REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 118 OF 2008

(CONSILIDATED WITH CR APPEAL NO. 119 OF 2008)

1. OMAR ALI HIRIBAE
2. JAMES MOHAMED MOYU…….....……APPELLANTS

-VERSUS-

REPUBLIC……RESPONDENT

JUDGEMENT

The appellants **JAMES MOHAMED MWOYU** alias J (refer to as 1st appellant) and **OMAR ALI HIRIBAE** (refer to as 2nd appellant) were jointly charged with two counts of robbery with violence contrary to section 296(2) Penal Code, that on 26th May 2003, between 5.00Pm and 7.00Pm at UKANGWATI forest in Mpeketoni location of Lamu District, Coast Province, jointly while armed with offensive weapons namely pangas, robbed **PAUL KIMANI** and **JOSEPH NGIGE CIGUA** of bicycles make unknown, valued @ Kshs.6000/- and at or immediately before or immediately after the time of such robbery, murdered the said **PAUL KIMANI**(the 1st deceased) and JOSEPH NGIGE GICHUA(2nd accused).

Both appellants denied the charges and after due trial in which ten prosecution witnesses testified and appellants were the only defence witness, they were convicted and sentenced to death. They challenge the Trial Magistrate findings both on conviction and sentence.

On 26/05/03, **STEPHEN MAINA NJUGUNA**(Pw 1) was accompanied by the 1st deceased and his sister **MARY WAMBUI**, the two men were riding bicycles from Mpeketoni to Kipini. **MARY** was Pw 1`s pillion passenger while 1st deceased carried flour and mangoes on his bicycle for Pw 1. At Bogwe, the trio entered a "Mangwe" Den(Pokomo word for a sort of liquor den or pub) where local brew known as MUKOMA was being sold and they ordered for drinks. While having their drinks, the two appellants appeared – Pw 1 knew 1st appellant as "J", he had known him in Kipini since the year 2002, it was his first time to see 2nd appellant.

Each one of them carried a panga and a small sack of about 50Kg. The pair ordered for one bottle of brew which they shared, then left at about 6.00Pm. The 1st deceased took his bicycle and left, while Pw 1 remained to wait for his sister to finish her drink. Five minutes later Pw 1 left, cycling fast so as to catch up with the 1st deceased – unfortunately his bicycle got a puncture and he decided to go to KATONDO to repair it. They walked as they pulled the bicycle – it was getting dark and when they reached

KANGWATI centre, Pw 1 saw 1st appellant squatting by the roadside holding a mango and a panga. 2nd appellant was squatting on the other side of the road behind a Mukoma tree. They both had raincoats which covered their faces. 1st appellant arose and approached Pw 1 and his sister, while holding a panga. Pw 1 recognized him and because those were the same rain coats they had worn earlier – so he called out 1st appellant by name and the latter responded saying;-

"Kumbe ni wewe Sako" and Pw 1 confirmed. 2nd appellant rose and joined them where they stood with 1st appellant – he had removed the cover on the head. 1st appellant requested Pw 1 to leave his sister with them to which Pw 1 responded that if they wanted her, they would first have to escort him home. So 1st appellant told them to go and that they would come later. Pw 1 and his sister left. However just ten metres ahead, Pw 1 saw a bicycle on the right side of the road with the sack of flour and mangoes he had given deceased – he recognized it and told his sister. The sack was on the short grass, about 5 metres away. His sister suggested that he should ask the pair about the scenario but Pw 1 decided against it. After going past Kangawati, Pw 1 heard two bicycles following them fast, without lights – he and his sister gave way – it turned out to be the two appellants and as they passed, 1st appellant said they had gone ahead. Pw 1 and his sister arrived at their home at 9.15Pm and upon inquiry whether 1st deceased had been there, learnt he had not. So Pw 1 borrowed some flour from a neighbor to make porridge then they slept. The next morning at 7.00am, he went to the deceased`s home and learnt that deceased had not returned from Mpeketoni.

Eventually the deceased`s body was recovered in the bush at Kangwati and flour, T-shirt and cooking fat which Pw 1 had given him to carrying were found in a paper bag just next to the body. The body had no head or limbs – only the torso remained. Eventually appellants were arrested.

On cross-examination Pw 1 confirmed that he knew 1st appellant as a Mukoma wine tapper who lived at GOKWE and they had met several times before and even shared drinks. He had known him for 2 years. He realized that the mango he had seen appellants eating on the roadside, were the same ones he had given deceased to carry for him. It was Pw 1 further evidence on cross-examination that 1st appellant is the one who passed them that night while riding deceased`s bicycle, saying they were going ahead. He denied suggestions that he was drunk after consuming the "Mukoma" saying he only consumed one cup and this could not have affected his senses – so he was certain 2nd appellant was the same person he saw in the Mangwe and then squatting along the road. Pw 2 **CHARLES KIMANI** who was in the search party confirmed that 1st deceased`s body was recovered in a thicket near Kangawatu forest. He was able to identify him by his clothes and the sandles which were found near the body. **JOSEPH**`S (2nd deceased) brother **JULIUS KIMUHA** also confirmed to the trial court that the 2nd deceased left Kipini for Lamu through Mpeketoni using a bicycle never to return. At the place where 2nd deceased`s body was recovered, there were a lot of bones and 2nd deceased head, hands and leg were found in the same area.

MARY WAMBUI KIHUKA(Pw 4) who had accompanied Pw 1 and deceased, gave evidence which corroborated that of Pw 1 regarding their movements, appellants appearance at the liquor den and that both were in jackets and their encounter with applicants at Kangawati Forest and how they eventually came upon the red bicycle and sack placed on the ground. She explained that the bicycle was on the side of the road where 1st appellant had come from. She also confirmed that the appellants later overtook them while riding bicycles and 1st appellant even spoke to them. She described 1st deceased`s bicycle as being red in colour.

LUCY MURIGI NGIGE (Pw 6) the wife of **JOSEPH**, identified a shirt, long trouser recovered at the scene, as the same ones the deceased had worn. Pw 7 **MICHAEL GICHOBU** identified 1st deceased body to the Doctor who did post mortem while PW 3 **JAMES MAINA KAMAU** identified the body of the 2nd victim. Pw 9 **DOCTOR KOMBO MOHAMED MBWANA** carried out a post mortem on the two deceased`s bodies and his evidence was that what was left of the 1st body was just skeleton which had been partly eaten by wild animals, and as for the 2nd deceased, by the time the post mortem was

carried out, his head was not even available. **PC COSMAS MWANIA** (Pw 10) who arrested them, says he met 1st appellant at Kareni, he was carrying a panga. He also arrested 2nd appellant and after interrogation recovered a bicycle from 1st appellant`s house, and with information offered by 2nd appellant as to where 1st appellant had hidden another bicycle, a bicycle which had freshly painted black part was recovered in Pangani area. The bicycles were duly identified in court by Pw 2, Pw 3, Pw 4 and Pw 6 by physical features and period they had seen the same and also used the.

Appellant in his unsworn testimony told the trial court that he was just at his farm when police officers arrived, asked him which ethnic community he belonged to, upon learning that he was a Pokomo they ordered him to accompany them to the police station saying they had received a report about some Pokomo, then he was placed in cells and charged for an offence he knew nothing about.

2nd appellant`s evidence was that while carrying out his daily chores police officers approached him, snatched away his panga, took him to the police station and he was charged. In her judgement, the trial magistrate held that the evidence proved that appellants were found in possession of the bicycles belonging to the deceased – one bicycle having been recovered in 1st appellant`s house, and the other recovered (through the aid of 2nd appellant) hidden in the forest and he invoked the doctrine of recent possession saying the chain of events and time lapse was such as to lead to no other rational explanation other than that appellants were the ones who robbed and killed the two victims. The Trial magistrate was also satisfied that witnesses had adequately identified the two bicycles by their physical features, period they had seen the bicycles and even made use of them. Since the issue of ownership and possession had been satisfied, the Trial Magistrate held that it was now upon the appellants to explain how they had come into possession of the same.

