REPUBLICOF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 5 OF 2011

EDWARD KIPKEMOI YANO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence by the Chief Magistrate's Court

at Eldoret (Hon. S. Kemei, PM) delivered on the 31st December 2010

in Criminal Case No. 1558 of 2010)

JUDGMENT

[1] This appeal arises from the conviction and sentence passed on the **31 December 2010** by the Court of the Principal Magistrate in Eldoret in the **Chief Magistrate's Court's Criminal Case No. 1558 of 2010: Republic vs. Edward Kipkemoi Yano**. The Appellant, who was the 1st Accused before the lower court, was charged before the lower court, jointly with three others, with the offence of robbery with violence, contrary to **Section 296(2)** of the **Penal Code, Chapter 63** of the **Laws of Kenya.** It was alleged that**,** on the **23rd day of February 2010** at around 10.00 p.m. at Kapsiliot Farm in Uasin Gishu District within the Rift Valley Province, while armed with a dangerous weapon, namely a panga, they jointly violently robbed **David Masinde Nabutola** of **Kshs. 900/=** in cash and 6 Kilograms of maize flour, all valued at **Kshs. 1,080/=,** and that at or immediately before or immediately after such robbery they used actual violence to the said **David Masinde Nabutola.**

[2] In the Second Count, the 2nd Accused before the lower court, one **Elisa Masava**, was charged with being unlawfully present in Kenya contrary **to Section 4(1)** of the **Immigration Act, Chapter 172** of the **Laws of Kenya.** The Appellant and his co-accuseds denied the charges; whereupon the Prosecution called a total of 6 witnesses in proof thereof. The Appellant similarly gave a sworn statement in his defence and called his witnesses; and having heard both sides, the Learned Trial Magistrate, in his considered Judgment dated and delivered on **31 December 2010**, found the Appellant guilty and convicted him of the offence of robbery with violence as charged, and sentenced him to suffer the death penalty. His three co-accused were, on the other hand, all acquitted by the lower court in respect of the allegations against them.

[3] Being aggrieved by that decision, the Appellant lodged this appeal, which he did on **12 January 2011**. He raised the following Grounds of Appeal:

> **[a]** That the Learned Trial Magistrate erred in law and fact in failing to observe that the evidence of identification by the victim did not meet the standards required by the law;
>
> **[b]** That the Learned Trial Magistrate erred in law and fact in convicting and sentencing him while relying on the evidence of the Complainant as the only identifying witness; which evidence was not immune to errors.
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> **[c]** That the trial court erred by convicting him on self- incriminating evidence obtained from him under duress without following the applicable rules and regulations;
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> **[d]** That the Learned Trial Magistrate grossly erred in convicting him yet the Prosecution case was riddled with numerous contradictions and inconsistencies;
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> **[e]** That the Learned Trial Magistrate erred in convicting him in a shoddily investigated case in which the chain of events leading to his arrest was not established.

[4] With leave of the Court, the Appellant filed Amended Grounds of Appeal on **19 April 2017** pursuant to **Section 350(2)(v)** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya**. In his Amended Grounds of Appeal, the Appellant contended that:

> **[a]** The Trial Magistrate erred in both law and fact by convicting him on the basis of evidence of identification by recognition without considering that the Complainant did not reveal or mention the names of the suspects to those who administered first aid or escorted him to hospital;
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> **[b]** The Trial Magistrate erred in both law and fact by convicting him while relying on a confession not recorded in accordance with the provisions of **Section 25A** of the **Evidence Act**, or the **Evidence (Out of Court Confessions) Rules, 200**
>
> **[c]** The Trial Magistrate erred in both law and fact by convicting him on the basis of a confession taken under duress, force, intimidation and coercion;
>
> **[d]** The Trial Magistrate erred in both law and fact by convicting him on the evidence of identification by recognition without observing that nothing was said about the size, brightness and intensity of the moonlight;
>
> **[e]** The Trial Magistrate erred in both law and fact by convicting him on contradictory and uncorroborated evidence adduced by the Prosecution Witnesses.

Thus, the Appellant prayed that his appeal be allowed, the conviction quashed and the sentence set aside.

