



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KARANJA & SICHALE, JJ.A)

CRIMINAL APPEAL NO 9 OF 2018

BETWEEN

OBED EDES TESHA.....1ST APPELLANT

WILBERT PHILIP TESHA.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a Judgment and Decree of the High Court of Kenya at Kajiado

(Nyakundi, J.) dated 22nd November 2013 in H.C.CR. A No. 7 OF 2015)

JUDGMENT OF THE COURT

1. The 1st and 2nd appellants, **Obed Edes Tesha** and **Wilbert Philip Tesha** were tried before the Magistrates Court (**Mary A. Ochieng', SRM**) for the offence of robbery with violence contrary to **section 296(2)** of the Penal Code with an alternative charge of handling stolen goods contrary to **section 322(2)** of the Penal Code.
2. The particulars of the offence were that on 3rd October, 2012 at Emaui Village in Namanga, Kajiado Central County within Rift Valley Province, jointly while armed with a knife, the appellants robbed **Saitoti Murumbe Kishinda** a motorcycle registration no. KMCW 217V valued at Kshs. 75,000/= and at or immediately before or immediately after the time of such robbery they used actual violence; in the alternative they faced a charge of handling the same property which was believed to have been stolen.
3. The appellants denied the charges and trial proceeded with the prosecution calling evidence of 7 witnesses. On their part, the appellants gave unsworn statements of defence and called no witnesses. Ultimately, the appellants were found guilty and convicted on the robbery charge and sentenced to death.
4. A brief background of the case before the two courts below is that Saitoti Murumbe Kishinda, (the complainant), used to operate a boda boda taxi business using motorcycle registration no. KMCW 217V belonging to one Mary Kashano Mbatia, PW1. On or about 3rd October, 2012 in Emaui village, Namanga in Kajiado Central County, within Rift Valley Province at about 1 p.m. the 2nd appellant approached the complainant while posing as a customer. The two agreed on a service fee and set off in the presence of one Lemaron Kartemi Lemita, PW3. On the way, they picked up the 1st appellant who requested that they be dropped at a different location at an additional fee.
5. When they came to a stop, the 1st appellant alighted the motorcycle but the 2nd appellant suddenly grabbed the complainant's shoulder and shoved him to the ground. In the course of a struggle, the 1st appellant used a rope which he untied from the motorcycle to strangle the complainant. The 2nd appellant then forced his fingers down the complainant's throat which the complainant bit in self-defence. The 2nd appellant subsequently brandished a knife and held it over the complainant's neck. The complainant hit his hand, but the knife bruised him on his right ear in the process. The appellants then hopped onto the motorcycle and sped off.
6. The complainant sustained injuries on his right ear, on the legs and mouth. With the assistance of passers-by, he sought the help of other boda boda operators, PW3 included, who assisted him to look for the stolen motorcycle. He was also taken to Alpha Medical Center for medical attention; he was later referred to Namanga Health center where he was treated and discharged, and he thereafter filed a report at Namanga police station. The appellants were arrested, charged and subsequently tried, convicted and sentenced to death for the offence of robbery with violence contrary to **section 296(2)** of the Penal Code.

7. Being aggrieved, they proffered an appeal against the conviction and sentence before the High Court which appeal was premised on grounds *inter alia* that the learned trial magistrate erred in law and fact in: failing to give points for determination, the decision thereon and reasons for the decisions contrary to **section 169** of the Criminal Procedure Code; failing to find that enough doubt was created by the prosecution hence the appellants ought to have been acquitted; convicting the appellants despite the defective charge sheet which did not disclose whether a knife was a dangerous weapon within the meaning of **section 89** of the Penal Code; shifting the burden of proof from the prosecution to the appellants contrary to the law; convicting the appellants based on inconsistent and contradictory evidence tendered by the prosecution; failing to take into account, consider and give reasons why the appellant's defence was disregarded and convicting the appellants despite their right to a fair trial having been contravened.

