REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 9 OF 2019 CONSOLIDATED WITH HCCRA NO: 10 OF 2019

1. VINCENT KERANDI CHWEYA..1ST APPELLANT

2. HESBON MOKAYA ANGWENYI..2ND APPELLANT

VERSUS

THE REPUBLIC..PROSECUTOR

{Being an Appeal against the Judgement of Hon. Were – SRM Keroka dated and delivered on the 13th day of August 2010 in the original Keroka Principal Magistrate's Court Criminal Case No. 1701 of 2009}

JUDGEMENT

On 29th December, 2009 the appellants were arraigned at the Keroka Senior Resident Magistrate's Court for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code.

The particulars of the offence were that on 16th December 2009 at Nyamagesa location in South Masaba district within Nyanza Province jointly, while armed with dangerous weapons namely pangas they robbed Mogaka Marunga of his Samsung C- 160 phone valued at Kshs. 3,000/=, a TVS Motor Cycle Registration No. KMCB 968 U valued at Kshs. 90,000/= and cash 925/= and at or immediately before or immediately after the time of such robbery injured the said Mogaka Marunga.

The appellants pleaded not guilty to the charge but upon hearing and evaluating evidence adduced before him by both sides the trial magistrate found them guilty of the offence and sentenced the 1st appellant to death and ordered the 2nd appellant to be detained at the president's pleasure as he was a minor.

Being aggrieved by the sentence and conviction the appellants lodged separate appeals at the Kisii High Court. Their appeals by way of a Petition of Appeal received by that court on 25th August, 2010 and 26th August, 2010 were subsequently transferred to this court by letters dated 11th January, 2019. The appeals were processed and admitted by this court on 27th May, 2019. They were thereafter consolidated. The appeals are against the conviction and sentences. It is the contention of both appellants that the conviction was against the weight of evidence, that their defence was ignored and that the sentences of death (though commuted to life imprisonment) and detention at the pleasure of the president were overly harsh and excessive.

The appeal which is vehemently opposed was canvassed by way of written submissions. The appellants submitted that the trial was not properly conducted as Section 207 (1) of the Criminal Procedure Code was not fully complied with as the time the offence was committed was missing in the charge sheet hence rendering the charge sheet defective. They also submitted that the names of those who gave evidence differed from the list of witnesses on the charge sheet. The appellants further contended that failure to call the investigating officer weakened the prosecution's case. they submitted that Section 137 (a) of the Criminal Procedure Code was also not observed hence rendering their conviction unsafe.

In addition, the 1st appellant contended that the mandatory death sentence imposed upon him was excessive, arbitrary and inhuman and deprived him of his right to a fair trial in Article 50 (2) of the Constitution. The 1st appellant submitted that the nature of the sentence tied the magistrate's hands and his mitigation was therefore not considered. He urged this court to reconsider the sentence in view of the case of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** in which the Supreme Court declared such sentences unconstitutional. He also urged this court to consider Articles 165 (3), 159 (2) (a) (b), 22, 163 (7), 1 (1), 2 (4), 1 (3), 20 (1), 25, 26, 27, 28, 29 and 160 of the Constitution.

On his part Mr. Majale, Learned Counsel for the respondent, submitted that the prosecution proved the case against the appellants beyond reasonable doubt; that Section 207 (1) of the **Criminal Procedure Code** highlights the contents of a charge sheet and that the same were fully met in this case the same being the date, place, name of the complainant, the offence and the items that were stolen. He further submitted that the ingredients of the offence were proved and that the evidence of violence to the complainant was corroborated by medical

evidence. He contended that the appellants were positively identified by the complainant who knew them prior to the incident and there was no doubt as to their identity.

On the appeals against the sentences counsel submitted that the sentence against the 1st appellant was way before the Supreme court pronounced itself in the Muruatetu case. He urged this court to consider the circumstances of this case including how brutal the appellants were in the attack and impose deterrent sentences. He urged this court to dismiss the appeal against the conviction.

I have considered the rival submissions carefully but as an appeal is in the nature of a retrial, I also have to re-consider and evaluate the evidence in the trial court so as to arrive at my own independent conclusion. In so doing I have taken into consideration that I did not hear or see the witnesses giving evidence **(see Okeno v Republic [1972] EA 32**).

