REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 41 OF 2017

NICHOLAS THIANE KIRUNYA.....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. 193 of 2012 delivered on 23rd day of February 2017)

JUDGMENT

1. On 13/02/2012 the Appellant herein, **Nicholas Thiane Kirunya,** was arraigned before the Tigania Law Courts in **Magistrate's Criminal Case No. 193 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 11th day of February 2012 at Kianjai Location, Tigania West District within Meru County, jointly with others not before court while armed with dangerous weapon namely panga and knife, robbed RUTH MAKENA of Kshs. 7,750/=, mobile phone make Nokia 1200, 40 kgs of Beans all valued at Kshs. 12,750/= and at the time of such robbery used actual violence to the said RUTH MAKENA by cutting her on the head, left hand and right leg with a panga.'*

3. The trial began before **Hon. Gichimu, J.W.** Acting Principal Magistrate where three witnesses testified before the Magistrate was 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 succeeding trial Magistrate **Hon. Sogomo, G.** Senior Resident Magistrate, declining the Appellant's application for the trial to begin afresh. One more witness testified bringing the total number of witnesses who testified in the case to four.

4. The complainant testified as **PW1.** She was one **Ruth Makena**. **PW2** was **Silvanus Munira** who was an immediate neighbor to PW1. **PW4** (wrongly captured as PW5) was a Clinician at Miathene Sub-County Hospital who produced a P3 Form for PW1 on behalf of his colleague and the investigating officer **No. 83485 Cpl. James Okoth** testified as **PW3** but was wrongly captured as PW4**.** 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 a business woman in Kianjai area. On 11/02/2012 she went to bed as her daughter one **Yvonne Kawira** (not a witness) slept in an adjacent room. At around 02:00 am PW1 was woken up by someone falling on her bed. The person struggled with her on the bed. PW1 heard the voices of some other people in her sitting room. PW1 screamed while struggling with the person. She was stabbed on the head using a knife. Yvonne ran out of the house and loudly called PW2 who hurriedly came to PW1's rescue and found PW1 still struggling with the person inside her house. PW2 joined PW1 and overpowered the person. They tied him as villagers streamed to PW1's house in answer to the distress call.

6. As the person heard PW2 called, he threw the knife he had used to stab PW1 with on the head, a panga he had and as well as some money which he had taken from PW1's house outside the house. The other people who were in the sitting room also fled with some money and 40 kgs of beans. PW2 saw them carrying a sack on his way to rescue PW1 but they escaped before he could recognize them. When the person inside the house was overpowered, he was searched by PW2 and PW1 's phone was found in the person's pocket. The money was collected as well as the phone, the knife and the panga and the person was taken to Kianjai AP Camp and later to Ngundune Police Post and then to Tigania Police Station. PW1 was issued with a P3 Form and was taken to Miathene District Hospital where she was treated, and the P3 Form filled. The person who had been arrested was identified as the Appellant herein.

7. PW4 produced the P3 Form as an exhibit while PW3 produced the other exhibits. PW3 also visited the scene and upon concluding investigations he charged the Appellant.

8. 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 and gave sworn testimony. He contended that he was engaged to PW1 and that the traditional rites

had even taken place and that he had gone into PW1's house to see her as usual when PW1, in the company of PW2 who was PW1's uncle, attacked him with a matchet and a fight ensued. The Appellant did not call any witness and closed his case. By a judgment delivered on 23/02/2017 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.

9. Being aggrieved by the conviction and sentence, the Appellant lodged the appeal subject of this judgment where he preferred the following nine grounds of appeal: -

> ***1. THAT the trial magistrate erred in both law and fact by not observing that the evidence adduced PW1 and PW2 is contradicting and was not sufficient to convict the appellant.***
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> ***2. THAT the trial magistrate erred in both law and fact by not observing that PW2 indicated that the phone that she was robbed is red in colour and yet the one presented in court was green in colour.***
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> ***3. THAT the trial magistrate erred in both law and fact by failing to observe that the right of appellant of fair trial was prejudice when he failed to apply Section 200 (3) CPC.***
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> ***4. THAT the trial magistrate erred in both law and fact not observing that the whole evidence was conflicting and uncollaborating.***
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> ***5. THAT the trial magistrate erred in both law and fact not observing that the prosecution case was not proved beyond reasonable doubts.***
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> ***6. THAT since the accused was not represented by the advocate during the trial he now beg leave honourable court to assign lawyer in respect of the accused.***
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> ***7. THAT the trial magistrate erred in both law and fact by not observing that the vital witness were not summons to testify before court to clear doubt.***
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> ***8. THAT I have written these grounds with the absence of the court proceeding and I wish to add more grounds after being furnished with the court proceeding together with the judgment.***
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> ***9. THAT the trial magistrate erred in law and fact by rejecting the accused defence without giving any cogent reason as per required in the law.***

10. 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 of appeal. He prayed that he be set at liberty.

11. 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 as he was arrested at the scene and exhibits accordingly recovered.

12. 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.

13. 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:

14. There is no doubt that the Appellant was arrested inside the house of PW1. What is to be ascertained is whether the Appellant had truly gone to see PW1 as his girlfriend or to commit the offence he was charged with. I have weighed the defence alongside the evidence of PW1 and PW2. The Appellant did not cross-examine PW2 on the Appellant's relationship with PW1 or PW2's relationship with PW1 given that the Appellant alleged that PW2 was an uncle to PW1. I only find the issue having brought at the tail end of he case and denied PW2 the opportunity to respond to the allegation. The defence was an afterthought and is for rejection. The Appellant was hence not inside PW1's house as he alleged but as an intruder intent on committing an offence.

15. I must also ascertain whether the charge was proved. 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.***
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> ***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."

16. 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**.

17. **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.**

18. 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.

19. The record has it that when PW1 was attacked aforesaid she lost her phone which was recovered inside the Appellant's pocket. She also lost money and beans. 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 and his companions constituted theft.

20. 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 panga and a knife. PW1's evidence on that aspect was corroborated by PW2 and PW4, a Clinical Officer who produced the P3 Form. PW1 sustained serious injuries on her head and had to be treated at Miathene Sub-County Hospital. The trial court saw and noted the scars on PW1. The degree of injury was assessed as harm. That therefore settles the issue of the use of actual violence on PW1 hence proving the offence of robbery.

21. There is no doubt from the record that the attacker was armed with a knife and a panga which knife he used to injure PW1. The panga and the knife in the circumstances were dangerous or offensive weapons. There is as well no doubt that personal violence was visited on PW1 during the robbery and that the Appellant was in the company of others who escaped. That settles the requirements under **Section 296(2)** of the **Penal Code**.

22. 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**.

23. 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. Gichimu, J.W.** Principal Magistrate where three witnesses testified before the Magistrate was 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 succeeding 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.

24. The succeeding Magistrate 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.

25. 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 request was vehemently opposed by the prosecution. The court then considered the application for a fresh hearing alongside a High Court decision thereon and 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 5 years in court. I do not see how the court exercised its discretion wrongly. The ground fails.

26. 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.

27. 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.

b. Sentence: -

28. 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.

29. 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.

30. 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 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. M. GIKONYO

JUDGE