



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 113 OF 2017

JOSHUA KIMATHI MITEU *alias* JUDGE.....APPELLANT

-versus-

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment, conviction and sentence of Hon. Sogomo, G., Senior Resident Magistrate in Tigania Principal Magistrate's Criminal Case No. 158 of 2012 delivered on 19th day of September 2017)

JUDGMENT

Background:

1. The Appellant herein, **Joshua Kimathi Miteu *alias* Judge** was arraigned before the Tigania Law Courts on 03/02/2012 in **Magistrate's Criminal Case No. 158 of 2012** (hereinafter referred to as '**the Case?**') facing the charge of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code**. He denied the charge and a trial was ordered. The Appellant was unrepresented.
2. The particulars of the charge of robbery with violence were that '*on 12th day of December 2011 at Kianjai Market, Tigania West District within Meru County, while armed with dangerous weapon namely knife, robbed AGNES KAILU MITO of her mobile phone make Nokia 1200, one sweater, one lessa all valued at Kshs. 3,300/= the property of the said AGNES KAILU MITO and during the time of such robbery used actual violence to the said AGNES KAILU MITO.*'
3. The trial began before **Hon. Bildad Ochieng**, Learned Senior Principal Magistrate where two witnesses testified before the Magistrate was transferred from the station. Upon compliance with **Section 200(3)** of the **Criminal Procedure Code** the hearing of the case began *de novo* before **Hon. Gichimu, J.W.** Principal Magistrate where three witnesses testified before the Magistrate was also transferred from the station. Upon compliance with **Section 200(3)** of the **Criminal Procedure Code** as required, the hearing of the case continued from where it had reached up to judgment upon the trial Magistrate **Hon. Sogomo, G.** Senior Resident Magistrate, declining the Appellant's application for the trial to begin afresh. Two more witnesses testified bringing the total number of witnesses who testified in the case to five.
4. The witnesses who testified in the case were the complainant who testified as **PW1** one **Agnes Kailu Mito**. **PW2** was **Joyce Kagwiria** who was a daughter-in-law to **PW1**. **PW3** was the village elder for Mutiojuri village one **Mutabari Stephen**. **PW4** was a Clinician at Miathene District Hospital who produced a P3 Form for **PW1** and the investigating officer **No. 99851 PC Zainab Ali** testified as **PW5**. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.
5. **PW1** was walking home from her farm in Rii area at around 07:00pm on 12/12/2011. As she was at Kathema Kaindi area she was shone a torch from behind by someone and upon asking who that was, the person ordered her to surrender her phone and money. **PW1** told the person that she only had a phone which she readily gave out. The person insisted on **PW1** giving him money and slapped her, her spectacles fell, and she picked them. **PW1** then asked the attacker who was armed with a slasher why he was assaulting her and yet she had no money. The attacker aimed the slasher on **PW1**'s head and **PW1** shielded it using her right hand where her right index finger was severely cut. **PW1** ran towards a nearby homestead while screaming as the attacker, whom **PW1**, had by then recognized, pursued her. **PW1** fell as she was nearing the gate of the homestead and the attacker caught up with her. Her piece of wrapper (*leso*) and a sweater were forcefully taken. On sensing that someone was approaching, the attacker ran away.
6. **PW3** arrived at the scene to find **PW1** still lying down and bleeding profusely. As he approached the scene he saw the Appellant whom he knew very well running away from the scene. **PW3** assisted **PW1** and administered first aid on the hand as he took **PW1** to a Clinic in Kianjai. **PW1** was referred to Meru General Hospital where she was treated, put on a P.O.P. and discharged. **PW1** sent one **Jona** (not a witness) who reported the matter to the police. **PW1** went to the police on 14/12/2011 and as well reported the matter at Tigania Police Station. He gave the name of the Appellant herein as the attacker. She was issued with a P3 Form which was filled and returned to the police.
7. **PW1** later attended and identified the Appellant in an identification parade. **PW2** was called by **PW1** on 12/04/2012 and asked to proceed to the scene where **PW1** was attacked and find out if it was true that the clothes which **PW1** lost during the attack had been dropped there.

PW2 proceeded to the scene and found the clothes. She identified them as those belonging to PW1 which she had lost during the ordeal. They were the *leso* and a scarf. PW2 collected them and took them to the Area Chief. She also identified the clothes in court.

8. PW4 produced the P3 Form for PW1 and confirmed that PW1 was injured on 12/12/2011 and accordingly treated. The degree of injury was assessed as maim. PW5 testified on how the investigations were carried out until when the Appellant was arrested on 02/02/2012 at Mathiru village and charged before court. PW5 produced the identification parade forms and the clothes as exhibits.

