THE COURT OF APPEAL AT KISUMU
(CORAM: ASIKE-MAKHANDIA, OMONDI & KIMARU, JJ.A)

CRIMINAL APPEAL NO. 89 OF 2020 BETWEEN

DENNIS WAFULA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Bungoma (Ali Aroni, J.) dated 9th June, 2016

in HCCRA No. 68 of 2014)

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JUDGMENT OF THE COURT

1. The appellant, **Dennis Wafula**, was charged with the offence of **robbery with violence** contrary to **Section 296 (2)** of the **Penal Code**. The particulars of the offence were that on 27th December, 2011, in Eluuya Village, Milima Location, in Bungoma District, within Bungoma County, the appellant, jointly with others not before court, while being armed with a dangerous weapon namely *panga*, robbed **Timothy Wekesa Wanyonyi** of his motorcycle make TVS Star Reg. No. KMCM 756M, valued at Kshs.85,000, and at, or

immediately before, or

immediately after the time of such robbery, used actual violence on the said **Timothy Wekesa Wanyonyi.**

2. The appellant denied the charge. The prosecution called five witnesses. It was the prosecution's case that the complainant, **Timothy Wekesa** (PW2), was employed as a *bodaboda* operator by PW1, **Ruth Naliaka.** PW2 told the court that on 27th December, 2011, he was at Naitiri stage, when his colleague, **Edwin Sindani** (PW4), was approached by two men who needed transport services. PW4 had another customer, and he referred the two men to PW2. The men asked PW2 to ferry them to Eluuya. They agreed on a fee of Kshs.100. When they got to their destination in Eluuya, the two men alighted. As PW2 was awaiting payment, one of the men brandished a *panga* that was hidden in his trousers. PW2 fled and left the motorbike behind, as he feared for his life. The two assailants escaped with his motorcycle.

3. PW2 reported the incident at Naitiri AP Post. At the police post, he was informed that his motorcycle had been impounded at Mukuyuni, and that one of the suspects had

been arrested. PW2 attended an identification parade conducted at Kimilili Police

station the following day, and he was able to pick out the appellant as one of the men who robbed him of his motorcycle. PW4 also attended the identification parade and picked out the appellant as one of the customers who had approached him for his services, before he referred them to PW2. PW1 identified the motorcycle registration number KMCM 756M and produced ownership documents.

4. PW3, APC **Bernard Rotich,** was the arresting officer. He told the court that on 27th December, 2011, at about 7.00 p.m., he was on his way to Naitiri when he received word of the robbery involving PW2's motorcycle. He then saw a motorcycle coming from Eluuya direction that was being ridden at a very high speed. The motorcycle hit a pothole and the rider together with a pillion passenger fell off the bike. The pillion passenger managed to escape, but he was able to arrest the rider who was the appellant. He escorted him to Mukuyuni Police Station, together with the recovered motorcycle, registration number KMCM 756M.

5. PW5, Inspector **Samuel Kimathi**, conducted the identification parade with respect to the appellant. It was his

evidence that

the parade was conducted in accordance with the law, and that PW2 and PW4 were able to pick out the appellant as the robber from the parade. He produced the identification parade forms as well as photographs of the motorcycle that the appellant was arrested in possession of.

6. The trial court found that the appellant had a case to answer.

He was placed on his defence. He elected to give an unsworn statement. He gave an alibi defence and stated that he was at a drinking den, on the material night of 27th December, 2011. He left for his home at about 7.30 p.m., and was arrested near a Catholic church at Makunga. He was taken to Mukuyuni Police Station. It was his testimony that he was exposed to the identifying witnesses, prior to the identification parade being conducted.

7. The trial court (Nanzushi, RM), in a judgment delivered on 26th June, 2014, found the appellant guilty as charged. Upon conviction, the appellant was sentenced to death.