In defence, appellants opted to dwell on events surrounding the day of their arrest. On the issue regarding identification the Trial Magistrate was satisfied that Pw 1 & Pw 4 positively identified appellant at the liquor den, and later at KANGAWATI where there were squatting, and later still as the pair overtook them while riding bicycles and they even exchanged pleasantries. The Trial Magistrate states;-

"I am satisfied that 1st accused was riding the bicycle of PAUL KIMANI…….The 2nd accused was at all times in the company of the 1st accused and though he was not riding the bicycle of the late PAUL KIMANI, he and 1st accused were together in the evening of 26th May 2003. The accuseds persons activities of riding the bicycle of PAUL KIMANI, are an excellent circumstantial proof of linkage between the accused and the death of the deceased person"

The Trial Magistrate aptly noted that had the accused persons not been found in possession of the bicycles, then they would have been charged with murder, but the fact that they were found with recently stolen bicycles where the owners had been killed would link them to robbery with violence. He noted that PW 1 recognized the bicycle 1st appellant was riding as that belonging to **PAUL KIMANI**(1st accused) as he sped past them, and the package 1st deceased was carrying was found in the area appellants had been seen by Pw 1 and Pw 2 under suspicious circumstances.

Appellants challenge the findings of the Trial Magistrate on the following amended grounds by 1st appellant and grounds by 2nd appellant.

1. Then rights under section 72(3)(b) of the old constitution and Article 49 9f) of the new constitution had been violated.

2. The provisions of section 200 (3) Criminal Procedure Code were not adhered to

3. The prosecution did not prove its case beyond reasonable doubts

4. Conditions were not conducive for positive identification and evidence of identification was inadequate

5. Key witnesses were not summoned to court to testify

6. There was no proof of possession and it was erroneous for Trial Magistrate to admit the police officer`s evidence regarding how 2nd appellant led him to recovery of the other bicycle.

7. Their defences were rejected what proper reason.

Both appellants filed written submissions and a common ground by both appellants is that they were held in police custody for a period of 1 year and 2 months that have been arrested on 9/6/03, they were arraigned in court on 9/8/04 and no explanation was offered for that delay. They sought to rely on the decision in **NDENDE V R (1991) KLR 567 and PAUL MWANGI MURUNGA V R CR APP NO. 35 of 2006(C.A) NKU** and crowned it with the mother case of **ALBANUS MWASIA MUTUA V R Cr Appeal No. 120 of 2004.**

The State Counsel **MR NAULIKHA** did not respond to this – we have looked at the charge sheet which shows date of arrest as 9/6/03 and PW 10 confirmed this as date of arrest and date of appearance in Court when plea was taken was 10/08/04, more than one year later. No explanation has been offered about the delay. Section 72 (3) (b) which the appeal provided that for;-

"Upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention, where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of providing that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with".

So the appellants should not have been held beyond 14 days and if the period was exceeded then it was up to prosecution to offer a reasonable explanation. No explanation is forthcoming here and we need not belabor the point. The appellants rights were ended violated and we find so. However, our reading of the old Constitution and the current Constitution does not provide for an acquittal – under the old Constitution – what was provided was redress by way of compensation under section 72(6). In the current constitution Article 49 uses the term, release NOT acquit – which implies that at the time the individual appears in court they shall be entitled to realize such as being released on bail. This was violation of a civil liberty which calls for redress. It does not qualify or an acquittal as that suggests hearing evidence and that it has been found wanting, Release is not the same as acquittal. We make a declaration that appellants constitution rights were violated and they are entitled to redress by the State.

