REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO. 25 OF 2020

DAVID WAKAHU WAWERU.....APPELLANT

VS.

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Gatundu, Hon. H. M. Ng'ang'a, SRM. dated 8th May, 2020 in Criminal Case No. 324 of 2016)

JUDGMENT

1. ***DAVID WAKAHU WAWERU (Wakahu***) was charged before Gatundu Chief Magistrate's Court with the offence of robbery with violence contrary to **Section 269(2)** of the Penal Code. After trial, the said court convicted him as charged and sentenced him to 30 years imprisonment. Wakahu has appealed against the conviction and sentence before this Court. This being the first appellate court, it will be guided by the holding of the case of ***OKENO V. REPUBLIC (1972) EA 32*** that, it is the duty of the first appellate court to re-evaluate the evidence and reach its own conclusions on the matter before it on first appeal. It is not enough for the first appellate court to merely pick the findings of the trial court and substitute them as its own. It must form its own opinion but always remembering that it has not heard the witnesses or observed their demeanor.

2. The case presented by the prosecution at the trial was that, ***DANIEL KURIA KARIUKI (Daniel)*** was on 29th July, 2015 at 1pm driving motor vehicle Probox registration number KBX 386C. That vehicle was a taxi. The vehicle belonged to ***Peter Kairu Watai***. Daniel had been employed to drive that taxi 2 years prior to the incident, the subject of this case. While Daniel was driving the taxi at Githioro in Gatundu, someone approached him and requested Daniel to go with him to get some chicks. That customer, while they were on the road, spoke to someone on telephone and told the person on the other side of the line that they were almost there. The customer complained to Daniel that he was speaking on telephone to a certain teacher from whose home they were to collect the said chicks and that the teacher had instructed him that someone would assist them to get the chicks. Daniel drove the customer for 40 minutes. Daniel stated that he was able to observe this customer as they drove. Daniel on instructions of the customer turned into a rough road where they came across two men. The customer informed Daniel that those two men were to travel with them. Those two men boarded the vehicle and sat at the rear. The customer was seated in the front passenger seat. After driving a while, Daniel was requested by one of the passengers to reverse the vehicle because they had arrived at the destination. As Daniel reversed, the two men who sat on the rear seat got a rope and put it on Daniel's neck and used it to pull Daniel to the back seat of the car. The person who initially posed as a customer went to the driver's seat and attempted to start the vehicle but the vehicle did not start. The two men asked Daniel what they needed to do to start the vehicle and on Daniel requesting that he be released so that he could start the vehicle, they declined. On Daniel urging them to release him, one of the passengers seated at the rear of the car stabbed Daniel with a knife on his right hand and chest. The initial customer was still attempting to start the vehicle while the other two tied Daniel's hands with a rope. The two also callo taped Daniel's mouth and eyes and Daniel in his testimony stated that he lost consciousness at this point. Before losing consciousness Daniel saw a lady whom he said he had seen at Gatundu Court, a witness in the case.

3. ***Lucy Wanjiru Njoroge (Lucy)*** stated that on 29th July, 2015 at 1pm, she was in the compound of her home at Wanjenga. While there, she saw two men walking. She identified one of the men as Wakahu. She heard one of them was speaking on telephone. She head the engine of a vehicle. It was a Probox. There were two men at the front seat of that vehicle. She noted the driver trying to turn the vehicle from where it had come from. Lucy went closer to the vehicle and identified Wakahu as one of the men seated at the rear seat of the vehicle. She also saw Wakahu hit the driver, Daniel. When Daniel screamed, Lucy went back to the compound of her home where she met her friend who on telling him what she witnessed the friend ran away. Lucy met Beth Wakonyo and they decided to look for assistance4. When members of public joined them they went to the place where the vehicle was parked. In the car the found Daniel who was unconscious. When he regains consciousness they removed cello tape and rope. The assistant chief and deputy officer in charge of station (OCS) came to the scene.

