# IN THE HIGH COURT OF KENYA AT BUNGOMA

**(CORAM: CHERERE -J)**

**CRIMINAL APPEAL NUMBER 54 & 56 OF 2015**

**(C0NSOLIDATED)**

**BETWEEN**

**FERDINAND JUMA SAKWA.....1ST APPELLANT**

**TML.....2ND APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Appeal against conviction and sentence in Criminal Case Number 875 of 2013 in the***

***Chief Magistrate's Court at Bungoma delivered by C.L.Yalwala (SRM) on 31st March, 2015)***

**JUDGMENT**

**Background**

1. **FERDINAND JUMA** and **TITUS MAFURA**, the appellants were jointly charged with others that were acquitted with 2 counts of robbery with violence contrary to Section 295 as read with section 296 (2) of the Penal Code. The appellants have appealed against the conviction and death sentence imposed on them in respect of the first count committed against Hellen Kadogo Wafula on the night of 25th and 26th April, 2013 where actual violence was applied in the course of the robbery.

**The prosecution's case**

2. The prosecution called 7 witnesses in support of the charges. **PW1, Hellen Kadogo Wafula**, the complainant recalled how a group of 5 persons who were armed with torches and pangas gained entry into her house and they robbed her Kshs. 7,600/- and a Nokia phone valued at Kshs. 2,000/-.She said that the robbers stayed in the house for about 30 minutes and freely engaged them in talks as a result of which the torches were flashed against the robbers faces and she was able to recognize the 2nd appellant whom she referred to as "***L***", physically and by his voice since he was in the same school with her son and used to visit her home frequently. It was her evidence that she informed the police that she had recognized L as one of the persons that robbed her. PW2 Purity Wafula who was with complainant on the material night recalled that after 5 persons stormed in their house armed with pangas and torches, she was able to recognize the 1st appellant, who had been their neighbor for 8 years from the refection of their torches on the mirror that was in the living room. It was her evidence that she informed the police that she had recognized Ferdinand Juma as one of the persons that robbed them. PW3 Erastus Walabane Chepkuto went to the rescue of complainant but was repulsed by the 1st appellant whose voice he recognized having lived with him in the same neighbourhood for a long time. PW7 PC Kennedy Omwamba, the investigating officer stated that he arrested the 2 appellants after PW1 and PW2 reported that they had identified them and gave their names.

3. Both appellants denied the offences and i*n a judgment* dated *31st March, 2015;* appellants were convicted and sentenced to suffer death.

**The Appeal**

4. The conviction and sentence provoked this appeal. In their separate petitions of appeal and written submission, they raised 4 main grounds as follows:

1) ***That the circumstances of identification were not favourable***

2) ***That the court did not conduct voire dire examination of PW2***

3) ***That none of the stolen goods were recovered from them***

4) ***That the death sentence is unconstitutional***

5. When the appeal came up for hearing on 5.11.18, the appellants stated that they were wholly relying on their grounds of appeal and written submissions.

6. Mr. Oimbo, learned State Counsel opposed the appeal and stated that death was the only available sentence for robbery with violence when the appellants were convicted. Counsel submitted that the appellant had been positively recognized by PW1 and PW2 who knew them well before the material date. Counsel also submitted that non recovery of stolen goods did not mean that the offence of robbery with violence had not been proved. Counsel finally submitted that it was not necessary to conduct *voire dire* examination of PW2 since she was not a child of tender age.

**Analysis and Determination**

7. This being a first Appeal, this Court has a duty to evaluate the evidence, analyse it afresh and draw its own conclusion, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify as did the trial Court, and give due allowance for that (see Isaac Ng'ang'a Kahiga v Republic [2006] eKLR).

8. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions for the appellants and on behalf of the state.

9. In dealing with this appeal, I will separately address the 4 grounds summarized above.

**1) Was it necessary to conduct voire dire examination of PW2?**

10. Section 19 of the Oaths and Statutory Declarations Act Chapter 15 Laws of Kenya requires a court taking the evidence of a child of tender age to conduct voire dire examination to determine if, in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

11. A "***child of tender years***" is defined under section 2 of the Children Act No. 8 of 2001 to mean a child under the age of ten years. PW2 was 16 years when she testified and it was therefore not necessary for the court to conduct *voire dire* examination before taking her evidence.

**2) Were the appellants positively recognized?**

12. The difference in approach between identification and recognition was expressed thus by Madan J.A for the Court in ***Anjononi and Others vs The Republic [1980] KLR***;

> ***"……This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya Vs. The Republic (unreported.)"***

11. That is not to suggest of course, that cases of misrecognition cannot occur (See ***Karanja & Anor vs. Republic [2004] KLR 140)*** and courts are still duty-bound to examine such evidence with great care.

12. This is a case of recognition since it is on record that the appellants were well known to the complainant and PW1, PW2 and PW3. The complainant stated she recognized the 2nd appellant whom she referred to as "***L***", physically and by his voice since he was in the same school with her son and used to visit her home frequently. 2nd appellant's third name is L and he conceded that he is popularly known as L. PW2 stated he saw the 1st appellant's face with the help of mirror reflection from the torch lights that the robbers had and recognized him as a neighbor with whom they had lived with for 8 years. PW3 similarly stated that he had lived with the 1st appellant in the same neighbourhood for long and was able to recognize his voice on the material night.

13. There is no evidence that the robbers' faces were covered or disguised. There is evidence that the robbers were in the complainant's house for about 30 minutes within which time they had time to interact with complainant and PW2 thereby creating a conducive environment for recognition.

14. From the totality of the evidence on record, I have come to the conclusion that the appellants were satisfactorily and more reliably recognized since they were not strangers to PW1, PW2 and PW3.

***c) What is the effect of non-recovery of stolen goods***

15. It is on record that none of the goods stolen from complainant were recovery. While recovery of stolen good from a suspect may reinforce a case of robbery, it is not an ingredient for the offence of robbery with violence. In this case, the appellants were recognized at the robbery scene and failure to recover the goods does not lessen their culpability.

d) **Is the death sentence is unconstitutional**

16. As rightfully submitted by Mr. Oimbo, learned State Counsel, death was the only available sentence for robbery with violence as at the time the appellants were convicted. The Supreme Court decision in ***Francis Karioki Muruatetu & Another v Republic & 5 others [2016] eKLR*** declaring the mandatory death sentence unconstitutional has necessitated resentencing of all persons previously sentenced to the mandatory death sentence. In the case of ***William Okungu Kittiny v Republic KSM CA Criminal Appeal No. 56 of 2013 [2018] eKLR***, the Court of Appeal applied the ***Muruatetu Case*** **(Supra)** *mutatis mutandis* to the provisions of **section 296(2)** of the ***Penal Code (Chapter 63 of the Laws of Kenya)*** which imposes the mandatory death penalty for the offence of robbery with violence and held that death was a discretionary maximum sentence.

17. In the case of ***Michael Kathewa Laichena & another v Republic [2018] eKLR,*** Majanja J, précised the procedure that a court considering resentencing should take and stated as follows:

> ***"The Sentencing Policy Guidelines, 2016 ("the Guidelines") published by the Kenya Judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. Since the Guidelines did not take into account the fact that the death penalty would be declared unconstitutional, the Court in the Muruatetu Case (Supra, para. 71), considered that in re-sentencing in a case of murder, the following mitigating factors would be applicable;***
>
> ***(a) age of the offender;***
>
> ***(b) being a first offender;***
>
> ***(c) whether the offender pleaded guilty;***
>
> ***(d) character and record of the offender;***
>
> ***(e) commission of the offence in response to gender-based violence;***
>
> ***(f) remorsefulness of the offender;***
>
> ***(g) the possibility of reform and social re-adaptation of the offender;***
>
> ***(h) any other factor that the Court considers relevant.***

18. The court further stated that the ***Guidelines*** do not replace judicial discretion but are intended to promote transparency, consistency and fairness in sentencing.

19. The maximum sentence for simple robbery is 14 years' imprisonment. The mitigating circumstances in this case are that the petitioners could be considered first offenders. The facts from the record shows that the offence took place at night and appellants although armed with pangas did no violence on the complainant and her witness.

20. Under the proviso to **section 333(2)** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***, the court is entitled to take into account the period the appellants have spent in custody in determining the sentence. The petitioners were charged in 2013 and convicted in 2015. They have remained in custody for 6 years which include 3 years during the trial and another 3 years after conviction.

21. The use of guideline judgments of Superior Courts has also been underlined to ensure consistency and fairness. In ***Wycliffe Wangusi Mafura v Republic ELD CA Criminal Appeal No. 22 of 2016 [2018] eKLR*** where the Court of Appeal imposed a sentence of 20 years where the appellant was involved in robbing an Mpesa shop with the use of a firearm with which he threatened the attendant but was caught before he inflicted any violence on her. Likewise, in ***Paul Ouma Otieno alias Collera and Another v Republic KSM CA Criminal Appeal No. 616 of 2010 [2018] eKLR,*** the Court of Appeal sentenced the appellants to 20 years imprisonment where the robbery was aggravated by the use of a firearm.

22. Considering all the mitigating and aggravating factors, the period spent in pre-trial and post-trial custody and the cases I have cited, I re-sentence the petitioners to **14 years' imprisonment** commencing the date of sentencing before the trial court which is ***31st March, 2015***.

**DELIVERED AND SIGNED IN BUNGOMA THIS 9th DAY OF November, 2018**

**T. W. CHERERE**

**JUDGE**

**In the presence of-**

**Court Assistant - Ribba & Diannah**

**1st Appellant -**

**1st Appellant -**

**For Respondent -**