REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 9 OF 2017

DANIEL MASEKE GIBAYE.....APPELLANT

-versus-

REPUBLIC.....RESPONDENT

- consolidated with –

CRIMINAL APPEAL NO. 10 OF 2017

PETER NSONGO KIMUNE.....APPELLANT

-versus-

REPUBLIC.....RESPONDENT

(Being appeals from the judgment, conviction and sentence of Hon. E. M. Nyagah, Principal Magistrate in Migori Chief Magistrate's Criminal Case No. 118 of 2014 delivered on 8th March 2017)

JUDGMENT

Introduction:

1. **Daniel Maseke Gibaye** and **Peter Nsongo Kimune**, (hereinafter referred to as '**the first appellant**' and '**the second appellant**' respectively), were charged, tried and convicted before the Chief Magistrate's Court at Migori with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**, Chapter 63 of the Laws of Kenya.

2. They were subsequently sentenced to suffer death; a result of which they lodged separate appeals which were consolidated and are the subject of this judgment.

The trial:

3. The appellants were charged and tried together while another suspect, one **David Wambura Nahashon** (hereinafter referred to as '**David**') was arrested and separately tried around one year after the alleged robbery. That was in Migori Chief Magistrates Court Criminal Case No. 124 of 2015 where judgment was delivered on 9th December 2015. He was also convicted and sentenced to suffer death. He consequently filed an appeal before this Court being Criminal Appeal No. 84 of 2015 which appeal was dismissed on 01/11/2016.

4. The prosecution in a bid to prove its case called 6 witnesses. **PW1** was **the complainant** one **Samuel Ghati Mwita** whom I will henceforth refer to him as **'the complainant'**. **PW2** was the complainant's father. **PW3** was the owner of Motor Cycle registration number KMCX 516X make Boxer Bajaj (hereinafter referred to as **'the motor cycle'**). **PW4** was a police officer attached to the Stock-Theft unit at Masurura. **PW5** was a Clinical Officer from the Migori County Referral Hospital whereas **PW6** was the investigating officer who took over the conduct of the case from the original investigating officer who had since been transferred.

5. The brief facts of the case were that on the 3rd day of March 2014, the complainant woke up quite early and proceeded to plough his farm in the company of his wife (not a witness). At around 6.00 a.m. the complainant was called by **David** who asked to be ferried to Kehancha town using the motor cycle which the complainant operated a taxi business by. The complainant obliged.

6. The complainant then took David to Kehancha town and on reaching there, David instead asked the complainant to take him to **Peter Nsongo** (the second Appellant herein) whom he knew very well. The complainant agreed and the two set off accordingly. They reached

where the second appellant was employed as a farm hand and met him tethering some cows. David and the second appellant then told the complainant that they were to go and pick some money elsewhere and asked the complainant to take them there. He again obliged. While they were on the way, they were stopped by two other people whom the complainant knew very well. They were **Daniel Maseke** (the first appellant herein) and one **Omondi**. One of the passengers alighted from the motor cycle and the two (the first appellant and Omondi) asked the complainant to take them to a distant place which he declined. While in the company of the four persons he knew well, the complainant was hit with an object on the head and lost consciousness for 2 weeks. The complainant lost the motor cycle, a Nokia phone and Kshs. 1,700/=.

7. The complainant was left for the dead as the attackers fled using the motor cycle. The complainant was later taken to the Migori County Referral Hospital by PW4 and other police officers. Upon recovery he reported the matter to the Migori Police Station where he was issued with a P3 Form. The motor cycle was also recovered accordingly.

8. When the complainant did not return home as usual in the evening of the fateful day and could not be reached on phone, PW2 reported the matter at Kehancha Police Station on the following day. He learnt that someone had been attacked near Maasailand and proceeded there in the company of some of the complainant's boda boda colleagues. They headed to and met the Area Chief who confirmed the attack and informed them that the person had been taken to hospital by officers from the Anti-Stock theft unit. PW2 headed there and showed the officers the complainant's photograph. The officers confirmed that it was the man in the photograph whom they had taken to hospital. PW2 then rushed to the hospital and saw the complainant unconscious who had a big injury on the head.

