REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCRA NO. 16 OF 2018

DAVID MUTWIRI NDATHO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being appeal from original conviction and sentence in the Principal Magistrate's Court at Marimanti in Criminal Case No.263 of 2017 delivered by L.N. MESA - (Senior Resident Magistrate (S.R.M) on 22nd February, 2018).

J U D G M E N T

1. **DAVID MUTWIRI M'NDATHO Alias MUCHOMBA,** the Appellant herein was charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code.** The particulars as per the charge sheet presented to court are that on 16th April, 2017 at about 1am in Maragwa Location in Tharaka North Sub-County within Tharaka Nithi County jointly with another not before court while armed with a panga robbed **PATRICK MARIGU** of **Kshs.112,400/-** and immediately before the time of such robbery used actual violence against the said Patrick Marigu by cutting him on the left arm with a panga.

2. The Appellant herein denied committing the said offence and the prosecution presented six witnesses at the trial to prove their case. The Appellant defended himself on oath and denied committing the offence. The trial court upon evaluation of evidence found him guilty and convicted him and sentenced him to death.

3. A brief summary of the prosecution's case against the Appellant at the trial indicates that the complainant Patrick Marigu (PW1) was sleeping in his house on 16th April 2017 at around 1am when robbers broke his door and cut him severally with a panga before making away with **Kshs.112,400/-** he had earned through selling of his goats. He told the trial court that as the robbers broke his door, he lit his torch towards the door which was broken open by means of a huge stone (tendered as P. Exhibit 3) and it was then that he was able to see and identify the robbers who then attacked and robbed him. According to him the Appellant was a person known to him prior to the incident.

3. The evidence on recognition of the Appellant as one of the assailants was corroborated by Benson Muriungi (PW2) and Evans Mukundi Mati (PW6). The complainant testified that he was injured in the course of robbery and that evidence was supported by Bernard Chabari (PW3) a clinical officer at Marimanti District Hospital who tendered P3 (P. Exhibit1) which indicated that the complainant suffered serious cuts with left upper limb completely cut with only epidermis layer on the lower part remaining. The injuries the complainant suffered were classified as grievous harm.

4. When placed on his defence the Appellant denied committing the offence and told the trial court that he was sleeping at this house on the material date and time. He further stated that he met the complainant's son - Benson (PW2) the following day who reportedly informed him about the robbery affecting the complainant. He confirmed that the complainant was known to him well. He faulted the complainant stating that he refused to take oath before testifying because he allegedly knew that the charged against the Appellant were not true. He further stated that PW2- was a son to the complainant while PW6- (Evans Mukundi Mati) testified on a different date in order to be couched on what to say. He also pointed out that the complainant had told the court that he was referred to Consolata Hospital, Nkubu while the clinical officer (PW3) stated that he was admitted in Marimanti District Hospital for two weeks.

5. The trial court's decision on conviction was based on the strengths of the prosecution's evidence on recognition. The trial court was satisfied that based on the evidence of the complainant, PW2 (Benson Muriungi) and PW6 Evans Mukundi Mati) recognition was positive. The Appellant's defence of *alibi* was discounted by the fact that the trial court found that it was possible for the Appellant to reach the complainant's home because it would take about 4 hours for one to walk between the complainant's house and the accused's home. The trial court also found that the defence o*f alibi* was not raised earlier by the Appellant and not well grounded given that he did not account about where he was between 6 pm on 15th April 2017 and 1am on 16th April 2017- the material time of the incident. The defence of *alibi* was dismissed as an afterthought and the trial court found the prosecution's case had been proved beyond reasonable doubt and proceeded to convict the Appellant and sentenced him to death as provided by law.