Another common ground raised by the appellants is that the Trial Magistrate did not comply with the provisions of section 200 (3) Criminal Procedure Code. This trial begun before **MR D.OGEMBO (SRM)** on 23/06/05, he was eventually transferred from Malindi and the matter taken over by **MR D. OCHENJA(SRM)** ON 9/7/07 appellants submit that they requested for hearing **DE NOVO** but the application was opposed by prosecution on grounds that some witnesses could not easily be traced as they had changed residence and this was upheld by the Trial Magistrate. It is this rejection which is contested and reference is made to the decision in **PETER KOROBIA NDEGWA VR CR APP NO. 125 OF 1984**(unreported) where the group declared that the case was a nullity owing to the fact that the provisions of section 200(3) Criminal Procedure Code was not complied with.

MR NAULIKHA`s response to this ground is that the Magistrate who took over from **MR OCHENJA** did ask the appellants whether they wished for **DE NOVO** hearing, and 1st appellant opted for the matter to proceed from where it had reached whereas 2nd appellant wanted **DE NOVO** hearing. Again prosecution was opposed to the **DE NOVO** hearing on grounds of not being easy to secure attendance of witnesses and the court directed that the matter proceed from where it had reached.

We confirm that **MR OGEMBO** heard eight witnesses, then **MR OCHENJA** took over and heard two

witnesses, he was also transferred and **MISS NYAMBU** took over and on 7/5/08, heard the defence case and wrote judgment. On 7/5/08 the record shows that section 200(3) Criminal Procedure Code was explained to appellants and the record reflects the following;-

"1st accused – I proceed from where we reached"
"2nd accused – hearing to proceed form where it reached"

The issue of **MR OCHENJA** not complying with section 200(3) Criminal Procedure Code does not arise because the appellants made that election before the court could even explain the provisions but it was opposed and the objection was held. We have considered the reasons presented to the court for opposing **DE NOVO** hearing and the length of time the trial had even taken before beginning and we are persuaded that the Trial Magistrate made the appropriate directions regarding how the matter was to proceed. **MISS NYAMBU** duly complied with provisions of section 200(3) and there is nothing to comment about, regarding her role.

Another common ground raised by both appellants relates to identification - they say the conditions were not conducive for positive identification saying the conditions that prevailed were not ideal for identification because it was dark and they were passing through a forested area. We are alive to the issues to be considered in evidence regarding identification as set out in the case of **CHARLES O. MAITANYI V R 1988 KLR page 198** which held that issues to be considered when identification is made under stressful circumstances, include the existing conditions and whether the witness was able to make a true impression and description of the individual being identified.

Whereas we acknowledge that the prevailing conditions were well into darkness – we also note that the Trial Magistrate considered several other factors which persuaded her that appellants were sufficiently identified.

(a) The first encounter at the Mangwe Den(which appellants do not deny which was before darkness fell, because according to Pw 1, the appellant s left the den at about 6.00Pm. Infact because of the manner in which they were dressed, Pw asked her bother Pw 11 whether the appellants were police officers and it was then that Pw 1 told her that 1st appellant (who was dressed in a red jacket was called Jay) and she observed that 2nd appellant wore a blue jacket – they were seated just 5m away from her – so both she and Pw 1 had ample time to see the appellants.

(b) The next encounter was along the road at Kangwati forest – true darkness had fallen, but when 1st appellant got up approaching Pw 1 with a panga, the latter called out his name he was someone known to him for about 2 years and infact Pw 1`s evidence is that 1st appellant was even known to his family and children because 1st appellant used to visit his home and they had shared drinks several times. They did not just have a fleeting moment`s encounter, it was long enough for 1st appellant to even acknowledge his presence and call back to Pw 1 by his nickname and they chatted briefly before over taking the siblings to go ahead.

(c) The third encounter was as the two appellants sped past the brother and sister pair on the stolen bicycles and again 1st appellant called out to Pw 1 that they were going ahead.