[5] He urged his appeal by way of written submissions and impugned the evidence of identification that was adduced before the lower court by **PW1**. His argument was that, since it was the contention of **PW1** that he knew him well, it is inexcusable that he did not mention his name to those who responded to his distress call and who administered first aid to him, namely, **PW2** and **PW3**. He cited the case of **Kiarie vs. Republic [1984] KLR 739** for the proposition that a witness may be honest and yet mistaken.

[6] It was further the submission of the Appellant that, although **PW1** alleged that illumination was provided that night by way of moonlight, no effort was made by the Prosecution to provide an indication as to the intensity of the moonlight, whether or not it was full, half or quarter. According to him, the Trial Magistrate failed to heed the caution expressed in **Republic vs. Turnbull [1976] 2 AllER 549** and therefore failed to thoroughly test with care the evidence of identification adduced by the Prosecution to ensure that it was reliable. The Appellant also discredited the Prosecution evidence contending that it was so contradictory, inconsistent and full of discrepancies that it cannot be saved by **Section 382** of the **Criminal Procedure Code**. He cited contradictions as to the evidence of identification, as well as the date and place of his arrest. He posited therefore that the lower court ought to have resolved all those contradictions in his favour by acquitting him of the charge of robbery with violence.

[7] Regarding his alleged confession before the village elder that led to the arrest of his co-accuseds, the Appellant's submission was that, having acquitted his co-accuseds, the Trial Magistrate had no basis for his conviction; and that he ought to have similarly acquitted him; more so because the alleged confession was obtained by coercion and duress. He added that, in any case, the applicable rules and procedures for obtaining confessions were not complied with. He consequently urged the Court to re-evaluate the evidence and find that the Prosecution did not discharge the burden of proving its case beyond reasonable doubt.

[8] On behalf of the State, **Ms. Mokua** was of the view that the ingredients of the charge of robbery with violence were well proved by the four Prosecution Witnesses who testified before the lower court. According to her, the Complainant identified the Appellant as one of the four people who robbed him; and that he struggled with him at close range outside the house where there was moonlight. She further pointed out that evidence was adduced by **PW1** to the effect that the Appellant was his neighbour and that he mentioned his name as "Takataka" at the earliest possible opportunity; and therefore that this was a case of recognition of a person well known to the witness. She therefore urged the Court to find that the case against the Appellant was proved beyond reasonable doubt and to dismiss the appeal.

[9] The appeal was argued before my brother, **the Hon. Mr. Justice D. Ogembo** who has since been transferred out of this station. Consequently the matter was re-allocated to this Court for disposal pursuant to **Section 35** of the **High Court (Organization and Administration) Act, 2015.** This being a first appeal, it is expected of this Court to subject the evidence that was presented before the lower court to a fresh analysis and evaluation for it to come to its own conclusions thereon. This was well explicated in **Okeno vs. Republic [1972] EA 32** by the Court of Appeal for East Africa thus:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...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 conclusion; it must make its own findings and draw its own 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..."**

[10] The Complainant testified before the lower court as **PW1**. His evidence was that he was in his house on the night of **23 February 2010** when he heard a violent knock on the door; that suddenly, three people stormed in and ordered him to produce money, his money-maker pump, solar panel and radio cassette. He added that he had only **Kshs. 900/=** which the robbers took before setting their sights on his money-maker pump. He further stated that he resisted them and struggled over that item with one of his attackers and that, in the process of that struggle, they moved out of the house where there was moonlight. That he was thus able to recognize the Appellant with whom he was struggling over the pump before one of the others cut him with a panga on his fingers. He then screamed for help and the assailants abandoned the pump and ran away; having robbed him of **Kshs. 900/=** in cash and 6 Kilograms of maize flour.

[11] PW1 further told the lower court that thereafter, he went to his neighbour, **Zephaniah Rotich (PW2)** who administered first aid to him. When he went to **Chepyemit Health Centre** the following day for treatment, he was referred to **Kapsowar District Hospital** where he was admitted for one day. Later on **3 March 2010**, the village elders called for a meeting in which the Appellant was interrogated and that he admitted having committed the offence jointly with others, whose names he supplied. The other suspects were consequently searched for, arrested and handed over to **Kasuna Police Post**; and that, after recording his statement, he was issued with a P3 Form, which was filled and returned to the Police along with his bloodstained jacket and pair of long trousers that he was wearing at the time of the incident. They were produced before the lower court as exhibits.