8. Dissatisfied by the said decision, the appellant lodged an appeal before the High Court at Bungoma, challenging both his conviction and sentence. His appeal was anchored on the

following grounds: that the trial court took a long time to conclude his trial; that he was not served with the prosecution witness statements; that the investigating officer was not called as a witness; that he did not appear in the photographs of the motorcycle produced before the trial court; that the trial court irregularly shifted the burden of proof from the prosecution to him; and that the trial court failed to consider his defence statement, as well as his mitigation.

9. The learned Judge (Ali-Aroni, J.) (as she then was) found that the appellant was positively identified as one of the robbers by PW2 and PW4 during the identification parade, and that he was arrested in possession of the stolen motorcycle. The doctrine of recent possession was applied. The learned Judge therefore saw no reason to overturn the decision of the trial court.

10. The appellant is now before us on a second appeal. He faulted the learned Judge for failing to find that the prosecution failed to disclose all relevant evidence to the appellant before trial. He was aggrieved that the learned

Judge failed to properly analyze the prosecution's evidence which was riddled with discrepancies. He complained that the learned Judge failed to

find that the trial court did not comply with the provisions of **Sections 200** and **211** of the **Criminal Procedure Code** before convicting him. He complained that his conviction was based upon a defective charge sheet. He took issue with the fact that he was not informed of his right to legal representation, and further that he was not accorded legal counsel at the State's expense during trial. He is aggrieved that his trial took an unreasonably long time to be concluded, and that the identification parade was not conducted in accordance with the law. He faulted the first appellate court for failing to consider his defence as well as his mitigation. He was also aggrieved that the investigation was conducted by an administration police constable, whose rank did not legally allow him to do so. Lastly, the appellant argued that his sentence was unconstitutional and should therefore be reconsidered by this Court.

11. The appeal was canvassed by way of written submissions, which had been duly filed by both parties. It was the appellant's submission that the evidence of identification was not watertight so as to sustain his conviction. He

asserted that the incident took place at about 7.30 p.m., and though PW2 stated

that there was sufficient light which enabled him identify the appellant, he was not able to tell the colour of clothing worn by the appellant on the material night. The appellant explained that the prosecution made no attempt to disclose crucial evidence to the defence, which prejudiced his case.

12. The appellant submitted that the prosecution's evidence was full of contradictions namely: PW2 stated that the stolen motorcycle was make Luman 756M, while the photographs produced in court showed a TVS 5 Model motorcycle; PW3 stated that he arrested the appellant at about 7.00 p.m., while PW2 stated that he transported the assailant at about 7.30 p.m; PW1 stated that the offence was committed on 26th December, 2011, yet the charge sheet indicates 27th December, 2011, while the identification parade indicates 17th December, 2011.

13. It was the appellant's submission that, though the evidence during trial was taken by G.R. Serero (PM), the judgment was delivered by Nanzushi (RM), who did not have the opportunity to observe the demeanour of the witnesses, and that the trial court failed to observe the provisions of

Section 200 of the **Criminal Procedure Code**. He pointed out that the trial court

record was silent on whether the provisions of **Section 211** of the **Criminal Procedure Code** were observed. The appellant was of the view that the charge sheet was fatally defective, as the value of the motorcycle on the charge sheet was indicated as Kshs.85,000, while the cash sale receipt produced by PW1 indicated that it was purchased for Kshs.83,500. He urged that his right to a fair trial was violated by the fact that his trial took an unreasonably long period to be concluded.

14. Lastly, the appellant submitted that the death sentence imposed by the trial court was unconstitutional, as it violated his right to be free from cruel, inhuman and degrading treatment, his right to inherent dignity, and his right to life, enshrined under **Articles 29**, **28** and **25** of the **Constitution**, respectively. He maintained that the sentence was harsh and excessive.

