REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R. MWONGO, J

CRIMINAL APPEAL NO. 116 OF 2015

HARON KURIA NGOTHO..1ST APPELLANT

JIMNAH MWANGI MACHARIA..2ND APPELLANT

DAVID WAWERU KIMANI..3RD APPELLANT

FRANCIS MUIGAI MBURU..4TH APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Being an appeal against the judgment of Hon E. Kimilu SRM delivered on 1st July, 2015 in Naivasha CMCR No 2889 of 2013)

JUDGMENT

Background and basis of appeals

1. Haron Kuria Ngotho (3rd Accused in the lower court), Jimnah Mwangi Macharia (4th Accused), David Waweru Kimani (1st Accused), and Francis Muigai Mburu (2nd Accused), were charged, with others not before the court, with three counts of robbery with violence contrary to **section 296(2)** of the **Penal Code**.

2. The particulars of the charges were that on 2nd December, 2013 at ZZ Bar in Maai Mahiu Township in Nakuru County while armed with swords, knives and rungus, they robbed three persons and at the time used or threatened to use actual violence. In Count 1 that they robbed Ezekiel Hubes Mungai of Kshs 35,000/=; In Count 2 that they robbed Elizabeth Nyambura Njeri of Kshs 5,000/= cash and mobile Nokia phone all worth Kshs 10,000/=; and in Count 3 that they robbed Rahab Wangari of a Nokia phone.

3. After a hearing in which the prosecution availed five witnesses, and all the accused persons gave unsworn statements, the trial court found all accused guilty of the charges in respect of Counts 2 and 3. The court sentenced each accused to death in respect of Count 2, and suspended the sentence in respect of Count 3.

4. Haron Kuria first filed his appeal on 8th July 2015 (No. 116 of 2015). The other three accused persons also filed applications to appeal on 8th July, 2015. After the proceedings had been prepared for Haron Kuria, all appellants filed amended grounds of appeal on 16th October, 2019 in file No. 116 of 2015. All the appellants have appealed against conviction which they seek be quashed, and also pray that their sentence be set aside.

5. I have treated the appeals as consolidated as they all emanate from the same act. Thus Appeal Numbers **115 of 2015 Jimnah Mwangi Macharia**, No. **117 of 2015 David Waweru Kimani** and No. **118 of 2015 Francis Mungai Mburu** are dealt with as one and the mother file is Appeal Number **116 of 2015**. Accordingly, the consolidated judgment will be placed in each of the said files at conclusion of the appeal.

6. In summary, the grounds of appeal in the combined appeals raise the following issues:

i. Whether there was proper identification

ii. Whether the charge sheet was defective

iii. Whether there was proof beyond reasonable doubt and whether the defence evidence was taken into account

iv. Whether there was compliance with section 214 of the CPC

v. In respect of Accused 3 whether mitigation was properly done in accordance with Muruatetu case

7. As this is a first appeal, this court is expected to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis, while bearing in mind the caution that it neither saw nor heard any of the witnesses. As such, the court has to give due allowance for the advantage the trial court had that it has not had. The court is guided by the Court of Appeal decision in **Isaac Ng'ang'a Alias Peter Ng'ang'a Kahiga v Republic Criminal Appeal No. 272 of 2005** where the court stated:

> ***"…in the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same***

Analysis and Determination

8. The material facts of the case are as follows. PW1 Elizabeth Nyambura, PW2 Rahab Wangari and PW3 Grace Muthoni Muriithi were all in ZZ Bar on 2/12/2013 at about 5.30am. PW1 was a barmaid, and PW3 was an attendant in the bar. PW2 had come to the bar on the invitation of PW1 to meet with a person called Hubes. The lights in the bar were on when about ten men walked in.

9. PW1 testified that, among the men who walked in, she recognized the 1st accused who she knew from Maai Mahiu, and the 2nd accused who she knew by the name of "banker" and his face was familiar to her as she had also seen him in Maai Mahiu. The 2nd accused told her he was going to rob the customers and she objected. The 2nd accused then grabbed her jacket and pulled her close to him, face to face, and pulled out a panga. As she resisted and objected she tried to defend herself. He cut her left hand between the small finger and second finger and her right leg below the knee. He robbed her of Kshs 5,000/= and her Nokia phone. Meanwhile, the 1st accused joined and the two removed her trouser searching for money in her bikers, and threatened to rape her.