9. PW3 who owned the motor cycle and which he had given to the complainant to undertake the taxi business was equally concerned when he unusually did not hear anything from the complainant in the evening of the fateful day and could not reach him on phone. He decided to find out if there was any problem and went to the complainant's home three days later, but after he had reported the matter at Kehancha Police Station where he saw the motor cycle parked thereat. PW3 learnt that the rider of his motor cycle had been asked by the traffic police officers to get the owner but had not returned to the station. PW3 identified photographs of the motor cycle during the hearing.

10. When the complainant was eventually discharged from hospital he recorded a statement with the police and the appellants herein were arrested and charged in connection with the events in issue. However, the two other assailants had fled, later David was arrested and charged but Omondi is still at large.

11. A P3 Form was filled in for the complainant and was produced by PW5 before the trial court together with the treatment notes. Those documents confirmed that indeed the complainant sustained injuries which were classified as grievous harm.

12. At the close of the prosecution's case the appellants were placed on their defenses. The first appellant opted to give a sworn statement and the second appellant gave an unsworn statement. None called any witnesses.

13. The first appellant testified on how he was arrested. That, on 14/06/2014 he had attended a Criminal Case No. 53 of 2014 at Kehancha Law Courts and as he was leaving he was arrested by the police and taken to the police station. That, he was arraigned before court and denied the charge he knew nothing about. He could not remember where he was on 03/03/2014.

14. The second appellant testified that he was employed as a farm hand in Maasai land and that as he was tethering some cows on 06/03/2014 he was arrested by two officers and falsely charged with an offence he knew nothing about.

15. By a judgment delivered on 8th March 2017 the trial court upon evaluation of the evidence was satisfied that the charge had been proved beyond any reasonable doubt. The appellants were found guilty, convicted and accordingly sentenced to suffer death.

The Appeal:

16. Being aggrieved by the conviction and sentence, the appellants lodged separate appeals whose effect are the contentions that the trial court shifted the burden of proof, failed to satisfy itself that the circumstances did not favour proper identification, the charge was not proved and on an equal measure handed down a very severe sentence.

17. When the appeals separately came up for direction before this Court, they were consolidated, and the appellants filed separate written submissions. The State opposed the appeals and urged the Court to be guided by the evidence on record which go along to prove the charge.

Analysis and Determinations:

18. As this is the appellant's first appeal, the role of this Court is well settled. It was held in the case of **Okemo vs. Republic (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. Republic (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

19. In discharging the above duty, this Court will consider each of the grounds of appeal by the appellant's Counsel and culminate with an exposition as to whether the charge of robbery with violence was proved as against the appellant. I will therefore deal with the appeal as follows: -

On the issue of identification:

20. It was the appellants' argument that they were not properly identified as one of those who attacked the complainant since the attack was

sudden and no identification parade was conducted.

21. I will therefore turn to the record. It is not disputed that the first appellant and the complainant were neighbors and as such known to each other quite well. Further it remains undisputed that the complainant was a classmate to the second appellant and as such knew him as well. The complainant narrated how the ordeal occurred and the joint role played by the appellants together with their two accomplices.

22. Going through the evidence on record, this was a case of identification by recognition. I have not come across any issue which could possibly be said to have impeded such recognition of the appellant. From the background of the complainant and appellants there is no doubt that the complainant knew whom he was dealing with without any doubt and that they were the appellants. Further, the attack occurred during the day.

23. As this is a case of identification by recognition aforesaid I find that there was no need of an identification parade. That however does not lessen the duty on this Court to treat the evidence of visual identification with caution more so given that the complainant remains the sole identifying witness.

