



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE MAKHANDIA, P.O. KIAGE & OTIENO-ODEK, JJA)

CRIMINAL APPEAL NO. 658 OF 2010

BETWEEN

JAMES ODUOR OPEMAAPPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Busia (A. Mbogholi & F. Ochieng, JJ), dated 02nd July, 2009

in

HCCRA No. 81 of 2006)

JUDGMENT OF THE COURT

The appellant was charged with robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. The particulars were that on the night of 30th and 31st August 2005 at Masiebi village, Sigulu sub-location, Nangosia location in Busia district within Western Province jointly with others not before the court, while armed with offensive weapons namely *pangas* and *rungus* he robbed EMMANUEL OBONYO of various items and cash all valued at Kshs. 22,015, and immediately before or immediately after the time of such robbery used actual violence to the said EMMANUEL OBONYO.

The appellant was arrested and arraigned before the Principal Magistrate's Court at Busia and charged via **Criminal Case No. 1842 of 2005**. The trial magistrate (W.N Nyarima, PM) evaluated the evidence tendered before the court and convicted the appellant under **Section 215** of the **Criminal Procedure Code** and sentenced him to death.

Aggrieved by the conviction and sentence, the appellant appealed to the High Court. The appeal was heard by A. Mbogholi & F. Ochieng, JJ who by a judgment delivered on 2nd July, 2009 upheld the conviction of the appellant by the trial court and dismissed the appeal.

Further aggrieved, the appellant filed the instant 2nd appeal, on 4 grounds, complaining that the judge erred in law by;

- a) Holding that the appellant was positively identified by the complainants.
- b) Disregarding the glaring contradictions on the testimonies of PW1, PW2 and PW3.
- c) Failing to re-evaluate the evidence on record hence making an erroneous conclusion.
- d) Sentencing the appellant to the mandatory death sentence.

During the hearing of the appeal, learned Counsel **Ms Nabifo** held brief for **Mr Wangoda** who is on record for the appellant while the respondent was represented by **Mr. Sirtum**, the learned Principal Prosecution Counsel. The appellant filed written submissions, but the respondent did not do so.

Ms. Nabifo relied on the filed submissions and did not submit orally to the Court. The written submissions can be summarized as; the

appellant was not positively identified since the evidence was not sufficient enough to place the appellant at the scene of the crime; there were glaring contradictions in the testimonies of PW1, PW2 and PW3 as to the time and date the attack took place; and that the appellant was sentenced under a mandatory sentence without the right to mitigation. Counsel urged the Court to refer the matter back to the trial court for re-sentencing in view of the Supreme Court holding in **FRANCIS KARIOKO MURUATETU & ANOTHER V REPUBLIC & 4 OTHERS [2017] eKLR**, should we uphold the appellant's conviction.

In opposing the appeal, **Mr. Sirtui**, submitted on identification which he deciphered to be the heart of this appeal. Counsel stated that the robbery took place between 9.30pm and 2.00am while there was sufficient lighting from electric bulbs to allow for proper identification of the appellant and his accomplices by PW1 and PW2. They were further identified at the market the following day and taken to the police station. Hence the appeal has no merit.

As this is a second appeal, our jurisdiction is confined to consideration of questions of law only by dint of **section 361(a)** of the **Criminal Procedure Code**. We think that the appellant was properly and safely identified at the scene which was well-lit with electric bulbs. He was observed by PW1 and PW2 and we must respect the concurrent findings of the two courts below as we do not see a basis for our interference in this case. We agree with what this Court had to say in **SAMUEL WARUI KARIMI V REPUBLIC [2016] eKLR**;

“This is a second appeal and this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See Chemangong -vs- R, [1984] KLR 611.”

The only issue of law in this appeal to be determined is the issue of the mandatory sentence. From the record, it is clear that the appellant was found guilty of robbery with violence by the trial court and sentenced to death as provided for in **Section 296(2)** of the **Penal Code**. The same was upheld by the two judge bench at the High Court.

The said **Section 296(2)** provides as follows;

(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

It is couched in mandatory terms since it uses the term shall be sentenced to death. On that we cannot fault the trial magistrate for following the mandatory provision of the law. The High Court also delivered its judgment on 2nd July 2009, which was before the creation of the Supreme Court of Kenya, let alone the delivery of the ground breaking decision in **FRANCIS KARIOKO MURUATETU & ANOTHER V REPUBLIC & 4 OTHERS** (Supra).

In that decision, the Supreme Court held that a mandatory sentence is unconstitutional as it takes away judicial discretion to determine an appropriate sentence on a case by case basis. It was found that this took away judicial discretion to determine the appropriate sentence based on the facts of each case. The Supreme Court specifically stated;

“[41] It is evident that the trial process does not stop at convicting the accused. There is no doubt in our minds that sentencing is a crucial component of a trial. It is during sentencing that the court hears submissions that impact on sentencing. This necessarily means that the principle of fair trial must be accorded to the sentencing stage too.”

This Court has adopted the dicta of the Supreme Court and reduced various mandatory sentences on merit, for instance in **JARED KOITA INJIRI V REPUBLIC [2019] eKLR**, **EVANS WANJALA WANYONYI V REPUBLIC [2019] eKLR**, **PAUL NGEI -vs- REPUBLIC [2019] eKLR** and **CHRISTOPHER OCHIENG -vs- R [2018] eKLR**.

Consequently, we find it fitting to interfere with the mandatory death sentence meted upon the appellant by the trial court and affirmed by the first appellate court and substitute it with a sentence of 20 years' imprisonment with effect from 15th September 2006 when the trial court passed the sentence.

Dated and delivered at Kisumu this 31st day of January, 2020

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.