10. PW1 also saw the 1st and 2nd accused robbing the customer called Hubes of Kshs 35,000/=. At the time, Hubes was in the company of PW1's friend Rahab Wangari (PW2). As the robbers ran away, the 3rd and 4th accused were apparently waiting at the stairs as 1st and 2nd accused did their acts. The 3rd and 4th accused beat PW1 and she fell down. After the robbers escaped, PW1 went back into the bar and called the owner to whom she explained everything that had happened. PW1 thereafter went to Maai Mahiu Ngeoyo where she was treated. Later she went to Naivasha District hospital where she was also treated and issued with a P3 form.

11. In cross examination, PW1 stated that she lost consciousness after being beaten by the 3rd accused; and that she clearly saw the 3rd accused's face. She asserted that she knew the 4th accused as Mwangi, and she gave his name to the police; and that the events of the night.

12. Rahab Wangari PW2, in her testimony corroborated the evidence of PW1. She said she was having a drink with Hubes at about 5.00am when the attack by the robbers started. She said she knew the 1st accused as a robber in the area and that he was known by the nickname "banker". She saw the 2nd accused – whom she knew by the nickname "Kamotho" for about five years – open a Guinness bottle with his teeth. He, Kamotho, joined them at the table and snatched a shs 500/= note that she was giving PW1 for a drink. He told Hubes and her to hand over what they had. Hubes' wallet fell as he stood up and 2nd accused took it and her Nokia phone; she noticed that he was armed.

13. PW2 also said she saw the 4th accused, one Mwangi, participate in the robbery. She knew him as a conductor at Narok stage. She had seen him around for about five years. She saw him chase PW1 back when PW1 had gone down the stairs. After the attack, PW2 joined PW1 to report to the police giving the names of their assailants. Whilst there, 2nd accused was brought, but he did not have a panga; 3rd accused came pretending he was bringing breakfast for 1st and 2nd accused. Similarly, she identified the 4th accused at the police station.

14. In cross examination by the 2nd accused, PW2 said there was electric light in the bar, and she identified him using the light. She admitted that she did not identify 2nd accused for purposes of arrest, nor that she attended any identification parade for the 3rd accused. She however said the 4th accused was known by the nickname "Mrefu".

15. PW3 Grace Muthoni Muriithi's evidence also corroborated that of PW1 and PW2. She said she was at the bar counter when the attack occurred. She saw the 1st and 2nd accused enter the bar first and they approached the counter. She knew 1st accused as "Banga" and 2nd accused as "Kamotho". Afterwards, the others came in. Kamotho and Banga went to a customer and asked for money on a threat to injure him. They attacked the customer who was in company of Rahab (PW2), and grabbed Rahab's phone returning her SIM to her. She saw all this in the electricity light at the counter and in the bar. When the attackers left according to PW3, Rahab, the customer and Nyambura went to report to the police. She went to call the owner.

16. She said she did not know the 3rd accused, but had seen him before. It was he who came into the bar when she was sweeping broken pieces of bottle, and asked her why she had called the police. She shouted for help and he ran away. After cleaning up the bar, she went to report at the police station. In cross examination, PW3 said there was electric light by which she saw her attackers in the bar;

17. PW4 Silvester Mesa, a Clinical Officer at Naivasha District hospital, gave evidence on behalf of Fred Mbugua, who had filled the P3 form for PW1. The prosecution's application for him to produce the report under section 33(2) of the Evidence Act on account of transfer of

Fred Mbugua with whom he had worked, was not opposed by all four accused persons, and was allowed. He produced the P3 form as PExb 1 and stated that the victim, Elizabeth Nyambura had cut wounds on left hand affecting the small finger. Her lower limbs also had a cut on right cuff muscle.

18. PC Investigating Officer, gave evidence as PW5. He stated how he was called by a security guard from ZZ Bar and told of the robbery. He explained that he went to the scene; interrogated the complainants; he investigated the incident and how the accused persons were arrested. No identification parade was done as the accused were known to the complainants. He stated that all the accused were known to him as he had been in Maai Mahiu police station for five years. He stated that Hubes had been in and out of the country but did not explain why he was not called to give evidence.

19. Each of the accused persons gave unsworn evidence. The trial court assessed their evidence and found it to be mere denials, and concluded that the prosecution evidence was unchallenged.

20. Was the offence proved beyond reasonable doubt? On this issue **Section 295 Penal** of the **Code** defines robbery whilst **section 296(2)** of the **Penal Code** describes the ingredients which must be proved for the offence of robbery with violence, and the sentence. The sections provide as follows:

> ***"295. 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.***
>
> ………
>
> ***296(2) 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"***

21. I have noted from the judgment that the trial magistrate properly directed herself that the ingredients of robbery that must be proved are, in her words:

> ***"i. The robber must have been armed with [a] dangerous weapon OR***
>
> ***ii. He must have been in the company of one or more people OR***
>
> ***iii. Immediately before or immediately after the robbery [he] used violence or occasioned actual violence to the victim."***

The trial magistrate went on to highlight the evidence that proved the offence.

22. The above statement of the law is a fair paraphrase of the Court of Appeal's holding in **Juma Mohamed Ganzi & 2 others v Republic [2005] eKLR** where it said that the offence of robbery with violence is proved if:

> ***"(i) The offender is armed with any dangerous or offensive weapon or instrument; or***
>
> ***(ii) The offender is in the company with one or more other person or persons; or***
>
> ***(iii) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person."***

23. In this case, I find that there is clear evidence of each ingredient from the detailed testimony of the three eyewitnesses PW1, PW2 and PW3. I fully agree with the trial magistrate on that aspect. I need not rehash the detailed evidence. In short, all eye witnesses stated that there was more than one robber; that at least one of them was armed; and that they used force and threats to dispossess the victims. The 2nd accused cut PW1 with a panga and robbed her of her mobile phone and cash 5,000/-; 1st and 2nd accused removed PW1's trouser and threatened to rape her; PW2 saw 2nd accused with what she described as a sword; 3rd and 4th accused were at the stairs and beat PW1. All the ingredients of the offence are captured in that evidence. In my view, the distinction between the description by one witness of a panga and a sword is not a material contradiction that would affect the outcome.

24. Further, with regard to the complaint on identification and failure to have an identification parade, all eye-witnesses (PW1, PW2 and PW3) stated that there were electric lights in the bar; that they had clear sight of the accused persons; that each of the witnesses knew one or other of the accused persons by a nickname or by face; and that none of the accused persons wore any disguise. I am satisfied that these witnesses identified the accused by recognition, which is safer than identification by way of an identification parade. They stated that they gave the police the names or nicknames of the accused.

25. Further, I agree with the trial magistrate that although there was an allegation by each of PW1, 2 and 3, that one Hubes was robbed by the 2nd accused during the same incident, there was no compliant by Hubes, and no evidence by him of anything that he lost. He was not called to give evidence and no explanation was given for his absence. The trial magistrate, therefore, properly acquitted all accused from this count of the charge.

26. As for the defective charge sheet, the complaint was that the trial court failed to comply with section 214 of the CPC in respect of amending the charge sheet. The proceedings show that on 21/7/14, the prosecutor applied to amend the charge sheet to incorporate the alias names of the 1st, 2nd and 4th accused persons. The issue was put to all the accused, and they each responded: *"No objection"*.

27. Thereafter, and in accord with **section 214 CPC**, the court ordered that the substance of the charge and every element thereof be read out to each of the accused in Kiswahili which language they stated they understood. The charge was so read out and plea was taken afresh in respect of each of Counts 1,2 and 3. Each of the accused responded: *"Not true"*. The trial court entered a plea of not guilty in respect of each accused.

28. **Section 214 CPC** provides:

> ***"Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:***
>
> ***Provided that—***
>
> > ***i. where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;***
> >
> > ***ii. where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination".***

29. I am satisfied that the trial court acted in accordance with s **section 214 CPC.** The only amendments made to the charge sheet were with respect to incorporating the alias names of the accused into the charge sheet. The court had the plea taken afresh and recorded the appellants' responses.

30. On the issue of sentencing, each of the accused sought that the sentence be set aside in their submissions. Accused 3, Haron Kuria Ngotho specifically argued this as a ground. He stated that the trial magistrate:

> ***"failed to consider the appellant's mitigation, circumstances …..and awarded a harsh and cruel sentence"***

31. Accused No 3 prayed for a sentence rehearing in light of the case of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR**.

32. I agree with the appellant that neither he nor the other accused persons were given a proper opportunity for mitigation. That is, they were not enabled to avail information to the trial court that would properly inform it in considering the sentence. The record shows what occurred at mitigation stage as follows:

> ***"Mitigation:***
>
> ***1st Accused : Nil***
>
> ***2nd accused: I pray for leniency***
>
> ***3rd accused: I am sole breadwinner in my family***
>
> ***4th accused: I am a first offender***
>
> ***Court: I have considered the nature of the offence each accused is sentenced to death sentence in respect of count II…"***

33. The proper position in law is that the trial court may receive evidence on mitigation. **Section 216** of the **CPC** provides that:

> ***"The court may, <u>before passing sentence</u> or making an order against an accused person under section 215, <u>receive such evidence as it thinks fit to inform itself as to the sentence or order properly to be passed</u> or made."***

34. This aspect of the trial was improper as the accused persons' mitigation did not in fact amount to mitigation, in terms of section 216 CPC, for purposes of enabling the court ***"to inform itself as to the sentence or order properly to be passed or made."*** It is vitally important for the trial court to ensure, particularly in cases concerning capital offences and felonies where the sentence may be substantial, that the accused are properly informed of the object of mitigation. In addition, the court must endeavor to ascertain that the information or evidence received from the accused at mitigation has a bearing on the sentence to be meted out by the court.

