IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 141 OF 2015

WILLIAM TARIBO MUKENYA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya (Hon. R. Sitati and Hon. A. C. Mrima, JJ.) dated 24th July 2015 against conviction and sentence. ***in Kakamega CRA No. 110 of 2013)***

JUDGMENT OF THE COURT

This second appeal arises from the judgment of **R. N. Sitati** and **A. C.Mrima, JJ.** dated 24th July 2015.

The brief background to the appeal is that the appellant was charged in the Senior Principal Magistrate's Court at Mumias in **Criminal Case No. 969 of 2011** with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code**. The particulars of the offence were that the appellant on the 4th day of November 2011 at about 1.00am at Umalla Gulu village, Bungasi sub-location, Musanda Location in Mumias District within Kakamega County while armed with a jembe robbed **Susan Azulu Mukenya** kshs. 4,500/= and immediately after the time of such robbery used actual violence on the said **Susan Azulu Mukenya**. The appellant denied the charge prompting the prosecution to call four (4) witnesses in support of the charge, while the appellant who gave sworn evidence was the sole witness for his defence.

At the conclusion of the trial, the learned trial magistrate (**H. Wandere, PM**) analyzed the rival position on the record before him and concluded inter alia as follows:

> **"...The incident happened at night. The complainant and PW2 were able to identify the accused. He had called out to her before he broke the door open. The complainant broke up because she heard and recognized his voice. It was her son but before she could walk to the door he had already broken it open and was inside. She had managed to light a tin lamp. PW2 had lit her torch on the mobile. They saw accused clearly even described his clothes to the police. They were able to see him because of the tin light and torch light.**
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> **I have considered what accused said in defence. The same is a mere denial. He was able to cross examine his mother the complainant at length. She told accused that she loved him and had him arrested for what he did to her. He never raised the issue of forcing the wife to sell changaa or others who had committed this offence, got arrested and set free by the police. Neither did he raise that issue when he cross examined PW3.**
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> **The evidence available in this matter boils down to recognition. The prosecution have proved the same beyond reasonable doubt. Accused is guilty as charged. I convict him under section 215 Criminal Procedure Code."**

Aggrieved, the appellant appealed to the High Court raising various grounds. The learned judges of the High Court, reevaluated the record in light of the rival submissions before them, identified three issues for determination and after taking into consideration principles of law that guide the Court in the determination of those issues and applying the thresholds therein to the rival positions before the Court, pronounced themselves on those issues as follows:

> **"28. From the above analysis and going by the evidence adduced before the trial court, we find that the recognition of the appellant by PW1 and PW2 was free from error and hence safe.**
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> **32. We therefore find no reason to disbelieve the evidence of PW1, PW2, PW3 and PW4. We find that the prosecution proved that PW1 was robbed of her money being kshs.4,500/= by the appellant herein and that in doing so the appellant used actual**

violence on PW1. This was also medically proved.

33. On the allegations that the investigations were incomplete, we have gone through the record before the trial court and noted that the investigating officer visited the scene, recorded statements from witnesses, issued P3 form to PW1 and endeavoured to avail witness to Court. We do not think that there was anything significant that he did not do that may have amounted to the alleged inadequacy of the investigations. In reaching that conclusion, we remain aware of the appellant's submission that the prosecution failed to avail the arresting officer. It is on record that the appellant was arrested by a member of public given that the robbery was an issue of public knowledge and immediately PW1 availed herself. She was personally present when the appellant was escorted to the village elder and then to the police. According to PW1, the only reason why the appellant had been arrested was in connection with the robbery and not otherwise. We do note that under section 143 of the Evidence Act, Chapter 80 of the Laws of Kenya, the prosecution is at liberty to decide on which witness to avail in a trial. The only danger in failing to avail a crucial witness is that the Court may infer that such evidence which was not adduced would have adversely affected the prosecution. (See Bukenya and Others vs. Uganda [1972] EA 549, Joseph Munyoki Kimatu vs. Republic [2014]eKLR among others).

34. However in this case, the member of public who arrested the appellant was not such a crucial witness as the reason why the appellant was arrested was quite clear and as so explained by PW1 who was personally present from the time of arrest upto handing over to the police.

35. We are further not convinced that there are any material inconsistencies in the proceedings before the trial court which can lead to the trial being rendered unreliable and a nullity. However, in the event there are any inconsistencies, the same are curable under section 382 of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya, given that no miscarriage of justice was occasioned.

36. We have also had a look at the appellant's defence. The same centers on how he was arrested and also introduces the issue of a grudge with PW1 arising out of PW1's insistence that the wife of the appellant engages in an illicit brew business which the appellant was not agreeable to. We have looked at the entire proceedings and noted that the appellant never raised this issue during cross examination of PW1. We therefore find that the same is an afterthought and we hereby reject the same. Be that as it may, PW1 testified that the appellant is not married and has no house at home as he used to stay in his elder brother's house.

Without in any way shifting the burden of proof, we also note that the appellant stated that he is married to Lilian Nekesa and they had a one-moth baby and when the appellant was prompted by the prosecution (during cross-examination) as to why he was not considered the wife a witness, he responded as follows:

> ***"My wife may lie to court so as to assist me as her husband."***

We are therefore left wondering on what exactly the appellant meant or was driving at by the above utterance,

37. Further the appellant did not deny that on the said day he was at home as he clearly stated as follows:

> ***"On the night in issue, I was in my house with my wife called Lilian Nekesa. Our child was a month old. My mother's home is about 70metres from mine. My younger mother was also in the homestead."***

We therefore find that the appellant's defence was properly and rightly considered by the trial court and when weighed in light of the prosecution's evidence, that defence did not shake the prosecution evidence as to create any reasonable doubt in the mind of the Court. We therefore return the finding that the offence which the appellant faced was rightly proved in law.

39. The constitutionality of death sentence has been a subject of serious litigation over time. The Court of Appeal in a bench comprising five judges in the case of Joseph Njuguna Mwaura & 2 Others vs. Republic, Criminal Appeal No. 5 of 2007 unanimously upheld the constitutionality of death penalty in capital offences including robbery with violence. In the absence of any review or change in the law, the foregone holding remains the only applicable law and we have no hesitation in so following that decision. Indeed, the same is binding upon us. We therefore reject the contention that the sentence of death is unconstitutional since it remains lawful in Kenya and we do uphold the same.

40. Having carefully and in great detail considered the appeal before us, we have come to the finding that the appeal lacks any merit and is hereby dismissed. The decision of the learned trial magistrate on conviction and sentence is hereby affirmed. Right of appeal within 14 days."

It is against the above background that the appellant is now before this Court on a second appeal raising only one ground of appeal in his memorandum of appeal dated 2nd June 2020. It is the appellant's single complaint that:

> **"1. The trial court erred in law and fact by sentencing the appellant to death without exploring other forms of punishment or meting down the death sentence to a termly sentence given that the mandatory death sentence has been removed by the Supreme Court."**

The appeal was canvassed virtually through written submissions that were orally highlighted by learned counsel for the respective rival parties herein. Learned counsel **Mr. Kouko Cecil Wilson** appeared for the appellant; while **Mr. Edward Kakoi**, the learned Principal

Prosecution Counsel (PPC) appeared for the State.

It is the appellant's submission that he has been in custody for nine (9) years as at the time of the hearing of this second appeal. The appellant appreciates that whereas **section 296(2)** of the **Penal Code** provides that an offender convicted for robbery with violence in circumstances stipulated for therein *"shall be sentenced to death"*, that positon was altered by the Supreme Court in the case of **Francis Karioko Muruatetu vs. Republic [2017]eKLR**, when on 14th December 2017, the Supreme Court declared that the mandatory death sentence is unconstitutional since it is human degrading treatment. The appellant therefore submits that as a Kenya Citizen equally protected by the Constitution he should also benefit from that ruling.

It is also the appellant's position that while he agrees that the **Muruatetu** decision [supra] did not outlaw the death penalty and that the penalty is still applicable as a discretionary maximum penalty for the offence of robbery with violence, the appellant humbly prays that the penalty as meted out against him by the trial court and affirmed on appeal should be revisited and interfered with, notwithstanding that the issue was raised before the learned Judges of the High Court on first appeal who declined to accede to the appellant's request.

The appellant's reason for urging this Court to accede to his request before this Court is because the circumstances prevailing in the **Muruatetu** case [supra] and on the basis of which the Supreme Court revised the sentence therein are similar to those prevailing herein on the basis of which the appellant contends that since it is not disputed that he had not been convicted of any prior offence he ought not to have been given the maximum penalty especially when the value of the property robbed was kshs. 4,500.00 and although the complainant suffered injuries, the period of nine (9) years the appellant has spent in custody is sufficient punishment for the offence committed.

Lastly, the appellant also urged us to be guided by the 2016 judiciary sentencing policy guidelines and the High Court decision in the case of **Dahir Hussein vs. Republic [2015]eKLR** on the objectives of sentencing; that the objectives include; deterrence, rehabilitation, accountability for one's actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim; and that sufficient basis has been laid to warrant interference with the sentence handed down against him by the trial court and affirmed by the High Court along the lines suggested above by him.

In rebuttal, the State submitted that the appellant stands nonsuited on his appeal for reasons firstly, that this Court is limited by dint of **section 361(a)** of the **Criminal Procedure Code** (CPC) to deal with matters of law only but not to delve into matters of fact which have been dealt with by the trial court and reevaluated by the first appellate court. In support thereof, the state relied on the principle enunciated in the case of **Njoroge vs. Republic [1982] KLR 388** as reiterated in the case of **Chemagong vs. Republic [1984] KLR 611** among numerous others that:

> **"On second appeal, the Court should focus on points of law accepting and being bound by the concurrent findings of fact by the two courts below, unless those findings were not backed by evidence, or are based on a misapprehension of the evidence, or the two courts are shown demonstrably to have acted on wrong principles in making those findings."**

Applying the above threshold to the rival position herein the respondent submitted that going by the content of the appellant's submissions, the conviction has not been challenged. What has been challenged is the legality of the sentence for which no basis has been laid to warrant interference with the sentence handed down against the appellant by the trial court and affirmed on first appeal.

To buttress the above submission, the respondent has urged the Court to bear in mind the fact that there are no mitigating factors in regard to the appellant's action. Instead his action was aggravated by the fact that the victim was the mother of the appellant; the appellant is not remorseful for what he did to his own mother; and in the cause of robbing his mother, he also assaulted and threatened to rape her. In addition, there is nothing to show that he is a reformed person attending counselling or theological classes or that if released he will be a productive member of the society. On that account, the respondent urged that the sentence is proportionate to the offence considering that the appellant attacked and robbed the very person he is obligated in law to protect; and that though the amount robbed may appear small, the Court should focus on the circumstances under which the offence was committed and the relationship between the appellant and the complainant. The respondent urged us to find the appeal unmeritorious and dismiss.

This is a second appeal. Our mandate is as has been highlighted in **Chemagong vs. Republic** case [supra]. We have considered the record in light of the respective parties rival submissions as assessed above and the single ground of appeal that the appellant has invited us to pronounce ourselves. It is common ground that by dint of **section 361(1)(a)** of the **Criminal Procedure Code**, our mandate on a second appeal is limited to matters of law only; and that matters pertaining to sentence are matters of fact. Notwithstanding the above crystallized position, the appellant urges that the peculiar circumstances of this appeal bring it into the parameters set by the Supreme Court decision in the **Muruatetu** case [supra] by virtue of which this Court has severally revisited and pronounced itself

on this issue and that we should likewise pronounce ourselves thereon. Although neither party referred us to any of such decisions (where the Court has been similarly invited in a like manner), we take judicial notice of the fact that this is not the first time this Court has been invited to pronounce itself on this issue.

Raphael Mourice Muriu Ngoya & Another vs. Republic [2019]eKLR is one among numerous others in which the Court when similarly confronted expressed itself as follows:

> **"On resentencing, we stand guided by the new jurisprudential guidelines set out in the Supreme Court case of Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15/2015 [2017] eKLR in which the apex court held at paragraph 69 as follows:**
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> > **"Consequently, we find that section 203 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory deaths sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum penalty".**

Similarly, this Court in **William Okungu Kittiny vs. Republic, Criminal Appeal No. 56 of 2013** had this to say:

> **"From the foregoing, we hold that the findings and holding of the Supreme Court, particularly in Paragraph 69 applies Mutatis Mutandis to Section 296(2) and 297 (2) of the Penal Code. Thus the Sentence of death Under Section 296(2) and 297(2) of the Penal Code is a discretionary maximum punishment."**

See also **Wycliffe Wangusi Mafura vs. Republic [2018]eKLR**, where the Court stated as follows;-

> **"We also said in William Okungu Kittiny's case (Supra) that the decision of the Supreme Court in Muruatetu's case has immediate and binding effect on all other courts and that the decision did not prohibit courts below it from ordering sentence rehearing in any matter pending before those courts. Accordingly, since this appeal had not been finalised, this Court has jurisdiction to direct a sentence re-hearing or pass any appropriate sentence that the trial magistrate's court could have lawfully passed."**

In light of the above jurisprudential trend emanating from this Court, this Court must first consider whether the death penalty imposed on the appellant was merited. The circumstances to be borne in mind when making such a decision include the value of the property robbed; the gravity of the injuries the victim sustained in the course of the robbery and whether the appellant had a chance to mitigate at the trial. If the Court is satisfied that the death sentence was not appropriate, there are two approaches open to this Court in the disposal of this appeal. One is for us to first of all set aside the death sentence handed down against the appellant by the trial Court and affirmed by the 1st appellate court and resentence the appellant taking into account the relevant circumstances. Alternatively, we may remit the appellant to the High Court for resentencing.

In this appeal the value of the property of which the victim was robbed was Kshs.4,500.00, secondly, although the victim suffered grave injuries, she recovered with no major disability and lastly, although the appellants mitigated at the trial, the mitigation was not taken into account nor did the trial court exercise any discretion in sentencing the appellant as the death penalty was the only lawful sentence the trial court was capable of handing down against the appellant. We note that this position has now changed in light of the jurisprudential set by the Supreme Court.

We find that this is an appropriate case for review of the appellant's sentence. However, in view of the fact that the appellant has been in prison of rover 9 years now since his conviction, we find it prudent to bring this appeal to conclusion by reviewing the sentence ourselves instead of sending the appellant back to the first appellate court or the trial court for that exercise. Taking into consideration the totality of the circumstances that we have already adverted to, particularly the fact that the victim of the robbery was the appellant's mother who was injured during the robbery, the ends of justice to both the victim and the appellant will best be served by setting aside the death penalty handed down against the appellant and substituting thereto a deterrent term of imprisonment.

Accordingly, we set aside the death sentence imposed against the appellant and substitute it with a sentence of thirty (30) years imprisonment. The appeal has therefore succeeded only to this limited extent.

DATED** and **DELIVERED** at **NAIROBI** this 29th **day of January, 2021.

R. N. NAMBUYE

JUDGE OF APPEAL

HANNAH OKWENGU

JUDGE OF APPEAL

F. SICHALE

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR