



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 170 OF 2013

BETWEEN

STEPHEN OKOTH MANYASAAPPELLANT

AND

REPUBLIC RESPONDENT

-consolidated with-

CRIMINAL APPEAL NO. 171 OF 2013

BETWEEN

FRANCIS MUSONYE OMUKOTOAPPELANT

AND

REPUBLICRESPONDENT

(Being appeals from original conviction and sentence of S.M. Shitubi – C.M. in Criminal Case No. 103 of 2012 delivered on 12th September, 2013 at Kakamega)

JUDGMENT

Background:

1. By a substituted Charge Sheet, the Appellants herein were on 20/03/2012 jointly charged with the offence of robbery with violence as under:-

“CHARGE:- ROBBERY WITH VIOLENCE, CONTRARY TO SECTION 296 (2) OF THE PENAL CODE.

PARTICULARS: (1) STEPHENE OKOTH MANYASA

(2) FRANCIS MUSONYE OMUKOTO:- *On the night between 13th and 14 January, 2012 at [particulars withheld] in Kakamega Central District within Western province, jointly with others not before Court, being armed with crude weapons namely – pangas, iron bars, rungus and pieces of stones rob bed R A M of 3 Nokia phones, DVD player, JVC radio, 2 wrist watches, 3 remotes control, hot-ports, a thermos flask, 6 sufurias, 5kg*

rice, 4 sets of table clothes, 5 trousers, 2 shirts, 2 pairs of shoes, 4 pairs of bed sheets, a hammer, a mullet, a blanket, a pair of spectacles and 2 kgs of sugar, all valued Kshs. 88,200/=, and at the time of such robbery with violence, used personal violence to the said R A M.”

2. **STEPHEN OKOTH MUNYASA** faced another count on being found in a dwelling house. The same was framed as follows:-

“BEING FOUND IN A DWELLING HOUSE WITH INTENT TO COMMIT A FELONY THEREIN CONTRARY TO SECTION 305 OF THE PENAL CODE.

STEPHENE OKOTH MANYASA:- On the night between 13th and 14 January, 2012 at Shiembela village, Sichiru sub-location, Shimbuli location ion Kakamega Central District within Western Province was found in the dwelling – House of PHILIS OMUSANGA NDELEMA with intent to commit a felony namely theft therein.”

3. On entering pleas of not guilty on both counts, the Court proceeded with to the hearing of the case.

The Prosecution Case.

4. The prosecution called 9 witnesses in support of the charges. **PW1, R A M**, was the Complainant in respect to the charge on robbery with violence. He testified on how thugs struck into his home on 14/01/2012 at 01.30 a.m., tied him as well as his wife and stole several items. He however did not recognize any of the attackers. He was injured in the course of the attack.
5. **PW2** was **B O M**. She was PW1’s wife who also reiterated how the thugs struck into their home on the 14/01/2012 at 01.30 a.m. tying PW1 and herself, injuring them and eventually stealing several items before leaving. She managed to identify the Appellants herein as having been part of the gang which attacked them. She recognized and identified them by their names given that she knew them quite well before that day.
6. **NABWAYO IMBIAKHA TOLBERT** testified as **PW3**. He is PW1’s neighbour who came to their rescue. But, that was after the attackers had left. **PW4** was **A O O** who was PW1’s employee and who used to stay within the main compound. He was the first one to be attacked by the gang of 5 robbers who pounced in the home on 14/01/2012 at around 01.00 a.m. He was forced to lead the attackers to the PW1’s main house and witnessed the entire ordeal. He managed to recognize and identify the Appellants herein. **K A M** who was PW1’s grandson testified as **PW5**. He also reiterated how the ordeal took place and identified one MUSONYE as one of the attackers.
7. **PW6** was **KENNEY NJAYE** who was the Clinical Officer from Kakamega General Hospital. He confirmed that PW1 and PW2 had been injured and clearly stated the extent thereof. As he had attended to them the first time they went for treatment he easily filled in the P3 forms which were produced in Court alongside the treatment notes as exhibits.
8. **PW7** was the Police Officer who arrested Francis Musonye in the company of PW1 whereas **PW8** was the Police Officer who arrested Stephen Okoth, though on a different offence. The Investigating Officer testified as **PW9**.
9. In a ruling delivered on 20/06/2013, the trial Court placed the Appellants herein on their defences on the first count but dismissed count II for lack of evidence. The Appellants herein opted to and gave sworn testimonies. The Court thereafter pronounced itself in a judgment delivered on 12/09/2013 where the Appellants herein were found guilty and accordingly convicted on the offence of robbery with violence. The Appellants were then sentenced to death. It is the conviction and the sentence which prompted the appeals.

The Appeals:

10. Both Appellants filed separate appeals on 19/09/2013 with STEPHEN OKOTH MANYASA filing Criminal Appeal No. 170/2013 and FRANCIS MUSONYE OMUKOTO filing Criminal Appeal No. 171/2013. By an order of this Court made on 25/06/2014, the appeals were consolidated with Appeal No. 170/2013 being the lead appeal. STEPHEN OKOTH MANYASA then became the first Appellant and FRANCIS MUSONYE OMUKOTO the second Appellant.
11. A careful look at the Petitions of Appeal and the parties' submissions brings out the main issues for determination as follows:-

- a. ***Whether the Appellants were properly identified as the assailants;***
- b. ***Whether the Appellants were detained contrary to the Constitutional dictates;***
- c. ***The Constitutionality of the death sentence.***

Each of the foregoing will be dealt with singly:-

- a. **Whether the Appellants were properly identified as the assailants:-**

12. The issue of the identification of the assailants was dealt with by PW2, PW4 and PW5. The attack was on 14/01/2012 at around 01.00 a.m. This was at the heart of the night when PW2, PW4 and PW5 were asleep in their houses. It was PW4 who was first attacked in his house which was in the same compound with the main house where PW1, PW2 and PW5 were sleeping in. He was awoken by the smashing of one of the doors into the house where he was sleeping with his brother one M but in separate rooms. PW4 immediately put on the electricity light and saw five people entering into his house. He without any hesitation recognized the second Appellant herein who was someone he had known for some time and worked with at PW1's place at a certain time. Further, when the second Appellant noticed that PW4 was looking at him, he readily told him not to look at him. By that time he was about one meter away and in full glare of the electricity light. PW4 was then held and taken to the sitting room as the second Appellant took away his items including long trousers, 4 shirts and a phone make Nokia. PW4 then called his brother Moses who was in the other bedroom, but in the same house, who after opening he was hit with a metal bar on the head and fell down. Both were tied with wires. PW4 was asked who was in the main house and then forced to take the five attackers there. He is the one who called PW1 on reaching at the door to the main home. As the security light was lit, PW4 again had an excellent opportunity to see the second Appellant herein.

13. It was PW1 who opened the door to the main house. He was immediately hit with a metal bar and ordered to be silent. At that time PW4 pulled aside and watched the rest of the ordeal as it unfolded. He now had ample time to observe what was happening as the attackers concentrated on those who were in the main house. He again saw the second Appellant herein carry several items out of the main house including sufurias, bed sheets, DVDs, bags. Apart from clearly recognizing the second Appellant, PW4 also managed to recognize the first Appellant. In PW4's words, the first Appellant kept on hiding from him during the ordeal as he knew PW4 well before.

14. PW2 was also in the main house. It was her testimony that when the attackers entered into the main house, two of them struggled with PW1, her husband. By that time PW2 watched them under the electric light. She noticed two others standing outside and in the light. On noticing that PW2 was observing them, the two attackers who were outside the house broke the security light, but by then she had already identified them. PW2 first recognized the second Appellant who was dressed in a marvin and a jacket similar to a police uniform. She had known the second Appellant for about 10 years being a neighbour and attended the same church and at times she used to give him some casual jobs to do at her home. She also identified the first Appellant who wore a cap and tried to hide himself behind a wall. He wore a jungle jacket with a creamish cap. PW2 had known him for about 7 years having taught him for about 3 years before the first Appellant dropped out of school. The first Appellant came quite close to PW2 and PW2 was able to confirm the first Appellant's identity.

15. The two attackers in the house tied PW2's hands and her legs and demanded for money as they

kept on hitting her. One of them attempted to rape her but PW2 was lucky as her legs had been so tied. PW2 was hit severally on her body and at one time had her private parts pulled with pliers until the skin came off. Attempts to force a metal rod into her private parts were not successful but lastly the rod was inserted in her mouth. She witnessed several items being taken by the thugs including Kshs. 12,000/= which belonged to their Church which had come into her possession by virtue of her being the Treasurer.

