REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

(CORAM: R, MWONGO, J)

HCCR APP NO 30 OF 2017

GEORGE MBAYA GITHINJI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment dated 30th May 2017 by Hon P Gesora

Chief Magistrate in CMCR Case No. 934 of 2015, Naivasha,)

JUDGMENT

Background

1. The appellant was charged with three others, with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code.** After a hearing, the appellant was found guilty and convicted and sentenced to death; the other two accused were acquitted. It was alleged that the appellant with three others, armed with dangerous weapons namely pistols, robbed Ann Nyaguthii Mwangi two mobile phones and cash, all valued at Kshs 15,300/=. The particulars also indicate that the accused persons threatened to use violence against the victim.

2. Dissatisfied with the trial court's judgment, the appellant has appealed on the following grounds:

> *a. That the appellant prays for resentencing and case re-hearing as per the recent direction from supreme court in the **Francis Muruatetu case.***
>
> *b. That the learned trial magistrate erred in law by awarding a conviction based on uncorroborated evidence by a single identifying witness.*
>
> *c. That the learned trial Magistrate erred in law and fact by convicting the appellant on reliance of an identification parade conducted without following procedure therefore a nullity.*
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> *d. That the learned trial Magistrate erred in law by dismissing the appellant's defence of alibi without giving it an objective analysis to test whether it was truthful.*

3. The appellant also filed supplementary grounds of appeal on 29th September 2019, and written submissions.

4. The issues arising for determination are:

> i. Identification by a single identifying witness
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> ii. Defence of alibi by appellant
>
> iii. Resentencing and rehearing

Identification by a single identifying witness

5. The appellant submitted that identification by single witness was an error supported by an identification parade which did not follow procedure. According to the appellant he was not positively identified by witnesses as they did not mention physical features or unique marks of the accused to the police before being taking to the parade. He further alleges that the time taken in the robbery was too short and the identifying witness was in fear and shock since her life was in danger with a gun pointed at her and she could not have properly identified the assailant.

6. The law on identification and particularly on identification by a single witness is well set out in our jurisprudence. The Court of Appeal for Eastern Africa in **Abdalla Wendo v Republic [1953] 20 E.A.C.A 166** held on this issue as follows:

> ***"Subject to certain exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification, were difficult. In such circumstances what is needed is other evidence whether it be circumstantial or / direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."***

7. The same court in **Roria v Republic [1967] EA 573,** also held that:

> ***"A conviction resting entirely on identity invariably causes a degree of uneasiness that danger is of course greater when the evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld. It is the duty of this court to satisfy itself that in all the circumstances it is safe to act on such identification."***

8. The courts in Kenya have consistently relied on the English case of **R v Turnbull & Others (1976) 3 ALL ER 549**, which has a detailed discussion on the factors that ought to be considered when the evidence turns on identification by a single witness. The Court there said:

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

9. Further, the Kenya Court of Appeal in the case of **Wamunga v Republic (1989) KLR 426** followed this view when it stated:

> ***"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."***

10. The purpose of identification parades was re-emphasised in the case of **John Mwangi Kamau v Republic [2014] eKLR,** the Court expressed itself as follows:

> ***"15. Identification parades are meant to test the correctness of a witness's identification of a suspect. See this Court's decision in John Kamau Wamatu –vs- Republic – Criminal Appeal No. 68& 69 of 2008. In this case Eliud, George and Joseph testified that they had indicated in their initial reports that they had gotten impressions of the assailants and they could identify them. However, we cannot help but note that DW1, CPL John Makumi (CPL John), in producing the Occurrence Book testified that the incident was recorded as OB. No. 45 of 24/6/2003; the assailants' were never described in the said report. We also note that the aforementioned witnesses did admit that they never gave the physical description of their assailants to the police. In Gabriel Kamau Njoroge –vs- Republic (1982-1988) 1KAR 1134, this Court observed:-***
>
> ***"A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade."***
>
> ***16. Ideally, a witness ought to give the description of his/her assailant for purposes of organizing an identification parade. In this instant case, the appellant contends that the failure to do so rendered the identification parade worthless. So, what is the consequence of the said failure? In Nathan Kamau Mugwe –vs- Republic- Criminal Appeal No. 63 of 2008 this Court faced with a similar situation expressed itself as follows:-***
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> > ***"As to the compliant in ground six that the witnesses had not given to the police the description of the appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in GABRIEL's case, supra, the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification. All the Court said was that the witness 'SHOULD' be asked. That is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a***

witness of an opportunity of a properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him.

