



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CRIMINAL APPEAL NO. 100, 101, 103 & 104 OF 2019 (Consolidated)**

**JOSEPH WEKESA MUFUBI alias MESHACK.....1<sup>ST</sup> APPELLANT**

**BENJAMIN WANJALA MASINDE.....2<sup>ND</sup> APPELLANT**

**DAVID MUSABWA NDUSU alias DAVY.....3<sup>RD</sup> APPELLANT**

**JOSEPH MUSANGA MUSABWA .....4<sup>TH</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*[An appeal from the conviction and sentence in original Sirisia Law Courts Criminal case No. 1064/2015 delivered on 27 .6.2019 by Hon Wattimah, SRM]*

**JUDGEMENT**

The four accused persons were charged with Three Counts of Robbery with violence contrary to **Section 295** as read together with **Section 296 (2)** of the Penal Code. The particulars in count 1 are; on the 10 day of July, 2014 at Lunao Village, Musanga Sub Location in Bungoma North District within Bungoma County, jointly with others not before court while armed with dangerous weapons namely AK 47 Rifles, Rungus and Pangas robbed FRANCIS WANJALA MAKOKHA of cash Kshs 26,000/= and immediately before or after the time of such robbery used actual violence to the said FRANCIS WANJALA MAKOKHA.

In count 2, the particulars were; on the 10<sup>th</sup> day of July, 2014 at Mabati Tatu Village, Misanga Sub-location in Bungoma North District within Bungoma County, jointly with others not before court while armed with dangerous weapons namely AK 47 riffles, Rungus and Pangas robbed SAMWEL WASWA of cash Kshs 400/= and at immediately before or immediately after the time of such robbery used actual violence to the said SAMWEL WASWA.

Count 3 read that on the 10<sup>th</sup> day of July, 2014 at Mabati Tatu Village, Misanga Sub-location in Bungoma North District within Bungoma County, jointly with others not before court while armed with dangerous weapons namely AK 47 riffles, Rungus and Pangas robbed JOSEPH BARASA SIKUKU of one Motor Cycle Registration Number KMBD 144V, Make TVS Star, Red in Colour valued at Kshs 90,000/= and at immediately before or immediately after the time of such robbery killed HELLEN SITOKO LISALI.

After full trial where the prosecution called 10 witnesses, the Appellants were convicted on all Counts and sentenced to suffer death.

The appellants appealed against the conviction and sentence in Bungoma HCCRA No. 113, 114, 119 and 120 of 2016 (Consolidated) where Justice Sitati upon considering the appeal stated;

*As regards sentence, the supreme court in John Karioko Muruatetu Vs Republic (2017) eKLR stated that the death sentence prescribed for capital offences is unconstitutional. That being the case, and to that extent only, I hereby set aside the sentence of death imposed upon each of the appellants and direct that each appellant be allowed to give their mitigation before they are sentenced afresh.*

The file was therefore placed before Hon Wattimah SRM for re sentencing. After considering the mitigation, he stated;

*Having said that, I consider the accused persons mitigation, the fact that they are first offenders and the age of the accused persons. I also called for Victim Impact Assessment reports which I have thoroughly considered. And having done that and putting in mind the unconstitutionality of death sentence as discussed in Muruatetu case, I sentence each accused (1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup>) persons to serve 25 years in jail.*

Aggrieved by the sentence, the appellants have preferred this appeal and each appellant filed separate grounds of appeal;-

### 1<sup>st</sup> Appellant

1. That the trial magistrate grossly erred in both law and fact by failure to analyses that appellant's fundamental rights and freedom provided in the bill of rights were threatened and violated/infringed and denied contrary to articles 25(1), 49(1) (a) (b)(c)(f) 50(2) (g) (h) (e)(9) (p).
  - a) Appellant was not informed of right to representation by an advocate or assigned one at state expense.
  - b) That 25 years sentence is excessive and demeaning contrary to articles 50(2)(p).
  - c) Appellant was detained for over 24 hours without being taken to court for plea.
2. That the appellant was not identified on elaborate identification parades hence his conviction was unsafe/parades are used to ascertain witness's identification of suspects.
3. That the trial magistrate erred by basing on dock identification to met a conviction upon appellant, yet it is worthless.
4. That there was no first report on the OB, P3 police statements and investigations diary giving names, description or body mark of appellant his arrest is thus an afterthought.
5. That the case against the appellant was not proved to the required standard. It was coached, framed and fabricated.

### 2<sup>nd</sup> Appellant's amended grounds of appeal

1. That the learned trial magistrate erred in law and fact by convicting the appellant on a defective charge sheet under section 295 as read with section 296(2) of the penal code, the charge therefore was duplicitous in law, the appellant should have been charged under section 296(2) of the penal code.
2. That the learned trial magistrate erred in law by failing to note that the charge as framed was duplicitous-295 as read with section 296/2 of the penal code thus could not support a conviction and sentence of 25 years.
3. That the learned trial magistrate erred in law and facts by convicting me the appellant in reliance of the evidence of identification by recognition where there had been no advance first report of such recognition made to the police.
4. That the learned trial magistrate erred in law and facts awarding a sentence of 25 years imprisonment on reliance of a dying declaration purported to have been made by hellen Sikoyo when she was passing on yet this evidence was not recorded anywhere thus it was hearsay evidence given by PW5.
5. That the learned trial magistrate erred in law in misconstruing the circumstances of the arrest of the appellant in connecting him with the purported robbery with violence which by the evidence adduced the appellant had no knowledge of the same.

### 3<sup>rd</sup> Appellant

1. That the prosecution witnesses were not credible, they gave contradictory and uncorroborated evidence contrary to section 163 and 165 of the Evidence Act.
2. That there was no first report in the OB, P3 giving names description of appellant to person in authority.
3. That, the case against appellant is coached, fabricated and framed.
4. That the Charge Sheet is incurably defective and was not amended in accordance with section 214 of the CPC hence judgment was null and void.
5. That, the case against the appellant was not proved to the regained(sic) standard.
6. That, the witnesses were mistaken and circumstances at the scene of crime and were not favourable for positive of the attackers.
7. That, 25 years sentence is excessive inhuman and arbitrary.
8. That, no elaborate identification parade was conducted to ascertain correctness witnesses identification of suspect his conviction is thus unsafe.

#### **4<sup>th</sup> Appellant**

1. That the learned trial magistrate erred in law and fact and paraded and faulted by failed to observe that the identification was of stranger made under difficult condition and that he did not exclude the possibility of error of mistake according to PW1 evidence.
2. That the trial magistrate erred in law to uphold that the alleged Motor Cycle was not recovered yet the PW4 of the said Motor Cycle which hence occasioning a reasonable doubt.
3. That the trial magistrate erred in law and by failing to consider whether the identification parade was conducted or not in the respect to the appellant herein referred to as 5<sup>th</sup> accused seen from the trial proceeding.
4. That there was misinterpretation of the law by the trial court right from the constitution of PW1 and PW2 without analyzing the purported evidence before court of which the trial magistrate biasly rallied on them which is unconstitutional.
5. That the trial court erred in law and fact in consideration of extraneous factors in convicting the appellant and admits with the investigation officer which was not in record as how the investigation process done this was observe violation of section 216 and 329 of the criminal procedure code cap 75 laws of Kenya which vitiated the whole original trial declared unconstitutional.
6. That there was no exhibit or cartridges found on appellant possession linked the appellant that could have any nexus linkage to the alleged crime hence leading to an injustice.
7. That the trial magistrate erred in law and fact by failing and admits with PW2 RUTH WANJALA in his evidence without consideration of cross examination by Mr. Kitui who represent the appellant said it was not 5<sup>th</sup> accused, it was accused one on page 17 line 10-11.
8. That the first report was not with any complain with my names or description linked the appellant to the crime of or on the fateful night. See OB NO. 4/10/7/2014 and 6/10/7/2014.
9. That may the honourable court quash this conviction by looking into the sentiments that the trial judge based on and find there in unscrutinizing areas for the sake of the appellant.