6. The Appellant was aggrieved by both the conviction and sentence and preferred this appeal raising the following grounds in his petition

namely:-

i. That the learned trial magistrate failed to note that prosecution's witnesses gave inconsistence, contradictory and conflicting testimonies.

ii. That the prosecution's case was not proved beyond reasonable doubt.

iii. That the trial magistrate failed to note that a light from a torch was not sufficient to identify him.

iv. That the Appellant was arrested on mere allegations.

v. That no exhibit was tendered to support the prosecution's case.

vi. That the learned trial magistrate failed to note that the Appellant was unrepresented.

vii. That the complainant hoodwinked the trial court on allegation of treatment.

viii. That the learned trial court dismissed the Appellant's defence without giving reasons.

ix. That the trial court failed to note that there was no independent witness.

x. That no exhibit was recovered from the Appellant.

7. In his written submissions the Appellant, submitted on 7 grounds though he introduced a new ground regarding failure by prosecution to call a vital witness. The Appellant did not seek leave pursuant to the provisions of **Section 350** of the **Criminal Procedure Code** so that ground will not be considered despite its irrelevant to his appeal.

8. On the first ground that the prosecution's case was characterized by contradictions and inconsistencies. He points out that the complainant told the trial court that he reported the incident as he went to hospital when he had testified that he reported the incident after he was discharged. The Appellant has urged this court to find that PW1 & PW2 were not credible witnesses based on the said inconsistency. I have however considered the evidence tendered by PW1 and PW2 and noted that there is no material or significant inconsistency in their evidence.. The complainant testified that he was taken to Marimanti before being taken to Consolata Hospital in Nkubu and that he we went and made formal report at Gatunga Police Station upon being discharged from Hospital. It is possible that a report was made by PW2 and others who had taken the complainant to Gatunga Police Station on 16th April 2017 when the complainant was seriously injured and too frail to record a statement. He told the trial court that he was unconscious. I am therefore not persuaded that there was inconsistency in that respect.

9. On the ground that the prosecution's case was not beyond reasonable doubt, the Appellant has submitted that the complainant did not indicate the type of torch he used to identify him during the robbery. He has also stated that the complainant did not state if the robbers also had torches. The Respondent has contended in its written submissions that the Appellant was well known to the complainant since he had been employed by the complainant previously. It has further contended that the Appellant's accomplice was a neighbour and therefore were known as well to the complainant. The State has contended that identification of the Appellant was by recognition and in that respect it has relied on the case of ***John Kioko Mwikya -vs- Republic [2019] eKLR*** to support their contention.

10. The question of recognition is usually central in cases of this nature given that most robberies happen at the cover of darkness in the night. I note that the police in the instance case conducted an Identification Parade which theyb claim was positive but Identification Parade is insignificant when the culprit is known to the complainant like was the case here. The complainant knew the Appellant well prior to the robbery incident as he had previously employed him as a herdsboy. There was no point in conducting an Identification Parade but having said that, I do not find that the Appellant's conviction was based on the results of that Identification Parade. The trial court clearly found that recognition had been established beyond reasonable doubt by the evidence of complainant (PW1), Evans Mukundi Mati (PW6) and PW2-Benson Muriungi (PW2). I have re-evaluated the evidence of the three cited witnesses and noted that all the witnesses stated that they had torches and were familiar with both the Appellant and his accomplice said to be still at large. The Appellant himself in his defence admitted as much and therefore I find that the issue of identification was by recognition and was positive. The Appellant was positively identified by the witnesses cited above and I find that the prosecution's case in that respect satisfied the threshold of beyond reasonable doubt.

11. The Appellant has contended that nothing was recovered from him and that should be construed to mean that the prosecution's case was not proved. However as contended by the Respondent non recovery of stolen items in itself cannot negate the weight of prosecution's case. As observed in the case of ***Peter Okee Omukaga & Another -vs- Republic (Eldoret Criminal Appeal No. 274 of 2009)*** none recovery of stolen items or failure to conduct an Identification Parade does not make a conviction unsafe if the other evidence sufficiently links the Appellant with the offence. This court finds that going by the evidence tendered by the prosecution, the prosecution's case was proved beyond reasonable doubt. Identification was by recognition and it was positively established as it was well corroborated. I do not accept the Appellant's argument that there was no independent witness or that PW2 was a son to PW1. There is nothing to suggest that the complainant harboured ill motive against the Appellant or that PW6 was couched as alleged.