In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade. We reject the contention that because James had not given to the police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected."

11. In light of the guidance from the aforesaid cases, this Court must examine the identification process that was employed in this case to ascertain that the persisting conditions favoured a correct and legally acceptable identification of the accused.

12. In her testimony, PW2, Ann Nyaguthii Mwangi, gave her evidence of how she was robbed. She testified that she was in her shop at about 12.30 pm. The shop was still open, and the energy saver lights were on at the time. Two men approached the shop and as she woke up to serve them, the accused pointed a gun (pistol) at her and ordered her to stay where she was. He took Kshs 5,000/= and two mobile phones. She stated that she gave a description to the police and when the accused was arrested she identified him in an identification parade.

13. The record shows that PW9 IP Alvine Matara of Naivasha Police Station testified on how he conducted the identification parade on request by Corporal Kogo, the Investigating Officer. He stated that he explained to the accused his rights as regards the parade. He also stated that he applied the rules as contained in the identification parade forms he used and produced as Exhibit 4. PW9 stated that he assembled the other consenting members of the parade in the cell corridor of the police station, including the accused. The suspect (appellant) stood between the 3rd and 4th members of the parade. There were two witnesses, one Mary Ndaguya and the other Ann Nyaguthi Mwangi (PW2), but Mary Ndaguya was unable to identify the suspect. However, PW2 readily identified the accused. Thereafter the suspect (accused) signed the parade form.

14. I have perused Exhibit 4. It clearly shows there were seven members of the parade. It records that PW2 identified the accused by touching him; he was standing in between parade members 3 and 4.

15. In my view, there was sufficient light in the shop and PW2 was able to clearly see the accused. She encountered the appellant first hand and at close range. He spoke to her telling her to keep quiet and stay where she was. She saw him take the money. In my considered view, PW2 was in a position to properly identify the appellant, as the conditions for identification were fulfilled. In addition the identification parade appears to have been conducted in compliance with the law.

16. Accordingly, I see no reason to impugn the finding on identification by the trial court.

Defence of alibi by appellant

17. The appellant submitted that the trial magistrate did not consider his testimony and in particular his defence of alibi.

18. In his defence, the appellant gave an unsworn statement. He stated that on 16th June, 2015 her woke up as usual and went to wait for the vehicle for which he works as a turn-boy. As he was waiting, a vehicle arrived at about 9.30 am. The occupants were police officers who interrogated him. They ordered him to go to his house and accompanied him. After searching the house and taking photographs, they arrested him and charged him with the present offence.

19. The appellant did not give any evidence concerning what happened or where he was on the material night. As such he did not lay a basis for an alibi. An **"Alibi"** is defined in the **Cambridge Dictionary** as follows :

"1)proof that someone who is thought to have committed a crime could not have done it, especially the fact or statement that they were in another place at the time it happened:

2)an excuse for something bad or for a failure:

20. The appellant's evidence did not rise to the level where it could in any way raise doubt in the prosecution's case or shake the credibility of the prosecution witnesses. In addition, his evidence was unsworn, and therefore incapable of being tested for veracity. In **May v Republic, C.A. Cr Appeal No. 24 of 1979 (1981) KLR 129** it was held as follows regarding unsworn testimony:

"An unsworn statement is not, strictly speaking, evidence and the rules of evidence cannot be applied to an unsworn statement. It has no probative value, but it should be considered in relation to the whole of the evidence. Its potential value is persuasive rather than evidential. For it to have any value it must be supported by the evidence recorded in the case."

21. In light of the above, I do not consider that the appellant established an alibi to the offence for which he was charged, and the trial court's determination cannot be impugned on this ground.

Resentencing and rehearing

22. The appellant argues, as I understand it, that **section 296(2)** of the **Penal Code** which makes the death sentence mandatory for the

offence of robbery with violence, deprives the court of the use of judicial discretion in a matter of life and death; and that such law can only be regarded as unjust and unfair as the sentences imposed fails to conform to fair trial tenets that accrue to accused persons under **Article 25** of the **Constitution**. He has cited the case of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** in support of his argument under this head. Thus, the appellant seeks an order for the re-hearing of the case and re-sentencing.

