



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT VOI**  
**CRIMINAL APPEAL NO 19 OF 2016**

**WENDETO NGULA LUKILA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From original conviction and sentence in Criminal Case Number 79 of 2016 in the Senior Principal Magistrate's Court at Voi delivered by Hon E.G. Nderitu (SPM) on 20<sup>th</sup> July 2016)**

**JUDGMENT**

1. The Appellant herein, Wendeto Ngula Lukila was jointly charged together with Bakari Kubwa Kitona (hereinafter referred to as “the Appellant’s Co-Accused) with robbery with violence contrary to section 295 of the Penal Code as read with section 296 (2) of the Penal Code. The particulars of the charge were that on the 23<sup>rd</sup> day of January 2016 at about 9.00 p.m. at Mlegwa village within Taita Taveta county jointly while armed with panga and a rungu robbed Daniel Mwanzai Zonge cash money Kshs7,000/- and one (1) mobile phone make Nokia 3310 all valued at Kshs.10,000/- and at the time of the robbery threatened to use actual violence to the said Daniel Mwanzai Zonge (hereinafter referred to as “PW 1”).
2. When the Appellant was arraigned in court on 29<sup>th</sup> January 2016 for plea taking, he pleaded guilty to the charges against him. He was again arraigned in court on 11<sup>th</sup> February 2016 and after the charges were read and explained to him in detail, he again pleaded guilty once more.
3. In view of his utterances that he had nothing to say and wanted to be sent to jail at Shimo La Tewa immediately, the Trial Court ordered that he be subjected to psychiatric examination before sentencing. The Psychiatric Report indicated that he was fit to plead and stand trial. On 24<sup>th</sup> February 2016, the Charge was read to him again and he pleaded guilty.
4. The Learned Trial Magistrate Hon. E.G. Nderitu, Senior Principal Magistrate convicted the Appellant on his own plea of guilty and sentenced him to suffer death as provided under the law.
5. Being dissatisfied with the said judgment, on 1<sup>st</sup> July 2016 the Appellant filed a Notice of Motion application seeking leave to file his Petition of Appeal which application was granted and deemed to have been duly filed and served. He relied on four (4) Grounds of Appeal. He filed his Amended Grounds of Appeal and Written Submissions on 26<sup>th</sup> April 2017. He filed his Supplementary Written Submissions on 21<sup>st</sup> September 2017. The Respondent filed its Written Submissions on 27<sup>th</sup> July 2017.
6. When the matter came up on 19<sup>th</sup> October 2017 both the Appellant and the State asked the court to deliver its judgment based on their respective written submissions. The judgment is therefore based on the

said written submissions.

## **LEGAL ANALYSIS**

7. The Psychiatric Report by Dr C.M. Mwangome dated 17<sup>th</sup> February 2016 indicated that the Appellant's appearance, behaviour, mood, speech and cognition were normal and was thus fit to plead. The Appellant's admission of the charge three (3) times to wit on 29<sup>th</sup> January 2016, 11<sup>th</sup> February 2016 and 24<sup>th</sup> February 2016 despite having been warned of the consequences of pleading guilty on such a charge was reflective of the fact that he was aware of what he was saying and understood the implications of his actions. The assertions in the Amended Ground of Appeal that he pleaded guilty without having known the consequences of his action were therefore neither here nor there.

8. Appreciably, although this is a first appeal and appellate courts are mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR**, this court found and held that it did not have power or jurisdiction to analyse the evidence that was adduced during trial as its duty was limited to looking at the extent and legality of the sentence that he was given only in line with Section 348 of the Criminal Procedure Code Cap 75 (Laws of Kenya).

9. The said Section 348 of the Criminal Procedure Code stipulates as follows:-

**“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.”**

10. In any event, the evidence that was adduced during trial related to the Appellant's Co-Accused. As no evidence was adduced against the Appellant herein having pleaded guilty to the offence, it was difficult for this court to envisage what part of the Prosecution's case he was contending had not been proved against him beyond reasonable doubt.

11. Indeed, the purpose and objective of an appeal is intended to test the evidence that was adduced during trial by analysing and evaluating it afresh to establish if the prosecution has proved its case to the required standard, which is proof beyond reasonable doubt. It is on that basis that while this court understood the gist of the Appellant's Written Submissions, it could not delve into determining the merit or otherwise of the same.

12. The Learned Trial Magistrate rightly pointed out that upon the Appellant pleading guilty, her hands were tied and that she could only mete out to him only one (1) sentence, which was to suffer death as prescribed by law.

13. Having said so, on 14<sup>th</sup> December 2017, in the case of **Petition No 15 of 2015 (as consolidated with Petition No 16 of 2015) Francis Karioko Muruatetu & Another vs Republic & Others**, the Supreme Court found that Section 204 of the Penal Code Cap 63 (Laws of Kenya) which prescribed a mandatory death sentence was unconstitutional as mitigation by a person convicted of capital offence was superfluous.

14. It was the view of this court that a mandatory death sentence under Section 296 (2) of the Penal Code was equally unconstitutional. The same provides as follows:-

**“If the offender is armed with any dangerous or offensive weapon or instrument, or is in the company with one or more other persons, or if, at or immediately before or immediately after the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”**

15. In the premises foregoing, it would be prudent to refer this matter to the Learned Trial Magistrate in

line with the case of **Francis Karioko Muruatetu & Another vs Republic & Others** (Supra) which was referred back to the Trial Court for sentencing hearing. Indeed, the Supreme Court placed importance on fair trial even at the sentencing stage when it rendered itself as follows:—

**“It is evident that the trial process does not stop at convicting the accused. There is no doubt in our minds that sentencing is a crucial component of a trial. It is during sentencing that the court hears submissions that impact on sentencing. This necessarily means that the principle of fair trial must be accorded to the sentencing stage too.”**

16. This court therefore found merit in Amended Ground of Appeal No (4) and allowed the same to enable the Appellant benefit in a Sentencing hearing.

### **DISPOSITION**

17. For the foregoing reasons, the Appellant’s Petition of Appeal that was lodged on 1<sup>st</sup> July 2016 was partly successful as the sentence to suffer death as prescribed under Section 296(2) of the Penal Code is hereby set aside and/or vacated for having been unconstitutional. However, the conviction was upheld as it was lawful and fitting, the Appellant pleaded guilty to the offence in the first instance.

18. It is hereby directed that the Appellant be produced before the Learned Trial Magistrate Hon E. G. Nderitu on 10<sup>th</sup> January 2018 for sentencing hearing.

19. It is so ordered.

**DATED and DELIVERED at VOI this 20<sup>th</sup> day of December 2017**

**J. KAMAU**

### **JUDGE**

In the presence of:-

Wandeto Ngila Lukila - Appellant

Miss Anyumba - for State

Susan Sarikoki– Court Clerk