IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), MAKHANDIA & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 88 OF 2016

BETWEEN

GEOFFREY MUCHUGIA GITONGA.....1ST APPELLANT

BENARD THAIRU WANGARE.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a Judgment of the High Court at Nairobi (E. Ogola & J. Kamau, JJ.) dated 14th November, 2013

in

H.C.CR.A No. 159 & 160 OF 2014)

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JUDGMENT OF THE COURT

Like in many criminal trials, at the heart of this appeal is the question of identification. It is common in such trials for the defence and the prosecution to disagree about the fairness of identification of the suspect. This contest can be quite intense, as it is believed that eyewitness identification is accurate and therefore is one of the most compelling types of evidence. Consequently, achieving the admissibility of evidence of visual identification of a suspect goes a long way towards obtaining a conviction. In admitting evidence of identification, courts must always bear in mind that a wrongful conviction is one of the worst errors that can be committed by a court of justice.

It is because of this balance that courts in this country have emphasized that evidence of identification be treated with extra caution. For instance in, **Cleophas Otieno Wamunga V. R**, (1989) eKLR, this Court cautioned that;

> **"Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification".**

The prosecution case in this appeal is that both the trial court and the first appellate court correctly found that the appellants were positively identified as the robbers who, on 20th November, 2008, in the company of others and while armed with dangerous weapons, attacked and robbed the two complainants.

The attack occurred when on the material night at around 10.00 p.m, the complainants were walking home from Gikambura Shopping Center in Kiambu West District within Central Province. They met a gang of four men armed with *rungus* and *pangas* who surrounded them and began to attack them stealing from them their mobile phones, cash and personal items, in the process, cutting them with *pangas,* causing them bodily harm. According to the witnesses, there was full moonlight, and the complainants recognized 2 of their attackers as the appellants who were well known to them by their names "Mucigia" and "Nillie". The two had previously worked with them. After the attack the complainants managed to get to their homes and were taken to Thogoto Kikuyu Mission Hospital by their family members.

The trial court found the appellants guilty of both counts of robbery with violence contrary to **section 296(2)** of the Penal Code and sentenced them to suffer death. Naturally, being aggrieved by this decision, they proffered their first appeal to the High Court, which

dismissed their appeal. That has precipitated the filing of this second appeal on the grounds of failure to adequately analyze and evaluate the evidence, contravention of **section 214** of the Criminal Procedure Code, lack of positive identification, delivery of a judgment that did not meet the legal threshold contemplated by **section 169** of the Criminal Procedure Code, failure to accord them a chance to mitigate before the imposition of death sentence which was inhuman and degrading punishment.

Before us, Mr. Ondieki, learned counsel for the appellant, submitted that the appellants' rights under **Article 49** and **50** of the Constitution were violated as they were presented to court 12 days later than was required by law. As such, they were entitled to their freedom. He also submitted that there were contradictions and inconsistencies in the prosecution's evidence concerning the type of mobile phone stolen from the complainants and how the appellants were identified.

On identification, counsel urged the Court to find that, if PW1 relied only on the moonlight and a flash of light from a vehicle to identify the appellants, and if PW2 had been drinking hence likely to have impaired his judgment, then it was unsafe to base the conviction on their evidence. The purported recognition or identification was therefore mistaken and did not meet the required legal standards and safeguards. For these propositions, counsel relied on the cases of **James Tinega Omwenga V. R**, Criminal Appeal No. 59 of 2011; **Maitanyi V R** (1986) KLR 98; **Wanjohi & Others V R** (1989) KLR 415 and **Wamunga V. R** (1989) KLR 424 – 425.

Ms. Wangele, learned counsel for the respondent opposed the appeal and submitted that there was no violation of the constitutional rights of the appellants as they were arrested on 11th January, 2009 and brought before the Chief Magistrates Court on 23rd January, 2009; that this period was within the stipulated time; that identification was free from any error given that there was full moonlight, the distance between the attackers and the witness and the fact that the appellants were not strangers to the witnesses.

Counsel's view on the alleged contradictions on the model of the Nokia phone was that it was minor; that the two counts of robbery with violence were proved beyond doubt; and that the learned Judges properly so found and upheld the conviction and sentence.

This is a second appeal. By the provisions of **section 361(1)** of the Criminal Procedure Code this Court is expected, indeed enjoined to consider only issues of law in such appeal. Where the two courts below have made concurrent findings of fact, this Court is required to respect those findings unless the conclusions are not supported by the evidence or are based on a misapplication of the evidence. See: **M'Riungu V. Republic, (**1983) KLR 455.

The submissions by the parties summarized in the foregoing paragraphs confirm what we have said earlier, that the main issue is whether the prosecution proved its case beyond reasonable doubt. The other concerns, such as, whether the judgment of the trial court violated **section 169** and whether the appellant's constitutional right to fair trial was violated, are, nonetheless important but peripheral. Others such as the alleged defect in the charge sheet were raised by counsel for the first time before this Court. By this very fact the two courts below were denied a chance to express their opinions, one way or another, on such questions. For that reason we decline the invitation to determine the question and those others in the category.