23. Our Courts have stated that they have no jurisdiction to alter the death sentence or to purport to impose another sentence that is not provided for in law. In **Joseph Njuguna Mwaura & 2 Others v. Republic [2013] eKLR** the Court of Appeal held that:

> ***"A look at all the provision of the law that impose the death sentence shows that these are couched in mandatory terms using the word "shall". It is not for the Judiciary to usurp the Mandate of Parliament and outlaw a sentence that has been put in place by Kenyans, or purports to impose Kenyans or purports to impose provided in law."***

24. In addition, the Supreme Court has held that:

> ***"We are in agreement and affirm the Court of Appeal decision in Geoffrey Ngotho Mutiso vs. Republic CRA 17/2008 that whilst the Constitution recognizes the death Penalty as being lawful, it does not prove that when a conviction for Murder is recorded, only the death sentence shall be imposed."*** *(Emphasis supplied).*

25. The Supreme Court nevertheless did not outlaw the sentence of death, as it stated whilst dealing with the death penalty under **section 204** of the **Penal Code** and determined as follows:

> ***"[69]Consequently, we find that Section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides the mandatory death sentence for murder. For avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment."***

26. In other words, whilst the Supreme Court has not outlawed the death sentence, it holds that the blind application of a mandatory death sentence would be unconstitutional for two reasons: firstly for failing to grant an accused the full dignity of a trial on sentencing; and, secondly, for failure of the trial court to exercise its sentencing discretion. Thus a determination reached without hearing an accused person at a sentencing hearing at which the court avails the accused the full protections of the law would thus be overturned for resentencing.

27. In the present case, there is no evidence from the record that a sentencing hearing was held. There was no mitigation by the accused. The record shows: **"Mitigation: Nil".** The trial Magistrate then immediately meted sentence in the following terms:

> ***"I have considered the nature of the offence as well as all the circumstances surrounding the commission of the offence. The law has set out a mandatory sentence on this offence- 3rd accused is hereby sentenced to suffer death sentence".***

28. I note that the trial court failed to avail the appellant his full trial rights; did not hold a sentencing hearing and applied the mandatory provisions of **section 296 (2) Penal Code** without giving any consideration to mitigating circumstances.

29. In my view, position in law today is this: before a mandatory death sentence can be imposed, there is a higher responsibility on the court to ensure due process in respect of the passing of that sentence and that such sentence is not imposed through blind application of the statutory prescription. This was the position taken by the Supreme Court in **Muruatetu** when it categorically stated:

> ***"[58] To our minds, any law or procedure which when executed culminates in termination of life, ought to be just, fair and reasonable. As a 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."***

30. Even where the accused person may state he has no mitigation or is silent after conviction, I believe that the courts are now obligated under Muruatetu to explain to the accused that a sentencing hearing shall be held at which the court will consider mitigating factors, including, but not limited to:

a) Age of the offender;

b) Being a first offender;

c) Whether the offender pleaded guilty;

d) Character and record of the offender;

e) Commission of the offence in response to gender-based violence;

f) Remorsefulness of the offender;

g) The possibility of reform and social re-adaptation of the offender;

h) Probation Officer's Pre-sentencing Report

*i) Any other factor that the Court considers relevant***.**

31. To the extent that it was only the sentencing that was not conducted by the trial court in accordance with the guidelines under **Muruatetu**, the appeal herein succeeds.

32. For clarity it is affirmed that the decision of the trial court is otherwise upheld as in all other respects the appeal has failed.

33. Accordingly, the orders which this court deems appropriate are as follows:

a. There shall be a sentencing hearing at which the appellant shall present his mitigation;

b. The Probation Officer, Naivasha, shall avail to court, within thirty days, a full report regarding the circumstances of the accused, his family and victims ;

c. This Court shall conduct sentencing hearing, considering all relevant matters and sentence the Appellant afresh.

34. Orders accordingly.

Dated and Delivered at Naivasha this 29th Day of July, 2019

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RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. George Mbaya Githinji - Appellant in person

2. Ms Abuga for the State

3. Court Clerk - Quinter Ogutu