



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 395 OF 2010**

***CONSOLIDATED WITH***

**CRIMINAL APPEAL NO. 396 OF 2010**

**SIMON NDUNG’U WAINAINA.....1<sup>ST</sup> APPELLANT**

**PAUL NDUNG’U KARIUKI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

*(Being an appeal from the original conviction and sentence in the Chief Magistrate’s court at Nairobi Cr. Case No. 524 of 2007 delivered by Hon. R. A . Mutoka (Mrs) CM on 4<sup>th</sup> February, 2008).*

**JUDGMENT**

1. The Appellants were jointly charged with two others with three counts of robbery with violence contrary to Section 296 of the Penal Code. The particulars of each of the counts were that:

I. On the 27<sup>th</sup> day of January, 2007, at Uthiru in Nairobi within Nairobi Area, while armed with dangerous weapons namely AK 47 assault rifles jointly with others not before court robbed ZELDA WHITE of motor vehicle Toyota Prado registration number 29CD305K valued at Kshs. 2.5 million and at or immediately before or immediately after the time of such robbery used actual violence which caused the death of the said ZELDA WHITE.

II. On the 27<sup>th</sup> day of January, 2007 at Uthiru in Nairobi within Nairobi area while armed with dangerous weapons namely AK 47 assault rifle jointly with others not before court robbed Sylvia Moller one mobile phone make Nokis 3310 valued at Kshs. 4,000/= and at or immediately before or immediately after the time of such robbery used actual violence which caused the death of LOISE ANDERSON.

III. On the 27<sup>th</sup> day of January 2007 at Uthiru in Nairobi within Nairobi area while armed with dangerous weapons namely AK 47 rifles, jointly with others not before court robbed LOISE ANDERSON of one bag containing assorted clothes all valued at Kshs. 10,000/= and at or immediately before or immediately after the time of such robbery used actual violence which caused the death of LOISE ANDERSON.

2. After a full trial, both Appellants were convicted and sentenced to suffer death. Their co-accused persons who were the 3<sup>rd</sup> and 4<sup>th</sup> accused were acquitted for lack of sufficient evidence. The Appellants were dissatisfied with their conviction and sentence and each of them filed separate appeals to the High Court. The appeals were consolidated at the hearing for purposes of this judgment.

3. They were initially heard in the High Court by Hon. Lagat Korir & D.K. Njage, Marete, JJ. In their judgment delivered on 3<sup>rd</sup> July, 2014, both the conviction and sentence were upheld, hence appeals dismissed.

4. The Appellants further preferred an appeal to the court of Appeal vide Criminal Appeal No. 14 of 2018. The court in an order issued on 30<sup>th</sup> August, 2018, ordered that the Appellants be re-heard on their appeals in the High Court, citing that one of the judges who heard the initial appeal had no jurisdiction as he was appointed as a Employment and Labour Relations Judge. This order gave birth to this judgment.

5. In their respective Petitions of Appeal, the Appellants appealed against the conviction and sentence. It is important to state that the

Appellants too argued two other appeals (Nos. 57 and 58 of 2010) before this court. In both instances, they withdrew their respective appeals against conviction and proceeded only against the sentence. They were both represented by learned counsel, Mr. Ondieki who after submission in support of the appeal did not attend court.

6. Mr. Ondieki submitted that the Appellants had been in custody for more than 10 years. That they were remorseful and needed a second chance to rebuild their lives. He added that the 1<sup>st</sup> Appellant who is now 39 years old was arrested while he was only aged 24 years. The 2<sup>nd</sup> Appellant on the other hand is aged 38 years. It was submitted that they were now rehabilitated through attaining life support skills which would support them when they left prisons.

7. Before the Respondent replied, the court ordered the filing of probation officer's pre-sentence reports, which would include victim impact reports. Meanwhile, learned State Counsel, Mr. Momanyi did not oppose the appeal on sentence. He however underscored the seriousness of the offences including the grave circumstances in which in one of the robberies two innocent souls were lost.