[12] PW2 confirmed the Complainant's account and said he was asleep in his house on the night of **23 February 2010** when, at about 11.00 p.m., he was awoken by his neighbour, the Complainant herein. That the Complainant reported to him, in the presence of another neighbour, **Benjamin Kibor (PW3),** that he had been attacked and robbed of **Kshs. 900/=**, pump, solar panel and radio by four thugs; and that in the process he was cut on the fingers. He confirmed that the Complainant was bleeding profusely; and that they had to administer first aid to stop the bleeding. **PW1** further confirmed that a public meeting was later held at which the Complainant named the Appellant as the suspect and that, in turn, the Appellant implicated his three co-accuseds.

[13] In the same vein, **PW3** told the lower court that he was at home on the night of **23 February 2010** when he heard some noise at about 11.00 p.m. He went outside and got to learn that the Complainant had been attacked and robbed and that he had sustained injuries on the left fingers. He confirmed that they administered first aid to him with **PW2**; and that the Complainant claimed he had recognized some of the suspects and could identify them by appearance. He added that, later on **3 March 2010**, a public meeting was called in which the Complainant mentioned the name of the Appellant, who was also known as "Takataka." **PW3** stated that the Appellant was given what he called a thorough beating whereupon he implicated other suspects who were also arrested.

[14] PW4, Andrew Kiplagat Yego, was one of the clan elders who handled the robbery complaint. He testified that on **24 February 2010**, he was in his house at about 7.00 a.m. when a neighbour brought the subject robbery incident to his attention and asked for his assistance, noting that the Complainant was one of his workers. He stated that he immediately visited the Complainant at his home but was informed that he had already been taken to hospital. He observed that the Complainant's door had been broken and that traces of blood were visible at the scene. He further stated that on **3 March 2010**, they called for a public *baraza* over the incident in which the Complainant identified Takataka, the Appellant herein, as one of the people who had robbed him; whereupon enraged members of the public attacked the Appellant and forced him to reveal the names of his accomplices. He confirmed too that all the four suspects were arrested and handed over to Karuna **Police Station** for further investigations.

[15] Shadrack Kimeli Kirwa, PW5, is a Clinical Officer who was then attached to **Chepyemit Dispensary**. He testified before the lower court on behalf of his colleague, **Brimin Koskey,** who had examined the Complainant and filled the P3 Form marked the **Prosecution's Exhibit No. 1.** He told the lower court that the Complainant had suffered deep cuts on the ring and index fingers which his colleague had classified as Grievous Harm.

[16] The last Prosecution Witness before the lower court was **PC Wanjala Wenani (PW6).** He was attached to **Karuna Police Station** at the material time. He testified on behalf of the Investigations Officer, **Cpl. Maina**, who was then on leave, and who handed over to him the Police file and the exhibits, namely a jacket and a pair of bloodstained long trousers. He produced the same before the lower court as the **Prosecution's Exhibit 2A and B.**

[17] In his defence, the Appellant told the lower court that he attended a public *baraza* on the **27 February 2010** at **Kapsiliot** which had been called by the clan elder. According to him, the Complainant was present and that he did not implicate anybody; and that the meeting was put off pending further investigations of the Complainant's allegations. He added that he was shocked by his inexplicable arrest; and added that was beaten before being escorted to the Police Station where he was forced to join other people not hitherto known to him. He denied the allegations against him.

