



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KARANJA & SICHALE, JJA)

CRIMINAL APPEAL NO. 8 OF 2017

BETWEEN

JAMES MWANGI MAINA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a Judgment and Decree of the High Court of Kenya at Nairobi (Fred A. Ochieng & L. A. Achode, JJ.) dated 14th February 2012

in

H.C.C.R.A. NO. 109 OF 2008)

JUDGMENT OF THE COURT

1. This is a second appeal against the judgment of the High Court where a two-judge bench (Fred A. Ochieng & L. A. Achode, JJ.) upheld the appellant's conviction on two counts of the offence of robbery with violence and the resultant death sentence as meted out by the Chief Magistrate's Court (Karani (Miss) – Resident Magistrate).

2. A brief background of this appeal is that on the night of 25th July, 2005 while Samson Otieno Mangogo, PW1, was seated in his bar in Kayole area, the appellant together with four others came in and ordered everyone to lie down. One of them ordered PW1 at gun point to hand over his phone, Bird model, and money amounting to Ksh.1500; shortly after the five left, PW1 heard gun shots and the sound of people running. He then used his wife's phone to inform a police officer, one Police Constable Wekesa, who was previously known to him, of the incident. P.C Wekesa in turn prompted other police officers, including PW3, Police Constable Ronald Nyachae, to go to the crime scene in hot pursuit after the assailants. According to David Njuguna, PW2, the appellant and another came into his 'simu ya jamii' shop to make a call and upon realizing that one of them had a gun, he raised an alarm causing them to flee. He recognized the appellant as one of his customers who had frequented his shop for over two years.

3. According to PW3, one of the robbers was shot dead during an exchange of fire between the police and the assailants during the police chase. He arrested the appellant three days later after he was informed of his whereabouts by PW2.

4. The appellant was arraigned before the Chief Magistrate's Court at Makadara and charged with two counts of robbery with violence contrary to **section 296(2)** of the Penal Code: On the first count, he was charged with robbing PW1 of Kshs. 1,500.00 and a mobile phone, Bird model, while armed with a pistol; Count 2 robbing PW2 of a 'simu ya jamii' phone, Motorola model, valued at Kshs. 3,500.00.

5. The appellant pleaded "not guilty" to the charges preferred against him and the matter proceeded to full hearing with the prosecution calling three witnesses in support of its case. On his part, the appellant gave an unsworn statement of defence and called no witnesses.

Ultimately, the trial court found him guilty as charged and sentenced him to death.

6. Aggrieved, the appellant filed his first appeal against both conviction and sentence, before the High Court on grounds that the trial court: failed to caution him of the serious consequences of his conviction in violation of his constitutional rights and that the resultant sentence was unconstitutional; rejected his application to recall PW1 and PW2 for further cross-examination in violation of his constitutional right to being provided with adequate time and facilities to prepare his defence; failed to find that he was not properly identified; failed to consider his defence despite it casting doubt on the prosecution's case and; failed to find that the Prosecution did not prove its case beyond reasonable doubt and to the required standards.

7. Upon reanalyzing and reconsidering the evidence adduced before the trial court and arguments by both parties, the first appellate court found the appeal to be devoid of merit and dismissed it.

8. The appellant now proffers this second appeal relying on both his home-grown grounds and the grounds drafted by his counsel on record. In a nutshell, the appellant challenges the first appellate court's decision on the grounds that the learned Judges erred by: failing to note that the appellant was not properly identified; failing to properly exercise their duty to re-evaluate and re-analyze the evidence before them and by finding that the prosecution proved its case beyond reasonable doubt.

9. During the plenary hearing, parties were represented by learned counsel, Mr. Amutala appeared for the appellant while Prosecution Counsel, Mr. Njeru, appeared for the State/respondent. The appeal was canvassed through both written and oral submissions.

10. Urging the Court to allow the appeal, Mr. Amutala submitted that the identification of the appellant was dock identification in violation of the provisions of the Police Force Standing Orders. He maintained that the appellant ought to have been identified through an identification parade as he was not known to PW1 prior to the material day.

11. Mr. Amutala contended that the first appellate court did not properly exercise its duty by failing to note that by the trial court failing to specify which count the appellant was being convicted and sentenced on, one of the counts was left in abeyance as the appellant could not have been sentenced to death twice.

12. On the issue of sentencing, counsel urged the Court to consider the time already served by the appellant as he was arrested in July 2005 and had been in custody all through trial. He maintained that there was no fatality during the robbery incident and that the appellant was remorseful and had since reformed.

13. Opposing the appeal Mr. Njeru, learned prosecution Counsel submitted that the first appellate court properly exercised its duty and did not err in reaching concurrent findings with those of the trial court. He contended that the prosecution established the offence of robbery with violence as against the appellant to the required threshold through irrefutable evidence.

14. On identification, counsel submitted that PW1 properly identified the appellant as he was the one guarding him during the ordeal which took about 5 to 10 minutes in a well-lit place by electric lights. Further, that he clearly identified the appellant by a scar on his face, a fact he pointed out during his testimony before the trial court. He maintained that PW1 had ample opportunity to identify the appellant and that on the day he was identified by PW1 and arrested, his attempt to flee was inconsistent with his asserted innocence.