8. According to Mr. Momanyi, the Appellants were merciless robbers who with callousness killed two victims without provocation. He submitted that they accosted the victims who were driving in a Toyota Prado No. 29CD309K which they had blocked with an Isuzu Pic-Up vehicle owned by PW5 Edwin Kinyati who incidentally had earlier been robbed and hooded into the car boot. According to the prosecution case, as one of the robbers demanded the opening of the doors of the Prado vehicle, others from the rear opened fire which led to the death of the complainants in the instant charges. Mr Momanyi urged the court to also take into account that several goods were lost including the Motor Vehicle which nevertheless was later recovered. Mr Momanyi added that the Appellant had gone into an orgy of robberies which began with PW3. He emphasized that the use of an AK 47 rifle was an aggravating factor as the weapon was used to cause death of the deceased persons. Further, he urged the court to consider that the 2<sup>nd</sup> Appellant upon arrest had escaped from lawful police custody. Hence, had the tendency to commit another offence. He urged the court to impose a deterrent sentence to deter other would be offenders.

9. In rejoinder, the 1<sup>st</sup> Appellant conceded that the offence was serious but added that he was arrested when he was young, has a family and ought to be given another chance to reorganize his life.

10. The 2<sup>nd</sup> Appellant too indicated that he had children who were suffering due to his incarceration. He added that he was remorseful and that peer pressure compelled him into crime. It was his submission that with the artisan skills attained in prison, he would reorganize his life to be a better citizen.

### **Determination**

11. **Section 296(2) of the Penal Code** provides that any person who is convicted for the offence of robbery with violence shall be sentenced to death. However, following the decision of the Supreme Court in the case of **Francis Karioko Muruwatetu**, death sentence is no longer mandatory. It was declared unconstitutional to that extent. The justification by the court was that imposing a mandatory sentence (in this case death) denies a trial court the discretion to impose an appropriate sentence based on the circumstances of the case and the mitigation that an accused person offers. That drives the court in this case to consider the circumstances of the case as well as the mitigating factors in determining what appropriate sentence to impose against the Appellants.

12. They have only appealed against the sentence and therefore both aggravating and mitigating factors must be well balanced in arriving at a proper sentence.

13. During the hearing of the appeal the court requested for the filing of Probation officer's pre-sentencing reports in respect of each Appellant. The same were filed on 25<sup>th</sup> September, 2019 which reference shall be made to in respect to this appeal and appeals No. 57 and 58 of 2009. They were prepared by Mr. Andrew Kanyutu M. a Probation Officer stationed in Nairobi.

14. With respect to the 1<sup>st</sup> Appellant, he maintained innocence but regrets that lives were lost and families of the victims continue to hurt to date. He added that some family members of the victims visited him at Kamiti Prison and forgave him. However, this information could not be verified by the relatives of the deceased persons. He continues to have support from his brother and sister who particularly takes care of the Appellant's family. Indeed, his family members are eager to have him back home and contribute to his change of character more so, because his children require his presence.

15. The only views of victims obtained were from the widow of the late Prof. Job Bwayo (subject of appeals Nos. 57 & 58 of 2010 involving the Appellants). The deceased was a renowned international researcher on HIV vaccine, he was survived by four children and a widow. Since the robbery, the wife has remained indisposed and subsequently undergone treatment in USA and Kenya. She is yet to recover from the injuries as she sits down with difficulties and has never regained her full speech or mobility. In fact, she was tormented by the interview which according to her was a revisit of the painful experience she underwent that has completely changed her life. She wondered what kind of justice would be visited on the Appellant's if they were released yet they had already been condemned to death. She was reluctant to give sufficient details of the experience due to the psychological, emotional and physical pain she went through that continues to traumatize her. Indeed, in her own statement she could not conceptualize how the Appellant's could be released yet her family continues to suffer not only in sickness but the death of a loved one. Efforts to track other victims through the American Embassy and DCI offices in Gigiri in Kabete were not successful.

16. As regards the community's views, the Area Chief was interviewed and he described the 1<sup>st</sup> Appellant as a notorious criminal. Other community members declined to divulge information about the Appellant for fear of their own security.

17. As regards interview with fellow inmates and police officers they described him as a very dangerous man. To them, a favorable re-sentencing would be good riddance so as to get rid of him.

