence. He elected to give a sworn statement and call no witnesses. He alleged that the complainant had told him in January 2015 that the land that the appellant and his family occupied should be sold to pay school fees for the appellant's sister. The appellant had refused and as a consequence, the complainant had threatened him. He further alleged that the complainant and some young men had attacked him on 10th January 2015 as he was on his way to the shop at around 7:00 p.m. He had been arrested on the 28th of January 2015 by the Chief while he was on his way to the shops, and the complainant had arrived and started kicking and assaulting him. He had thereafter been charged with the offence before court, which he denied committing. He confirmed that the complainant and PW2 were known to him; that PW1 was his father's cousin while PW2 was also his relative.

14. I have considered the record of the trial court and the prosecution and defence cases. I have also considered the appellant's written submissions and the submissions made on behalf of the state. In his written submissions, the appellant argues with respect to his first and second grounds in the Amended Grounds of Appeal that the content of the first report of PW1 was in conflict with the allegations made before the court as revealed by the evidence on record. He submitted that the complainant had not reported the theft of his phone to the police when he went to make his report at the police station vide OB/10/14/1/2015. He also submitted that the prosecution had ignored his plea to be supplied with witness statements which was contrary to Article 50 of the Constitution.

15. The State opposed the appeal. In his submissions in response, Mr. Ayodo stated that the prosecution had proved its case against the appellant beyond reasonable doubt. With regard to the appellant's argument that the stolen phone had not been produced as an exhibit, his submission was that the exhibits produced in court were reliable and convincing.

16. To the appellant's submission that he had not been properly identified, his submission was that the identification was proper as it was by recognition. He thus urged the court to find that the conviction was safe and not interfere with the finding of the trial court.

17. With regard to the appellant's complaint about the sentence imposed on him, Mr Ayodo submitted that in view of the **Muruatetu** decision, the prosecution was leaving the issue to the court. However, in his view, the sentence of death against the appellant was merited as the ingredients of robbery with violence had been established.

18. From the submissions on record, I believe that 3 issues arise for consideration. The first relates to the evidence before the trial court, and whether it was sufficient to sustain a conviction against the appellant. The second, which is connected with the first, is whether it was necessary for the police to carry out an identification parade in order to establish whether it was the appellant who perpetrated the offence against the complainant. The third issue relates to the sentence imposed on the appellant, and whether the trial court erred in imposing the death penalty given the decision of the Supreme Court in the **Muruatetu** decision.

19. The appellant argues that the evidence before the trial court was insufficient to sustain a conviction against him. The appellant was convicted of the offence of robbery with violence. The ingredients of the offence of robbery with violence were set out by the Court of Appeal in the case of **Oluoch -v- Republic [1985] KLR** where it was held:

> **"Robbery with violence is committed in any of the following circumstances:**
>
> **a. The offender is armed with any dangerous and offensive weapon or instrument; <u>or</u>**
>
> **b. The offender is in company with one or more person or persons; <u>or</u>**
>
> **c. At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person ……" *[our own emphasis].***

The use of the word OR in this definition means that proof of any one of the above ingredients is sufficient to establish an offence under section 296(2) of the Penal Code.

20. The appellant in this case was in the company of another. He was armed with a stone, and he attacked the complainant on the face with the stone. He robbed him of his phone, tearing off his shirt pocket in the process. Though the phone was never recovered, a receipt in respect thereof was produced in evidence.

All the ingredients of the offence of robbery with violence in this case were established.

21. The second issue relates to the identity of the appellant as the perpetrator of the offence against the complainant. He argues that an identification parade should have been held. Since it was not, the evidence against him on the basis of which he was convicted was not safe.

22. The evidence before the trial court, however, was not of identification, but of recognition. PW2 knew the appellant and his accomplice. He referred to the appellant as *'apulei'* or nephew when he saw him, from the light of his torch, attacking the complainant. It was his call of '*apulei*' that seems to have made the appellant and is accomplice ran away and stop attacking the complainant. There was thus no need for an identification parade as the appellant was recognised by his victim and the first person to arrive at the scene.

