REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 194 OF 2012

(Being an appeal from the decision of (Hon. B. Mosiria, PM)

in Kapsabet Senior Principal Magistrate's Court SPMCRC No. 1124 of 2012)

MEDI YUSUF.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

JUDGMENT

1. The appellant was charged with Robbery with violence Contrary to Section as read with Section 296(2) of the Penal Code.

2. The particulars of the charge are that on 26th May 2012 at Iruru Forest, Kapsabet Location within Nandi County, jointly with another not before court he robbed Robert Kiptoo Ngetich one mobile phone make Nokia 1280 valued at Kshs. 1,850/- and immediately before the time of such robbery used actual violence to the said Robert Kiptoo Ngetich.

3. The appellant pleaded guilty to the charge and was sentenced to death.

4. This appeal is against both the conviction and sentence and the appellant's prayer is that the conviction be quashed, the sentence of death be set aside and he be set at liberty.

5. The gist of the appeal which is premised on three grounds is that he was not given enough time to prepare his case, that the trial magistrate did not consider he was psychologically fit the same having been proved by a doctor and that an identification parade was not conducted to prove he committed the offence.

6. At the hearing of the appeal he opted to rely on written submissions in which he comprehensively argued each ground and cited authorities to support his arguments.

7. The appeal is vehemently opposed.Prosecution counsel Ms. Kagali submitted that the appellant was warned severally about the nature of the offence and the sentence it attracts; that age and mental assessments were conducted to confirm the appellant's age and capacity to plead to the charge and that the appellant understood the language used by the court and therefore the plea of guilty was unequivocal and it ought not to be disturbed. She submitted that the law is clear that there is no right of appeal where the appellant has pleaded guilty save to the extent and severity of the sentence.

8. On the sentence Ms. Kagali left it to this court to consider applying the Supreme Court decision in Francis Karioko Muruatetu & another [2017] eKLR to this case. She however urged this court to consider the facts and circumstances of this case.

9. In reply to the submissions of prosecution counsel the appellant stated that as his parents were never involved when the age and mental assessments were done this violated his right.

10. I have considered the rival submissions carefully. **Section 348 of the Criminal Procedure Code** expressly states that no appeal shall lie from a conviction arising from a plea of guilty save to the extent or legality of the sentence. However the court must satisfy itself that the plea was unequivocal before it can confirm there was indeed a plea of guilty to sustain the conviction. Where the plea is unequivocal then the conviction is not safe and this court would have no alternative but to quash it.

11. I have perused the record of the lower court very carefully and I am satisfied that the plea herein was unequivocal. The first thing to note is that the plea was taken over a period of time.The appellant was first arraigned on 28th May, 2012. The record however shows that the plea was not taken on that day as the trial magistrate was going for another official engagement. The plea was taken on 4th June, 2016 when the charge was read over and explained to the appellant in Kiswahili, a language which he understands. He pleaded not guilty and was released on a bond of Kshs. 300,000/- with a surety and the case was given a hearing date. However when he went back to court for mention he indicated he wanted to change plea. The record shows that the trial magistrate warned the appellant of the sentence but he insisted he wanted to plead guilty which he did. The prosecution was not ready with the facts on that day so the case was adjourned to 4th July 2016. When the facts were read to him he disputed some of them and a plea of not guilty was entered and the hearing dated was confirmed. However the appellant subsequently indicated he wished to plead guilty and only upon his admitting the facts did the trial magistrate convict him. After that it took almost two months for the court to sentence him as the court referred him for age and mental assessment and thereafter a prebail report. The appellants contention that he was not given time to prepare his case is therefore without basis. The contention that his rights were violated is also not merited. The trial magistrate took a lot of time to ensure that the appellants' right to a fair trial was not breached including initially treating him as a child and considering a non-custodial sentence. The facts narrated by the prosecution proved the offence of robbery with violence beyond reasonable doubt. Accordingly this court finds there is nothing to warrant it to quash the conviction and the appeal on conviction is dismissed.

12. On the sentence the appellant contends that it was harsh and excessive. On her part prosecution counsel urged this court to consider the facts and circumstances of this case and determine whether the case of Francis Muruatetu (supra) should apply.

13. I have looked at the court record. The only reason the trial magistrate gave for sentencing the appellant to death is that the sentence was mandatory. Jurisprudence has since evolved and in the case of Francis Karioko Muruatetu & Another Vs. Republic [2017] eKLR the Supreme Court stated in respect to Section 204 of the Penal Code: -

> **"[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 by 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….."**

The Court then held: -

> **"a) The mandatory nature of the death sentence as provided for under Section 204 of the Penal code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26 (3) of the Constitution.**
>
> **b) This matter is hereby remitted to the High Court for re-hearing on sentence only on a priority basis and in conformity with this judgment..."**

14. I am of the considered view that the above principle in the Muruatetu case applies equally to the mandatory nature of the death sentence as provided under **Section 296(2) of the Penal Code** and that the appellant herein is entitled to enjoy the same rights as did the applicants in the Muruatetu case. Accordingly and in view of the facts and circumstances of this case the sentence of death herein is set aside and is substituted with a sentence of twenty (20) years imprisonment from the date the appellant was sentenced in the lower court. The appeal succeeds only to that extent.

SIGNED DATED AND DELIVERED AT IN ELDORET THIS 4TH DAY OF SEPTEMBER, 2019.

E. N. MAINA

JUDGE

In the presence of: -

1. Mr. Onkoba for State

2. The Appellant in person

3. Joseph Mwelem - Court Assistant