18. The conclusion of the Probation Officer is that the 1<sup>st</sup> Appellant was not remorseful having not acknowledged that he committed the offence. To him, the offences were committed by other gangsters who were killed by police in 2007. His personal view was that for the 13 years he has been in prison, he has reformed and was ready to prop up his life and that of his family with the help of the skills he has learnt in prison. Nevertheless, according to the Probation Officer, the Appellant is feared by the community and still considered a danger if he were released. The officer hoped that the findings in the report will help the court to reach to an objective decision.
19. As regards the 2<sup>nd</sup> Appellant, the pre-sentence report indicates that he does not acknowledge he committed the offence. He was however remorseful and claimed to feel the pain and anguish undergone by the families of the deceased person. He added that he had rehabilitated in prison by learning artisan skills which would assist him reorganize his life if he left prisons. It is stated that he has now learnt how to deal with anger and interpersonal skills which would help him relate with other members of the community. He has additionally attained a grade 3 in mechanic. He also intends to model drug users through counselling having learnt the skill in prison.
20. As regards family interview, a cousin one Hannah Njambi gave a background of the 2<sup>nd</sup> Appellant as a person who comes from a destitute family. His parents were deceased and the wife died in 2014 leaving behind 3 children. His two other siblings are dependent on alcohol and live irresponsible lifestyle. She described him as a person who previously was free from crime and related well with other members of the public. She highly vouches for his release so that he can go back and take care of his children who are currently under the care of well-wishers.
21. On the victim's impact statement, the same is similar to that obtained with respect to the 1<sup>st</sup> Appellant. It is only the widow of Prof. Job Bwayo who was interviewed and her statement is underscored hereinabove in this judgment.
22. In conclusion, the probation officer notes that the 2<sup>nd</sup> Appellant's children had undergone a challenging time since the death of their mother and incarceration of their father. Their education is wholly dependent courtesy of NGO organizations. However, the family of one of the deceased person wife to the deceased Pro. Bwayo was against his release lamenting that such a move would be insensitive to the pain she and other victims went through. The Probation Officer however left the court to make an independent and impartial sentence on the appropriate sentence to impose upon the Appellant.
23. From the chronology above, it is important to underscore the aggravating factors in the robberies. They were a series committed on 27<sup>th</sup> January, 2007 commencing with PW5 who was a businessman. He was blocked by a Toyota Double Cabin while driving his Motor Vehicle KAR 186A, make Toyota. The robbers were four men armed with AK 47 rifles. He lost his ATM card which the robbers used to withdraw money from his account amongst other goods including his motor vehicle. This robbery was at Gikambura in Kikuyu at around 1200 noon.
24. The robbers had not had enough as they used PW5's vehicle to rob another witness, PW3, Michal Kamau Mathini. The witness had just come from church around 1.00 pm and he was driving his M/V KAM 286 make Pajero. In his vehicle were a few sacks of maize. The robbers used PW5's vehicle to block PW3. PW3 was hooded into the boot of his vehicle and several sacks of maize loaded on him to arrest any movement not withstanding that his hands had been tied using his tie.
25. The robbers used PW3's motor vehicle yet again to rob the deceased persons and their family members. Loice Zeida who was a daughter of Zedka White was driving Toyota Prado Reg. no. 29 CD 309K Blue in colour. Inside the vehicle were a son of Loice and another sister. They had packed their vehicle besides the road in Uthiru where they waited for one Hamprey whom they were going to visit. Hamprey was to walk on foot to where the vehicle stopped after which he was to direct them to his home. This was at about 2.00 pm when the Pajero vehicle belonging to PW3 pulled next to their vehicle and one of the robbers pulled to the driver's sit welding a machine gun. Suddenly the occupants realized they were being car jacked. The robber was banging the windows to be opened. As this happened, other robbers with AK 47 were shooting the vehicle from the rear. Without much analysis of the evidence, two of the deceased had been felled. In a merciless manner, as one of the deceased Zelda who was on the front passenger sit lay dangling from the seat, the robbers had taken control of the Prado vehicle. They started driving it as her hand swept the ground. One of her daughters rushed to pull her out of the car. She was bleeding helplessly and she realized that she was lifeless when no pulse was felt. A clean 45 minutes passed before any help came to take the two deceased persons to Nairobi Hospital where they were pronounced dead.
26. The Appellants took off with the motor vehicle plus all the personal belongings of the deceased and their family members apart from a bag that fell off from one of the victims. They were to drive into Kenya Agricultural Research Institute (KARI) aslong Waiyaki Way. From the evidence on record, it is not clear how the vehicle left KARI as it was found abandoned at Limuru next to a bar.
27. Incidentally, the robbers while accessing KARI compound left the driver's diving license with the security guard one Kipkoech Amos, PW2. It is also not clear how the vehicle was driven out of the KARI compound without the license being given back to the driver. Nevertheless, it was established that the license was one of the items robbed from PW5's motor vehicle. It belonged to his brother who was accompanying him at the time of the robbery.
28. With the above brief summary, there is no doubt that apart from PW3 and PW5, the deaths of the deceased persons were caused without utter provocation. The Appellants were young boys who were trigger happy to see they left a trail of blood. In fact, the robberies subject to this appeal were orchestrated in a movie-like theatre manner. The robbers surrounded the motor vehicle of the deceased persons and without even notifying the victims what they wanted started shooting and killing them instantly.
29. Reading though the evidence, it is a clear testimony of the pains of the family members who were present during the robbery. Although none of the surviving members could be reached for interviews by the Probation Officer, the interview of prof. Amos Bwayo's wife is a testament of the pain and trauma that the victims continue to undergo. The court cannot simply wish it away that the interests of the Appellants' families should supersede the intensity with which the robberies were committed, the gravity of the violence meted and the resultant consequences of the robberies.
30. Yes, the Appellant have trained in the various skills elucidated in their submissions and confirmed in the Probation Officer's reports, but

