



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISC. CRIMINAL APPEAL CASE NO. 4 OF 2015

DOUGLAS MUTHAURA NTORIBI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicant was charged with the offence of robbery with violence Contrary to Section 296(2) of the Penal Code. He was convicted by the trial Court at Nkubu on 3.7.2005 (**A.K. KANIARU PRINCIPAL MAGISTRATE – as he was**) and sentenced to suffer death.

The applicant filed Criminal Appeal number 118 of 2005 before the Meru High Court and on 29th July, 2008 the same was disallowed. The applicant soldered on and filed criminal appeal No.317 of 2008 before the Court of Appeal. That appeal suffered the same fate on 30th April, 2014.

The applicant filed the Notice of motion on 3.2.2015 under Article 50 of the Constitution Mr. Kiogora appeared for the applicant. Counsel contends that there is new and compelling evidence in form of the occurrence boon (OB) from Nkubu Police Station. Counsel submit that the evidence was not within the knowledge of the applicant during the trial. The conviction is based on identification. The O.B report clearly states that the complainant never identified the appellant. Counsel relies on the case of **PETER MANSON OKEYO V REPUBLIC, Nairobi Constitutional Petition No.347 of 2013**. Mr. Kiogora submitted that the OB provides new and compelling evidence.

Mr. Odhiambo opposed the application. Counsel filed a Preliminary Objection which he relied upon. Counsel contends that there is no new and compelling evidence. The OB was available during the hearing all along. The evidence ought to be admissible. What has been produced is an investigation diary. It is not dated or stamped. We can't tell where it came from. Compelling evidence should be evidence which can make the Court change its decision. The issue of identification was dealt with by the Court of Appeal. There was enough light. The O.B does not displace that evidence.

The issue for determination is whether there is new and compelling evidence as envisaged by Article 50(6) of the Constitution. Mr. Odhiambo raised the issue that the trial was conducted before the promulgation of the New Constitution. This cannot be an issue. There is no limitation on the discovery of new and compelling evidence. Once that fact is realized, it does not matter where the applicant or petitioner was convicted.

The particulars of the offence as per the charge sheet were as follows:

“On the 8th day of June 2004, Bombitine village Kigane sub-location in Meru Central District within the Eastern Province, jointly with others not before Court while armed with dangerous weapon to wit pangas and rungas robbed Dr. SIMON K. IKIUGU cash Kshs.500/= and immediately before or immediately after such robbery used actual violence to said Dr. SIMON K. IKIUGU”.

The new and compelling evidence brought by the applicant is OB 7 from Nkubu Police station. The date is not given. The OB Section reads as follows:

Cpl. Kanyi, PC Nderitu, PC Nthiga and PC Sigei books back from Kiambogo village where by unknown number of thugs attacked Dr. Simon Kungu while asleep with his family. They hit the rear door using a big stone but the thugs were unable to enter after being resisted by Dr. Kungu and his wife. They managed to cut two of the thugs and the thugs ran away leaving a panga and a hat. The Police poldog was called from Meru Division to track the suspects but it lost sense. Dr. Simon Kungu gave the thugs Ksh.500/= . He was injured on the head by the thugs. Other than the money he gave out nothing was stolen.

The title of the document provided by the applicant is that it is an investigation diary. The information contained in the document is not the first report to the Police contrary to Mr. Kiogora's submissions, there is nowhere in the document stating that the complainant did not identify his attackers. While testifying, the complainant informed the court that he saw the applicant at the time of the incident. He used to see him around but did not know his work. He was only about two meters away from the window. He had a cap on but it had not covered the face. Once outside the house he saw the applicant clearly. There was moonlight and he saw the applicant very well. The applicant then ran away.

The findings of the trial court were upheld by the two superior Courts. The High Court reiterated the circumstances under which the applicant was identified and found that the identification was positive. One of the grounds of appeal before the court of appeal was that:-

The Judges erred in failing to find that there was no first report made to the Police giving the name or description of the appellant and the Judges erred in disregarding the occurrence book.

The Court of appeal revisited the issue of identification and held that the identification of the applicant was based on recognition and was free from error.

