



IN THE COURT OF APPEAL

AT NAIROBI

ICORAM: OUKO (P), KARANJA & SICHALE, JJA

CRIMINAL APPEAL NO. 7 OF 2018

BETWEEN

GEOFREY NJOGU MWANGI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kajiado,

(R.Nyakundi) dated 19th April, 2017 **IN HC. CRA. NO. 4 OF 2015**

JUDGMENT OF THE COURT

Geoffrey Njogu Mwangi alias **Njogu wa Saintena**, (the appellant herein) was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code, the particulars of the offence being that on **7th February, 2013** at Lau Lau dam in Kajiado District within Kajiado County, jointly with another not before court, while armed with dangerous weapons, namely knives robbed **Justin Burura Isaboke** of Kshs 38,517.00 and at or immediately before or immediately after the time of such robbery they used actual violence to the said **Justin Burura Isaboke**.

The background to this appeal is that **Brian Sitali Kasenji**, (P.W.1), a boda boda operator at Kajiado was walking home at around 6.40 p.m. on **7th February, 2013** when he saw a motor bike parked off the road near a river. He saw two (2) people who looked like they were fighting. He hid himself amongst the trees and saw one of the persons push the other into the river and thereafter walked away towards town. P.W.1 then moved towards the ditch and shone his torch. He heard a person crying for help. The person said he was **Justin** (P.W.7) and that he had been injured by **Njogu Wa Saintena** (the appellant herein). P.W.1 saw the person bleeding from the neck. He called the assistant chief, **Leonard Lesinko** (P.W.3) who came after about 30 minutes together with **Mbatha** (P.W.4), a boda boda rider. The assistant chief (P.W.3) and **Mbatha** (P.W.4) reported the incident to the police whilst P.W.1 remained guarding the scene. With the assistance of the police, P.W.3 took **Justin** to hospital. **Justin** told them that he had been injured by **Njogu Wa Saintena** and another person he did not know.

Lorna Mercy Kagwewo Mutwiri, (P.W.2), a business woman at Kajiado had employed **Patrick Njue Mwiriki** (P.W.6) as a manager. **Justin Burura Isaboke** (P.W.7) was also her employee. Besides, at one time she had also employed the appellant whom she later sacked allegedly on account of theft. P.W.7's employment entailed distribution of wines & spirits. In the morning of **7th February, 2013**, P.W.6 (the manager) gave P.W.7 cigarettes worth 39,397.00 to go sell and bring money in the evening. At 4 pm on the same day, P.W.7 informed him that he had collected Kshs 38,517.00 and that he was to collect more money from one more customer, supposedly before taking the day's collection to P.W.6.

According to P.W.7, he carried out his assignment (on the material day) as expected and started to collect money for the day's sales from about 3.00 p.m.; that at about 6.30 p.m. he met with **Njogu Wa Santo** (sic) (the appellant) who was a former colleague; that the appellant asked for a lift to the police station on his motor bike under the guise that the appellant needed to bail out his wife who had been arrested; that while on the way, the appellant asked him to stop and carry another person which he did; that when he had just re-started the motor cycle, the appellant stabbed him with a knife and asked him to cooperate; that the appellant led him to a path leading to a river; that on reaching the river, the appellant ordered him to stop and put a rope on his neck; that a struggle ensued in the course of which the appellant stabbed him on the throat with a knife; that the appellant cut him on the head, face, both cheeks and above the chest; that he asked the appellant to take the money if that was what he wanted; that the appellant continued cutting him as he struggled holding the knife; that in the process, the knife cut his fingers on both hands and finally, that the appellant removed all the money that P.W.7 had from the trouser pockets and the jacket and took off. P.W.7 stated further that on that date, he could not tell how much money he had but after reconciling the records

later, he realized that he was missing Kshs 38,317.00.