12. The Appellant has averred that no exhibit was tendered by the prosecution during trial which is not true as the record of proceedings clearly show that the prosecution tendered P3 (P Exhibit 1), a huge stone used to break the door to the complainant's house (P. Exhibit 3) and photographs of the scene of crime (P.Exhibit 5). The treatment notes from Consolata Hospital appears not to have been properly tendered as evidence because they were simply marked for identification but no witness was called to tender them. The Appellant has strongly relied on one of the treatment chits from Consolata Hospital where the history of the patient is captured as having been assaulted by

"unknown persons" but that in my view cannot aid the Appellant in this appeal because besides the fact that author of that document was not called to properly tender the treatment chit in evidence, it is evident that the condition of the complainant when he reached Consolata Hospital was such that he may not have been in a position to talk owing to loss of blood and the injury to the arm that had to be amputated.

13. The Appellant has complained that he was not represented at the trial but the State has responded that he was not prejudiced because he has not demonstrated that he suffered substantial injustice for being unrepresented. This court finds that the Appellant did not at any stage of the trial applied to be represented including during the hearing of this appeal. In the cited case of ***David Macharia Njoroge -vs- Republic [2011] eKLR*** the court made the following observations in regard to the provisions of **Article 50** of the **Constitution**;

> ***" State funded legal representation is a legal right in certain instances. Article 50(1) provides that an accused person shall have an advocate assigned to him by State and at State expense, if substantial injustice would otherwise result. Substantial injustice is not defined under the constitution. However provisions of International Convention to which Kenya is a signatory are applicable by virtue of Article 2(6). Therefore provisions of ICC PR (International Covenant on Civil and Political Rights) and the commentaries by Human Rights Committee may provide instances where legal aid is mandatory. We are of the considered view that in addition to situations where "substantial injustice would otherwise result," person accused of capital offences where the penalty is loss of life have the right to legal representation at State's expense. We would not go as far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new constitution would automatically be entitled to a re-trial where no such legal representation was provided. The reasons are that, firstly, the provision of the new constitution will not apply retroactively and secondly every case must be decided on its own merit to determine if there was serious prejudice occasioned by reason of such omission."***

14. The Appellant has not suggested or alleged that he suffered prejudice or injustice as a result of having no advocate to represent him during the trial. As I have observed above, the Appellant's ground would have been well grounded had he sought legal representation and failed to be provided and/or show that he suffered substantial injustice as a result of lack of legal representation. He has not done neither of those and he cannot be heard to say that he was prejudiced by lack of legal representation.

15. The appellant has stated that the trial court dismissed his defence without assigning reasons but a look at the Judgment show that the trial court went to great lengths in considering the defence put forward including his defence of *alibi.* I have re-evaluated the same and find that the defence put forward did not raise any doubt or displaced the weight of the prosecution's case. The conviction of the appellant was well grounded.

16. On sentence, though the Appellant made no representations about despite raising it as a ground, in this appeal, the Respondent has urged this court to uphold the sentence given the fact that the complainant's hand was chopped off during the incident. I have indeed considered that fact and I am persuaded that the complainant suffered serious injuries which the clinical officer correctly classified as grievous. I am however inclined to intervene given the principle of the case of **Muruatetu** that death penalty is certainly not the only sentence that can be meted out and the fact that court's hands are no longer tied by the mandatory nature of **Section 296(2)** of the **Penal Code.** The death penalty may have been a bit harsh and will reverse the same and substitute it with a custodial sentence of 30 years in prison.

In conclusion, this appeal on conviction for the aforesaid reasons fails. The conviction is upheld but the death sentence that is set aside and in its place impose imprisonment of 30 years and the time he has already spent from the time he was placed in prison shall be taken into account in computing the 30 years imprisonment.

Dated, signed and delivered at Chuka this 15th day of July, 2019.

R.K. LIMO

JUDGE

15/7/2019

Judgment dated, signed and delivered in the open court in presence of Maari for State and the Appellant for in person.

R.K. LIMO

JUDGE

15/7/2019