that alone cannot be sufficient reason why they should be set free to go back to the society without ensuring that they serve and take responsibility of the mistake that they made.

31. I have regard to the fact that the 1<sup>st</sup> Appellant is considered by both the community and the prisons a dangerous person. It is in that prison that he ought to be reformed. It is unfathomable that the prison would wish him released because he is already a trouble to them. If this were to be taken to warrant his release, what would the community do with him if he is released? My take is that the prison must take up their responsibility and ensure they marshal all their skills and efforts to meet the purpose for which the 1<sup>st</sup> Appellant went to prison.

32. Although the 1<sup>st</sup> Appellant remains innocent until proven guilty, the court cannot turn its back from the fact that he is facing a murder trial in High Court Cr. Case No. 18 of 2013 in which he is accused of murdering a fellow inmate Peter Mungai MACHARIA in Naivasha GK prison on 27<sup>th</sup> April, 2011. As at date, the prison authorities consider him a danger not only to themselves but to fellow inmates. It would be unkind to humanity and purpose for serving justice that such a person should be released back to the community which also regards him a danger only after remaining in custody for 13 years. I take the view that a stringent sentence ought to accrue with the offences the 1<sup>st</sup> Appellant committed.

33. No doubt the mitigating factors are outweighed by the aggravating factors. He has trained in mechanics, holds a certificate in Islamic Studies and trained in football coaching. These are skills that only promote his personal development but do not impact on the lives of people he killed. The purposes of a punishment must be met by imposing a stringent sentence. Having weighed all these circumstance, I bear in mind that death sentence may not always reform an offender. He needs not suffer death but serve long jail term enough to remind him of the crimes he committed. I therefore set aside the death sentence and order that he shall serve 50 years imprisonment commencing from the date of his arrest.

34. As for the 2<sup>nd</sup> Appellant, a lengthy jail term is mitigated by the fact that he has remained a person of good character whilst in prison. He too was arrested whilst a very young man but at the same time, he must shoulder the responsibility for the crimes. I also set aside the death sentence and substitute it with an order that he shall serve 45 years imprisonment commencing the date of his arrest. It is so ordered.

**Dated and Delivered at Nairobi This 15<sup>th</sup> October, 2019.**

**G.W.NGENYE-MACHARIA**

**JUDGE.**

**In the presence of:**

1. 1<sup>st</sup> Appellant in person

2. 2<sup>nd</sup> Appellant in person

3. Mr. Momanyi for the Respondent.