We find that the Trial Magistrate properly considered the opportunities available to the witnesses for identification and she arrived at a safe conclusion. As regards an identification parade not being conducted – that would have been irrelevant in respect of 1st appellant as he was already well known to Pw 1 and we hold that failure to conduct the identification parade was not fatal to the prosecution ease.

The appellants also complain that a key person mentioned by Pw 1 as **HUSSEIN** was not called as a prosecution witness and urges this court to draw an inference that it is because if he was to be called he would have given evidence adverse to prosecution. From the record **HUSSEIN** was in the liquor den and bought PW 1 a drink. It is not clear whether by the time the appellants arrived he was still present or had

left. It is not even suggested that **HUSSEIN** took notice of the appellants or spoke to them, so as to cause the court to think that he was a potential witness. We find that failure to call him was not fatal and the decision in **BUKENYA** and **FIVE OTHERS V UGANDA Cr App No. 68 of 1972 EACA page 549** does not apply in this instance. Surely what different evidence would IGAMBA who was mentioned as having been in the party searching for the bodies have come to say – that nobody was ever recovered? We find no basis for demanding this particular witness attendance – his role was limited to search for the bodies.

Indeed as **MR NAULIKHA** submitted, prosecution called a total of ten witnesses to prove its case, the prosecution does not have to call a superfluity of witnesses, some whose roles are so minimal that it becomes insignificant and only goes to prolong a hearing. We agree. As regards the identification of the bicycle, we acknowledge that no receipts were produced in support of the bicycles, yet the Trial Magistrate considered the identification made by (a) family members (b) friends as regards the specific physical features of the bicycles by colour, prolonged interaction with the bicycles some parts being purchased in presence of these witnesses and specific distinct features which consistently stood out in the physical character of the bicycles to hold that their ownership and identity was sufficiently proved. We cannot fault her on that.

The question of an interpreter does not arise and the 2nd respondent is on a wild goose chase because the record clearly shows that **SANGO** was a Pokomo interpreter and prior to that there was **SAMSON BAHATI KIMBEJA**. The Trial Magistrate properly invoked the doctrine of recent possession and correctly observed that the circumstances inculpably pointed to accuseds as the culprit, - the recovery of the bodies and the luggage 1st deceased were just within the area that Pw 1 and Pw 4 had encountered appellants, coupled with them accosting the witness(Pw 1 & Pw 4) under very suspicious circumstances, and their speeding off in the bicycles which were later recovered and linked to them was sufficient to lead to one irresistible conclusion that appellants did rob and kill the deceased. The prosecution case was well corroborated and our re-evaluation and analysis of the evidence leads us to conclude that convictions were safe and are upheld. We are keenly aware of the sentiments expressed by the Court of Appeal regarding the death sentence in the case of **GODFREY NGOTHO MUTISO V R Cr App. No. 17 of 2008** our understanding is that it does not mean that the death sentence is unconstitutional, and in this we are fortified by Article 26 (3) of the Constitution of Kenya 2010 which provides that;-

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

The view taken by the Court is that the mandatory death sentence

(a) is inconsistent with the discretion given to courts in meting out sentence.

(b) is consistent with the Constitutional provision regarding
Right to life and right not to be subjected to degrading or intention treatment.

We are of the view that the decision acknowledged that there are varying degrees of an offence spanning from extreme sadism coupled with unbearable pain and terror, which could only be termed as heinous, to the less shocking/threatening variety that to pass the mandatory death sentence would be so excessive and disappropriate to the circumstances surrounding the question commission of the offence. Our view is that the situation which prevailed – killing two individuals for mere bicycles and consistently decapitating or amputating their body parts is so heinous that it must surely deserve the maximum sentence of death. We therefore find that the sentence was appropriate, legal and we confirm the same. The appeals are dismissed on both counts.

Delivered and dated this 7th day of July 2011 at Malindi

H A OMONDI **M.ODERO**
JUDGE **JUDGE**

Mr Naulikha for State
Appellants both present in person
c/c-Randu Eng-Swa