IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KOOME & KANTAI, JJ.A.)

CRIMINAL APPEAL NO. 7 OF 2016

BETWEEN

HENRY MWAURA KAMAU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Ojwang & Warsame, JJ.) dated 3rd February, 2009

in

HC. CR.A. 427 OF 2006)

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JUDGMENT OF THE COURT

The appellant, **Henry Mwaura Kamau**, was tried and convicted by the Principal Magistrate, Kiambu, on two counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code** and one count of being in possession of imitation of firearm contrary to **Section 34** of the **Firearms Act.** There was also an alternative charge of handling stolen goods contrary to **Section 332 (2)** of the **Penal Code.** Particulars of the first count were that on 4th January, 2006 at Kamiti Prison compound in Kahawa West jointly with others not before the court they robbed **Lee Lyatigu Ambwangi** of various items – a mobile phone ,a pair of shoes, a wallet and cash and that immediately before or immediately after the time of such robbery they used actual violence to the said person. Particulars of count 2 were that on the said day at the said place they robbed **Fridah Kagwiria** of a handbag and cash and, again, immediately before or immediately after the said robbery they used actual violence to the said person. The third count related to being in possession of an Imitation Firearm contrary to **Section 34(3)** as read with **Section (1)** of the **Firearms Act** – particulars being that on the same day at the same place he was found in possession of an imitation firearm with intent to commit a felony, namely robbery with violence. The trial court did not make any finding in respect of an alternative charge of handling stolen goods contrary to **Section 332(2)** of the **Penal Code** which the appellant faced. Upon conviction the appellant was sentenced to death in respect of Count 1 and 2 and was sentenced to 2 years imprisonment in respect of Count 3.

A first appeal against conviction and sentence was dismissed by the High Court of Kenya sitting at Nairobi (Ojwang & Warsame, JJ. – as they then were), that court however correcting the error by the trial court – the sentence in respect of Counts 2 and 3 were ordered to be put in abeyance to abide execution of the sentence in respect of Count 1.

The appellant is not satisfied with those findings and has filed this second appeal. Our mandate in such a case is limited by **Section 361(1) (a)** of the **Criminal Procedure Code** to a consideration of issues of law only. That mandate has been considered in many judicial pronouncements of this Court. For instance, in the case of **M'Irungi v Republic [1983] KLR 455** we said of the mandate of the Court in a second appeal that:

> ***" ...where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and it should not interfere with the decision of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.".***

There are 9 grounds of appeal set out in the Supplementary Grounds of Appeal filed on behalf of the appellant by his lawyer, **Ratemo Oira & Company Advocates**. When the appeal came up for hearing before us on 14th November, 2019 **Mr. Ratemo Oira** abandoned all the grounds of appeal leaving only ground 9 where it is urged:

> ***"THAT the appellant urge this Honourable Court to consider the sentence and the mitigating factors in accordance with the decision of the Supreme Court, Petition No. 15 of 2015; Francis Karioko Muruatetu & Others –vs- Republic."***

This, in our respectful view, was a correct approach by counsel as the other grounds of appeal which attack findings that led to conviction had no legs at all considering the circumstances of the case which are well captured by High Court on first appeal. The appellant accompanied by others, robbed the 2 complainants of the items set out in the charge sheet. The robbery took place within the compound of Kamiti Prison, a compound which was well illuminated by flood lights. Prison warders were attracted to the commotion and went to the scene of robbery where they shot dead 2 of the robbers. The appellant was shot on the leg and fell into a quarry where he pleaded not to be killed. He was arrested at the scene and the items stolen from the complainants were found on his person. The complainants and the prison warders identified him as one of the robbers and, in the premises, identification was water-tight.

On the sentence of death awarded to the appellant Mr. Oira submitted before us that the appellant has been in custody for 13 years; that he has reformed; that he should be given an opportunity to live a normal life. He proposed a prison sentence taking account of time already served.

Mr. Obiri, learned Assistant Public Prosecutor, in opposing the appeal submitted that the 2 courts below had considered the sentence which had been affirmed by the High Court. According to counsel, sentence is a matter of fact which we should not consider as it is outside our jurisdiction. Counsel concluded his submissions by stating that the holding by the Supreme Court in the ***Francis Karioko Muruatetu*** case (supra) had not displaced **Section 361** of the **Criminal Procedure Code**.

We have considered the record and submissions made before us.

It is true, as submitted by Mr. Obiri, that **Section 361** of the **Criminal Procedure Code** limits our mandate in second appeals. **Section 361 (1) (a)** of that **Code** declares, in express terms, that severity of sentence is a matter of fact and we have no jurisdiction to entertain facts in such appeals.

What we however understand Mr. Oira to be saying is that the sentence of death that was imposed be interfered with as the Supreme Court of Kenya has made certain findings in the case of ***Francis Karioko Muruatetu*** (supra) on the issue of imposition of mandatory sentences.

The record shows that, before the trial magistrate, and after being convicted, the appellant, in mitigation, pleaded with the trial court saying:

> ***"I was victimized."***

The court then stated that it had considered that the appellant was a first offender but that the offence in count 1 and 2 carried mandatory sentences. The sentence of death was then imposed and affirmed on first appeal, the only correction being a holding that 2 death sentences could not be imposed, the simple reason being that a man can only die once, not twice.

The serious question that the Supreme Court of Kenya was asked to answer in the ***Francis Karioko Muruatetu*** (supra) case was whether it was correct for Parliament to impose mandatory minimum sentences in certain offences. That court returned the answer that it was wrong for Parliament to do that as that robbed the trial court of the opportunity to take and consider the circumstances of each case, mitigation, if any, and after doing so, award an appropriate sentence.

That finding has freed the courts from the previous position where, regardless of special circumstances in particular cases, the trial court operated in a straight-jacket with no room on the sentence to be imposed as Parliament had already pre-determined the sentence. We therefore disagree with the submission by Mr. Obiri that this Court lacks jurisdiction to interfere with the sentence. The issue here is not severity of sentence; the issue is the mandatory nature of sentence for certain offences like the one in this appeal involving a robbery with violence.

In the case before the trial court the appellant, with his accomplices, armed themselves with an imitation firearm and robbed the complainants of cash, a mobile phone, shoes, a wallet and a handbag. The complainant in respect of count 1 was knocked to the ground while being threatened; the complainant in respect of count 2, readily handed over her handbag when it was demanded, and was let to go. There was violence during the robbery but injury, if any, was not serious. As a matter of fact, it is the appellant who was shot but luckily survived. The stolen items were all recovered at the scene.

Having considered the circumstances of the case before the trial court we think that the sentence of death was not deserved. The appellant should serve time in prison.

The appeal against conviction fails and is dismissed. The appeal against sentence succeeds to the extent that we set aside the sentence of death imposed and substitute thereof a sentence of twenty (20) years imprisonment from the date of conviction.

Dated and delivered at Nairobi this 6th day of March, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

M.K. KOOME

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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