15. The appeal was opposed. Learned prosecution Counsel, **Ms.**

Kibet, made submissions to the effect that the ingredients of the offence of robbery with violence were established by the prosecution beyond any reasonable doubt. She stated

that the appellant was armed with a *panga*, and that the assailants were

more than one. She stated that the doctrine of recent possession was properly applied in this case, as the appellant was arrested in possession of the stolen motorcycle, and that he failed to give a reasonable explanation why a stolen motorcycle was in his possession so soon after the robbery incident. Regarding the alleged inconsistencies in the prosecution's evidence, **Ms. Kibet** submitted that the same were minor and did not vitiate or affect the strength of the prosecution's case.

16. On whether the appellant's alibi defence was properly evaluated, **Ms. Kibet** submitted that since the appellant's testimony was unsworn, it was not subjected to cross-examination, and was therefore of no probative value. On sentence, learned Prosecuting Counsel held the view that the same was lawful and commensurate to the offence. She invited us to dismiss the appeal for lack of merit.

17. 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, it is perverse. See

Kaingo v. Republic [1982] KLR 213.

18. We have carefully considered the record, judgments of both the trial and first appellate court, and the rival submissions set out above, in light of this court's mandate. The appeal turns on the following issues:

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

    ii. ***Whether the charge sheet was defective;***

    iii. ***Whether the appellant's right to a fair trial was violated;***

    iv. ***Whether the appellant's sentence was sound in law.***

19. The appellant's conviction was based on the evidence of identification and the application of the doctrine of recent possession. In ***Kariuki Njiru & 7 others v Republic [2001] eKLR*** this Court stated as follows with regard to evidence of identification:

"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."

20. The robbery incident was said to have occurred at about 7.30

p.m. PW2 and PW4 were the identifying witnesses. They both operated *bodaboda* motorcycles at the material time. The appellant and his accomplice first approached PW4 for transport services, but since PW4 had another customer, he referred them to PW2. PW2 stated that they negotiated the fare and came to an agreement of Kshs.100. However, on reaching their destination, instead of paying the agreed sum, the appellant removed a *panga* he had hidden in his trousers, causing PW2 to flee in fear for his dear life. The appellant and his accomplice then made away with his motorcycle. The appellant was arrested that very night by PW3, while in possession of the said stolen motorcycle. PW3 had been informed of the robbery and lay in wait for the appellant and his accomplice to ride by. He was able to arrest the appellant when he lost control of the motor cycle when he hit a pothole.

21. PW5 conducted an identification parade the following day on 28th December, 2011, where PW2 and PW4 picked out the appellant as one of the assailants. PW2 stated that he was able to identify the appellant at the stage, when he was first introduced to him as a customer, as darkness had not yet set in. PW4, on his part, stated that it was not very dark, and that there were lights at the stage, on the verandas of the shops, which enabled him to positively identify the appellant. We note that the identification parade was conducted the following day when the memory of the witnesses was still fresh.

22. This evidence of identification was not the only evidence that was adduced by the prosecution. There was additional evidence of recovery of the stolen motorcycle from the appellant immediately after the robbery incident. PW3 told the court that after receiving word that the motorcycle in question had been stolen, he came across a motorcycle that was being ridden at high speed. The motorcycle hit a pothole and the appellant and his accomplice fell off from it. The appellant's accomplice managed to escape, but the

appellant was arrested. The recovered motorcycle was the same one that had been robbed

from PW2 a few moments prior to the arrest. The appellant did not give any explanation as to how he came to be in possession of the said motorcycle. We are satisfied that the evidence against the appellant was overwhelming and credible. It displaced appellant's alibi defence which was not worthy of belief.

23. It was the appellant's submission that the charge sheet as drafted was fatally defective as it indicated the value of the motorcycle as Kshs.85,000/=, yet the purchase receipt produced by PW1 indicated that the motorcycle was valued at Kshs.83,500/=. He further pointed out that the charge sheet indicated that the stolen motor vehicle was make TVS Star, yet PW2 testified that the motorcycle that was stolen from him was make Lucman 756M. The recovered motorcycle was identified by PW1 who owned the same, and had employed PW2 as a *bodaboda* rider. Both PW1 and PW2 identified the motorcycle by its registration number KMCM 756M. Regarding the make of the motorcycle, the cash sale receipt produced in evidence indicated that the motorcycle was make TVS Star, which is what appeared on the charge

sheet. The error in the value of the motorcycle is curable under **Section 382** of the **Criminal**

Procedure Code and does not dent the otherwise strong culpatory evidence adduced against the appellant by the prosecution.