24. The principles to guide this Court when faced with the foregone issue are well settled. The Court of Appeal in the case of **Wamunga vs Republic (1989) KLR 426** stated as under; -

> ***"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. It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

26. In **R –vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court 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 recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

27. The foregone does not mean that there cannot be safe recognition even at night. The Court of Appeal in **Douglas Muthanwa Ntoribi vs Republic (2014) eKLR** in upholding the evidence of recognition at night held as follows: -

> ***"On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified: -***
>
> > *"I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant."*
>
> ***The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error..."***

28. Again, the Court of Appeal in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs Republic (unreported)** had this to say on the evidence of recognition at night: -

> ***"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."***
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> (emphasis added).

29. Whereas the evidence of the complainant on the issue of identification of the appellant was that of a single witness and which was not corroborated, there can still be a legal conviction in such circumstances. This issue has been a subject of consideration in various cases including one before the Court of Appeal of Uganda in **Obwana & Others v. Uganda (2009)2 EA 333** where the Court presented itself thus: -

"It is now trite law that when visual identification of an accused person is made by a witness in difficult conditions like at night, such evidence should not ordinarily be acted upon to convict the accused in the absence of other evidence to corroborate it. .....This need for corroboration, however, does not mean that no conviction can be based on visual identification evidence of a sole identifying witness in the absence of corroboration. Courts have powers to act on such evidence in absence of corroboration. But visual identification evidence made under difficult conditions can only be acted on and form a basis of conviction in the absence of corroboration if the presiding judge warns himself/herself and the assessors of the dangers of acting on such evidence."

30. Going by the above legal guidance and by considering the totality of the circumstances under which the attack took place, this Court reiterates the position that the identification of the appellants by way of recognition was free from error. The ground therefore fails.

a. <u>Was the charge proved in law?</u>

31. The starting point on this discourse is what the law provides on the offence of robbery with violence. The offence of robbery with violence is a creation of **Sections 295 and 296(2)** of the Penal Code and for clarity purposes I shall reproduce them as tailored: -

"295.Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

296(2). If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

32. From the foregone legal provisions, it can be seen that the offence of robbery with violence is made up of two parts. The first part is the **robbery** and the other part is the **violence**.

33. **Robbery** is committed when a person steals anything capable of being stolen and immediately before or after the theft the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto. Two things must therefore be proved for the offence of robbery to be established: **<u>Theft</u>** and **<u>the use of or threat to use actual violence.</u>**

34. On the other hand, the offence of **robbery with violence** is committed when robbery is proved and further if any one of the following three ingredients are established: -

(a) The offender is armed with any dangerous or offensive weapon or instrument, or

(b) The offender is in the company of one or more other person or persons, or

(c) The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person.

35. The record is clear that when the complainant was attacked aforesaid he lost the motor cycle, his phone and some money. Apart from the recovery of the motor cycle none of the other items were recovered. Since the complainant did not consent to the taking away of the items which were in his possession by the appellants and his accomplices, those acts on the part of the appellants constituted theft.

36. The issue of use of actual violence on the complainant was equally demonstrated. The record is alive to the fact that the attackers pounced on the complainant and hit him on the head to overpower him to be able to commit the theft. The complainant's evidence on that aspect was corroborated by PW5, a Clinical Officer who produced the P3 Form and treatments from the Migori County Referral Hospital. The complainant sustained severe head injuries as well as injuries on the ears and both limbs. A CT Scan revealed the presence of multiple skull fractures and an acute inter-cerebral bleed. The complainant was also admitted for about two weeks. The degree of injury was assessed as grievous harm and the probable weapons used were blunt. That therefore settles the issue of the use of actual violence on the complainant and hence proves the offence of robbery.

37. There is no doubt from the record that the attackers were more than one, were armed and they struck, beat and used personal violence on the complainant. That settles the requirements under **Section 296(2)** of the **Penal Code**.

