IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL NO. 142 OF 2017

BETWEEN

MOSES KINYUA MUCHAI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence dated 29th December 2013 in Criminal Case No. 98 of 2007 at Thika Chief Magistrates Court before Hon.L. Gicheha, SRM)

JUDGMENT

1. The appellant, **MOSES KINYUA MUCHAI**, was charged with his co-accused with the offence of robbery with violence contrary to **section 296(2)** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. While his co-accused was acquitted and he was convicted and sentenced to death.

2. The particulars of the charge were that on 27th December 2006 jointly with his co-accused, while armed with knives they robbed Patrick Muthiani Kyule of a mobile phone Nokia 1110 and Kshs.1350/- all valued at Ksh.5850/- and at or immediately before such robbery wounded the said Patrick Muthiani Kyule.

3. The appellant relied on the supplementary grounds of appeal and written submissions. He complained that the trial magistrate did not consider his defence and was wrong in terming it as an afterthought and in so doing shifted the burden of proof to him. He also complained that he was not furnished with witness statements thereby violating his fundamental right to a fair trial.

4. As this is a first appeal, I am enjoined to review all the evidence and come to an independent conclusion whether or not to uphold the conviction and sentence bearing in mind that I neither saw nor heard the witnesses testify.

5. The circumstances leading to the case are fairly straight forward. Patrick Muthoni Kyule (PW 1) testified that he owned a Tuk Tuk and that on 27th December 2006 at about 6.00pm, he drove the appellant and his co-accused to a house where he was told to wait. After waiting for a while, the appellant came back, stabbed and robbed him of Ksh.1300/- he had in the pocket and a Nokia 1110. The appellant and his accomplice attempted to drive off the Tuk Tuk but were unable to do so. As they ran off, PW 1 gave chase while raising alarm. Among the people who responded to the alarm was Duncan Chege Njau (PW 3) who also gave chase and they managed to catch the appellant. PW 3 confirmed that he recovered the mobile phone and cash which PW 1 identified as his.

6. An administration police officer, Corporal Kilonzi Ndalya (PW 2), who was nearby, heard the screams and went to the scene. When he arrived there, he found the appellant had been arrested by members of the public. Together with PW 1 and PW 3, they went with the appellant to the police station. PW 3 handed over the recovered items to PW 2. Thereafter PW 1 was attended to by a doctor, Doctor Michael Ngugi (PW 4), who produced the P3 form and confirmed that PW 1 had been injured following the stabbing.

7. In his sworn defence, the appellant confirmed that PW 1 carried him in the Tuk Tuk but they did not agree on fare after which a scuffle ensued and he ran away.

8. My own re-evaluation of the evidence is that the appellant, in the company of another assailant and armed with a weapon attacked and stabbed PW 1 while stealing his money and mobile phone. In essence, the prosecution proved the ingredients of robbery with violence under **section 296(2)** of the ***Penal Code***.

9. The appellant was arrested by PW 3 shortly after the incident and had in his possession PW1's phone. PW 1 produced the receipt for the phone proving ownership. All these facts leave no doubt as to the appellant's complicity in the felonious act. His defence placed him at the locus in quo and when weighed against the prosecution case lacks merit.

10. Although the appellant complained that he was not given statements, the record shows that the issue was not raised at the trial. He

participated fully in the proceedings by cross-examining the witnesses extensively. He even gave his defence. In short he did not suffer any prejudice. The conviction is therefore affirmed.

11. As regards the sentence, I note that in ***Francis Karioko Muruateru & Another v Republic*** **SCK Pet. No. 15 OF 2015 [2017]eKLR**, the Supreme Court declared the mandatory death sentence unconstitutional. Consequently, I set aside the death sentence and invite the appellant to mitigate.

DATED and DELIVERED at KIAMBU this 20th day of February 2018.

D.S. MAJANJA

JUDGE

RULING ON SENTENCE

The appellant, **MOSES KINYUA MUCHAI**, was charged and convicted of the offence of robbery with violence. He was sentenced to death. In view of the decision in ***Francis Karioko Muruateru & Another v Republic*** **SCK Pet. No. 15 OF 2015 [2017]eKLR**, I called upon him to mitigate his sentence.

He pleads that at the time he committed the offence, he was young and he regrets his action.

He states that he has now reformed. I have considered the circumstances of the case, he participated in a violent act which calls for severe sentence. Noting that he was young and impressionable at the time, I hereby sentence him to **fifteen (15) years** imprisonment. The sentence shall run from the date of the sentence in the subordinate court. The appellant is informed of his right to appeal to the Court of Appeal.

DATED and DELIVERED at KIAMBU this 20th day of February 2018.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Maundu, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.