4. ***Beth Wakonyo (Beth)*** was at her home when Lucy went there and told her that she saw men fighting in the Probox vehicle. Later, after getting other people to come to the scene, Beth saw Daniel being removed from the car and she noted he had been stabbed. There was no

one else in the car at that time.

5. ***Naomi Wawira Munui (Naomi)*** lived in the vicinity where Lucy's house was. She saw two men by the road. She saw them pass by three times. She went to the road and saw the two men. One of those men was Wakahu. She also heard one of the men speak on cell phone asking that the person he was speaking to come with the car. She was later alerted by Lucy of the presence of a Probox vehicle. When she went to where that vehicle was, she saw Wakahu standing behind that Probox. The car bonnet was opened by another man. Naomi called the assistant chief because she suspected something was not right. She also went closer to the vehicle and noted Daniel in the car, he was bleeding. He had cello tape on his mouth and his hands and legs were tied with a rope.

6. ***Dr. Wycliff Amol*** from Gatundu hospital produced the P3 Form which showed Daniel suffered penetrating stab wound on the chest.

7. ***Wakahu*** offered sworn defence. He denied the charge and alleged he had been framed by his sister Margaret Njeri. He confirmed he recognised Lucy and Beth. He stated that after finishing school he left his home area at Kwa Njenga and moved to Nairobi. Further, that he only returned home during Christmas. He said that in the year 2015 he only went home in December.

8. Wakahu's grounds of appeal can be summarised as follows:-

a) That the trial court erred to convict him on contradictory evidence and without proper identification.

b) The trial court's sentence was excessive.

c) The trial court did not consider his defence and was biased.

d) The prosecution failed to produce crucial witnesses.

9. The first two issues above raised by Kakahu require this Court to determine whether prosecution proved the case against Kakahu on the required standard, that is, beyond reasonable doubt. I am indebted to the citation by *Justice E.C. Mwita* in the case ***GORDON OMONDI OCHIENG VS. REPUBLIC (2021) eKLR*** thus:-

> ***"31. And in*** *BAKARE V STATE (1987) 1 NWLR (PT 52) 579,* ***the Supreme Court of Nigeria emphasized on the phrase proof beyond reasonable doubt, stating:-***
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> ***'Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability.'"*** (emphasis)

10. Daniel stated that he was hired by a customer with whom he spent a considerable time with. That customer was not Wakahu the accused. Daniel stated that at some point in their journey with the customer they picked two men who sat at the back seat of the vehicle. It is those two men seated at the back who attacked him by tying his neck with a rope, stabbed him and cello taped his mouth and eyes. The customer thereafter took over the driving of the vehicle but the vehicle failed to start.

11. Lucy and Naomi saw two men passing by the road. According to Naomi, it was unusual for men to pass by that road. Lucy said she knew one of those two men. One of those men was Wakahu. Lucy said she knew Wakahu as a neighbour and a schoolmate. She knew him by name. She heard the vehicle and saw the two men, who were pacing up the road, board that vehicle and sat at the back. One of those men seated at the back seat was Wakahu. She saw Wakahu hit Daniel.

12. Naomi said of the two men pacing up the road was Wakahu whom she heard conversing on telephone. She also saw Wakahu standing behind the vehicle. Later, on being recalled, Naomi stated that it was the other man in the company of Wakahu who spoke on telephone. Naomi also knew Wakahu because he came from her neighbourhood.

13. Daniel as stated before did not observe the men who on boarding the vehicle sat at the back seat of the car. Lucy however being alerted of the vehicle near her gate and having noted two men, one of them being Wakahu, who were pacing up the road went to the road. She saw two men seated in the front seat of the car and two seated at the back seat. Daniel in his evidence said that he saw a lady when he was being assaulted and that lady he later saw her in court testifying in the case.

