



IN THE COURT OF APPEAL

AT KISUMU

[CORAM: KOOME, SICHALE & KANTAL, JJA]

CRIMINAL APPEAL NO. 135 OF 2015

BETWEEN

JOSAM WESONGA MAKOKHA..... APPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kakamega (R. Sitati, J) dated 21st July, 2015

IN

KAKAMEGA HC. CRA NO. 23 OF 2013

JUDGMENT OF THE COURT

On 22nd March, 2013, Olwande, the then Acting Senior Principal Magistrate, Butere Law Courts convicted the appellant of two counts of robbery with violence contrary to S. 295 as read with S.296 (2) of the Penal Code and made no finding in respect of the alternative charges thereof of handling stolen property contrary to S.322 (1) of the Penal Code. The appellant was sentenced to suffer death as by law then provided. It is not clear from the record whether in the second count of robbery with violence, the sentence was put in abeyance. The 1st appellate court made comments as regards this failure on the part of the trial court when in its judgment it stated:

“The appellant was found guilty as charged on counts I and II and convicted of the same. He was sentenced to suffer death as by law provided. The trial court made no finding on the alternative charges. It is not clear from the sentence whether the appellant was sentenced to one or two deaths. We wish to point out at this stage that the trial court should have clearly indicated that the appellant was sentenced to suffer death on count I while holding the sentence on count II in abeyance, for a man can die only once”.

Be that as it may, the appellant being aggrieved by the outcome of the trial filed an appeal at the High Court. In a judgment rendered on 21st July, 2015, Sitati, & Mrima, JJ dismissed the appellant’s appeal.

Undeterred, the appellant filed this appeal before us. In a Memorandum of Appeal dated 15th May, 2019, and filed on the same day (15th May, 2019), the appellant faulted the learned Judges for failing to find that there was no proper identification; “.... That the ingredients of proper identification parade were not observed; that the ingredients of the offence of robbery were not proved and finally, that the Judges erred in failing to re-evaluate the evidence.”

On 30th July, 2019, the appeal came before us for plenary hearing. Learned counsel, Mr. Teremwa Darius and Mr. Muia Peter (Prosecution Counsel) appeared for the appellant and the respondent respectively. Each of them wholly relied on their written submissions, the appellant’s submissions having been filed on 13th June, 2019 whilst the respondent’s submissions were filed on 29th July, 2019.

In his submissions, the appellant’s counsel urged grounds 1 and 2 together. In so doing, counsel pointed out that the appellant was allegedly identified by a single witness, Prisila Lukhania Amkutwa (P.W.1) who is said to have identified the appellant by the T-shirt he was wearing, and that she did not ‘touch’ the appellant upon identification at the parade contrary to Police Force Standing Orders.

On sentence, counsel asked us to review it in view of the Supreme Court decision in **Francis Karioko Muruatetu & another vs. Republic SC Petition No. 16 of 2015** which outlawed the mandatory nature of a death sentence.

In the respondent's submissions in opposition to the appeal, it was urged that given that the offence was committed in gruesome circumstances, the appellant is underserving of any other sentence other than death. No submissions were made as regards the appellant's complaint that the identification was not positive.

The appeal before us is a second appeal. Our mandate in a second appeal is as stipulated in Section 361(I) (a) of the Criminal Procedure Code. It provides:

“ 361 (I) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section:

(a) on a matter of fact, and severity of sentence is a matter of fact; or

(b) against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence.”

In so far as case law is concerned, the decision of **David Njoroge Macharia vs. Republic [2011] eKLR** sums up the said mandate. In the said decision, it was stated:

“Only matters of law fall for consideration and the court 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 also Chemagong vs. Republic [1984] KLR 213).”

Similarly, in **Kaingo versus Republic [1982] KLR 213** it was held as follows:

“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 Karoti S/O Karanja versus Republic [1956 17 EALA 146]).”

Prisila Lukhania Amkutwa (P.W.1) together with her father **Francis Makutwa Mukazi** (P.W.2) and her husband were travelling from Kisumu to Bungoma on **7th September, 2012**. Along the way, and at about 9.45 p.m. at a place called Shitsitswi, they got a puncture and stopped to change the punctured tyre. All of a sudden, 2 people appeared. Her father (P.W.2) was hit severally until he fell down. It is then that one of the assailants turned to P.W.1 and ordered her to lie down. She was not able to do so as at the time, she was pregnant. She was hit with **“something that looked like a club and cut on the left arm with a knife”**. She shone her phone light which together with the car lights enabled her to identify her assailant. Several items were stolen from them including Kshs 20,000.00 which was in a wallet, 2 phones (both Samsung), P.W.1's ID, ATM card and NHIF card. The robbers also took away P.W.1's suit case containing 4 T-Shirts, 4 trousers, 4 sweaters, P.W.1's child's clothes and a Spanish book belonging to P.W.1's child. P.W.2's driving license, ID card, 2 phones and shoes were also stolen. P.W.1's husband lost his ATM card, alien ID card and Kshs 6,000.00. When the robbers left P.W.1 together with her husband and P.W.2, the trio made haste and reported at Bungoma Police Station and also sought help from Bungoma District Hospital where they were attended to by a Clinical Officer **Elias Adoka** (P.W.3).

On **11th October, 2012**, P.W.1 picked the appellant from an identification parade conducted by Chief Inspector **Saitera Mwita**, (P.W.4), the then OCS Butere Police Station. According to P.W.1, the appellant was wearing one of their T-shirts. The T-shirt had some faded parts as parts of it had been bleached by jik. At the police station, she was shown her husband's brown open shoes, brown closed shoes, her child's Spanish book, P.W. 2's ID card and driving licence and her husband's wallet. P.W.2 was also able to recover his driving licence and his Identity Card.

Acting on a tip off, on **9th October, 2012**, **P.C. Eric Kimathi Kione** (P.W.5), went to a place called Mtambo where they found the appellant. Upon searching him, they found a brown wallet and an ID Card of P.W. 2 in his possession. At the appellant's house, they recovered P.W.2's driving licence and KRA receipts, a Spanish book for children, brown open shoes, brown closed shoes and a wallet all belonging to P.W.1 and her husband.

In his unsworn statement of defence, the appellant denied the commission of the offence. According to him, the 2 cards and 3 pairs of shoes were removed from a drawer at the police station and planted on him. He denied wearing P.W.1's T-shirt as the one he was wearing on that day was a new Kenya Commercial Bank T-shirt.

The first appellate court re-analyzed the evidence adduced at the trial court and stated:

“that we have tested with the greatest care the testimony given by Pilisila under the circumstances she found herself in and we are satisfied that she was a focused and steady witness who was able to withstand the rigorous cross-examination without deviating from what she had stated in her evidence in chief. We therefore accept her evidence as being true. We do not agree with the appellant that Pilisila's evidence (sic) that in her panic, Pilisila did not identify him”.

Further, the 1st appellate court stated:

“we hasten to add here, that the fact that the appellant was found in possession of recently stolen items during the robbery fortifies our finding that the appellant was one of the robbers who attacked the complainant (sic) in this case on the fateful night of 7th September, 2012. In our view, the appellant did not adequately explain how he came to be in possession of the stolen items recovered from him during investigations. We have carefully considered the appellant’s defence and find that the same does not displace or weaken the prosecution case that those items belonged to the complainant’s herein and that they were stolen from them during the robbery in which the appellant, who was more violent than his accomplice participated. We dismiss the appellant’s contention that those items were planted on him”.

We agree, that the appellant was positively identified by P.W.1 who also identified a T-shirt that the appellant was wearing at the identification parade. Further, and as rightly pointed out by the 1st appellate court, the appellant was found with some of the items stolen from P.W.1 and P.W.2 on the night of the robbery when a search was conducted at his house. We find that the 1st appellate court properly re-evaluated the evidence and came to the conclusions that the appellant was guilty as charged.

As regards the contention that the ingredients of the offence of robbery were not proved, we find that nothing turns on this. In **Oluoch vrs. Republic [1985] KLR**, this Court held:

“Robbery with violence is committed in any of the following circumstances:

- (a) the offender is armed with any dangerous and offensive weapon or instruments; or***
- (b) the offender is in company with one or more person or persons; or***
- (c) 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***

The circumstances obtaining herein reveal that there was more than one robber, that all the three (3) victims of the robbery were assaulted and that the appellant was armed with offensive instruments which he used to harm P.W.1 & her husband as well as P.W.2. P.W.3 confirmed that the trio sustained injuries. In our view, all the ingredients of the offence of robbery with violence C/S 295 as read with S. 296 (2) of the Penal Code were satisfied.

The upshot of the above is that we find no merit in respect of the appeal against conviction.

However, in respect to the sentence, we take note that the Supreme Court in the case of **Francis Karioko Muruatetu & another vs. Republic SC Petition No. 16 of 2015**, outlawed the mandatory nature of a death sentence. Whereas the death sentence was not outlawed, courts have been given discretion in sentencing by taking into consideration factors such as the circumstances under which the offence was committed, the appellant’s mitigation and whether the offender is a first time offender.

The record is silent on whether the appellant herein gave his mitigation and whether he was a first offender. However, given the circumstances of the robbery, we deem it fit to substitute the sentence of death to imprisonment of a term. The appellant is resentenced to serve twenty five (25) years imprisonment from the date of his conviction.

It is so ordered.

Dated and Delivered at Kisumu this 31st Day of January, 2020.

M. KOOME

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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 the original.

DEPUTY REGISTRAR