9. At the close of the prosecution's case the Appellant was placed on his defense and on compliance with **Section 211** of the **Criminal Procedure Code**, the Appellant opted to remain silent. By a judgment delivered on 19th September 2016 the trial court upon evaluation of the evidence was satisfied that the charge had been proved beyond any reasonable doubt. The Appellant was found guilty, convicted and accordingly sentenced to suffer death.

The Appeal:

10. Being aggrieved by the conviction and sentence, the Appellant lodged the appeal subject of this judgment whose effect are the contentions that the trial court failed to comply with the law and order a fresh hearing in accordance with **Section 200(3)** of the **Criminal Procedure Code**, that he was not properly identified as the attacker and that the evidence was contradictory and inconsistent.

11. The appeal was heard by way of written submissions and the Appellant filed very comprehensive submissions and relied on several decisions on calling for the appeal to be allowed. He expounded on the grounds and added a further ground that some potential witnesses were not called to testify. He prayed for the appeal to be allowed and he be set at liberty.

12. The State opposed the appeal and urged the Court to be guided by the evidence on record which go along to prove the charge. It was submitted that the Appellant was adequately identified as the attacker and an identification parade so confirmed. On sentence, it was submitted that even with the change in law as a result of the recent decision of the Supreme Court on the constitutionality of the mandatory sentences handed down on capital offences, this was a perfect case where the death penalty remained the most ideal sentence.

Analysis and Determinations:

13. 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.

14. In discharging the above duty, this Court will consider the grounds of appeal 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: -

a. On the issue of identification:

15. It was the Appellant's argument that he was not properly identified as the attacker since the attack was at night and the attacker could not reasonably be identified in such circumstances.

16. The starting point is always that the evidence must support the charge. It is not for a court to be guided by otherwise factual positions which are not part of the tested evidence. A trial court is bound by the record unless it rightly takes judicial notice of some issues. The identification in this case was by way of recognition. Even though an identification parade was conducted, in instances where a victim tends to know the suspect so well an identification parade is not necessary and if conducted the results thereof are of very little probative value if any.

17. PW1 and PW3 were the witnesses who testified on the Appellant's recognition. PW1 narrated how the ordeal took place. PW3 testified that he saw the Appellant run away from the scene as he approached. Both PW1 and PW3 stated that although the incident took place at around 7:00pm, it was still very clear, and it was possible to identify any one. PW1 knew the Appellant well before the incident. She even testified that she informed the police as such and that she did not find any difficulty in picking the Appellant at the parade out of such acquaintance.

18. The fact that the Appellant was well known to PW1 was not denied by the Appellant. Infact during cross-examination, the Appellant asked PW1 if she had decided to frame him since the Appellant kept on demanding Kshs. 10,000/= out of some work he had done for PW1, an allegation which was denied by PW1.

19. On an equal footing it was not contended that PW3 was the village elder and knew the Appellant. The Appellant even examined PW3 on an alleged purchase of the Appellant father's land by PW3. PW1 stated that the attacker talked to her before she was attacked. PW1 responded and told him that he did not have any money, but she gave out her phone to him. The attacker then slapped PW1 who ran as the attacker pursued her until she fell. The attacker caught up with PW1. He held her and took away her *leso* and undressed her sweater. The attacker was still on PW1 until he realized that PW3 was approaching given that PW1 was screaming. When the Appellant was escaping he came closer to PW3; around 10 metres away. PW3 even saw what the Appellant carried.

20. It is the foregone that must be weighed against the settled principles of law on recognition of suspects. 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.”

21. 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.

22. 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.”

23. 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...”

24. 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.”

(emphasis added).

25. Going through the evidence on record, I have not come across any issue which could possibly be said to have impeded such recognition of the Appellant. From the background of PW1 and PW3 there is no doubt that they knew whom they were dealing with without any doubt and that it was the Appellant.

26. By placing the evidence of PW1 and PW3 on one hand and the legal considerations on the other hand, this Court finds that the identification of the Appellant by way of recognition was free from error. I am clearly satisfied that PW1 and PW3 recognized the attacker as the Appellant.

b. Was the charge proved in law?

27. 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.”

28. From the foregone legal provisions, 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**.

29. **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: **Theft** and **the use of or threat to use actual violence**.

30. 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.

31. The record has it that when PW1 was attacked aforesaid she lost her phone, *leso* and a sweater. The phone was not recovered. Since PW1 did not consent to the taking away of her items which were in her lawful possession, the acts on the part of the Appellant constituted theft.

