

**THE COURT OF
APPEAL AT
KISUMU**

(CORAM: ASIKE-MAKHANDIA, OMONDI & KIMARU, JJ.A)

CRIMINAL APPEAL NO. 113 OF 2020

BETWEEN

WINUS WANJALA JUMA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Bungoma (R. Wendoh, J.) dated 23rd November, 2018

in

HCCRA No. 16 of 2017)

JUDGMENT OF THE COURT

1. The appellant, **Winus Wanjala Juma**, was charged and convicted of the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on the night of 9th November, 2013, at Sio Village, South Kanduyi Sub-location, within Bungoma County, the appellant, jointly with others not before court, while armed with a dangerous weapon namely *rungu*, robbed

Benson

Anunda Odhialo of a motorbike Reg. Number KMCZ 637N, make Boxer, red in colour, and cash Kshs.4,800/=, all valued at Kshs.99,800/=, and at the time of such robbery, used actual violence to the said **Benson Anunda Odhialo**. Upon conviction, the appellant was sentenced to death.

2. The facts of the case according to the prosecution were as follows: The complainant, **Benson Aunda Odhialo** (PW1), was asleep at his house on the night of 9th November, 2013. At about 3.00 a.m., he was woken up by the sounds of people who had broken into his house. There were three men standing beside his bed. He tried to raise an alarm, but they attacked him using clubs and iron bars. They demanded his phone, money and keys to his motorcycle that was parked outside. They robbed him of his phone, make Nokia 500, cash of Kshs.4,800/= and his motorcycle registration number KMCZ 637N. PW1 stated that he was able to recognize one of his assailants, who was the appellant. He testified that he recognized the appellant, as he picked up the money which was on top of a box, since his accomplice lit up a torch in

the appellant's direction. He

immediately recognized the appellant, as he had previously interacted with him. He used to service his motorcycle.

3. PW2, **Dennis Anyangu**, who owned the motorcycle produced ownership documents for the same. The complainant had borrowed the motorcycle from him. The complainant's neighbour, **Jackton Dismas Musiko** (PW3), was on his way home from a funeral at about 2.00 a.m., when he met with a group of five people who had a motorcycle. They were standing about three meters from his location. He pointed his torch at their direction and recognized the appellant. He greeted the appellant, though the appellant did not respond. He went on his way. When he got home, the complainant informed him that he had been robbed, and that he had identified the appellant as one of the assailants. PW3 told the complainant of his earlier encounter with the appellant on his way home. PW3 took the complainant to the road where he had seen the assailants, but they were long gone.
4. The investigating officer, PC **Innocent Ijaka** (PW4), told the court that he was at Bungoma Police Station on 9th

November, 2013, when at about 3.00 p.m., the complainant arrived at the

station and reported that three assailants broke into his home the previous night, and robbed him of his phone, cash, and motorcycle. The complainant was from hospital. He told him that during the robbery, he had identified one of the assailants as the *fundi* who used to service his motorcycle. PW4 stated that he visited the scene of crime and discovered that a large stone had been used to break the lock and gain access to complainant's house. The following day, on 10th November, 2013, the complainant came to the station and reported that he had spotted the appellant at a drinking den. The appellant was arrested and charged. PW5, **Dr. Haron Omondi**, produced the complainant's P3 form. He testified that the complainant had a swollen and tender left arm, which injury was caused by a blunt weapon.

5. The appellant, in his sworn statement, denied being part of the gang that robbed the complainant.
6. After his conviction and sentence, the appellant, dissatisfied by decision of the trial court, lodged an appeal before the High Court of Kenya at Bungoma. His appeal was founded on the following grounds: that he was not named in the first

report

made to the police; that the police failed to conduct an identification parade; that the prosecution's evidence was marred by contradictions; and that the trial court failed to consider all the evidence on record.

7. The learned Judge (Wendoh, J.) found that the appellant was positively identified by PW1 and PW3. The appellant's appeal on conviction was dismissed. His death sentence was set aside by the first appellate court, and substituted thereof with a sentence of life imprisonment.
8. The appellant is now before us on a second appeal. In summary, he contends that the prosecution failed to prove its case against him beyond reasonable doubt, and that his conviction was based on mere suspicion. He faulted the learned Judge for disregarding his alibi defence. He took issue with his conviction, stating that there was no proof of *mens rea*. He was of the view that the sentence of life imprisonment was harsh and excessive in the circumstances.
9. The appeal was heard through written submissions. **Ms. Nduhukire** appeared for the appellant. It was her submission that the appellant's identification was unsafe,

because the

complainant failed to mention the source of light he used to identify his assailants, considering the incident took place at night. She argued that the appellant was arrested as he was going about his daily business, and that none of the stolen items were recovered from him. She asserted that the appellant's conviction was based purely on suspicion, and that suspicion, however strong, cannot form a basis for inferring guilt. It was her further submission that the appellant's alibi defence was uncontroverted. On sentence, counsel urged that the death sentence imposed by the trial court was unconstitutional, given the decision of the Supreme Court in **Francis Karioko Muruatetu v. Republic [2017] eKLR**. She reiterated that the appellant has been in custody for a period of eight years, and that the said period was sufficient punishment in the circumstances of the case.

10. The appeal was opposed. Prosecution counsel, **Ms. Kibet**, appeared for the State. It was her submission that the appellant was identified by PW1, a person well known to him. She submitted that the prosecution sufficiently discharged

its burden of proof, and that the appellant was properly convicted.

On sentence, while citing the decision of this Court in **Ayako v Republic [2023] KECA 1563 (KLR)**, counsel urged this

Court

to set aside the sentence of life imprisonment, and substitute it thereof with a custodial sentence of thirty (30) years, to be computed from 17th January, 2017, being the date that the appellant was convicted by the trial court.

