REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang & Odero, J J.)

CRIMINAL APPEAL NO. 129 OF 2007

- BETWEEN -

HAMISI ABDUL FARAJ.....APPELLANT

- AND -

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of Senior Resident Magistrate T. Mwangi dated 2nd August, 2007

in Criminal Case No. 3108 of 2005 at Mombasa Law Courts)

JUDGMENT

The appellant was charged with the offence of robbery with violence, contrary to s.296 (2) of the Penal Code (Cap.63, Laws of Kenya): the allegation being that he, jointly with another not before the Court, on **18th August, 2005** at about 11.00 a.m. in the Mkomani area of Mombasa, robbed **Said Abdalla Ahmed** of a cellphone, Nokia 3310 by make, valued at Kshs. 6,000/=, and, at or immediately after the time of such robbery, used actual violence to the said **Said Abdalla Ahmed.**

After taking the evidence, the learned Magistrate came to the following conclusion:

"I am satisfied that [the] accused person was positively identified by PW 1 and [PW] 2. He was arrested by the two with [the] assistance of other persons … [The] accused was with another not before the Court. Although they were not armed, it has been clearly demonstrated that [the] accused herein

used violence during the attack. Two ingredients of robbery with violence … were fulfilled. I am therefore satisfied that the prosecution proved its case beyond reasonable doubt. I find the accused guilty as charged, and convict him accordingly under section 215 of the Criminal Procedure Code".

After giving the accused an opportunity to make a statement in mitigation, the trial Court treated him as a first offender, but imposed a death sentence as expressly required under **s. 296 (2) of the Penal Code.** We do not doubt that the conventional understanding of s. 296 (2) of the Penal Code, as imposing a mandatory death penalty, will in due course, be the subject of re-interpretation under the **Constitution of Kenya, 2010;** but for the moment, we will recognize the sentence imposed by the trial Court to have been, in every respect, ***bona fide***.

M/s. M. Ananda & Company, Advocates, for the appellant, filed (**1st June, 2009**) grounds of appeal which may be summarized as follows:

(i) the evidence relied on to convict, was contradictory and uncorroborated;

(ii) the appellant's defence was reasonable, and showed no link between him and the commission of the offence;

*(iii) there had been no proper identification of the appellant at the **locus in quo**;*

(iv) material witnesses had not been called by the prosecution;

(v) the sentence imposed was harsh and oppressive;

(vi) the Court conducted proceedings in departure from "the constitutionally guaranteed rights of the appellant".

Learned counsel, **Mr. Ananda** submitted that the trial Magistrate had relied on *"contradictory and uncorroborated evidence of prosecution witnesses":* and that as a result, the prosecution had not proved their case beyond all reasonable doubts.

Counsel submitted that there was no evidence that the appellant had been found with any dangerous weapon; and that since the suspects were not armed, the Court ought not to have convicted the appellant.

Counsel sought reliance on a Court of Appeal decision, **John Njuguna Wainaina v. Republic,** Criminal Appeal No. 141 of 2006 (Nakuru). On a close examination of that decision, it becomes apparent that the Court was concerned that, by s. 296 (2) of the Penal Code, an accused person ran the risk of being sentenced to death when he or she, really, did not have, and was not seen to have, the capacity to subject the complainant to any significant amount of violence, at the time an alleged robbery took place. This perception emerges from the following passage in the Judgment:

"There was no question of another person apart from the appellant being involved in the robbery. As to whether the appellant was armed with a knife …, [the] complainant said the

appellant had a knife but that was all. At no stage did the appellant threaten to use the knife. All along the threat was to strangle the complainant and at that stage the complainant said he was actually *'strangled'*. He did not say where the knife was when he was being *'strangled'*. Even when the appellant was leaving, his parting shot was that if the complainant rose he (appellant) would strangle him. The complainant did not know where the knife was when he was being [*'strangled'*]. The two Courts below simply assumed the appellant was armed with a knife because the complainant had said so but they did not examine in detail the issue surrounding the knife. Had they done so as we have now done the two Courts might well have come to the conclusion that *while the appellant robbed the complainant the appellant was simply alone and he may not have been armed with anything. For our part, we doubt whether the appellant actually had a knife.* Otherwise why would he choose to *'strangle'* the complainant and not threaten him with the knife? We must give the benefit of this doubt to the appellant. In our view the appellant ought to have been convicted of *simple robbery under section 296 (1) of the Penal Code,* and not with capital robbery under section 296 (2) of the Code."

The burden of the instant appeal, we believe, revolves around counsel's perception of the Court of Appeal's decision in the **John Njuguna Wainaina** case; and for this reason, this Court has to make an appraisal of the argument on the merits.

Although it was learned counsel, **Mr. Onserio** who represented the respondent on the first occasion of hearing (**5th October, 2010**), it fell to learned counsel, **Mr. Muteti** to make the relevant submissions (on **26th October, 2010**). **Mr. Muteti** supported the conviction and sentence.

Counsel submitted that the issue of identification, which formed part of the appellant's case, was inapt: for the offence took place in broad daylight at 11.00 a.m., and arrest was effected soon thereafter. PW 1 and PW 2 observed the appellant as he ran away, and they did not lose sight of him. PW 1's evidence on the matter was unchallenged, as he was not cross-examined on the question of identification. PW 1 had testified that he was robbed of a cellphone; the suspect (the appellant herein) was in the company of someone else; the robbery took place in the context of a physical struggle — and so the terms of **s. 296 (2) of the Penal Code** were satisfied. PW 2 witnessed the robbery incident, and was involved in the pursuit and arrest of the appellant; the appellant was arrested as he swam in the ocean, just after the incident; there was no other person swimming in those waters at the time the arrest was effected; the basis of the arrest was the identification by PW 2.

Learned counsel submitted that the relevant fact-scenario had emerged from the cross-examination of PW 2 by the accused's Advocate: PW 2 said she had identified the appellant herein in the ocean waters, and that she had concentrated her attention on the appellant herein who had attacked her (PW 2's) father.

Mr. Muteti urged that the appellant had been involved in an incident of robbery with violence, and that the conviction handed down was entirely safe; and hence, the appeal lacked merit.

In his response, **Mr. Ananda** submitted that the said identification of the appellant as he swam, was flawed: that the process of perception of the suspect's get-away was obstructed, firstly by bushes into which the suspects fled; and secondly by the fact that a boat had to be secured from a different place (Tamarind Hotel), to be used in the chase — so there was a lack of contemporaneity.

Mr. Ananda submitted that the respondent's counsel had not responded to the argument based on the case, **John Njuguna Wainaina v. Republic,** especially the point that **no offensive weapon had been used.** Counsel contended that this incident *"does not satisfy the conditions of s. 296 (2) [of the Penal Code]."*

As a basis for addressing the specific point raised for the appellant, based on the Court of Appeal decision, we will first set out the vital facts coming through the evidence.

The complainant (PW 1) testified as follows:

(i) on the material date, at 11.00 a.m., he was at Mkomani Beach with his school-going daughter, ***Fatma,*** *for the purpose of collecting sea-shells for an art project; they passed two men close to the shore; and bathing in the shallow waters were two other men;*

(ii) the two men on the shore came close to PW 1 and his daughter; they held him by the neck, and grabbed his cellphone (a Nokia 3310) which he had strapped to the waist; the thieves ran away; the two men who were in the water attempted to help, but they were too late; these two men gave chase, PW 1 following them; the suspects went into a thicket, for refuge; people in a neighbouring house pointed out the suspect; as the suspects ran down-hill, the pursuers' concentration was on one, who was running along the beach; this particular suspect jumped into the water, and started swimming; PW 1 alerted the police by phone; PW 1's daughter (PW 2) and two of the pursuers were given a boat at the Tamarind Hotel, to give chase by sea; and this led to the arrest of the suspect who had been swimming away; PW 1 recognised this suspect as the one who had attempted to strangle him; and this suspect started pleading with PW 1 to forgive him; PW 1 was part of the team that escorted the suspect to the police station.

(iii) The appellant herein did not cross-examine PW 1 on his evidence;

(iv) PW 2's evidence was consistent with that of PW 1: the two suspects wrestled her father (PW 1) down, took his cellphone, and began to run away; the appellant herein sought cover in a bush, as PW 2 was following; he jumped into the water; PW 2 and others secured a boat from Tamarind Hotel, pursued and arrested the appellant herein who was swimming; the appellant was resistant, and attempted to capsize the boat; the Tamarind guards had called in the Police, who arrested the suspect; this suspect is the one who had tried to strangle PW 1; the suspects had no weapons on them, and they had wreaked violence upon PW 1 by means of their bare hands;

(v) The appellant gave unsworn evidence, to the effect that he was having a swim in the Mkomani area of the Indian Ocean shore, at the material time, and was arrested by persons in a boat, for no reason; and he was then taken to the Police station, and later charged in Court, on the basis of allegations unknown to him;

(vi) PW 2, on cross-examination by learned counsel, ***Mr. Abubakar****, had testified that it had taken her and the two Good Samaritans, ten minutes to get to the Tamarind Hotel, to obtain the boat which was used in the arrest, and that in the meantime, the appellant was swimming in the sea nearby; as to how PW 2 came to identify the appellant herein, she said:*

"I concentrated on [the] accused who was strangling my dad".

After considering all the evidence, we find the witnesses to have been consistent, and note that the record shows no doubts as to their truthfulness, and carries no negative impressions on their demeanour. At the same time, we formed the opinion that the appellant's evidence did not in any way shake the integrity of the prosecution evidence: which leads to the factual finding that the appellant was, indeed, involved in the incident which is the basis of the charge.

The only question remaining is whether, in the light of the precedent in **John Njuguna Wainaina v. Republic,** Criminal Appeal No. 141 of 2006 (Nakuru), we should hold, or not hold, that a crime had been committed under s. 296 (2) of the Penal Code — in which case the penalty expressly specified is the **death penalty**.

Section 296 of the Penal Code provides:

"(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

"(2) 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".

Evidence was given that the appellant herein, at the material time, was in the company of an accomplice who escaped and has not been arrested; the two were **not** armed; the appellant wrestled PW 1 to the ground, and attempted to strangle him, in the course of stealing PW 1's cellphone; so, the appellant did, indeed, use *"any other personal violence"* upon PW 1; and this, on a **plain reading of the law**, would vindicate the learned Magistrate when, on the basis of the evidence, he convicted the appellant and sentenced him to death.

Section 296 (2) of the Penal Code was introduced by the Criminal Law Amendment Act, 1971 (Act No. 25 of 1971) and the **Penal Code (Amendment) Act, 1973 (Act No. 1 of 1973)**, s.2; and since then, the Courts have been guided by its **plain meaning**. It follows that the Court of Appeal's decision, **John Njuguna Wainaina v. Republic** is introducing a novel dimension to the **interpretation of the law**: that an accused person, where he or she uses physical force to deprive the complainant of something, but without employing a dangerous or offensive weapon, or without blatantly threatening (or appearing to threaten) life and limb, should be convicted for **simple robbery.**

No similar line of decision-making by the Court of Appeal, since 1973 when the Penal Code (Amendment) Act was enacted, was brought to our attention; though we, in principle, recognise the position that decisions of that Court, where they are clear and settled on a given issue, set the **precedent** to guide other Courts.

Apart from **John Njuguna Wainaina v. Republic,** which was decided on **26th January, 2010** the Court of Appeal, on **30th July, 2010** gave another Judgment in which it takes a new bearing on principle, in the disposal of cases entailing the death penalty. The principle in the latter case, **Godfrey Ngotho Mutiso v. Republic,** Criminal Appeal No. 17 of 2008, which was in respect of sentencing in murder cases, was that the trial Court should **not** consider the death sentence as mandatory but should exercise a **discretion**, having in mind the **circumstances attending the alleged murder**. These are the relevant words of that Court:

"On our own assessment of the issue at hand and the material placed before us, we are persuaded, and now so hold, that Section 204 of the Penal Code which provides for a mandatory death sentence is antithetical to the constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial. We note that while the Constitution itself recognizes the death penalty as being lawful*, it does not say anywhere that when a conviction for murder is recorded, only the death sentence shall be imposed.* We declare that Section 204 …, to the extent that it provides that the death penalty is the only sentence in respect of the crime of murder, is inconsistent with the letter and spirit of the Constitution…."

The two decisions are a clear **signal** that the Judiciary should exercise its larger interpretive competence to make essential departures from the conventional perception of jurisdiction in criminal justice. **This** is the basis on which this Court has to decide the case before us.
There is indeed a new basis to the reasoning in the **John Njuguna Wainaina** case. The **Constitution of Kenya, 2010** which was promulgated on **27th August, 2010** [just after the Court of Appeal's decision in the **Godfrey Ngotho Mutiso** case] imposes an obligation upon this Court, as follows [Article 159 (2) (e)]:

"(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles —

…….

(e) the purpose and principles of this Constitution shall be protected and promoted".

The said *"purpose and principles of this Constitution"* are set out in **Article 10**, which provides [sub-article (2) (b)] that –

"The national values and principles of governance include –

……
(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized".

The *"equity"* obligation, in this regard, and in relation to this Court's mandate, in our opinion, invokes **proportionality** in the dispensing of sentence, in criminal justice.

On those principles, ought this Court to sentence the appellant to death, for his forcible taking of the complainant's cellphone, given all the attendant facts? Such, we think, would be grossly out of proportion to the threat and the amount of physical force that accompanied the taking of the cellphone.
We, therefore, substitute in place of the penalty under s. 296 (2) of the Penal Code, a conviction for **simple robbery** under **s. 296 (1) of the Penal Code**; and we sentence the appellant to a prison term of eight (8) years, as from the date when he was originally convicted and sentenced by the trial Court.

Orders accordingly.

DATED and **DELIVERED** at **MOMBASA** this **1ST** day of **March, 2011.**

J. B. OJWANG **M.ODERO**
JUDGE **JUDGE**