In the case of *LT COL TOM MARTINS KIBISU V REPUBLIC, Supreme Court Petition No.3 of 2014 (2014)eKLR*, the Supreme Court dealt with the issue of new and compelling evidence and at paragraph 42 stated as follows:-

We are in agreement with the Court of Appeal that under Article 50(6), "new evidence" means "evidence which was not available at the time of trial and which, despite exercise of due diligence, could not have been availed at the trial," and "compelling evidence" implies "evidence that would have been admissible at the trial, of high probative value and capable of belief, and which, if adduced at the trial would probably have led to a different verdict." A Court considering whether evidence is new and compelling for a given case, must ascertain that it is, prima facie, material to, or capable of affecting or varying the subject charges, the criminal trial process, the conviction entered, or the sentence passed against an accused person.

It is clear that the occurrence book was referred to during the hearing before the Court of Appeal. This cannot be new and compelling evidence. The O.B was available. Further, the OB has nothing to do with identification. The complainant identified the appellant. On 10.6.2004, he saw the applicant near his shop and called the Police. This led to the arrest of the applicant. I do find that there is no new and compelling evidence.

In view of the recent decision by the supreme Court in *Constitutional Petitions number 15 and 16 2015, FRANCIS KARIUKO MURIUATETU & ANOTHER V REPUBLIC* on the issue of the death penalty, I do not wish to stop at the level of dismissing the application for lack of new and compelling evidence. The Supreme Court in the above petitions held as follows:-

a. The mandatory nature of the death sentence as provided under section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution.

b This matter is hereby remitted to the High Court for re-hearing on Sentence only, on priority basis and in conformity with this judgment.

It is my view that the High Court is duly bound to consider cases where litigants have already been sentenced to suffer death. This consideration is not limited to only murder cases but to all capital offences. In this case the charge sheet indicates that the robbery involved Ksh.500/=. The evidence of the complainant before the trial court partly reads as follows:-

"Then those people told me "Mzee, we love you. Give us what have". Then I told my wife to bring 500/=. She brought. I threw it outside for them to take. They then told me to open. I refused to open. Then they overpowered me and opened by force. Then I jumped outside with a rungu. I started fighting with the thugs. The accused ran away. I hit one of the thugs with a bottle. While outside I saw the accused clearly again. There was moonlight and I saw the accused well. When the accused ran away, the other also ran away.

The incident occurred on 8.6.2004. The applicant was in custody since the time of the arrest on 10.6.2004 as by then robbery with violence suspects were not released on bond. He was ultimately convicted on 8.7.2005. He then by now served almost twelve years in prison. The victim was injured on the head. He was treated and discharged.

The issue which comes to consideration is whether the applicant should suffer death or serve life imprisonment for the offence. The circumstances of the case are quite clear. The robbers were armed with a panga. The complainant threw Ksh.500/= to the robbers. That is the only thing that was stolen. Can it be held with finality that the applicant cannot be reformed and will continue to be a threat to the society and should therefore spend the rest of his life in prison? I do not think so. A good and working prison system should be able to reform convicts. There is no legal research which leads to the conclusion that capital offenders cannot be reformed. The circumstances of this case does not call for the death sentence or life in prison. The decision of the Supreme Court on the death penalty is quite commendable and it is the duty of the lower courts to breathe life into it. This can be done by imposing sentences which are proportionate to the offence. There should be no automatic imposition of the death penalty. It is not even a case of "an eye for an eye". No eye was lost during the robbery. Only Ksh.500 was withdrawn to the robbers and the victim sustained minor injuries. How do we compare the robbery incident within a case of assault causing actual bodily harm where the victim suffers. Serious injuries but the courts are allowed to impose prison sentence.

Given the circumstances of the case, I do find that the death sentence is not ideal. I feel that it is my duty to consider the appropriate sentence to impose instead of waiting for another application by the convict. I do hereby set aside the death sentence and replace it with

fifteen (15) years imprisonment. The sentence to run from the date of conviction (8.7.2005).

Dated and Signed at Marsabit this Day of January 2018

S. CHITEMBWE

JUDGE

Dated, Signed and Delivered at Meru this 25th day of January, 2018

A. MABEYA

JUDGE