REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO 76 OF 2017

(Appeal originating from the conviction and sentence by Hon. Sogomo SRM

in Meru Criminal Case No. 1563 Of 2014)

MUNGATHIA ARITHO...........................1ST APPELLANT

JEREMIAH MBERIA..............................2ND APPELLANT

DANIEL KIUNYE.....................................3RD APPELLANT

VERSUS

REPUBLIC..RESPONDENT

J U D G M E N T

The Appellants herein together with another were jointly charged with Robbery with violence contrary to Section 296(2) of the Penal Code. particulars of the charge are that on the 31st day of August 2013 at Irotia village in Tigania East District within Meru County accused persons jointly with others not before Court while armed with dangerous weapons namely panga robbed off James Kibanya one shirt, one trouser, one coat, one hat, one pair of shoes, and cash kshs 3000 all valued at Kshs 7,000 and immediately before the time of such robbery wounded the said James Kibanya.

The three Appellants were convicted of the charge on 13th July 2017 and sentenced to death the same day. Record show that each accused had no previous conviction and that they were given an opportunity to mitigate.

The appeal is on conviction and sentence. They relied on amended grounds of appeal. The three Appellants relied on one set of grounds. They listed 14 grounds of appeal. Consolidated grounds are as hereunder:-

1. That the Trial Court erred in relying on evidence marred with inconsistencies and contradictions

2. That the evidence was not conclusive as no identification parade was conducted and no names were given to Police at the time of reporting if indeed the complainant identified the attackers

3. That there was no explanation for delay in apprehending the Appellants and that Magistrate erred in failing to compel the Investigating Officer to avail the investigation diary.

4. That the case proceeded before the Appellants were given witness statement and were thus denied fair hearing contrary to Article 50(2) of the Constitution.

5. That the Magistrate filed to accord the Appellant an opportunity to file submissions and failed failed to consider their defence

6. That the Trial Magistrate failed to comply with Section 200 of the CPC.

7. That the Trial Magistrate failed to analyze criminal liability of each Appellant.

In response, Mr. Kiarie for the state submitted that the prosecution were able to prove their case beyond reasonable doubt and those

ingredients of Section 296(2) were fully satisfied.

He submitted that identification was by recognition and that there was moonlight; that Pw1 and the other witnesses identified the Appellants.

He submitted that the Appellants took considerable time with the complainant in that they beat and even stripped him naked, as they spoke to him asking for money; that all this time was sufficient to help him identify the 3 Appellants. That the incident occurred on the road and that there was moonlight.

Counsel cited the case of **Elisha Muiya Omulama & Another Vs Republic [2018] eKLR** where the Court held that in evidence of recognition, how much time the witness spend with the suspect, at what distance, what form of light and whether the witness had seen the accused before are to be considered.

He submitted that in the instant case, the Appellants were known to the 3 witness as they were neighbours.Pw3 Respondent to screams.

On delay in apprehension of the suspects counsel submitted that the complainant was hospitalized for 8 months in hospitals in Kiatheni, Isiolo, Meru and Kijabe Mission Hospital. He added that the Appellant's defence of alibi was not corroborated.

In response, the 1st Appellant said that the complainant never gave out his name to Police when he reported.

2nd Appellant also said that if the complainant knew him, he would have mentioned his name and it would have been recorded in the occurrence book.

3rd Appellant said that the complainant never told the Police what was stolen from him. He added that the complainant, his wife and sister are his witnesses and complainant's son led Police to his arrest but never testified.

This being the first Appellate Court, the Appellant expects this Court to reevaluate evidence adduced before the Trial Court and arrive at my own conclusion. I do so while bearing in mind the fact that the Trial Court had opportunity to hear the witnesses and make observation on their demeanor, which I have not.

On perusal of record, I note that two witnesses testified before Mararo pm. I also note that before the case proceeded before Sogomo Srm provisions were explained to the accused persons on 4th July 2016.each of them opted to have the case proceed from where it had reached before the previous Magistrate. On 29th September 2016 the Court noted that copies of charge sheet, P3 and all statements had been supplied to the Appellants herein. None of the Appellants' refuted what was said by the Court.

The ground that Section 200 of CPC was not complied cannot therefore stand. Further the claim that the Appellants were not given witnesses statements is not true, as the record speak for itself.

In respective of identification parade, the 3 witnesses indicated that the Appellants were neighbours. They had known him before. It was not therefore necessary to conduct identification parade. It is also evidence that the Appellant took considerable time with the complainant. They even took time to undress him. As they did that, they talked to complainant while demanding money .this gave the complainant an opportunity to identify their voices.

Evidence show that Pw2 had not known the 3 Appellants before but she confirmed that Pw3 called out the names of the Appellants and the scene. Even though identification parade was not conducted in respect of Pw2, the Appellants were positively identified the Appellants .they found him still beating the complainant.

From the foregoing, I find that Appellants were positively identified as the persons who attacked and robbed the complainant.

As far as conviction is concerned, I do not see merit in grounds raised. I proceed to dismiss that limb of appeal.

In so far as sentence is concerned. I take note of the Supreme Court's decision on constitutionality of death sentence in ***Francis Karioko Muruatetu & Another Vs Republic – Petition No. 15 of 2015*** consolidated with ***Petition No. 16 of 2015*** **where** the Appellants had been sentenced to death for the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code. I note that the main issue canvassed in the appeal was whether the mandatory death penalty is unconstitutional.

The Supreme Court said at paragraph 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 an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, 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"***

At paragraph 52, the Supreme Court stated as follows:-

> ***"We are in agreement and affirm the Court of Appeal decision in <u>Mutiso</u> 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."

The Supreme Court further stated in paragraph 59 as follows:-

"We now lay to rest 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."

From the foregoing, the Supreme Court found that despite the fact that the statute provides for mandatory death sentence, the same is unconstitutional as it violates constitutional rights under Article 26 and 28 namely right to life, and right to inherent dignity and right to have that dignity respected and protected respectively. Rights under Article 26 and 28 fall under category of rights that shall not be limited. The constitution being the supreme law, any legal provision inconsistent with the constitution should not be allowed to stand.

I am of the view that the Appellants ought to benefit from the Supreme Court decision in so far as sentence is concerned.Resentencing should however be done by the Trial Court as that will accord the Appellants opportunity to appeal against the sentence if aggrieved.

FINAL ORDERS

- Appeal on conviction is hereby dismissed.
- This matter referred to the Trial Court for resentencing.

Judgment Dated and **Signed** at **Nairobi** this**19th** day of **November 2018.**

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RACHEL NGETICH

HIGH COURT JUDGE

Delivered at **Meru** this **23rd** day of **November 2018.**

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JUDGE

IN THE PRESENCE OF

……………………………..…………………..COURT ASSISTANT

…………………………………………………..1ST APPELLANT

……………………………………………………2ND APPELLANT

…………………………………………………...3RD APPELLANT