11. This is a second appeal. The mandate of this Court on a second appeal is confined to matters of law only, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, the decision is perverse. See **Kaingo v. Republic [1982] KLR 213.**

12. We have carefully considered the record, and the rival submissions set out above, in light of this Court's mandate.

The issues for determination can be summed up as follows:

- i. Whether the prosecution proved its case against the appellant to the required standard of proof beyond any reasonable doubt;***

ii. Whether the appellant's defence was properly evaluated; and,

iii. Whether the appellant's sentence was harsh or excessive.

13. The prosecution's case was that the appellant was identified as one of the assailants who broke into complainant's home and robbed him of his phone, cash and motorcycle. It is trite that before a court can base a conviction on evidence of identification, it should examine the evidence carefully and satisfy itself that the circumstances of identification were favourable and free from the possibility of error. This was the holding of this Court in **Kariuki Njiru & 7 others v Republic [2001] eKLR** where the Court held thus:

"The law on identification is well settled and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully and should only be accepted and acted upon if the Court is satisfied that the identification is positive and free from the possibility of error."

14. According to the evidence on record, the robbery incident took place at about 3.00 a.m. It was the complainant's evidence that he was woken up by sounds of people who had broken into his home. He noticed three assailants at his bedside. They demanded he surrenders his phone, money and keys to his motorcycle. He directed them to where

those items were. The

complainant stated that as one of the assailants was picking up the cash which was inside a jacket placed on a box, his accomplice switched on a torch in his direction, and he was able to identify the appellant as the assailant who picked up the money. He testified that the appellant was known to him at the time as he used to service his motorcycle from time to time.

15. It was the appellant's submission that his conviction was based on mere suspicion, and that his identification was unsafe, since the complainant did not point out the source of light he used to identify his assailants. We beg to differ with this observation, as from the record, it is clear that the complainant testified that he used the light from one of the assailants' torch to identify the appellant. We note that the complainant named the appellant as one of the assailants in his first report to PW3, which was immediately after the robbery. The complainant told PW3 that he had identified one of the robbers as the *fundi* who serviced his motorcycle. He made the same report to PW4 the following day when he went to report the robbery at the police station. We are

satisfied that the complainant positively identified the appellant during the robbery incident, and named him in his

first report to the police. The identification was that of recognition, as the appellant was someone who was well known to the complainant.

16. The evidence of identification by the complainant was corroborated by the evidence of PW3. PW3, on the material night, was on his way home when he came across a group of people who were pushing a motorcycle. He had a torch which he shone towards the direction of the said people. He immediately recognized the appellant and greeted him, but the appellant did not respond to his greetings. He stated that the appellant was armed with an iron bar. He knew the appellant prior to the robbery incident. He went about his way. When he got home, the complainant, his neighbour, informed him about the robbery incident, and that he had identified the *fundi* who serviced his motorcycle as one of the robbers. PW3 told him that he had seen the appellant with a group of people on his way home, and that they had a motorcycle. They tried to go in hot pursuit of the robbers but they did not manage to catch up to them.

17. The appellant in his defence stated that he was a mechanic. He however denied ever servicing the complainant's motorcycle. He stated that he could not recall his whereabouts on the material night the robbery occurred, and that he only remembers his date of arrest. We find that the appellant's submission that his alibi defence was not considered is unfounded, as he did not give any alibi in his defence statement. He merely denied being involved in the robbery.
18. After careful consideration of the evidence, we are satisfied that the prosecution's evidence against the appellant was overwhelming, and that it placed him at the scene of crime on the material night. He was positively identified by the complainant, as a person who was well known to him, which identification was corroborated by the evidence of PW3, who saw the appellant shortly after the robbery, armed with an iron bar, and in possession of a motorcycle. His conviction, which was affirmed by the first appellate court, was sound in law.
19. The last issue relates to the appellant's sentence. It was his

submission that the death sentence awarded by the trial court was harsh and excessive. He observed that the Supreme Court,

in the case of **Francis Karioko Muruatetu & Another** (supra),

determined that the mandatory nature of the death sentence in capital offences is unconstitutional. He urged that the eight (8) years he has spent in custody since his conviction by the trial court constitutes sufficient punishment for the offence.

20. Firstly, the Supreme Court in **Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions)** clarified that their decision in the **Muruatetu 1** related to the mandatory nature of the death sentence prescribed for murder cases under **Section 204** of the **Penal Code**, and did not apply to any other statutory mandatory death sentences or mandatory minimum sentences. Therefore, the mandatory death sentence prescribed by **Section 296(2)** of the **Penal Code** is lawful sentence.

21. Secondly, we note that the High Court reduced the appellant's sentence by setting aside the death sentence that was imposed on him, and substituting it thereof with a

life sentence. Any grievance as to the severity of the sentence is misplaced, as the sentence was, if anything, reduced beyond what the law

permitted, and the appellant is the beneficiary of that error. The concession by the Prosecution on the issue of the severity of sentence was therefore not informed by the law as it exists at the moment.

22. In view of the foregoing, the appellant's appeal both on conviction and sentence is hereby dismissed for lack of merit.

Dated and delivered at Kisumu this 19th day of December, 2025.

ASIKE-MAKHANDIA

.....
**.. JUDGE OF
APPEAL**

H. A. OMONDI

.....
**JUDGE OF
APPEAL**

L. KIMARU

.....
**.. JUDGE OF
APPEAL**

**I certify that this is
a true copy of original.**

DEPUTY REGISTRAR.