IN THE COURT OF APPEAL

AT KISUMU

(CORAM: NAMBUYE, OKWENGU & SICHALE, JJ.A)

CRIMINAL APPEAL NO. 93 OF 2016

BETWEEN

SWALEY MUHAYA LUBANGA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(*Appeal from the Judgment of the High Court of Kenya at Kakamega (**Ruth Sitati & Njoki Mwangi, JJ**) dated 9th March, 2016*

in

HC.CR. A. No. 49 of 2014)

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JUDGMENT OF THE COURT

1. **Swaleh Muhaya Lubanga** the appellant herein, was tried with two others before the Principal Magistrate's court at Kakamega, on two counts of the offence of robbery with violence contrary to section 296(2) of the Penal Code. In the first count, it was alleged that while armed with dangerous weapons, namely, pangas and crude weapons, they jointly robbed **Jerita Wesonga Matseshe (Jerita**) of various items and used actual violence at the time of the robbery. In count 2, it was alleged that while armed with dangerous weapons, namely, pangas and crude weapons, they robbed **Thomas Mugavana Sakwa (Thomas**), of his mobile phone and a motor cycle registration No. KMCS 696Z and used actual violence at the time of the robbery. The offences were allegedly committed on the 5th July 2012 at Shibuli sub-location in Kakamega County.

2. Following the trial in which Jerita, Thomas and 6 other witnesses testified, the appellant's co-accuseds were acquitted under section 210 of the Criminal Procedure Code, but the appellant was put on his defence, convicted of the two counts and sentenced to death. The appellant appealed to the High Court against the judgment of the trial court, contending that the evidence against him lacked probative value as he was not properly identified nor was he found in possession of any of the alleged stolen items. He also contended that the trial court failed to consider or give any weight to his defence. The High Court (**Ruth Sitati & Njoki Mwangi, JJ**), having heard his appeal, dismissed the appeal holding that the appellant was well known to both Jerita and Thomas who recognized him during the robbery with the aid of electric light, and therefore the issue of mistaken identity did not arise.

3. The appellant is now before us in this second appeal in which he has raised 4 grounds which in actual fact are 3. He faults the trial court for: failing to consider his alibi defence; failing to find that the prosecution had not discharged its duty of proving that the alibi defence was not true; failing to take into account his mitigation; and imposing a sentence which was harsh and manifestly excessive.

4. The appellant was represented by learned counsel **Byron Menezes**, who relied entirely on written submissions which he had filed. Relying on the case of **Johana Ndungu vs Republic, Criminal Appeal 116 of 2005** (unreported), counsel submitted that the crucial ingredients of the offence of robbery with violence were not established, as the appellant was convicted alone. Therefore, he was not proved to have been in the company of one or more persons. Nor was there any evidence that he was armed with any dangerous or offensive weapons, as both complainants were blindfolded, and could not see any weapons. Secondly, counsel for the appellant submitted that the prosecution did not dislodge the appellant's alibi defence in which he claimed that at the material time, he was not at the scene of the robbery but was away in Kericho selling mitumba. In this regard the appellant relied on **Benson Mugo Mwangi vs Republic [2010] eKLR**.

5. Thirdly, it was submitted that the High Court failed to submit the entire evidence that was adduced at the trial to a fresh and independent assessment. **Okeno vs Republic [1972] EA 32** was relied on for the proposition that it is the duty of a first appellate court to reconsider the evidence, evaluate it itself, and draw its own conclusion. Finally, the appellant's counsel argued that the sentence imposed on the appellant

was harsh and manifestly excessive; that neither the trial court nor the High Court considered the appellant's mitigating circumstances; and that the death sentence was unconstitutional as it infringes on the appellant's right to life. In this regard, counsel relied on **Francis Karioko Muruatetu & Anor vs Republic [2017] eKLR**. The appellant therefore urged the Court to allow the appeal.

6. The respondent was represented by **Mr. Kakoi**, a senior counsel from the Office of the Director of Public Prosecutions (ODPP). Mr. Kakoi also relied on written submissions which were filed by the ODPP. In the submissions, it was maintained that the offences against the appellant were proved beyond reasonable doubt, and that the ingredients of the offence of robbery with violence as stated in **Oluoch vs Republic [1985] KLR** were established. It was submitted that the element of theft was brought out by both Jerita and Thomas; that the appellant and his colleagues were armed with dangerous weapons and assaulted Jerita and Thomas; and that the appellant was in the company of two other people when the offence was committed.

7. As regards the appellant's alibi defence, it was submitted that the trial court did weigh the alibi defence against the prosecution evidence, and found the prosecution evidence overwhelming. Finally, it was submitted that the appellant was properly convicted and sentenced to death, and that the appeal was unmeritorious and ought to be dismissed.

8. This being a second appeal, our mandate is limited to considering matters of law only (see section 361 of the Criminal Procedure Code (CPC)). As was held in **M'Riungu v Republic [1983] KLR 455**:

> **"Where a right of appeal is confined to questions of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat the findings of fact as holdings of law or mixed finding of fact and law, and it should not interfere with the decision of the trial court or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law."**

9. In his memorandum of appeal and the written submissions, the appellant has raised issues concerning his identification, proof of the ingredients of the offence of robbery with violence, his alibi defence and the sentence imposed against him. Apart from the issue of sentence which we shall shortly address, it is evident that the issues raised by the appellant are issues of law.

10. The evidence that nailed the appellant was basically the evidence of identification. As was stated by this Court in ***Wamunga vs. Republic [1989] KLR 424***:

> **"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of mere identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification".**

11. It was therefore necessary that the evidence regarding the appellant's identification be carefully considered and analyzed. The two complainants, Jerita and Thomas testified that they were attacked at about 7.30 p.m. by three people. As it was dark, they did not identify their assailants until the robbers decided to move to the home of Jerita with the intention of robbing her of her TV and DVD. Upon reaching the home Jerita's son put on electric lights that were inside and outside the house. It was at that stage that both Jerita and Thomas swore that they were able to see and recognize the appellant as a person well known to them. As the robbers embarked on their mission, Thomas managed to escape and immediately reported to **Emanuel Omwaka Odhiambo** (Emanuel), that the appellant was one of those who had attacked them. Similarly, Jerita upon being rescued reported that she had recognized the appellant as one of those who attacked them. Both Jerita and Thomas knew the appellant well, as Jerita who was a teacher in the locality used to see him as she walked to school, while Thomas had known the appellant since he was young since they used to play football together.

12. The learned Judges of the High Court analyzed the circumstances of appellant's identification and came to the conclusion that he was recognized by the two witnesses. On our part we come to the same conclusion that the evidence of Jerita and Thomas left no doubt that the appellant was one of the three men who attacked and robbed them. The evidence of identification of the appellant was therefore safe to rely upon, and was also sufficient to dislodge the appellant's alibi as he could not have been in Kericho if he was at the scene of the robbery in Kakamega County.

13. With regard to the elements of the offence of robbery with violence, In Criminal Appeal No 116 of 1995 **Johana Ndungu vs Republic [1996] eKLR,** this Court had this to say about the elements of the offence of Robbery with Violence:

> ***"The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s.296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:***
>
> > ***1. If the offender is armed with any dangerous or offensive weapon or instrument, or***
> >
> > ***2. If he is in company with one or more other person or persons, or***
> >
> > ***3. If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.***
>
> ***Analyzing the first set of circumstances the essential ingredient, apart from the ingredients including the use or threat to use actual violence constituting the offence of robbery, is the fact of the offender at the time of robbery being armed with a***

dangerous or offensive weapon. No other fact is needed to be proved. Thus if the facts show that at the time of commission of the offence of robbery as defined in S.295 of the Penal Code, the offender was armed in the manner afore-described then he is guilty of the offence under sub-section (2) and it is mandatory for the court to so convict him.

In the same manner in the second set of circumstances if it is shown and accepted by court that at the time of robbery the offender is in company with one or more person or persons then the offence under sub-section (2) is proved and a conviction thereunder must follow. The court is not required to look for the presence of either of the other two set of circumstances.

With regard to the third set of circumstances there is no mention of the offender being armed or being in company with others. The court is not required to look for the presence of either of these two ingredients. If the court finds that at or immediately before or immediately after the time of robbery the offender wounds, beats strikes or uses any other violence to any person (may be a watchman and not necessarily the complainant or victim of theft) then it must find the offence under sub-section (2) proved and convict accordingly."

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14. Both Jerita and Thomas testified that their attackers were three. The fact that the other 2 accused persons were acquitted does not change this fact. All it means is that the two who were charged were not the ones who were with the appellant, but the appellant was actually in the company of 2 others. Contrary to the contention of the appellant, both Jerita and Thomas testified that they saw the appellant and his companion armed with crude weapons. It is evident that both were actually injured as a result of being assaulted by the assailants. Therefore, although only one ingredient was sufficient to establish the offence, the evidence revealed more than one of the necessary ingredients. We are therefore satisfied that the offences of robbery against Jerita and Thomas were both established.

15. As regards the appellant's alibi, in light of the evidence of Jerita and Thomas, that he was one of the assailants, it was obvious that he could not have been in Kericho as he alleged and the prosecution therefore discharged the burden of disproving the alibi. We therefore find no merit in the appeal against conviction, and dismiss the same.

16. As regards the appeal against sentence, under section 361 of the CPC, severity of sentence is a matter of fact and not law. However, we note that the magistrate who sentenced the appellant did not exercise any discretion but simply imposed the death sentence without considering the circumstances or appropriateness of the sentence. The learned Judges of the High Court also similarly did not consider the circumstances.

17. Contrary to the submissions made by the appellant's advocate the death sentence remains a legal sentence to be imposed in appropriate circumstances. What the Supreme Court held to be unconstitutional in **Francis Karioko Muruatetu & Anor vs Republic** (supra), is the mandatory nature of the death sentence as provided under section 204 of the Penal Code, as it takes away the discretion of the trial court in imposing an appropriate sentence.

18. In the appellant's case although a motor cycle was stolen during the robbery, and the complainants were assaulted, they did not suffer fatal or serious injuries. We believe that had the trial magistrate considered the circumstances and properly exercised his discretion, he would have found a term of imprisonment rather than a death sentence more appropriate.

19. For these reasons, we allow the appeal against sentence, to the extent of setting aside the sentences of death that was imposed upon the appellant and substituting thereto a sentence of 20 years' imprisonment on each count of robbery with violence, with effect from 15th April, 2014 which is the date the appellant was convicted. The offences having been committed at the same time, we order the sentences to run concurrently.

Those shall be the orders of the Court

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

R. N. NAMBUYE

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY ***REGISTRAR***