The complainant (PW1) gave cogent and credible evidence of how he was hired by the two appellants who he knew very well, to transport them to a place called Riasena on a motor cycle. He stated that they first went to a petrol station to fuel the motor cycle before embarking on their journey. When they arrived at their destination they found another man who he identified as Mrefu. He stated that the appellants alighted but as he turned to leave the 1st appellant suddenly attacked him with a panga. The 1st appellant cut him several times while the 2nd appellant held him so that he would not escape the blows. After that they took his Samsung phone and cash 925/= and rode away on the motor cycle leaving him for dead. When he regained consciousness he looked for help from people who were at a funeral in a home near the scene and he was taken to a hospital where he was admitted. He stated that police officers visited him in hospital and he told them the names of his attackers. The complainant's evidence was corroborated first by Clinical Officer Joel Ongari PW2 who confirmed that he was treated at Kisii Level 6 Hospital for injuries on the head, thoracic region and fingers. Secondly, Corporal Shadrack Kahera confirmed that he visited the complainant in hospital and that the complainant had serious injuries. He also confirmed that the complainant told him the names of his attackers and he arrested and charged them while the complainant was still in hospital. I am therefore satisfied that the complainant positively identified the appellants. He knew them before which makes it identification by recognition. The time he spent with them makes his evidence so strong that it renders the defence mounted by the appellants weak and unconvincing. It is unbelievable that the 1st appellant would have been asked to transport sand in a taxi and his allegation that there was a grudge between him and the complainant because of a girl was an afterthought and could not have been true because if it was then it should have been put to the complainant during cross-examination. As for the 2nd appellant, his defence was very inconsistent. Whereas it was his evidence that he was not engaged in any other work other than farming and he claimed to have been at home, he also alleged to have come from work on the material day. His evidence that there was no grudge between him and the complainant gave credence to the evidence of the complainant because it proved that he had no reason to lie or to fabricate evidence against him. I am satisfied that the appellants were positively identified by the complainant during the robbery and that the charge against them was proved beyond reasonable doubt.

On their submissions that the charge sheet was defective for not stating the time when the offence was committed. **Section 137 (f) of the Criminal Procedure Code** states: -

> **"Rules for framing of charges and information; the following provisions shall apply to all charges and information and notwithstanding any rule of law or practice, a charge or information shall, subject to this code, not be open to objection in respect of its form or contents if it is framed in accordance with this code –**
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> ***(f) subject to any other provisions of this section, it shall be sufficient to describe a place time, thing, matter, act or omissions to which it is necessary to refer in a charge or information in ordinary language so as to indicate with reasonable clearness the place, time, thing, matter, act or omission referred to."***

It is my finding that it was sufficient that the charge indicated the date on which the offence was committed. The charge sheet need not have stated the exact time of the offence as this was stated by the complainant in his testimony and as the appellants were given an opportunity to test his evidence through cross examination they did not suffer any prejudice. Moreover, even was I to find the charge was defective for that reason then the defect would be one curable under **Section 382** of the **Criminal Procedure Code** which states: -

> **"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice: Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."**

In the case of **Obedi Kilonzo Kevovo v Republic [2015] eKLR** the Court of Appeal dealt with a similar issue and held: -

> ***"It was not in all cases in which a defect detected in the charge on Appeal would render a conviction invalid, Section382 of the Criminal Procedure Code was meant to cure such an irregularity where prejudice to the appellant is not discernible."***

As for the other alleged violations I have perused the proceedings and have not found any area in which their right to a fair hearing was violated. Accordingly, I find no merit in the appeal against conviction and it is dismissed.

On the appeal against the sentence, it is evident that the only reason the trial court sentenced the 1st appellant to death was that its hands were tied by the mandatory nature of the sentence. The mandatory nature of that sentence has since then been declared unconstitutional **(See Francis Karioko Muruatetu & Another v Republic [2017] eKLR)** and as the appellants have a constitutional right to equal benefit of the law, it is now left to me to reconsider the sentence. At the time he was convicted, the 1st appellant was a first offender. However, the violence meted against the complainant is one that would militate against a **"light"** sentence. The appellants were so brutal that they even chopped off two of the complainant's fingers and hence their case cannot be treated in the same way as that of offenders who though they still rob their

victims, only threaten or scare them. In the case of 1st appellant therefore I shall substitute the death sentence with one of imprisonment for a term of twenty-five (25) years from the date he was sentenced by the lower court.

In respect to the 2nd appellant, he was detained at the pleasure of the President as provided under **Section 25 (2)** and **(3)** of the **Penal Code** because he could not be sentenced to death as he was a minor. In **AOO & 6 others v Attorney General & another [2017] eKLR** Mativo J held as follows: -

> ***"(a) A declaration be and is hereby issued that Section 25 (2) of the Penal Code (71) is unconstitutional in that it violates the provisions of Article 53 (1) (f) (i) (ii), (2) and Article 160 (1) of the constitutional of Kenya, 2010 and intentional convections governing the rights of children.***
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> ***(b) A declaration be and is hereby issued declaring that to the extent that the second to the seventh petitioners herein were imprisoned for an indefinite and/or an undetermined period of time at the pleasure of the president, thereby vesting into the executive judicial powers to determine the duration of their sentences contrary to the constitutional provision of separation of powers, their imprisonment at the president's pleasure is unlawful to the extent that it violates the concept of separation of powers and the principles of constitutionalism under the repealed constitution of Kenya 2010…"***

The above reasoning which I fully associate myself with was also followed by Majanja J in **Republic v SOM [2018] eKLR** and by Chitembwe J in **HM v Republic [2017] eKLR**. Accordingly, the trial courts order in respect to the 2nd appellant is likewise set aside and substituted with a term of imprisonment for twenty-five (25) years from the date he was sentenced by the lower court. It is so ordered.

Signed, dated and delivered in open court this 6th day of February 2020.

E. N. MAINA

JUDGE