35. In addition, it is of course appreciated that the sentence meted by the trial court was effected before the advent of the Supreme Court case of **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR** which held that the mandatory nature of the death penalty runs counter to constitutional guarantees enshrining respect for the rule of law. In that regard, the Supreme Court stated:

"[58] To our minds, any law or procedure which when executed culminates in termination of life, ought to be just, fair and reasonable. As a result, due process is made possible by a procedure which allows the Court to assess the appropriateness of the death penalty in relation to the circumstances of the offender and the offence. We are of the view that the mandatory nature of this penalty runs counter to constitutional guarantees enshrining respect for the rule of law."

36. Therefore, a trial court dealing with an offence in which the death penalty may be meted is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. Muruatetu further states:

"[59] We now lay to rest the quagmire that has plagued the courts with regard to the mandatory nature of Section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the Penal Code, unfair thereby conflicting with Articles 25 (c), 28, 48 and 50 (1) and (2)(q) of the Constitution."

....

"Article 27 of the Constitution provides for equality and freedom from discrimination since every person is equal before the law and has the right to equal protection and equal benefit of the law. Convicts sentenced pursuant to Section 204 are not accorded equal treatment to convicts who are sentenced under other Sections of the Penal Code that do not mandate a death sentence. Refusing or denying a convict facing the death sentence, to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation is clearly unjustifiable discrimination and unfair. This is repugnant to the principle of equality before the law. Accordingly, Section 204 of the Penal Code violates Article 27 of the Constitution as well."

"[53] If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. …………. Consequently, failure to individualise the circumstances of an offence or offender may result in the undesirable effect of 'over-punishing' the convict."

37. Thus failure to hear a convict in mitigation on account of a mandatory death sentence is an unlawful and discriminatory practice. This is not to say that the death sentence pronounced by the trial magistrate was unlawful. It is the due process failure that is at issue here. In **Muruatetu** the Supreme Court stated that the death sentence is allowable under the Constitution but within the law in the following terms:

"[66] It is not in dispute that Article 26 (3) of the Constitution permits the deprivation of life within the confines of the law. We are unconvinced that the wording of that Article permits the mandatory death sentence. The pronouncement of a death sentence upon conviction is therefore permissible only if there has been a fair trial, which is a non-derogable right. A fair hearing as enshrined in Article 50 (1) of the Constitution must be read to mean a hearing of both sides. A murder convict whose mitigation circumstances cannot be taken into account due to the mandatory nature of the death sentence cannot be said to have been accorded a fair hearing."

"[69] Consequently, we find that section 204 of the penal code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum penalty."

38. Although the accused persons' grounds of appeal essentially failed, this court cannot close its eyes and pretend that the sentencing was properly done both in light of the statutory provision of **section 216 CPC** and also in light of the **Muruatetu** paradigm.

39. Accordingly, I consider that the proper orders are as follows:

a. The appellants' appeals on conviction are dismissed on the basis that the trial court arrived at the proper conclusions on the facts and the law; The convictions by the trial court in respect of each accused are hereby upheld.

b. The lower court is directed to hold a re-sentencing hearing at which the accused persons will be permitted to avail, and the court will *"receive such evidence as it thinks fit to inform itself as to the sentence or order properly to be passed or made."* in terms of section 216 CPC.

c. The Probation Officer, Naivasha shall avail and file a pre-sentence report in respect of each accused detailing information relevant for the consideration of the court at sentencing;

d. The Prisons Service shall avail a report on each of the accused persons prior to the sentencing hearing.

40. This judgment will be placed in each of the following files of the appellants: Numbers **115 of 2015 Jimnah Mwangi Macharia**, **117 of 2015 David Waweru Kimani** and **118 of 2015 Francis Mungai Mburu.**

41. Orders accordingly.

Dated and Delivered at Naivasha this 17th Day of February, 2020

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Haron Kuria Ngotho - 1st Appellant in person

Jimnah Mwangi Macharia- 2nd Appellant in person

David Waweru Kimani - 3rd Appellant in person

Francis Muigai Mburu - 4th Appellant in person

2. Ms Maingi for the State

3. Court Clerk - Quinter Ogutu