14. The particulars of the charge that Wakahu faced before the trial court were as follows:-

> *"DAVID WAKAHU WAWERU* ***on the 29th day of July 2015 at Wanjeng area in Githunguri sub-county within Kiambu County, jointly with others not before court robbed*** *DANIEL KURIA KARIUKI* ***of his mobile phone make Samsung valued at Kshs.3,500 and case of Kshs.1500 all valued at Kshs.5,000 and at the time of such robbery wounded the said*** *DANIEL KURIA KARIUKI****."***

15. Wakahu by his written submissions has rightly submitted that the prosecution did not prove the above particulars of offence. Daniel did not, in his evidence state that any property was actually stolen from him by Wakahu and his accomplices. The only witness for the prosecution who mentioned the theft of Sumsung phone and cash was the *Investigating Officer (I.O) Cpl. Kanja*. The person from whom those items were allegedly stolen from, Daniel did not speak of such theft. Rather, Daniel testified that on him being violently removed from the driver's seat one of the men, the customer who earlier on hired him, sat at the driver's seat attempted to ignite the vehicle but failed to do

so. One of those men stabbed Daniel when he failed to give them directions of how to start the vehicle.

16. The evidence adduced by the prosecution clearly reveals that Wakahu and his accomplices attempted to steal the vehicle but it failed to start.

17. Bearing the above in mind, it is clear that the facts adduced by the prosecution did not prove the charge of robbery with violence contrary to **Section 296(2)** of the Penal Code. Prosecution did not prove robbery took place. There is however clear cogent evidence of attempted robbery of the motor vehicle. In my view, the evidence adduced by the prosecution proved the offence of attempted robbery contrary to **Section 297(2)** of the Penal Code. **Section 297(1) and (2**) provides:-

> "***(1) Any person who assaults any person with intent to steal anything, and, at or immediately before or immediately after the time of the assault, uses or threatens to use actual violence to any person or property in order to obtain the thing intended to be stolen, or to prevent or overcome resistance to it being stolen, is guilty of a felony and is liable to imprisonment for seven years.***
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> ***(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more person or persons, or if, at or immediately before or immediately after the time of assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."***

18. Wakahu was not charged with attempted robbery. He was charged with the offence of robbery with violence. However, the facts prove beyond reasonable doubt that the offence of attempted robbery of the motor vehicle registration number KBX 386C. The evidence of identification of Wakahu at the scene and of participating in the attempted robbery is free from error. Lucy and Naomi knew Wakahu as a neighbour. Naomi was a schoolmate of Wakahu. They were both consistent that Wakahu was part of the group of men who assaulted and wounded Daniel. Daniel testified that the men wanted to drive the vehicle away but it failed to start. I find that the inconsistencies highlighted by Wakahu do not raise credibility issues against Lucy and Naomi. Those inconsistencies in any event examined in relation to other evidence they cannot raise doubt in the prosecution's evidence. I am guided by the holding in the case of ***DENIS KINYUA NJERU VS. REBPULC (2017) eKLR*** as follows:-

> ***"In response to issue number one (1), the guiding principle was restated in the case of JOSEPH MAINA MWANGI VERSUS REPUBLIC CRIMINAL APPEAL NO. 73 OF 1993; that:-***
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> ***'In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of the Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are in consequential to the conviction and sentence'***
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> ***In NJUKI & 4 OTHERS VERSUS REPUBLIC [2002] 1KLR 771 the court added inter alia that:-***
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> ***'The main factor to be considered in such cases is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. However, where the discrepancies in the evidence do not affect an otherwise proven case against the accused, a court is entitled to overlook those discrepancies'.***
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> ***The duty of the court when faced with allegations of existence of discrepancies, inconsistencies and contradictions in any trial or appeal is to reconcile these and determine whether these vitiate the trial or not. See JOSIAH AFUNA ANGULU VERSUS REPUBLIC NAKURU Criminal Appeal No.277 of 2006 and CHARLES KIPLANGAT NGENO VERSUS REPUBLIC Nakuru CRA No.77 of 2009."***