32. The issue of use of actual violence on PW1 was equally demonstrated. The record is alive to the fact that the attacker pounced on PW1 while armed with a slasher. Both PW1 and PW3 saw the slasher with the Appellant. PW1's evidence on that aspect was corroborated by PW3 and PW4, a Clinical Officer who produced the P3 Form. PW1 sustained serious injuries on her right fourth finger and had to be treated at Meru General Hospital after she had been transferred from a Clinic in Kianjai. The trial court saw and noted the scars on the finger of PW1. The degree of injury was assessed as maim. That therefore settles the issue of the use of actual violence on PW1 hence proving the offence of robbery.

33. There is no doubt from the record that the attacker was armed with a slasher which he used to injure PW1. The slasher in the circumstances was a dangerous or offensive weapon. There is as well no doubt that personal violence was visited on PW1 during the robbery. That settles the requirements under **Section 296(2)** of the **Penal Code**.

34. I must state that I have revisited the evidence on record and do not find any meaningful contradictions which can vitiate the finding of the trial court. Minor contradictions and inconsistencies in evidence which do not go to the root of the charge cannot be a basis of impugning a decision. Such can be safely cured under **Section 382** of the **Criminal Procedure Code**.

35. As to whether the trial court erred in not ordering that the case starts *de novo*, I have already stated the history of the case. The record has it that the case was first heard before **Hon. Bildad Ochieng**, Learned Senior Principal Magistrate where two witnesses testified before the Magistrate was transferred from the station. Upon compliance with **Section 200(3)** of the **Criminal Procedure Code** the hearing of the case began *de novo* before **Hon. Gichimu, J.W.** Principal Magistrate where three witnesses testified before the Magistrate was also transferred from the station. Upon compliance with **Section 200(3)** of the **Criminal Procedure Code** as required, the hearing of the case continued from where it had reached up to judgment upon the trial Magistrate **Hon. Sogomo, G.** Senior Resident Magistrate, declining the Appellant's application for the trial to begin the hearing of the case *de novo* once again.

36. Both Learned Magistrates who took over the conduct of the case complied with **Section 200(3)** of the **Criminal Procedure Code**. The Appellant's complaint is that **Hon. Sogomo, G. SRM**, declined to order that the case starts *de novo*. I must state that once a court which has taken up a matter from a preceding magistrate mandatorily complies with **Section 200(3)** of the **Criminal Procedure Code** by explaining the right of the accused person at that point in time and calls upon the accused person to elect the way forward, that court then has a discretion to order that the case starts afresh or not. The court is not necessarily bound by the request made by the accused person. Unless there is evidence that the discretion was not exercised judiciously, the resultant finding by the court cannot be impugned.

37. In the case **Hon. Sogomo, G. SRM** complied with law to the latter. He then called upon the Appellant to elect the way forward and the Appellant opted for the case to start afresh. The court then considered the application for a fresh hearing alongside a High Court decision thereon. The court infact adjourned the case for a ruling after three weeks. The court found that the prevailing circumstances of the case called for the case to proceed from where it had reached. By then the case had taken over 4 years in court. I do not see how the court exercised its discretion wrongly. The ground fails.

38. On the contention that some potential witnesses were not called to testify, I have always taken the position that it is upon the prosecution to determine the number of witnesses it calls to prove a fact (**Section 143** of the **Evidence Act, Cap. 80** of the Laws of Kenya). That, unless it can be proved that a crucial witness(es) was not called and no justification for that was tendered then a court may presume that their evidence would have been prejudicial to the prosecution. (See the decision in **Bukenya vs. Uganda (1972) EACA 549** among many other like decisions). Having considered the record, I do not see how the said persons who did not testify were crucial in the case. The charge was proved even without their testimony. The ground also fails.

39. Having considered all the grounds challenging the conviction and in view of the various findings, this Court hence concludes that the offence of robbery with violence was proved as against the Appellant and that the learned trial Magistrate was merited in finding the Appellant guilty as charged. The appeal on conviction is hereby dismissed.

c. Sentence: -

40. The Appellant 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.

41. That legal position has by now changed courtesy of the Supreme Court in **Francis Karioko Muruatetu & Another v. Republic (2017) eKLR**. 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.

42. 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.

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.

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.

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.

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.

58. To our minds, any law or procedure which when executed culminate in termination of 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.

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.

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 trial and 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:

44. 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 Principal Magistrate’s Court at Tigania for hearing on sentence only and on a priority basis.

It is so ordered.

SIGNED BY:

A. C. MRIMA

JUDGE

DATED, COUNTERSIGNED and DELIVERED at MERU this 30th day of July, 2018.

F. GIKONYO

JUDGE