24. The appellant made submissions to the effect that his constitutional right to a fair trial was violated. The appellant urged that the prosecution failed to disclose material evidence to him prior to the commencement of trial. He however did not explain in his submissions what evidence was not disclosed to him. He stated that **Section 200** of the **Criminal Procedure Code** was not observed by the convicting magistrate who took over the proceedings from the previous magistrate. He complained that the provisions of **Section 211** of the **Criminal Procedure Code** were not adhered to by the trial court, in that the record was silent on whether the substance of the charge was explained to him again, and whether he was informed of the various options available to him when it comes to giving his defence evidence. The appellant further complained that he was not informed of his right to legal representation, and that no counsel was assigned to him at the expense of the State.

25. We note with concern that all of the above issues relating to the appellant's right to a fair trial were raised by the appellant for the first time on second appeal. The two courts below were not given an opportunity to form an opinion on the said issues, and these grounds cannot therefore form basis of vitiating the decision of the first appellate court. As a Court of final review, this Court is barred from considering issues which were not germane before the two Courts below. We therefore decline invitation by the appellant to consider the same. *(See the decision of this Court in* ***Wamalwa v Republic (Criminal Appeal 224 of 2020) [2024] KECA 742 (KLR) (21 June 2024) (Judgment))****.*

26. That being said, a perusal of the trial court record shows that the said court did comply with the provisions of **Section 200** of the **Criminal Procedure Code** when Hon. Nanzushi (RM) took over conduct of the matter from Hon. Sagero (PM) on 16th June, 2014. The appellant elected for the case to proceed from where it had reached. The record, on 5th July, 2013, also shows that the provisions of **Section 211** of the

Criminal Procedure Code were observed, and that the appellant elected to give unsworn

evidence. He further called two witnesses in his defence. With regard to the right to legal representation, a perusal of the record of the trial court showed that the appellant actively participated in the trial and cross-examined all the witnesses, and it was not evident that he suffered any substantial injustice that would require intervention by the Court to secure him an advocate. That ground of appeal fails.

27. The only question that was raised by the appellant before the first appellate court regarding his right to a fair trial was that his trial took an unnecessary long period of time to be concluded. The appellant was arraigned before the trial court on 29th December, 2011, and the trial court delivered its judgment on 26th June, 2014. This was a period of approximately two and a half years. We note that the delay in conducting the trial was not solely occasioned by the respondent, as the appellant was not produced before the trial court on several occasions by the Prison authorities where he was being held in pre-trial custody for the hearing of his case. Further, at one point the court (Judicial officer presiding) was on transfer, and other times away on official

duties. The delay

cannot therefore be blamed on the prosecution alone or the Court for that matter.

28. The last issue relates to the appellant's sentence. The appellant, upon conviction, was sentenced to death, which sentence was commuted to life imprisonment. The appellant, while citing the Supreme Court decision in ***Francis Karioko Muruatetu & another v. Republic [2017] eKLR***, urged that the mandatory

death sentence imposed by the trial court was unconstitutional, and that it violated his right to inherent dignity and his right to life. He complained that his mitigation was not given a consideration during sentencing.

29. The apex Court has since clarified that their decision in the ***Muruatetu case*** (supra) was in regards to the mandatory 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. See ***Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6***

July 2021) (Directions).

30. For the foregoing reasons, we find that the death sentence imposed by the trial court, and affirmed by the High Court was sound in law, and commensurate with the offence committed. The appellant's appeal on both 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.