



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPEAL NO. 81 & 82 OF 2009

BETWEEN

MARTIN BAHATI MAKOHA.....1ST APPELLANT

PETER OTIENO OMONDI.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera Cr. Case No. 480 of 2008 delivered by Hon. C. Maundu, SRM, on 27th February, 2009).

JUDGMENT

Both Appellants were jointly charged with the offence of robbery with violence contrary to **Section 296(2) of the Penal Code**. It was alleged that on 26th day of February, 2008 at Jonathan Ng'eno Estate in Lang'ata within Nairobi Area Province jointly with another not before the court while armed with dangerous weapons namely, pangas, robbed Nicholas Kioko Mutua of a mobile phone make Nokia 2626 and cash KShs. 1,000/= all valued at KShs. 5,950/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Nicholas Mutua.

Both Appellants were found guilty as charged and convicted accordingly. They were each sentenced to death. Being dissatisfied with both the conviction and sentence, they preferred the instant appeal. Each Appellant filed a separate appeal with the first Appellant filing Appeal No. 82 of 2009 and the 2nd Appellant filing appeal No. 81 of 2009. Both appeals have been consolidated for purposes of this judgment.

It is worthwhile to note that this is a second hearing of the respective appeals. The Appellants were first heard by a bench of two judges which upheld their conviction in a judgment delivered on 20th November, 2013 by Mbaru and Rika, J.J. They appealed against that judgment to the Court of Appeal which court on 21st November, 2017 by a bench of three judges namely, Kariuki, M'Inoti and Murgu, JJA ordered a rehearing of the appeal on ground that the first appeal was heard by judges who did not have jurisdiction to hear and determine matters reserved for the High Court. Both Mbaru and Rika, JJ were judges of the Employment and Labour Relations Court.

The appeal was canvassed before me on 7th March, 2018. Both Appellants opted to proceed against the sentence alone. At the time of their conviction and of hearing the first appeal, the law provided for a mandatory death sentence. As at present however, the jurisprudence has tilted this position. Following a judgment of the Supreme Court in **Francis Kariuki Muruwatetu and another vs Republic [2017] eKLR**, the provision for a mandatory death sentence under Section 296(2) of the Penal Code was declared unconstitutional. In that respect, in sentencing a court must look at the circumstances of the case as well as the accused person's mitigation before determining the most appropriate and suitable penalty to impose. But that is not to say that where circumstances of the case are grave and warrant a death sentence nothing prevents the court from imposing it. It then behooves this court to relook at the circumstances of the case and thereby determine what penalty is most suitable to the Appellants.

In the present case, the complainant who testified as PW1 was accosted by both Appellants along a wooden bridge at about 6.00 a.m. in the morning. They ransacked his pockets and stole his money. At the time of the robbery the 2nd Appellant was armed with a panga which he cut the complainant with as a result of which he sustained a cut wound on the left thumb and the throat. On examination by the doctor, the injuries were classified as harm. Thereafter, the Appellants who were known in the area were arrested and charged accordingly. In my view, although the court cannot encourage the nature of the offence committed by both Appellants and their behaviour towards the complainant, I am of the candid view that the circumstances under which the offence was committed were not so grave as to warrant a death sentence. I take into account that the Appellants were arrested sometime in March, 2008 and since the day of plea on 5th March, 2008, they have been in custody. As at date, that period commutatively adds up to exactly ten years and two days. They have suffered more than sufficient sentence

in the circumstances.

In the result, I hold that the appeal is merited. I find that both Appellants have served sufficient sentence and order that they be forthwith set free unless otherwise lawfully held.

DATED and **DELIVERED** this day 8th day of March, 2018

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *1st Appellant in person*
2. *2nd Appellant in person*
3. *M/s Sigei for the Respondent*