IN THE COURT OF APPEAL

AT KISUMU

(CORAM: KIAGE, SICHALE & KANTAI, JJ.A)

CRIMINAL APPEAL NO. 61 OF 2016

BETWEEN

AGGREY MUGESANI..APPELLANT

AND

REPUBLIC..RESPONDENT

*(Being an appeal from conviction and sentence of the High Court of Kenya at Kakamega (**Ruth Sitati & Njoki Mwangi, JJ**.) dated 1st March, 2012*

in

H.C. Cr. A. NO. 471 OF 2009)

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JUDGMENT OF THE COURT

As happens in our rural settings, residents will know each other by their real names, by appearance, or by nicknames. There will be various reasons for use of nicknames and where they are used, the real names of those known by nicknames may never be known.

At a village called **Lyananginga** in **Vigulu sub-location in Vihiga**, the appellant **Aggrey Mugesani**, was known as "**Moi**". That is what his friends called him, even the village elders knew him by that name.

At around midnight on the night of 27th and 28th September, 2010, **Grace Andisi** (**Grace-PW1**) of the said **Lyanaginga villag**e was in her house packing a bag as she was to travel to Kitale in the morning. She had secured the main door and the room was illuminated by a lantern. Unbeknown to her, someone had, probably during the day interfered with the door by unfastening the hinges. Grace suddenly saw that door cave in and three men, led by the man she knew as "**Moi**", entered the room. They had torches and were armed with pangas. Moi walked directly to her and, unprovoked, and although she did not offer any resistance, he cut her on the head. Meanwhile the others took two mobile phones from her and a radio from the room and, as they were escaping, Grace ran after them screaming, shouting that she had been robbed and injured by men who included Moi. She described the clothes Moi was wearing and stated that the men had not covered their faces or concealed themselves in any way.

Rhoda Amimo (**Rhoda-PW2**), Grace's neighbour, was attracted by the commotion and on emerging from her house, she saw men running from Grace's house with Grace in pursuit. She (**Rhoda**) and other neighbours who had by now gathered, assisted Grace to go to **Lyanaginga Health Centre** and en-route there, Grace informed Rhoda that it was Moi who led the gang that had attacked her and it was he (Moi) who had cut her on the head. Rhoda knew the appellant by the said nickname.

On 29th September, 2010 (a day after the incident) the appellant surrendered himself to **Jemima Muluku (PW4 – the Assistant Chief**) who summoned **APC James Singwa** (**PW3)** who arrested the appellant

and detained him at Vihiga Police Station, and was thereafter charged in court. The Assistant Chief knew the appellant by his said nickname.

The other piece of evidence before the trial court was that of **Tom Kafuja Homa** (**PW5**) a village elder of that village. He was visited on the night of 28th September 2020 by some ladies including Grace and Rhoda. He observed a bandage on Grace's head and on questioning, Grace informed him that she had been attacked by three people who included "**Aggrey Mugesani alias Moi**". He was given particulars of stolen items and he telephoned the Assistant Chief and informed her accordingly.

Dennis Chirchir (**PW6**), a Clinical Officer at Mbaja Health Centre examined Grace on 28th September, 2010 who had been assaulted and sustained injuries. He saw a cut wound on the forehead and produced a P3 form in court as part of the evidence.

That is the background that led to the charge being laid against the appellant – **Robbery with Violence contrary to Section 296(2)** of the Penal Code particulars being that on the night of 27th and 28th September 2010 at Vigulu Sub-location of Mungoma location in Vihiga, jointly with others not before court, while armed with dangerous weapons namely pangas, rungus and bright torches, they robbed Grace of two mobile phones and a radio, all to the value of Kshs. 9100 and at immediately before or immediately after the time of such robbery, they used actual violence to the said person.

We observe in passing, although this is not of much moment, that the charge sheet lists, amongst the dangerous weapons, "bright torches". How, tell, will 'bright torches' be a dangerous weapon? Torches will ordinarily be used for illumination – to light up a place in the hours of darkness. The user of the torch will want to observe his surroundings in a dark place and it would be unusual that the torch, a source of light, be used as a weapon, let alone a dangerous one! But we shall never know what informed the drafting of the charge sheet at Vihiga Police Station.

Put on his defence the appellant gave sworn testimony where he stated that he was at home on 29th September, 2010 when he was informed of an allegation being made in the village that he had robbed and injured Grace. He surrendered himself to the local administration, was detained at Vihiga Police Station and was thereafter charged in court. He denied the charge, wondering whether, if he had robbed and injured Grace, would he have surrendered himself to police?

The trial magistrate evaluated the prosecution case and the defence offered and in a judgment delivered on 15th June, 2012, the appellant was convicted and sentenced to life imprisonment. Dissatisfied, the appellant filed an appeal to the High Court of Kenya at Kakamega, complaining in a petition of appeal filed in that court, that evidence of recognition was wrongly admitted; that it was wrong for the trial magistrate to convict on the evidence of a single witness which could be mistaken; that certain provisions of the law were breached; and that the magistrate ignored the defence. The appeal was heard by **Sitati** and **Mwangi, JJ**., who, in a judgment delivered on 1st March, 2016, did not find merit in the same and dismissed it. The judges did not stop there. They considered the sentence imposed and found it unlawful. This is what they said at paragraphs 34 and 35 of the judgment:

> ***"The learned trial magistrate sentenced the appellant to life imprisonment. This was unlawful. The only sentence provided under the provisions of section 296(2) of the Penal Code is the death sentence. The trial magistrate did not have the discretion to sentence the appellant to life imprisonment. The decision by the Court of Appeal in Joseph Njuguna Mwaura & 2 Others vs. Republic [2013] eKLR held that the only penalty provided under the provisions of section 296(2) of the Penal Code, is mandatory death sentence.***
>
> ***In the circumstances, we invoke the provisions of section 354(3) (iii) of the Criminal Procedure Code and set aside the sentence of life imprisonment and substitute thereof, the death sentence as by law prescribed. The appeal fails in its entirety."***

A sentence of death was thus imposed against the appellant.

This is a second appeal from those findings. Our mandate in such an appeal is prescribed by **section 361(1)(a)** Criminal Procedure Code to consider only issues of law but not matters of fact that have been tried by the first court and re-evaluated by the High Court sitting on appeal – See ***Karingo vs Republic [1982] KLR 213 where at 219***:

> ***"…A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived***

at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari s/o Karanja v Republic (1950) 17 EACA 146).”

In the memorandum of appeal drawn for the appellant by his lawyer, **Kouko Cecil Wilson**, Advocate, there are five grounds of appeal set out which in sum state: that the High Court failed to evaluate the evidence to find that the case was not proved beyond reasonable doubt; that the judges erred by relying on evidence of identification, without observing that the conditions prevailing at the scene of crime were absolutely difficult for a witness to make any significant identification; that the first court relied on contradictory and inconsistent evidence; in the penultimate ground and also final ground:

“4. The trial court rejected the appellant’s sworn statement of defence and that of his witnesses which was not challenge by the prosecution.

5. 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 penalty has been removed by the Supreme Court.”

We are asked to allow the appeal by quashing the conviction and setting aside the sentence.

When the appeal came up for hearing before us on 28th November 2020 by the platform “Go-to Meeting” due to the prevailing global Covid-19 pandemic, **Mr. Ogutu**, advocate was instructed by **Mr. Kouko** to argue the appeal for the appellant while Mr. Kakoi, State Counsel, appeared for the **Director of Public Prosecutions (DPP**). Both sides had filed written submissions and what remained was a highlight of the same.

Mr. Ogutu laid emphasis on ground 3, submitting that the prosecution evidence was contradictory and inconsistent in that the doctor stated that the injury had been sustained 4 days earlier, while Grace stated that she was examined one day after the attack.

In written submissions, (which were not highlighted) it is stated, amongst other things, that there was no evidence how bright the light from the lantern used by Grace was; that the evidence of a single identifying witness, especially where the conditions for positive identification are difficult must be treated with the greatest care. It is submitted that there was doubt on whether identification was properly proved. On sentence, it is submitted for the appellant that in light of the decision of the Supreme Court of Kenya in the case of ***Francis Karioko Muruatetu vs R [2017] eKLR,*** the appellant in this case should benefit from the holding which declared unconstitutional the mandatory death sentence imposed by Parliament in certain cases.

Mr. Kakoi in opposing the appeal, took a general position that there was no point of law raised in the appeal. According to him, the question for determination here is whether the essential ingredients of the offence of robbery with violence were proved by the prosecution against the appellant. Counsel cited case law that declares that for that offence to be proved, it must be shown that the offender was armed with any dangerous and offensive weapon or instrument; or the offender was in the company of one or more person or persons; or at or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person. Counsel submitted that these factors are exclusive, the prosecution being required to prove only one of them for the offence to be proved. According to counsel, in the present case it was proved that Grace was attacked by three people, one of them was armed with a panga, Grace was cut on the head by the appellant and the degree of injury had been proved.

On identification, it was submitted on behalf of the DPP that there was a lantern in the room and the attackers also illuminated the room with torches, the robbers did not conceal themselves in any way at all, and Grace gave the name of the appellant at the earliest opportunity as one of the robbers.

On enhancement of sentence from life imprisonment to death sentence, the DPP concedes that it was wrong for the High Court, on first appeal, to do so without a cross-appeal having been filed or serving a warning to the appellant before hearing of the appeal at the High Court.

We have considered the record of appeal, the submissions made and the law, and this is what we think of this appeal.

As stated, it is a second appeal and we must be satisfied that there are issues of law raised by the appellant so that we are clothed with jurisdiction to entertain the appeal.

Looking at the memorandum of appeal, we recognize as a matter of law whether the High Court, on first appeal, evaluated the evidence. It is also a matter of law whether the appellant was properly identified as the assailant during the robbery. The final matter of law, we recognize, is the way the High Court dealt with the issue of sentence.

Before we embark on an analysis of those issues, we observe that it is raised as a ground of appeal (ground 4) that the appellant’s sworn defence “… and that of his witnesses…” was rejected. The appellant’s defence was that, upon hearing that it was alleged that he had attacked and robbed Grace, he surrendered himself to authorities. He said nothing more. He did not call any witnesses. The two courts considered what the appellant had stated in his defence but no witness was called by the defence. The complaint by the appellant in this respect is thus a strange one. On the complaint that the High Court did not evaluate the evidence, we have looked at the proceedings before the Court and the judgment. The High Court restated the whole case, analysed submissions by both sides, recognised its duty as a first appellate court and determined the appeal upon a careful evaluation of the whole case. The

High Court carried out its mandate of evaluating the case as required by law and we cannot see any merit in the complaint by the appellant in that regard.

On the issues of identification, Grace testified that she was in the course of packing a bag to travel in the morning and had a lantern lamp illuminating the room when suddenly three men, led by the appellant, entered the room flashing bright torches. The appellant attacked her by cutting her on the head with a panga. It may sometimes create some confusion where powerful torches are flashed and the beam may blind a victim who may not properly see who is holding the torch.

Let Grace speak for herself on the events of that evening during the attack:

> ***"…I screamed mentioning name. I identified only one person. I identified the one known as Moi at home. Moi is the one in the dock. The way he was dressed was familiar. When I screamed they took off and I ran after them up to the road. I know him because of the clothes he was wearing and the light shown (sic) on him from the face and the head also… Moi was known to me prior to the incident…"***

When neighbours including Rhoda arrived at the scene moments later, Grace informed them that **Moi** (**the appellant**) was one of the attackers.

It was therefore a case of recognition and **Widgery, CJ,** in the oft-cited case of ***R v Turnbull & Others [1976] 3 All ER 549*** warned that:

> ***"…Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made… All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger…"***

In our own jurisdiction this Court in the case of **Maitanyi v Republic [1986] KLR 198** held that, although a fact may be proved by the testimony of a single witness, that fact must be treated with the greatest care as pertains identification particularly where the conditions for identification were difficult. The court further stated that in such circumstances, a careful inquiry ought to be made into the nature of the light available and whether the witness was able to make a true impression and description of the attacker.

The High Court on first appeal, analysed the evidence of identification and came to the conclusion, at paragraph 24 of the judgment

> ***"PW1 was consistent in her evidence that it was the appellant who cut her with a panga. She saw him well and she knew him by the name, Moi. He hails from the same location as her. PW1 informed PW2, PW4 and PW5 soon after the robbery that the appellant was one of the robbers who stole from her and that he was the one who cut her with a panga."***

We, too, are of the same view. The appellant attacked Grace who was in her house which was illuminated by a lantern, which helped her to pack a bag. The appellant who was known to her, and who had not concealed his face walked straight to where she was and attacked her with a panga. Meanwhile the appellant's accomplices were robbing her, and during the robbery, and even after she chased them to the road, she called out the appellant's assumed name as one of the robbers. She gave his name to Rhoda, amongst others, as one of the robbers. There was sufficient light and, in the circumstances, Grace recognized the appellant in the attack and there cannot be any question that she properly identified him and gave out his name at the first opportunity. We are satisfied that the High Court reached the correct decision on this question.

The final issue which calls for our determination is how the High Court dealt with the issue of sentence. We must express our surprise in the way this issue was handled. As we have seen, the trial court after conviction, sentenced the appellant to life imprisonment. On appeal, the said sentence was changed – the appellant was sentenced to death.

The proceedings of the High Court begin at page 38 of the record of appeal. At the appearance before the judges on 13th October 2015, it is recorded that the appellant stated that he was ready to proceed as was the State Counsel. The appellant relied on written submissions and a judgment date was given. There was no cross-appeal and we have not seen any address by State Counsel on the issue of sentence, and there is certainly no warning given to the appellant that should he proceed with the appeal, the sentence may be altered to his disadvantage. All there is on the issue of sentence is at the tail end of the judgment where the judges state that life sentence awarded was unlawful. A death sentence was then pronounced, the High Court exercising its powers donated by **Section 354 (3) (iii)** of the Criminal Procedure Code.

We recognized in the case of ***Robert Wafula v Republic [2016] eKLR*** that although the law allows an appellate court to enhance sentence, that can only be done when an appellant has been warned of the consequences of proceeding with an appeal when sentence may be altered to his disadvantage. In ***Josiah Kibet Koech v Republic [2009] eKLR*** which was an appeal regarding sentence which had been enhanced by the High Court on first appeal, it was observed that because the State had not given any notice of enhancement of sentence to the appellant, such enhancement was without jurisdiction. In the case of ***J. J. W. v Republic [2013] eKLR*** held in a case where sentence had been enhanced:

> ***"However, what we do not appreciate is the manner in which the learned judge enhanced the sentence. It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 354 (3) (ii) and (iii) of the Criminal Procedure Code. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Oftentimes this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence at the end of the hearing of his appeal."***

In the appeal, before the High Court there was no cross-appeal and there was no warning at all to the appellant before hearing of the appeal commenced that the sentence could be altered to his disadvantage. It was correct that the DPP conceded this point before us. What the High Court did in altering the sentence from life imprisonment to the death sentence was certainly done without jurisdiction, and in those premises, that part of the holding of the High Court is set aside. It was irregular and unlawful for the High Court to alter the sentence without the necessary caution to the appellant.

We note that the appellant had been sentenced to life imprisonment by the trial court. Having reverted to that position after setting aside the sentence by the High Court, the mater should end there, but we note that the appellant prays that we interfere with even that sentence, in view of the new jurisprudence in our country on the issue of minimum sentences.

The appellant was sentenced to life imprisonment on 28th June, 2012. He had been charged with an offence where Parliament had imposed a mandatory sentence upon conviction.

The appellant cited the Supreme Court of Kenya decision in **Francis Muruatetu** (supra) urging that we award him an appropriate sentence in the particular circumstances of this case.

The appellant attacked Grace, a person known to him from the same locality, cut her head with a panga and he and his accomplices stole items as shown in the charge sheet – 2 mobile phones and a radio – which were not recovered. Upon conviction, and in mitigation, the appellant beseeched the trial court:

> ***"I ask for leniency. I have a family that depends on me…"***

The court prosecutor confirmed that the appellant was a first offender. In the premises and considering the fresh air that has come to the courts after the Supreme Court decision where courts are no longer in a straight-jacket but are informed, in sentencing, by the circumstances of each particular case, we are persuaded that the appellant here is entitled to a reasonable custodial sentence. The final orders in this appeal are that the appeal on conviction fails and is dismissed. We set however aside the sentence awarded by the High Court and substitute therefore a sentence of twenty (20) years imprisonment from the date of conviction.

As Sichale, JA has refused to sign this Judgment is delivered in accordance with **rule 32(2)** of the **rules of this Court.**

Dated and Delivered at Nairobi this 5th Day of February, 2021.

P. O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true

copy of original.

Signed

<u>DEPUTY REGISTRAR</u>