38. This Court hence comes to the finding that the offence of robbery with violence was proved as against the appellant and that the learned trial Magistrate was merited in finding the appellants guilty as charged. The appeal on conviction is hereby dismissed.

b. <u>Sentence: -</u>

39. The appellants also contended that the sentence was very harsh and excessive. I have looked at the sentencing proceedings where the court was then rightly guided by the mandatory nature of the then sentence. The court then had no option but to hand down the death sentence.

40. That legal position has by now changed courtesy of the Supreme Court in **<u>Francis Karioko Muruatetu & Another v. Republic (2017) eKLR</u>**. The Court, rightly so, found and held that the mandatory nature of the death sentence in capital offences is unconstitutional since

mitigation is an important congruent element of fair trial.

41. For purposes of ease of understanding of the rationale behind the finding, I will reiterate what the Court said thus: -

> ***"48. Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Article 25 of the Constitution; an absolute right.***
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> ***49. With regard to murder convicts, mitigation is an important facet of fair trial. In Woodson as cited above, the Supreme Court in striking down the mandatory death penalty for murder decried the failure to individualize an appropriate sentence to the relevant aspects of the character and record of each defendant, and consider appropriate mitigating factors. The Court was of the view that a mandatory sentence treated the offenders as a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death thereby dehumanizing them.***
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> ***51. The dignity of the person is ignored if the death sentence, which is final and irrevocable is imposed without the individual having any chance to mitigate. We say so because we cannot shut our eyes to the distinct possibility of the differing culpability of different murderers. Such differential culpability can be addressed in Kenya by allowing judicial discretion when considering whether or not to impose a death sentence. To our minds a formal equal penalty for unequally wicked crimes and criminals is not in keeping with the tenets of fair trial.***
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> ***52. We are in agreement and affirm the Court of Appeal decision in Mutiso that whilst the Constitution recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed. We also agree with the High Court's statement in Joseph Kaberia Kahinga that mitigation does have a place in the trial process with regard to convicted persons pursuant to Section 204 of the Penal Code. It is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness.***
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> ***53. If a Judge does not have discretion to take into account mitigation circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualize the circumstances of an offence or offender may result in the undesirable effect of 'overpunishing' the convict.***
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> ***58. To our minds, any law or procedure which when executed culminate in termination if life, ought to be just, fair and reasonable. As 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.***
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> ***59. We now lay to reset the quagmire that has plagued the courts with regard to the mandatory nature of Section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the Penal Code, unfair thereby conflicting with Articles 25 (c), 28, 48 and 50 (1) and (2) (q) of the Constitution.***
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> ***60. Another aspect of the mandatory sentence in Section 204 that we have grappled with is its discriminate nature; discriminate in the sense that the mandatory sentence gives differential treatment to a convict under that Section, distinct from the kind of treatment accorded to a convict under a Section that does not impose a mandatory sentence.***

42. Having said so, the Supreme Court remitted the matter to the High Court being the sentencing court for purposes of sentence re-hearing. I have no doubt that such remain the only reasonable way forward as the sentencing court will receive appropriate submissions from the prosecution and the defence prior to the sentencing.

43. One thing which I must clarify is that although the decision in **Francis Karioko Muruatetu** (supra) was on a murder case, the position changes not in the case of robbery with violence cases since **Section 296(2)** of the **Penal Code**, Cap. 63 of the Laws of Kenya provides the only sentence on conviction to be a death sentence.

Conclusion:

57. The upshot of the foregone analysis is that the appeal is dismissed on conviction and allowed on sentence only. The matter is hereby remitted to the Chief Magistrate's Court at Migori for hearing on sentence only and on a priority basis.

It is so ordered.

DELIVERED, DATED and SIGNED at MIGORI this 12th day of April 2018.

A.C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Daniel Maseke Gibaye and **Peter Nsongo Kimune** the Appellants in person.

Miss Monica Owenga, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Prosecutor.

Miss Nyauke – Court Assistant.