19. In respect to this case, I find no discrepancies which vitiate the prosecution's case.

20. In view of the above finding, I find that there is evidence to convict Wakahu of the offence of attempted robbery contrary to **Section 297(2)** of the Penal Code as provided under **Section 179** of the Criminal Procedure Code. That section empowers the court, either trial court or appellate court to convict a person of an offence even though he was not charged with that offence. In other words, a person can under **Section 1796** of the Criminal Procedure Code be convicted of an offence which is a minor offence, other than that which he/she was charged. In this case, Wakahu was charged with robbery with violence. The offence of attempted robbery is undoubtedly a minor offence to robbery with violence. I am indebted to the citation by *Justice R.E. Aburirli* in the case of ***JEREMIAH OUMA ADONGO VS. REPUBLIC (2021) eKLR*** as follows:-

> ***"26. As regards the power of the Court to convict the appellant of the cognate offence without affording the appellant an opportunity to address the issue, the Court of Appeal in ROBERT MUTUNGI MUUMBI V REPUBLIC [2015] eKLR expressed itself as hereunder:-***
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> ***'The third issue in this appeal relates to appellant's alleged lack of opportunity to plead before he was convicted of the offence of indecent act with a child. If we understood the appellant right, his contention is that he should not have been convicted of the offence of indecent act with a child, which he was not charged with, before he was afforded an opportunity to plead to that offence. Mr. Monda's response was that the appellant could be properly convicted under** *section 179* ***of the Criminal Procedure Code without having to plead to the offence, so long as it was a minor and cognate offence to that charged...***
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> ***As is apparently clear,** *section 179* ***of the Criminal Procedure Code empowers a court, in some particular special circumstances, to convict an accused person of an offence, even though he was not charged with that offence. The court contemplated by section 179 can be either the trial court or the appellate court… The question is whether the special circumstances contemplated by***

section 179 were in existence to enable the court convict the appellant of an offence with which he was not charged. An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted. (See *ROBERT NDECHO & ANOTHER V REX (1950-51) EA 171* ***and*** *WACHIRA S/O NJENGA V REGINA (1954) EA 398)...'*

27. The Court proceeded to state that:-

'The second consideration arises, of necessity, precisely because the accused person is not charged with, and has not pleaded to, the minor cognate offence. The purpose of delving into this consideration is to satisfy the court that the accused person was not prejudiced, and that by being charged with the major offence, he had sufficient notice of all the elements that constitute the minor offence. (See Republic v Cheya & Another [1973] EA 500).'"

21. Wakahu relied on the ground, in this appeal, that the trial court failed to consider his defence.

22. The defence offered by Wakahu was alibi defence. Wakahu denied being part of the group of men who attempted robbing Daniel the motor vehicle. He denied having bone to the same school with Lucy and stated that he only knew Lucy and Beth from sight. Wakahu further alleged that the charges against him were framed due to the bad blood between him and his sister Margaret Njeri. He stated that his sister did not want him to be part of the family because he was adopted. Wakahu did not call any other evidence to support the allegations that the charges against him were instigated by his sister. Most importantly, no question in that regard was put to the complainant Daniel or the I.O.

23. I am satisfied that the alibi defence raised by Wakahu fails. That defence was displaced by the prosecution's cogent unshaken evidence which placed Wakahu at the scene of the crime. I find that the evidence of the prosecution meets the criminal standard of proof beyond reasonable doubt. Wakahu erred to submit the trial court was biased against him. There was no evidence of bias.

24. Although Wakahu submitted that the prosecution failed to produce crucial witnesses he did not specify which witnesses that ought to have been called but were not. In the case ***KETER V. REPUBIC (2007) IEA 135*** the court held that the prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge. The prosecution in this case called Daniel the complainant and the two eye witnesses of Wakahu's involvement in the offence. No other witnesses were revealed to have witnesses of fact of the crime but were not called. I have stated before that the evidence tendered by prosecution was adequate to prove the guilt of Wakahu. That submission therefore is rejected.

25. The trial court sentenced Wakahu to serve 30 years of imprisonment. Although Wakahu submitted that the said sentence was excessive there is no basis for such submission.