23. In **R –vs- Turnbull & Others (1973) 3 ALL ER 549 it was held with respect to identification evidence 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?.... 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."** (Emphasis added)

24. In **Wamunga vs. Republic (1989) KLR 426**, the Court of stated that:

> **"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."**

25. Further, in its decision in **Eldoret Criminal Appeal No. 274 and 275 of 2009- Peter Okee Omukaga & Another vs Republic (unreported)** the court of Appeal observed as follows:

> **"We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as 'neighbours from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants."**

26. I am satisfied that in the present case, the complainant and PW2 recognized the appellant and his accomplice, both of whom were from their village, and one of whom was PW2's nephew. I therefore find that there was no error in the conviction of the appellant on the basis of the evidence of PW1 and PW2.

27. The appellant challenges the sentence of death imposed upon him. He argues that the court erred in not following the precedent set by the Supreme Court in **Francis Kariko Muruatetu & another v Republic (2017) eKLR**. In its decision, the Court affirmed the decision of the Court of Appeal in **Godfrey Ngotho Mutiso v R C.A. No. 17 of 2008**, and the High Court in **Joseph Kaberia Kahinga and Others v The Attorney General [2006] eKLR** and held that while the death sentence for murder and robbery with violence was not unconstitutional, the mandatory nature of the sentence that denied trial courts the discretion to pass a lesser sentence should the circumstances so permit is unconstitutional.

28. In this case, I note that the appellant was a first offender. In his mitigation, he maintained that he did not commit the offence, and that he had no parents and his siblings would suffer. His conviction pre-dated the **Muruatetu** decision, and the trial court expressed the view that despite his mitigation, the only penalty that it could pass was the death sentence. While the trial court did not make an error with respect to the sentence given the state of the jurisprudence at the time, I believe that this court can properly alter the sentence imposed on the accused in accordance with the guidelines given by the Supreme Court in **Muruatetu**.

29. In applying the rationale in **Muruatetu,** the court in **James Kariuki Wagana v Republic [2018] eKLR** the court considered the question of sentencing in robbery and murder cases and observed as follows:

> **"32. The law of the land as it stands today, therefore, is that the maximum penalty for both murder and robbery with violence is the death penalty but the Court has discretion to impose any other penalty that it deems fit and just in the circumstances.**

33. In light of this, I will, therefore, proceed to determine the appropriate sentence. First, it is true that all the elements for the offence of robbery with violence were proved. <u>However, there are no truly aggravating circumstances which would lift this case to the scales of the death penalty. Death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder.</u> That is not the case here. While force was used, one cannot say here that the Appellant used excessive force; and neither did he unnecessarily injure the Complainant during the robbery. He was not armed with any offensive weapon.

34. In his mitigation, the Appellant submitted that he was a first offender and that he was youthful and had a young family to take care of. I have taken these mitigating circumstances into consideration. I, therefore, sentence the Appellant to fifteen years for the conviction for robbery with violence. Given that "simple" robbery under section 296(1) of the Penal Code attracts a minimum sentence of fourteen years imprisonment, it seems logical that the minimum sentence for robbery with violence should begin at fifteen years imprisonment. Since there are no aggravating circumstances to take the crime here to the realm of heinous robbery with violence beyond the ingredients of the crime, it is fair and proportionate to give the minimum sentence logically possible. In my view, that is fifteen years imprisonment. (Emphasis added)

30. The appellant and his accomplice in this case were armed with stones, and they did use violence against the complainant. However, the level of violence involved did not rise to such a heinous level as to warrant the death penalty. Accordingly, I find that the appeal against sentence is merited. While the appeal against conviction is without merit and is accordingly dismissed, I hereby set aside the death penalty imposed on the appellant and substitute in its place a term of imprisonment for 15 years from the date of sentence by the trial court.

31. Orders accordingly.

Dated and Signed this 10th day of June 2019

MUMBI NGUGI

JUDGE

Dated Delivered and Signed at Kericho this 26th day of June, 2019

GEORGE DULU

JUDGE