On 8<sup>th</sup> May, 2020, the 4<sup>th</sup> appellant filed supplementary grounds of appeal as follows;

1. Erred in law and in facts in convicting and sentencing the 5<sup>th</sup> accused against indilligent consideration of investigation report (independent evidence).
2. Erred in law and in facts in not making a finding that the recovered cabre catridges of 7.62mm X 39 aa did not connect the 5<sup>th</sup> accused to this instant case.
3. Erred in law and in facts in convicting the 5<sup>th</sup> accused relying on unsworn, un cross-examined and attested statements or information from Fanuel Makhenga and the identification officer who did not come to testify in this indictment pursuant to section 151 CPC, Section 33 and 35 evidence Act.
4. Erred in law and in fact in not making independent, diligent and careful test analysis of the 5<sup>th</sup> accused person in relation to the identification and first report hence coming up with a wrongful uniform judgment and sentence.
5. Erred in law and in fact in meting out to the 5<sup>th</sup> accused a manifestly excessive long term sentence of 25 year imprisonment whereas there were other least severe pursuant to article 50(2) (p), 24(1)(e) constitution.
6. Erred in law and in fact in not inviting the acquittal verdict of a sister case of 1.10.2014 at Lukhokkwe that led to the arrest of the 5<sup>th</sup> accused to be used for proper sentencing in its sister case at Sirisia pursuant to section 325 CPC hence acquitting the 2<sup>nd</sup> appellant.
7. Erred in law and in facts in transferring the 5<sup>th</sup> accused case from Kimilili subordinate court without the orders of the High Court pursuant to section 81 CPC.

This being a first appeal, I am minded to quote the decision in **Kiilu & Another vs. Republic [2005]1 KLR 174**, where the Court of Appeal stated thus;

**It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.**

The parties filed written submissions which the court has carefully considered, case law referred to together with the legal provisions cited.

The respondent filed its submissions through Mr Thuo, Prosecution Counsel who submitted that since the High Court pronounced itself before the matter was taken back to the lower court for re-sentencing and therefore the proper channel for the appellants was to challenge the order on re-sentencing in the Court of Appeal.

The main issue on this appeal therefore is whether the sentence of 25 years meted out on the appellants is excessive in the circumstances. After the initial conviction where the appellants were sentenced to death, the appellants had a chance to challenge the propriety of their conviction. They indeed challenged and this court sent back the files for re-sentencing thus the only issue arising is on the sentence meted thereafter.

Section 295 of the Penal Code provides;

***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.***

Section 296 (2) of thereof provides;

***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 before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.***

In **James Kariuki Wagana vs Republic [2018] eKLR**, Prof. Ngugi J observed that;

***The law of the land as it stands today, therefore, is that the maximum penalty for both murder and robbery with violence is the death penalty but the Court has discretion to impose any other penalty that it deems fit and just in the circumstances.***

***In light of this, I will, therefore, proceed to determine the appropriate sentence. First, it is true that all the elements for the offence of robbery with violence were proved. However, there are no truly aggravating circumstances which would lift this case to the scales of the death penalty. Death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder.***

In the case before the court, all the ingredients of robbery with violence have been proved. PW6 and PW7, Clinical Officers based at Naitiri Sub County Hospital testified that they filled P3 forms for PW1 who had injuries on the chest, left hand and left shoulder, PW2 sustained injuries on the back head and was stitched with 10 stitches, PW3 had cut wound on the head and nose, PW4 had sustained injuries on the right face and back caused by a blunt object and PW 5 sustained injuries on the back and the right knee which was swollen. One person also died in the course of the commission of the offence.

The appellants state that the trial court failed to consider the ruling in **Francis Karioko Muruatetu & Another Vs Republic [2017] eKLR** hence meting on them an excessive sentence.

In that case, the Supreme Court held;

***...To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge: age of the offender, being a first offender, whether the offender pleaded guilty, character and record of the offender, commission of the offence in response to gender-based violence, remorsefulness of the offender, the possibility of reform and social re-adaptation of the offender, any other factor that the Court considers relevant.***

Their appeal against conviction having been dismissed by Sitati J, the appellants can only appeal against the sentence by Hon Wattimah SRM.

The court has considered the sentence by Hon Wattimah. He carefully took into account the mitigation by the appellants. I find no fault in either the approach or the principles of sentencing adopted. I am satisfied that the sentence was not excessive or unlawful.

I dismiss this appeal and affirm the sentence of 25 years imposed on the appellants;

1. JOSEPH WEKESA MUFUBI alias MESHACK
2. BENJAMIN WANJALA MASINDE
3. DAVID MUSABWA NDUSU alias DAVY
4. JOSEPH MUSANGA MUSABWA

**DATED** and Delivered at **BUNGOMA** 10<sup>th</sup> this day of March, 2021.

**S.N RIECHI**

**JUDGE**