The second issue that is also not core to the main question in the appeal is whether the judgment of the trial court was in accordance with **section 169** of the CPC. Counsel for the appellants faulted the trial court judgment for being too short and for failing to properly analyze the appellants' defence. The said section provides:

> **"169.Contents of judgment**
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> **1. Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it."**

On first appeal the High Court on this issue pronounced itself as follows:

> **"17. We have considered the trial court Judgement. It falls short of what is required under section 169 of the Criminal Procedure Code. The trial magistrate did not analyze the Judgement (sic). Neither did the magistrate put forth clear issues for determination. However, this court has the jurisdiction to analyze the evidence afresh…."**

To this we can only add that judgment writing is an art. The building blocks are provided by **section 169** aforesaid. It cannot therefore entail a simple copy-and-paste exercise of the evidence recorded and pleadings. The Judge must analyze the evidence, determine what is and what is not important in the context of the case, analyze it along with submissions, distill the important and relevant points, apply the applicable law to the evidence and then present all of it as a determination of the issue at hand in a manner that is easily understood, not only by judges, judicial officers and advocates but by a broad audience. While each judge may have a particular style of presenting this, some brief while others long, what must be borne in mind is that it must contain the three levels, arranged in a logical sequence.

The impugned judgment here is quite terse, only 1 and ¼ pages. With respect we are in agreement with the first appellate court that the judgment was short of the law and of what one would expect in a serious matter like this, where the appellants were being condemned to suffer death. Luckily, the first appellate court, in our circumstances gets the opportunity through re-evaluation and fresh scrutiny of the evidence to correct such shortcomings. As a result the appellants were not in any way prejudiced. This ground of appeal therefore lacks merit.

On the last point in this category of grounds, our simple answer is that there was no violation of the appellants' right to a fair trial as they were before the court in accordance with the law prevailing at the time, in 2009, namely **section 72** of the former Constitution.

Next we turn to the climax of this appeal; to that all-important question, whether the prosecution proved its case against the appellants beyond reasonable doubt. To prove the commission of the offence of robbery with violence the prosecution had to prove three elements as was stated by this Court in the case of **Juma Mohamed Ganzi & 2 others V. Republic** (2005) eKLR as follows:

> **"This Court has said in several decisions (see particularly the case of Oluoch v Republic [1985] KLR 549 that the offence of robbery with violence under section 296(2) of the Penal Code is committed in any of the following circumstances namely:**
>
> **"(i) The offender is armed with any dangerous or offensive weapon or instrument; or**
>
> **ii. The offender is in the company with one or more other person or persons; or**
>
> **iii. 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 appellants maintained that identification was not proper; there were contradictions and inconsistencies; that there were no recoveries made and; that the appellants' defence was not considered.

At the beginning of this judgment we emphasized and restated the law that evidence of visual identification or recognition in criminal cases ought to be carefully tested to avoid miscarriage of justice. The offence was committed at 10.00.pm in the night. Both courts below were in agreement that the identification was by recognition, as the appellants were well known to the complainants; they had previously worked together and were known to the complainants by their names. Both courts were also satisfied that the conditions were favourable for proper identification of the appellants as there was a full moon on the material night; and that the appellants were in close proximity to the complainants, approximately 5 meters apart.

The testimonies of the complainants on this point were found to be credible. That being a finding of fact, and no misdirection having been pointed out to us we have no basis to interfere with their concurrent conclusions.

We bear all the foregoing in mind as we come to the conclusion on this last ground that the prosecution discharged its burden proving the existence of the three elements of the charges as stated in **Juma Mohamed Ganzi** (supra). The appeal on conviction is dismissed.

The appellants have challenged the death sentence imposed on them and urged us to consider setting it aside in terms of the decision of the Supreme Court in **Francis Karioko Muruatetu & Another V. Republic** (2017) eKLR which declared the mandatory nature of the death sentence inconsistent with the Constitution. The trial Magistrate observed that the appellants were first offenders. Her view on the death sentence many years before the decision in

Muruatetu sounded like a prophecy. She expressed her empathy with the appellants and noted the confusion in this area, she nonetheless believed her hands were tied to pass only the death sentence.

In applying **Muruatetu** (supra), we take into consideration such factors as the gravity with which the offence was committed, the kind of weapons the appellants were armed with, whether they were ruthless, excessive, brutal or flagrant, their characters and criminal record, and so on and so forth.

Taking these together with the mitigating circumstances of the appellants into account, we allow the appeal on sentence, set aside the sentence of death and in its place impose twenty five years (25) imprisonment effective the date of conviction by the trial court.

Dated and delivered at Nairobi this 24th day of April, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

ASIKE – MAKHANDIA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR