



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE MAKHANDIA, KIAGE & ODEK, JJ.A.)

CRIMINAL APPEAL NO. 187 OF 2014

BETWEEN

JAFRED ONYANGO APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kakamega (Chitembwe & Jaden, JJ.) dated 14th February, 2013

in

HCCRA NO. 24 OF 2011)

JUDGMENT OF THE COURT

On the night of 11th to 12th February, 2010, a bold gang of seven or eight robbers decided to terrorize the good residents of Bondeni, Kefinco and Malaba Estates of Kakamega Central District in the former Western Province. The gang were armed with an assortment of dangerous weapons including; pangas, iron bars, axes and a pistol. They moved from house to house breaking doors and windows to gain access before violently assaulting and injuring the occupants, then making away with a motley collection of household and personal goods including socks, table clothes, cell phones, pillow cases, pliers, spoons, shoes, wallets, cooking fat, padlocks, soap, rice, packets of maize flour, a loaf of bread and cash.

Police on patrol were alerted and mounted a search for the robbers that very night. While in pursuit of the robbers, and barely a hundred metres from the scene of the last of the robberies, the police officers encountered some three men laden with all manner of household items in the dark, past midnight hour. When challenged to stop, the men took to their heels and the police unleashed a police dog after them. The dog caught up with one of the robbers, whom it bit a few times. He gave up his escape and was arrested. He had on him several of those items that had been stolen but a little while before in the robberies. Some were in a bag and others tied in a bed sheet, and the man dropped both as the dog attacked and bit him.

That man was the appellant herein and he was arrested then charged before the Chief Magistrate’s Court at Kakamega with nine counts of robbery with violence contrary to **section 296(2)** of the **Penal Code**. He also faced an alternative charge of handling stolen goods contrary to **section 322(2)** of the **Penal Code**. The goods had been identified by their owners and, in an identification parade mounted by the police, the appellant was picked out by a total of five witnesses.

The appellant denied the charges and a trial ensued with the prosecution calling some fourteen witnesses. When placed on his defence the appellant testified on oath denying the charges and stated that on the material night he was going to pick his girlfriend from the stage when he met police on patrol and was arrested and charged with offences he knew nothing about.

The trial magistrate found six of the main charges proved and convicted the appellant. He was sentenced to death on count 1, while the sentence for the conviction on the other counts was held in abeyance.

The appellant was aggrieved and preferred an appeal against both conviction and sentence to the High Court at Kakamega. The appeal was heard by Chitembwe and Jaden, JJ who, by a judgment dated 14th February, 2013 affirmed the appellant’s conviction and sentence, and dismissed the appeal.

Still aggrieved the appellant filed this second appeal complaining that;

“1. The Superior Court erred in law in failing to undertake its duty and responsibility as the first appellate court by not re-evaluating the evidence independently and arriving at its own conclusion;

2. Both the trial court and the Superior Court erred by relying on inadmissible evidence hence the prosecution did not discharge its onus of proving their case beyond reasonable doubt. Evidence adduced was circumstantial and it fell far below the legal threshold to be the basis of a sound conviction;

3. The circumstantial evidence set out by the prosecution was capable of several hypothesis and hence not to the required standards to be the basis of a sound conviction;

4. The mandatory death sentence imposed upon the appellant is unconstitutional;

5. The sentence imposed upon the appellant is manifestly harsh and excessive taking into account the mitigation on record as well as the circumstances of the offence.”

In written submissions filed on his behalf by **Ms Petty A. Omollo** learned counsel, the appellant contended that the first appellate court failed in its duty to re-evaluate the evidence and independently arrive at its own conclusions. It also failed to note the contradictions in respect of how the appellant was dressed, and that the identification parade was not proper as it violated the Police Force Standing Orders. The circumstantial evidence was also capable of several hypotheses. Those other hypotheses were, however, not mentioned. The rest of the submissions were dedicated to urging that the sentence of death imposed was manifestly harsh and excessive in the circumstances, and did not reflect a balancing of all relevant factors by way of a triadic approach as espoused in the South African case of ***S-vs- ZINN [1969] 2 SA 53 of 4 at 540 G-H***: “*what has to be considered is the triad consisting of the crime, the offender and the interests of society.*” It was urged that the appellant’s conviction be quashed and he be set at liberty but that if not, his sentence be reduced to a reasonable term given the circumstances, and the appellant’s mitigation.

The respondent also filed written submissions. Learned Prosecution Counsel, **Mr. Muia** wrote that on a second appeal our jurisdiction is limited to a consideration of matters of law only by dint of **section 361(a) and (b) of the Criminal Procedure Code**. Citing ***NJOROGE -vs- REPUBLIC [1982] KLR 388***, counsel contended that we ought to accept and consider ourselves bound by the concurrent findings of fact by the two courts below unless they are not backed by any evidence, are based on a misapprehension of the evidence or the two courts demonstrably acted on wrong principles.

Counsel proceeded to state that the appellant was properly and positively identified by PW1, PW2, PW3 and PW4 as one of the robbers and by PW9 and PW11 as one of the people who was challenged to stop while carrying items that had just been stolen and who was apprehended with the aid of the police dog. Thus, other than being identified, the doctrine of recent possession also justified the appellant’s conviction for the offences charged.

Regarding sentencing, while concurring that in light of the Supreme Court’s decision in ***FRANCIS KARIOKO MURUATETU & ANOTHER -vs- REPUBLIC [2017] eKLR***, the death sentence was no longer mandatory, counsel submitted that the offences herein were committed in a gruesome and heinous manner deserving of the full force of the law by way of the death penalty.

We have given this appeal due consideration keeping in mind that our jurisdiction as a second appeal is closely circumscribed. We think, with respect, that the learned Judges’ discharged their duty as a first appellate court properly and effectively. They considered the evidence for themselves, re-evaluated and re-appraised it, before arriving at the conclusion that the appellant was properly convicted. We think that the record leaves no doubt whatsoever that the appellant was identified at the *loci in quo* as one of the robbers. There was sufficient lighting and he was not a stranger to PW1. This was not the identification of a single witness under difficult circumstances but multiple ones in favourable circumstances.

Whereas the appellant blames the learned Judges for not noting that the identification parade was not properly conducted, they in fact did. They agreed with the trial court that the parade was not proper and that the evidence thereof was properly discounted and disregarded.

Beyond identification, there was iron-clad evidence that the appellant was challenged to stop by police on patrol including PW9 and PW11. Instead of doing so, he attempted to run off while laden with the loot robbed off the various complainants. A chase ensued and a police dog caught up with and started mauling the appellant before the police officers rescued him. The items recovered from him so soon after the robbery were positively identified by their owners. The elements of recent possession identified in ***ISAAC NG’ANG’A KAHIGA alias PETER NG’ANG’A KAHIGA -vs- REPUBLIC, Criminal Appeal No. 272 of 2005 (UR)*** cited by the appellant were therefore fully satisfied. We agree with what the Court had to say on the subject;

“It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved.

In other words, there must be positive proof:

i). that the property was found with the suspect;

ii). that the property is positively the property of the complainant;

iii). that the property was stolen from the complainant;

iv). that the property was recently stolen from the complainant.

The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.”

In the premises, the appellant’s conviction was safe and we have no basis upon which we can interfere with the same.

Turning now to the sentence, it is common ground that the death sentence is no longer mandatory for the so-called capital offences. Courts retain the discretion to impose the proper sentence while bearing in mind the circumstances of each case. In this appeal, whereas the appellant bemoans the sentence as manifestly harsh and excessive, the prosecution maintains that it was deserved.

There is no denying that the appellant and his partners in crime pulled off an audacious spate of robberies. They moved clothed in darkness, armed and dangerous with chilling impunity. With such people roaming the streets and pathways of our country common *Wananchi* will never be safe and the night, far from promising rest and rejuvenation, will always hold unsettling terrors. And the law will not be seen to be powerless in the face of such threats to life, limb and property.

Bearing in mind all the circumstances, and while noting from the record that counsel for the appellant indicated that he had no mitigation, we think that justice would be served by a setting aside of the sentence of death and substituting it with a sentence of twenty-five (25) years in prison to run from the date the appellant was first sentenced. And we so order.

Save as to sentence above, the appeal is without merit and is accordingly dismissed.

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

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.