16. PW5 who was aged 14 years was cleared by the Court to give sworn testimony upon *voire dire* examination. He testified that when the thugs entered the main house where he was with his grandparents, PW1 and PW2, he immediately hid himself under his bed in his room. Two of the thugs searched his room and brought him out. One of them then went to the sitting room leaving one with PW5 who asked for PW5's mobile phone. PW5 was interrogated about mobile phones which had allegedly been brought into their house for charging. He was then taken to the sitting room. Later he was ordered to go back to his bedroom and sleep. He obliged. While in his room, one of the attackers came back and took him to the sitting room to show them how to remove the TV, DVD and the radio. Thereafter he was again ordered back into his room. As he sat in his room, another thug came in and took his school bag, opened it and poured down his books. As he so did, another one came with a torch flashing about and he flashed the one who was with the bag on his face. PW5 immediately recognized him as the second Appellant whom he had known for 11 years as the second Appellant used to work at their home and was a neighbour. He saw how he was dressed; black marvin, police jacket and black long trousers. The attackers then left with his bag among many other items from the house. PW5 was later on called by PW4 who was still tied and he managed to untie him as well as PW1 and PW2.
17. When the gang left, PW2 stated that she had recognized the second Appellant herein as well as the first Appellant. Likewise PW4 confirmed having recognized both the Appellants herein during the ordeal as PW5 confirmed recognizing the second Appellant. When their neighbour PW3 came to their rescue that very night PW2, PW4 and PW5 informed him that the second Appellant was involved in the robbery and they immediately rushed to his home. They found the door to the second Appellant's house open but he was not in.
18. PW2 further testified that when she went to record her statement with the police she disclosed that Francis Musonye, the second Appellant as well as the first Appellant were involved in the robbery but was surprised that the police did not capture the names in the statement. She likewise disclosed how the Appellants herein were dressed. PW4 likewise disclosed the names of the Appellants to the police when he went to record his statement a day after the robbery. He also reiterated that he gave the names at the police station but was equally surprised that the names were not in the statements or the police reports. PW4 denied that he gave the second Appellant's name because he had previously stolen their items. PW5 likewise confirmed to the police that one of the persons he identified in the robbery was the second Appellant.
19. We note that the police did not conduct an identification parade but we are not so surprised by it. The case at hand revolved around the issue of visual identification by recognition. The second Appellant was recognized by three witnesses being PW2, PW4 and PW5 whereas the first Appellant was recognized by PW2 and PW4. It is not in dispute that all the witnesses knew the Appellants well for a long period of time and had dealt with them in one way or the other. On the other hand, the ordeal took a considerable period of time all under the full glare of electric lighting. To us, the circumstances gave the witnesses adequate time and opportunity to recognize the Appellants herein and we are so satisfied that that identification was safe and free from error.
20. In reaching the above finding, we are alive to the caution in the case of **R. vs. Turnbull [1973] 3 ALL ER 549** regarding identification at night. The Court in that case stated as follows:-

“... 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 reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

21.The foregone caution has had local emphasis in several decisions by the Court of Appeal and indeed remains good law. The Court of Appeal in the case of Wamunga Vs Republic (1989) KLR 426 on the very subject stated as follows: -

“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.”

It was further 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.Even with the above caution, it 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...”

23.Again the Court of Appeal in Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs R (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.”

24.Still on the issue of recognition, the Court of Appeal has further and on several instances reconfirmed that there can be no safest way of recognizing someone than by the giving of the name at the earliest possible opportunity. That was so held in the case of Simiyu & Another vs.

Republic (2005) 1 KLR 192. That +is exactly what happened in this case as the witnesses readily gave the names of the Appellants herein and indeed an ambush was laid at the second Appellant's house, but he was not in the house.

25. With the foregone analysis on the issue of identification, we re-emphasize our earlier finding that the Appellants were safely and properly identified as the robbers and that their identification remains free from error.

26. It is also on record that the Appellants, who were in the company of others, were armed with pangas, rungs and metal bars and used actual violence on PW1, PW2 and PW4. The testimonies of these witnesses on the injuries they sustained were corroborated by PW3, PW5 and PW6, the Clinical Officer. It was PW6 who treated them in the first instance and filled their P3 forms later on. We have looked at the treatment notes and the P3 Forms and noted that the injuries therein are consistent with those described by PW1 and PW2.

27. It is also on record and likewise to our satisfaction that the thugs who included the Appellants herein actually robbed PW1 of his properties which included a radio, a DVD, TV, Kitchen utensils, clothes, shoes, bedsheets, blankets among others and which items were never recovered.

28. In sum therefore, the charge of robbery with violence against the Appellants herein was proved as so required in law and we do entirely concur with the analysis and finding of the trial Court.

b. **Were the Appellants held contrary to the Constitution.**

29. The Appellants in their twin Petitions of Appeal on ground 11 averred that:-

“11. THAT the whole trial was based on irregularity as I was put in police cell for a period more than that required by law thereby infringing on my right to liberty.”

30. The first Appellant in his defence during examination-in-chief stated that he was arrested on a Friday the 13th and taken to Court on the following Monday the 16th. We have noted that the record does not have any other evidence touching on the issue of the Appellants' arrest and subsequent arraignment in Court. We therefore find that if the first Appellant was arrested on a Friday and arraigned in Court on the following Monday, then the allegation that he was held in custody contrary to law does not arise. **Article 49 (1) (f)** of the Constitution states that:-

“49 (1) An accused person has the right-

.....

(f) to be brought before a court as soon as reasonably possible, but not later than—

i. twenty-four hours after being arrested; or

(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;

This ground therefore lacks any legal leg to stand on and is hereby rejected.

(c) **The Constitutionality of the death sentence.**

31. This subject on the constitutionality of the death sentence has been taken up in various fora in view of the world's general position on the same. Kenyans have also tested the same in various judicial fora and for a time there were conflicting decisions on the same. This uncertain position led to Article 26 in our Constitution which states as follows:-

“26. (1) Every person has the right to life

(2)

(3) A person shall not be deprived of life intentionally, except to the extent authorized by the Constitution or other written law.

(4)”

It is to be noted that Kenyans, being aware of the position the world had taken on the issue of death penalty, saw it befitting and in 2010 gave unto themselves the above Article 26 among others.

32. Be that as it may, the Courts have now come up and settled the uncertainty which was created by conflicting judicial decisions and today, Kenyans can happily hold that the issue of the constitutionality of death sentence is so settled. The Court of Appeal consisting of a bench of five Honourable Judges in the case of **JOSEPH NJUGUNA MWAURA & 2 OTHERS versus REPUBLIC, Criminal Appeal No. 5 of 2008**, which decision was made on 18/10/2013, firmly settled this issue.

33. It must be made clear that the said uncertainty on this issue in the Courts was largely due to the different interpretations of the law taken by different Judges. However and as earlier on said, that uncertainty has now been buried in the annals of history unless and until it is resurrected by the promulgation of other written law to the contrary.

34. The Court of Appeal in the **Joseph Njuguna Mwaura case (supra)** clearly expressed itself as follows: -

“ We hold that the decision in Godfrey Mutiso -vs- Republic to be per incuriam in so far as it purports to grant discretion in sentencing with regard to capital offences. Our reading of the law shows that the offences of Murder contrary to section 203 as read with 204 of the Penal code, Treason contrary to section 40 of the Penal code, Administering of oaths to commit capital offence contrary to section 60 of the Penal Code, Robbery with violence contrary to section 296(2) of the Penal code and Attempted Robbery with Violence contrary to section 297(2) of the Penal Code carry the mandatory sentence of death.”

The Court went on to say thus:-

“The impact of this decision is that mitigation is now required to determine the appropriate sentence in cases where there had been convictions for capital offences. In effect, the holding in this case introduced sentencing discretion to judicial officers in Murder cases. Decisions by this Court are generally binding but we do have the power to depart from those decisions where we consider that in the circumstances, it is correct to do so. This Court will also not follow a case that it considers per incuriam. See Dodhia -vs- National Grindlays Bank Ltd (1970) EA 195.

“A look at all the provisions of the law that impose the death sentence shows that these are couched in mandatory terms, using the word “shall”. It is not for the Judiciary to usurp the mandate of Parliament and outlaw a sentence that has been put in place by Kenyans, or purport to impose another sentence that has not been provided in law. It has no jurisdiction to do so...

“Since the Constitution, both in the former epoch and the current clearly envisage that the right to life is not absolute, the State can limit it in accordance with any written law.”

35. On the issue of the International covenants and instruments abolishing death penalty which Kenya is a signatory to, the Court of Appeal in the **Joseph Njuguna Mwaura Case (supra)** stated as follows: -

“Indeed some of the International instruments envisage a situation where the right to life may be curtailed in furtherance of a sentence imposed by a Court of law. Article 6 of the International Covenant on Civil and Political Rights provides that:

- 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.***
- 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the more serious cases in accordance with the law in force at the time of the commission of the crime.... This penalty can only be carried out pursuant to a final judgment rendered by a competent court.***

“Kenya has been party to this convention since May 1972. This country however is not a party to the Second Optional Protocol to the International Covenant in Civil and Political Rights which aims at the abolition of the death penalty. This is instructive because it points out that under our law as it stands, the death sentence continues to be a valid sentence that can be passed by a Court of law.”

36. The Court of Appeal further held that by passing the present Constitution by way of a referendum in 2010, the people of Kenya had demonstrated that they wished to retain the limitation on the right to life contained in Article 26(3). The Court of Appeal cited with approval the words of the Court in **Mutiso –vs- Republic (supra)** as follows:-

“The appellant has not challenged Kenya to abolish the death penalty in preference to unqualified right to life and we have no information that this Country has any intention of joining the countries of the world which have heeded the United Nations call to abolish capital punishment. Suffice to say that an opportunity had arisen in the debate raging for the last two decades relating to a new constitution which is due for a referendum on 4th August 2010. The abolition of the death sentence is not one of the provisions in the proposed Constitution and it is not a contentious issue. As the draft was arrived at through a consultative and public process, it could be safely concluded that the people of Kenya, owing to their own philosophy and circumstances, have resolved to qualify the right to life and to retain the death penalty in the statute books.”

37. On whether the mandatory death sentence violates Article 26 of the Constitution of Kenya, the Court of Appeal again expressed itself fully in the case of **Joseph Njuguna Mwaura (supra)** and stated as follows: -

“We must now consider whether the death sentence as envisaged under our law amounts to cruel and inhuman or unusual punishment which is prohibited by the Constitution.

Blacks Law Dictionary (9th Edition) defines “torture” as “the infliction of pain to the body or mind to punish, to extract a confession or information or to obtain sadistic pleasure” and “cruel and unusual punishment” as punishment that is tortuous, degrading, inhuman, grossly disproportionate to the crime in question or otherwise shocking to the moral sense of the community”. Inhuman treatment is defined as “physical or mental cruelty that is so severe that it endangers life and health.”

38. On a careful analysis, the Court of Appeal settled for the following holdings:-

“Based on these definitions cruel, inhuman and degrading punishment is that which is done for sadistic pleasure, in order to cause extreme physical or mental pain, and that is

disproportionate to the crime, so that it causes moral outrage within the community.

“We do not think that the death sentence falls within the definitions. The death sentence is not done for the sadistic pleasure of others. It cannot also be said to be shocking to the moral sense of the community due to the fact, as we have stated, that it has now been endorsed by the people of Kenya through the referendum, and by the fact that it continues to exist in our statute books with constitutional underpinning.

“We also do not consider that the deprivation of life as a consequence of unlawful behaviour is grossly disproportionate punishment for the offence committed, which in many cases result in the loss of life, and the loss of dignity for the victims”.

39. This decision of the Court of Appeal is binding on this Court.

The above analysis therefore brings us to the inevitable conclusion that the death penalty in Kenya is permitted by the Constitution and statute (Penal Code) and it is not in contravention of Kenya’s obligations under the International law. Death sentence in Kenya is therefore not unconstitutional.

Conclusion.

40. Our foregone analysis therefore leaves us with no option but to return a finding that the appeals herein have no merit and are hereby dismissed. We so find and order.

DELIVERED, DATED and SIGNED in open court at Kakamega this 24th day of July, 2015

RUTH N. SITATI

A. C. MRIMA

JUDGE

JUDGE

In the presence of

Present in Person For 1st Appellant.

Present in Person For 2nd Appellant.

Present in Person For Respondent.

Mr. Langat Court Assistant.