On the same day (**7th February, 2013**) at 7.00 pm, P.W.2 received information that P.W.7 had been seriously injured at the dam. She rushed to the scene accompanied by her manager (P.W.6). On arrival at the scene, they saw P.W.7 lying in a ditch covered in pool of blood. P.W.7 was removed from the ditch and taken to Kajiado District Hospital from where he was referred to Kenyatta National Hospital. According to P.W.2, P.W.7 told her that it was '**Njogu**' who had stabbed him. P.W.2 noted that P.W.7 had a stab wound on the neck and that he was very weak. She took him to Nairobi West Hospital where he was admitted to the ICU unit until **7th February, 2013**. P.W.7 was later discharged from hospital on **19th February, 2013**. It was P.W.2's further testimony that P.W.7 told her that he had gone to collect money from J.K Bar when he met with the appellant who requested him for a lift to the police station to bail out his wife who had been arrested; that on their way to the police station, the appellant stopped him and requested him to carry another person; that at this point, the appellant held him by the neck and told him to stop by the river; that the appellant removed a knife and stabbed him, pushed him into a ditch, removed money from his jacket pocket and took off.

Jacob Ntiga Kyalo (P.W.5), was a retail shop owner. On **7th February, 2013** at 7.00 a.m., P.W.7 supplied him with cigarettes worth Kshs 1,165/= and collected the money at 4 p.m.; that at around 8.00 p.m., **Mbatha** (P.W.4) went and informed him that he had seen P.W.7 lying in a trench as if he was dead; that he went to the scene in company of P.W.4 and they found P.W.7 lying in a trench while bleeding from his neck; that P.W.7 told them that "**Ni Njogu, it is Njogu and I am feeling cold**". P.W.7 was removed from the trench and was put in the police land rover.

Dr. Tom Omoto (P.W.8), a surgeon based at Kenyatta National Hospital (KNH) and a consultant at Nairobi West Hospital attended to P.W.7 at Nairobi West Hospital. He testified that P.W.7 was admitted to the ICU at the hospital; that P.W.7 had multiple cuts and that the probable weapon used was sharp object.

P.W.7 was later re-admitted to the hospital following a blood clot in the chest.

Jonah Chebolet, P.W.9 was a Clinical Officer at Kenyatta National Hospital.

He attended to P.W.7 ten hours later after he had been injured on **7th February, 2013**. He had multiple cut wounds. He filled the P.3 form which he produced in evidence.

Paul Waweru Kangethe, P.W.10 produced a report from the Government Chemist. The Government Analyst report was in respect to blood samples taken from recovered items and money to match with the blood of the appellant and that of P.W.7. It was his evidence that the DNA findings generated from blood stains on the jacket, pullover, T-shirts, shoes, cash book and 100 Kshs notes all matched those generated by blood sample of P.W.7 and that DNA profiles generated from blood stains of the two Kshs 1000/= notes matched those of the appellant.

No. 65169 P.C. **Salim Mwangi**, P.W.11, the investigating officer proceeded to the scene on **7th February, 2013** at 8.30 p.m. He found P.W.7 lying in a ditch; that together with others, they removed P.W.7 who was soaked in blood and took him to Kajiado District Hospital where they were referred to KNH. P.W.7 was later taken to Nairobi West Hospital. He re-arrested the appellant who was brought to the police station by members of public.

In his defence, the appellant gave a sworn statement and called 3 witnesses.

He admitted that he knew P.W.7 as they used to work together; however, P.W. 7 used to frame him and report him to their employer (P.W.2) on allegations of stealing whenever an item got lost; that on the other hand, P.W.2 wanted him to divorce his wife so that she could befriend him, failing which P.W.2 had threatened to make him suffer; that on **7th February, 2013** at 5.00 p.m to 10.00 p.m., he was at his workplace working; that he later decided to go and collect money from his customers after which he went to his home without going back to his place of work; that the following day (**8th February, 2013**) in the morning, P.W.2 went to his home with members of the public; that he was arrested, beaten and taken to the police station; that he learnt of the charges leveled against him in court during plea taking.

John Mwiruri Njenga, (D.W.2) and **Anna Wambui**, (D.W.3), a husband and wife gave evidence in support of the appellant's case. In their testimony, they stated that they had employed the appellant in **November, 2012** to sell milk; that the appellant used to be paid a salary of Kshs **8,000.00** per month; that on **7th February, 2013**, the appellant went to distribute milk as usual; that from the calculations, the appellant sold milk worth 18,000/=; that on **8th February, 2013**, the appellant took milk for sale but did not return any money from the sales and they learnt later that the appellant had been arrested.

In a judgment delivered on **10th December, 2013**, the trial magistrate found the appellant guilty as charged and convicted him. He was sentenced to suffer death as per the law then prescribed.

Dissatisfied with the conviction and sentence, the appellant filed an appeal to the High Court of Kenya at Kajiado. In a judgment dated **19th April, 2017**, **Nyakundi**, J dismissed the appellant's appeal.

Aggrieved with this findings, the appellant moved to the Court of Appeal and in the Supplementary Grounds of Appeal dated **10th January, 2019**, the appellant listed eight (8) grounds faulting his conviction and for failure to consider the mitigating factors in accordance with the decision of the Supreme Court in **Francis Karioko Muruatetu & another vs. Republic [2017] eKLR** .

The appeal came up for plenary hearing before us on **23rd October, 2019**. **Mr. Ratemo Oira**, learned counsel appeared for the appellant while **Ms Wangele**, learned Senior Public Prosecution Counsel appeared for the respondent. **Mr. Oira** in urging the appeal abandoned all the grounds in the undated homegrown grounds as well as the supplementary grounds of appeal filed on **10th January, 2019** save for ground 8 that challenged the sentence imposed for being excessive. Counsel relied on the decision of **Francis Karioko Muruatetu & another vs. Republic (supra)** in asserting his position that the mandatory nature of a death sentence is no longer the norm. He pointed out that the appellant had been in custody for now over seven (7) years. He urged us to re-sentence the appellant and/or remit the matter to the High Court for resentencing.

In response, **Miss Wangele**, the learned Senior Public Prosecution Counsel had no objection to the appellant's abandonment of the grounds on conviction or the matter being remitted back to the High Court for re-sentencing. In her view, the re-sentencing process belongs to the realm of the court below.

We have considered the totality of the evidence on record, the grounds of appeal, the rival oral and written submissions, the authorities cited and the law.

Suffice to state that the appellant abandoned his appeal against conviction. The only ground of appeal urged before us was on sentence. We were asked to review the sentence. The state did not oppose this. In the Supreme Court decision of

Francis Karioko Muruatetu & another vs. Republic [2017] eKLR, it was held:

“On our own assessment of the issue at hand and the material placed before us, we are persuaded, and now so hold, that section 204 of the Penal Code which provides for a mandatory death sentence is antithetical to the Constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial. We note that while the Constitution itself recognizes the death penalty as being lawful, it does not say anywhere that when a conviction for murder is recorded, only the death sentence shall be imposed. We declare Section 204 shall, to the extent it provides that the death penalty is the only sentence in respect of the crime of murder is inconsistent with the letter and spirit of the Constitution, which as we have said, makes no such mandatory provision.”

Given the above, and given the fact that the trial magistrate expressed herself thus:

“My hands are tied in view of the offence the accused person is facing. I hereby sentence him to suffer death in the manner prescribed by the law. Right of Appeal 14 days granted. A copy of certified judgment be supplied to the defence at own cost”,

It is our view that neither the trial court nor the 1st appellate court considered the appellant's mitigation as their hands were tied, and rightly so at the time.

However, given the change in the law following the decision of **Francis Karioko Muruatetu & another (supra)**, the death sentence is no longer mandatory.

Accordingly, we allow the appeal on sentence, set aside the death sentence and direct that this appeal be referred back to the High Court sitting in Kajiado within fourteen (14) days of today's date for the court to record the appellant's mitigation and the victim's impact assessment before the resentencing of the appellant.

It is so ordered.

Dated and Delivered at Nairobi this 24th Day of April, 2020.

OUKO (P)

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JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

Signed

DEPTY REGISTRAR