26. The sentence for a conviction under **Section 296(2**) of the Penal Code is death. The trial court in sentencing Wakahu to serve 30 years imprisonment was guided or, may I say misguided as most of judges and magistrates were, that the Supreme Court decision in the case of ***FRANCIS KARIOKO MURUATETU & ANOTHER VS. REPUBLIC SC PET. NO. 16 OF 2015*** which found the mandatory provision of sentence of death on murder conviction to be unconditional, applied to all cases where statutory provision on sentencing was mandatory. Thankfully, that misinterpreting of the Supreme Court decision has been clarified by directions given by the Supreme Court in ***Petition No. 15 & 16 (Consolidated) of 2015 FRANICS KARIOKO MURATETU 1ST PEETIONER WILSON THIRIMBU MWANGI***

"PETITION NO. 15 & 16 (CONSOLIDATED) OF 2015

BETWEEN

FRANCIS KARIOKO MURUATETU.....1ST PETITIONER

WILSON THIRIMBU MWANGI.....2ND PETITIONER

AND

REPUBLIC.....RESPONDENT

KATIBA INSTITUTE

DEATH PENALTY PROJECT

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS

INTERNATIONAL COMMISSION OF JURISTS-KENYA CHAPTER

LEGAL RESOURCES FOUNDATION

ATTORNEY GENERAL.....RESPONDENT

> ***"[7] In the meantime, it is public knowledge, and taking judicial notice, we do agree with the observations of both Mr. Hassan and Mr. Ochiel, that while the report of the Task Force appointed by the Attorney General was awaited, courts below us have embarked on their own interpretation of this decision, applying it to cases relating to Section 296(2) of the Penal Code, and others under the Sexual Offences Act, presumably assuming that the decision by this Court in this particular matter was equally applicable to other statutes prescribing mandatory or minimum sentences. We state ..., there can be no justification for courts below us, to take the course that has now resulted in the pitiable state of incertitude and incoherence in the sentencing framework in the country, giving rise to an avalanche of applications for re-sentencing... We therefore reiterate that, this Court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the*** **Sexual Offences Act or any other statute…** ***[15] To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under Section 40 (3), robbery with violence under Section 296 (2), and attempted robbery with violence under Section 297 (2) of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases."***

27. The sentence by the trial court, therefor, was not excessive. Nay. It was illegal because the trial court should have sentenced Wakahu, on convicting him, to suffer death. Can this Court enhance the trial court's sentence? To do so a court ought to warn an appellant that if he/she does proceed with the appeal and fails, his/her sentence could be enhanced. While hearing this appeal, this Court did not warn Wakahu. A case in point is the case of ***GEORGE MORARA ACHOKI V. REPUBLIC (2014) eKLR***.

28. It should however be noted that the sentence under **Section 296(2) or 297(2)** of the Penal Code on conviction is death. That is mandatory sentence. The trial court being misguided, as many were overlooked the mandatory sentence and sentenced Wakahu to 30 years. That sentence of 30 years was illegal. Because the sentence of the trial court was illegal, this Court can enhance Wakahu's sentence despite the lack of warning to Wakahu. See the case ***GEORGE MORALA ACHOKI*** (supra)

> ***"In the case of JJW V REPUBLIC (Kisumu) Criminal Appeal No. 11 of 2011 (UR) where the appellant had been sentenced to seven years imprisonment but which sentence was enhanced on appeal to a sentence of ten years without notice we held that:-***
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> ***"It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 354 (3) (ii) and (iii) of the Criminal Procedure Code. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal."***

CONCLUSION

29. In view of the discussion in this matter, I hereby quash the conviction of ***DAVID WAKAHU WAWERU*** under **Section 296(2)** of the Penal Code and substitute therefor conviction of ***DAVID WAKAHU WAWERU*** under **Section 297(2)** of the Penal Code.

30. Save for the substitution as there above, the appeal against conviction is dismissed. Further, the trial court's sentence is hereby set aside and ***DAVID WAKAHU WAWERU*** is hereby sentenced to suffer death as provided under the law.

31. Orders accordingly.

JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 14TH DAY OF OCTOBER, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant: Ndege

Appellant: David Wakahu Waweru: Mr. Nyakundi

DPP for Respondent: Mr. Kasyoka

COURT

Judgment delivered virtually.

MARY KASANGO

JUDGE