15. On the issue of sentencing, Mr. Njeru submitted that the same was deserved and properly meted out by both courts below as PW1 and PW2 were threatened with a lethal weapon and that the appellant and his co-assailants even shot at the police officers who had pursued them. Further, that both courts below found that the appellant was not remorseful, and his mitigation was not compelling.

16. The duty of this Court as the second appellate Court is as was set out in

Karani v. R [2010] 1 KLR 73 wherein this Court stated thus:-

“This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.”

17. Having considered the record of appeal in its entirety, the evidence on record and rival submissions it is apparent that the issues for determination before this Court are:-

a) Whether failure to specify the Count on which the appellant was convicted and sentenced invalidated the Court's verdict.

b) Whether the appellant was properly identified.

18. On the first issue, the appellant argued that the learned Judges erred by upholding the trial court's decision despite the fact that the trial court did not specify which count he had been convicted and sentenced on. Further, that it was illogical to impose a death sentence twice.

19. **Section 169 (2)** of the Criminal Procedure Code provides as follows:-

“(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.”

(Emphasis supplied)

The consequence of the failure to comply with this provision was explained in the case of **Baland Singh v. R Criminal Appeal No. 483 EA** (does the citation have the year?) where the court expressed itself as follows:-

“...any failure to comply with the provisions of section 169, aforesaid, is an irregularity, even though no certificate has been granted that the case is fit for appeal on grounds of fact or mixed fact and law such irregularity will entitle and indeed oblige the Court of Appeal to examine the facts of the case with a view of determining whether there has been a failure of justice....”

(Emphasis supplied)

See also this Court’s decision in **Republic v. Edward Kirui (2014) eKLR** where it stated thus:-

“A mere non-compliance with section 169 of the Criminal Procedure Code does not render the entire trial a nullity.”

20. Admittedly, it is evident that the trial court failed to specify the count on which conviction and sentence were based. However, as seen in the aforementioned case law, although the trial magistrate failed to comply with the provisions of **Section 169** of the Criminal Procedure Code, this alone cannot nullify the trial unless it can be demonstrated that such failure occasioned a miscarriage of justice or prejudice to the appellant.

21. The appellant in his submissions has not demonstrated any miscarriage of justice or prejudice occasioned by such error. Moreover, a careful perusal of the decisions of both courts below show that they reached concurrent findings of fact upon which they both relied to support the conviction and sentence as meted out by the trial court. Specifying the counts separately would not change the outcome of the court’s verdict in anyway as the appellant cannot be sentenced to death twice. That ground of appeal therefore, falls by the way side.

22. On the second issue, on one hand, it was the appellant’s argument that the High Court erred by failing to find that identification by PW1 was not proper as the same was dock identification in violation of the provisions of the Police Force Standing Orders. On the other hand, opposing counsel argued that PW1 had ample opportunity to identify the appellant as he was right next to him for about five to ten minutes during the incident and that the crime scene was well lit by electric light. In addition, he argued that PW1 identified the appellant by a scar on his face.

23. It is not in contention that PW1 did not know the appellant prior to the incident, therefore, it was necessary that an identification parade be conducted when PW 1 was called to the police station to identify his assailants. However, Pw 2 knew the appellant well before the said incident and he did not need to identify him through an identification parade. We note that the chain of events was such that the same robbers who robbed PW1 are the ones who went to Pw2’s premises and carried out the second robbery.

24. From the foregoing, it is clear that the evidence on record as recounted by PW2 corroborated PW1’s evidence as far as the identification of the robbers was concerned. PW1’s and PW2’s evidence was taken into account by both courts below which reached similar findings of fact as to the events leading to the appellant’s arrest, arraignment, and resultant conviction and sentence. Therefore, this court cannot interfere with such findings unless they are based on a misapprehension of the evidence or the law. (See: **Chemangong v. R (1984) KLR 611** and **Kaingo v. R (1982) KLR 213 at p. 219**).

25. Consequently, since the prosecution also relied on PW2’s evidence of identification, the lack of an identification parade process with regards to PW1’s evidence of identification did not invalidate its case. The corroborative evidence by PW2 tied the appellant to the crime committed against PW1.

26. Considering the above, the appellant has not proved his case on how the two courts below erred in finding that he was properly identified. In view of the foregoing, we are not persuaded that the appeal against conviction has merit and in the result, the same is hereby dismissed.

27. On the sentence, although the death sentence is still lawful in this country and can still be meted out depending on the peculiar circumstances of each case, since the advent of the Supreme Court decision in **Francis Karioko Muruatetu and another vs. Republic, [2017] eKLR** courts have been empowered to mete out sentences other than the death sentence in capital offences such as the one that is the subject of this appeal. We have considered the mitigation tendered by the appellant before the trial court, the circumstances of the case including the fact that one person, who was part of the gang lost his life in the course of the robberies and the length of the appellant’s incarceration.

28. Bearing this in mind, we set aside the death sentence and substitute therefor a sentence of 25 years Imprisonment on both counts

(including the one that was left in abeyance) . The sentences will run concurrently.

Dated and delivered at Nairobi this 19th day of February, 2021.

W. OUKO, (P)

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JUDGE OF APPEAL

W. KARANJA

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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