[18] The foregoing being the summary of the evidence adduced before the lower court, the question is whether the decision of the Learned Trial Magistrate was well-founded. In **Section 295** of **the Penal Code,** it is provided that 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. Moreover, **Section 296(2) of the Penal Code**, pursuant to which the Main Charge was laid, stipulates that:

> **"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."**

[19] Accordingly, the Prosecution was under obligation to prove any of the following key ingredients of the charge:

> **[a]** That the Appellant was armed with a dangerous or offensive weapon or instrument; or
>
> **[b]** That he was accompanied by one or more other person or persons; or
>
> **[c]** That immediately before or immediately after the time of the robbery, he wounded, struck or used any other personal violence against the Complainant;

[20] It is manifest from the evidence adduced before the lower court that the Complainant was attacked at about 11.00 p.m. on the **23 February 2010** as he was sleeping in his house. His account that three people stormed into his house and robbed him of **Kshs. 900/=** as well as 6 Kilograms of maize flour; and that they wounded him by cutting him with a panga on the fingers, was entirely uncontroverted. Indeed, the Complainant's account was corroborated in material respects by the evidence of **PW2, PW3, PW4** and **PW5**. In particular, **PW5** produced the P3 Form confirming that the Complainant was indeed wounded and that he suffered Grievous Harm.

[21] Clearly therefore key ingredients of the offence of robbery with violence were proved before the lower court, noting that proof of any one of the ingredients set out in **Section 296(2)** of the **Penal Code** would have sufficed. (See **Suleiman Kamau Nyambura vs. Republic [2015] eKLR)**. Hence, the only issues arising from the Grounds of Appeal and the submissions made herein by the Appellant and Learned Counsel for the State are:

[a] Whether the Appellant was positively identified as one of the two people who robbed the Complainant;

[b] The effect of the contradictions singled out by the Appellant; **[c]** A comment on the alleged confession by the Appellant and its place in the decision of the lower court;

[d] Whether or not to interfere with the death sentence passed on the Appellant by the lower court.

[a] On the Evidence of Identification:

[22] There is no question that the incident occurred at about 11.00 p.m. at night when it was dark; hence the need for a thorough examination and careful testing of the evidence of identification that was adduced before the lower court by the Complainant, who was the only eye witness of the robbery incident. In **Wamunga vs. Republic [1989] KLR 426**, it was held that:

> **"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."**

[23] Useful guidelines were given in **R. vs. Turnbull & Others [1973] 3 AllER 549,** as to how such examination should be carried out; namely:

> **"...The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused under observation? At what distance: In what light: Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?**

[24] Similarly, in **the Wamunga Case** the Court of Appeal proffered the following criteria:

> ***"It is at least essential to ascertain the nature of the light available. What sort of light, its size and its position relative to the suspect; are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by there would have been a careful inquiry into these matters, by the committing magistrate, state counsel and defence counsel. In the absence of all these safeguards, it now becomes the great burden of Senior Magistrates trying cases of capital robbery to make these inquiries themselves. Otherwise who will be able to test with the greatest care."***

[25] Although the Appellant impugned the evidence of identification contending that no effort was made by the Prosecution to give an indication as to the intensity of the moonlight, whether or not it was full, half or quarter, the Judgment of the lower court shows that the Trial Magistrate exercised the needed caution in handling **PW1**'s evidence of identification. He expressed himself thus in this connection:

> **"Although the incident took place at night, the complainant stated that there was moonlight and he was able to recognize the First Accused who was his neighbour and who had even earlier on 20/2/2010 visited him. I find the moonlight enabled the complainant to identify and recognize the first Accused herein. The complainant impressed upon me as a honest witness and was consistent in his testimony and was not shaken even on Cross-Examination by the Accused Persons. Even though there was no other eye witness, I am convinced by the testimony of the complainant that the First Accused was involved in the incident as the First Accused and Complainant had not disagreed before. The first Accused confirmed that Complainant gave out the name of one of the Suspects as "Takataka". There is therefore no doubt about the identity of one of the robbers who attacked the Complainant on the night in question and he was none other than the First Accused herein...I am not persuaded by his defence claim that he has been framed up because of his disagreements with the clan elder over World Vision Wages dispute..."**

[26] It is therefore noteworthy that this was not a case of identification of a stranger at night in difficult circumstances, but one of recognition, regarding which it was held thus in **Anjononi & Others vs. Republic (1980)KLR 59** by the Court of Appeal:

> ***"....recognition of an assailant is more satisfactory, more reassuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another"***

I am satisfied therefore that the Learned Trial Magistrate's findings on identification were well founded.

[b] On the alleged contradictions and inconsistencies in the Prosecution Case:

[27] The Appellant took issue with the Prosecution evidence contending that it was so contradictory, inconsistent and full of discrepancies that it is beyond salvage under **Section 382** of the **Criminal Procedure Code**. He cited contradictions as to the evidence of identification, as

well as the date and place of his arrest. For instance, he pointed out that whereas **PW1** stated that he was arrested at the venue of the public *baraza*, **PW6's** evidence was that he was arrested at the scene of crime. He also referred to the contradictions as to his date of arrest with some of the witnesses saying he was arrested on **3 March 2010**, which was also the date of arrest as stated in the Charge Sheet, while others made reference to **27 February 2010**.

[28] In my view however, these contradictions are not significant. The fact of the matter is that the Appellant was arrested and charged with the offence of robbery with violence. The Court of Appeal, in **Joseph Maina Mwangi –Vs- Republic Criminal Appeal No. 73 of 1992**, made it clear that:

> **"An appellate court in considering those discrepancies must be guided by the wording of section 382 Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence".**

[29] Again, in the more recent case of ***Philip Nzaka Watu vs. R*** **[2016] eKLR** the Court of Appeal held that:

> ***"...it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."***

[30] It cannot be said that the discrepancies aforementioned had the effect of rendering the evidence adduced before the lower court unbelievable.

[c] On the alleged Confession by the Appellant:

[31] The Appellant faulted the Trial Magistrate for relying on a confession not recorded in accordance with the provisions of **Section 25A** of the **Evidence Act**, or the **Evidence (Out of Court Confessions) Rules, 2009;** and for basing his conviction on a confession taken under force, intimidation and coercion. It is noteworthy however that a specific finding was made by the Learned Trial Magistrate that there was no confession properly so called that was obtained from the Appellant regarding the claim that he implicated the rest of the Accused persons; and it was on that basis that the 2nd, 3rd and 4th Accused Persons were given the benefit of the doubt and acquitted by the lower court.

[32] It is manifest therefore, from a reading of the Judgment of the lower court, that the Appellant's conviction was not hinged on any confession as alleged by him. That being the case, I find no merit in this Ground of Appeal.

[c] On the Sentence passed by the lower court:

[33] Whereas the sentence that was imposed on the Appellant is lawful from the prism of the Constitution and **Section 296(2)** of the **Penal Code**; and therefore the lower court cannot be faulted for imposing the death penalty, the Supreme Court has since clarified matters in **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR** and held that:

> **[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.**
>
> **[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**.

[34] The Supreme Court added, at paragraph 69 of its Judgment that

> **"...For the avoidance of doubt, *this decision does not outlaw the death penalty*, which is still applicable as a discretionary maximum punishment."**

[35] Needless to say that the observations apply *mutatis mutandis* to the offence of robbery with violence under **Section 296(2)** of the Penal Code. Hence, in **William Okungu Kittiny vs. Republic [2018] eKLR**, the Court of Appeal held that:

> **"The appellant was sentenced to death for robbery with violence under Section 296(2). The punishment provided for murder under Section 203 as read with Section 204 and for robbery with violence and attempted robbery with violence under Section 296(2) and 297(2) is death. By Article 27(1) of the Constitution, every person has *inter alia,* the right to equal protection and equal benefit of the law. Although the Muruatetu's case specifically dealt with the death sentence for murder, the decision broadly considered the constitutionality of the death sentence in general. In the Mutiso Case which was affirmed by the Supreme Court, the Court of Appeal said *obiter* that the arguments set out in that case in respect of Section 203 as read with Section 204 of the Penal Code might apply to other capital offences. Moreover, the Supreme Court**

in paragraph 111 referred to similar mandatory death sentences. From the foregoing, we hold that the findings and holding of the Supreme Court particularly in paragraph 69 applies *mutatis mutandis* to Section 296(2) and 297(2) of the Penal Code. Thus, the sentence of death under Section 296(2) and 297(2) of the Penal Code is a discretionary maximum punishment..."

[36] In the premises, considering the circumstances in which the offence in the Count 1 was committed, I would be inclined to reduce and alter the sentence meted out on the Appellant from death to imprisonment for a term of 20 years, pursuant to **Section 354** of the **Criminal Procedure Code.**

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 17TH DAY OF JANUARY, 2019

OLGA SEWE

JUDGE