8. The appeal was opposed by the State on grounds that, the evidence adduced before the trial court was both direct and circumstantial in support of the charges against the appellants; the appellant's defence never controverted the testimonies by the prosecution witnesses as to the commission of the offence and their arrest as the perpetrators; the ingredients of the offence were established as per **section 296(2)** of the Penal Code as the testimonies of PW1, PW2, PW3 and PW4 and the actual recovery of the motor cycle, exhibit 1, proved without doubt the charge of robbery with violence and; the appellants were supplied with the prosecution witnesses' statements in advance of the trial, were informed of the charges against them and were accorded reasonable time to put in their defence hence the appellants did not establish a case of violation of their rights under **Article 50(2)(c)** and **(j)** of the Constitution.

9. The High Court considered the appellant's grounds of appeal by determining the following issues: what constitutes an offence under **section 296(2)** of the Penal Code; whether the charge sheet was defective; the law on the doctrine of recent possession and its application to the instant case; whether the appellants' rights to a fair trial under **Article 50(2)(c)** and **(j)** of the constitution and whether the trial Court erred by failing to give reasons for its decision. Having considered these issues *vis a vis* the evidence on record and the applicable law, the learned Judge found the charge of robbery with violence had been proved to the required standard and consequently dismissed the appeal for lack of merit.

10. Being aggrieved by this decision the appellants have proffered this second appeal to this Court. The appeal is premised the grounds that: the learned Judge erred in law by failing to find that no identification parade was done; the learned Judge erred in law by failing to find that the prosecution did not prove its case beyond reasonable doubt; the learned Judge erred in law by failing to properly re-analyze the evidence before him hence come up with findings of fact independent of those of the trial Court and; this Court to interfere with sentencing as upheld by the High Court.

11. During the plenary hearing before this Court, the appellants were represented by learned counsel Mr. Ratemo Oira while Ms. Wang'ele, Senior Principal Prosecution Counsel, represented the State.

12. In support of the appeal, counsel for the appellants submitted that the appellants had abandoned the grounds of appeal against conviction and were only challenging the sentence. He urged the Court to interfere with sentence in light of the case of **Francis Karioko Muruatetu & Another v. Republic (2017) eKLR**.

13. Ms. Wan'gele for the State had no objection to the appellants' abandonment of the grounds on conviction or the matter being remitted back to the trial Court for re-sentencing.

14. We have carefully considered the totality of the evidence on record, the impugned judgment of the High Court, the grounds of appeal, the submissions by counsel, the authorities cited and the law. The appellants having withdrawn the appeal against conviction, the only issue before this Court is on sentencing.

15. This Court has previously applied the findings and holding of the Supreme Court in **Muruatetu (supra)**, particularly regarding the unconstitutionality of the mandatory nature of the death sentence and considering whether or not a death sentence ought to be substituted with a lesser sentence. It has found that the findings and holding apply *mutatis mutandis* to **Section 296 (2)** and **297 (2)** of the Penal Code (See **Rajab Iddi Mubarak v Republic, Eldoret Criminal Appeal No. 105 of 2015** and **William Okungu Kittiny v Republic, Kisumu Criminal Appeal No. 56 of 2013**).

16. In the instant appeal it is evident from the record that neither the trial court nor the first appellate court considered the appellants' mitigation.

During trial, the appellants prayed for the leniency of the trial court and it was evident from the proceedings that the appellants had no previous convictions.

17. In view of the foregoing and based on the fact that the prosecution does not oppose the appellants' prayer for the review of the sentence, we are inclined to allow the appeal on sentence. In allowing the appeal, we have considered the fact that though armed with a knife, the appellants did not harm the complainant and the motorcycle was also recovered. Consequently, the appellants' appeal against conviction is hereby marked as withdrawn. We allow the appeal against the sentence and set aside the death sentence and direct that the matter be and is hereby remitted to the High Court sitting in Kajiado for mitigation and sentence.

It is so ordered.

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

W. OUKO, (P)

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR