IN THE COURT OF APPEAL

AT ELDORET

(CORAM: SICHALE, J. MOHAMMED & KANTAI, JJ.A.)

CRIMINAL APPEAL NO. 9 OF 2019

BETWEEN

DANIEL GITAU NJOKI ……..... 1ST APPELLANT

JOSEPH KINYANJUI…..……....……..... 2ND APPELLANT

VERSUS

REPUBLIC ……..……..…….... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi, ***(Ojwang' & Warsame, J.*** *(as they then were) dated 3rd February, 2009)*
in

H.C.CR.A. NO.S 375 & 384 OF 2005)

JUDGMENT OF THE COURT

[1] Daniel Gitau Njoki (the 1st appellant) and **Joseph Kinyanjui** (the 2nd appellant) and one **Titus Njihia Njoki** were jointly tried and convicted by the Chief Magistrate's Court at Kiambu for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The trial court acquitted **Titus Njihia Njoki** for lack of evidence while the 1st and 2nd appellants were each sentenced to death. Being aggrieved by the conviction and sentence, the two appellants appealed to the High Court.

[2] Upon hearing the appeals the learned Judges of the High Court (Ojwang' and Warsame, JJ. (as they then were), dismissed the appeals finding *inter alia* that: the trial court effectively and properly appraised the evidence and came to the right conclusion that appellants were properly identified as having taken part in the robbery; that in the circumstances of this case, the doctrine of recent possession was applicable; and that the alibi defence put forward by the appellants were not plausible. The two appellants were dissatisfied by the dismissal of the appeal and each filed a second appeal to this Court.

Submissions

[3] When the appeals which were consolidated came up for hearing, this Court was informed via email from the Prison authorities, that the 2nd appellant escaped from Kamiti Maximum Prison. The Court confirmed that the 2nd appellant escaped from prison on 23rd May, 2015. The Court directed that the 2nd appellant's appeal could not proceed in the circumstances but that of the 1st appellant could proceed.

[4] Learned counsel for the 1st appellant, **Mr. Kogi**, clarified that the 1st appellant was abandoning his appeal against conviction and only pursuing the appeal against sentence. Counsel relied on written submissions. He submitted that although this is a second appeal, this Court has the jurisdiction to hear and determine an appeal on sentence if the sentence is unconstitutional. He contended that the mandatory death sentence is unconstitutional and that it would be in order for this Court to interfere with the sentence imposed on the appellant. He relied on the case of ***Vincent Ndunde Murunga [2019] eKLR, Criminal Appeal No. 211 of 2018 (Vincent Ndunde case)*** where this Court set aside the sentence of death and substituted it with a sentence of 20 years imprisonment.

[5] Mr. Kogi further submitted that it was in the interest of justice that the 1st appellant's sentence be reduced. He posited that the 1st appellant has been in custody for 17 years now; that the 1st appellant is 55 years old; and that given the life expectancy of Kenyans of 66 years by the World Health Organization (WHO), the appellant has spent 1/3 of his life in prison.

[6] Learned Public Prosecuting Counsel, **Mr. Muriuki** appeared for the Republic and opposed the appeal. Counsel urged this Court to dismiss the 1st appellant's appeal on sentence on the grounds that since the 1st appellants appeal was on severity of sentence, this Court's jurisdiction is limited under **Section 361 of the Criminal Procedure Code** to matters of law.

Determination

[7] We have considered the record, the submissions, the authorities cited and the applicable law. On a second appeal, like the instant one, our jurisdiction is limited to consideration of matters of law only. ***Section 361 (1) of the Criminal Procedure Code*** provides that:-

> ***"361. (1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section –***
>
> ***(a) on a matter of fact, and severity of sentence is a matter of fact; or***
>
> ***(b) against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence."***

[8] From the record, we note that although the appellants were given an opportunity to mitigate, they did not say anything in mitigation. In sentencing the appellants, the learned trial magistrate applied the sentence provided under **Section 296 (2)** of the **Penal Code**. The trial court does not appear to have considered the circumstances of the case or exercised any discretion in sentencing.

[9] In ***Francis Karioko Muruatetu & Another v Republic, SC Pet. No. 15 of 2015 consolidated with Petition No. 16 of 2015 (Muruatetu case)*** the Supreme Court stated *inter alia* as follows:

> ***"[48] Section 204 of the Penal Code deprives the court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the court of their legitimate jurisdiction to exercise discretion not to impose the death sentence in the appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right.***
>
> **….**
>
> ***[58] To our minds any law or procedure which when executed culminates in termination of life ought to be just, fair and reasonable. As a result, due process is made possible by a procedure which allows the court to assess the appropriateness of the death penalty in relation to the circumstances of the offender and the offence. We are of the view that the mandatory nature of this penalty runs counter to constitutional guarantees enshrining respect for the rule of law.***
>
> ***[59] We now lay to rest the quagmire that has played the court with regard to the mandatory nature of section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial with a resulting sentence under section 204 of the Penal Code, unfair thereby conflicting with Article 25(c), 28, 48, 50(1) & (2)q."***

[10] This Court, in the case of ***William Okungu Kittiny v Republic*,*[2018] eKLR Criminal Appeal No. 56 of 2013***, held that:-

> ***"…the findings and holding of the Supreme Court particularly in paragraph 69 applies mutatis mutandis to section 296 (2) and section 297 (2) of the Penal Code. Thus the sentence of death under Section 296 (2) of the Penal Code provides for mandatory death sentence the Sections are inconsistent with the Constitution."***

[11] The 1st appellant was sentenced to death in accordance with **Section 296(2)** of the **Penal Code** which provides that a person convicted of the offence of robbery with violence "shall be sentenced to death." We concur with **Mr Kogi** that had the trial magistrate considered the circumstances in which the offence was committed, and properly exercised her discretion, she would not have imposed the death penalty as provided under **Section 296 (2)** of the **Penal Code**. In our considered view, a term of imprisonment would have sufficed, in the circumstances of this case.

[12] For the above reasons, the appeal against conviction by the 1st appellant having been abandoned is dismissed. We allow the 1st appellant's appeal against sentence, set aside the death penalty imposed upon him, and substitute thereto a term of twenty (20) years imprisonment effective from 20th July, 2005, the date when the 1st appellant was sentenced.

Dated and delivered at Nairobi this 29th day of January, 2021.

F. SICHALE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a truecopy of the original.

Signed

DEPUTY REGISTRAR