



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: OUKO (P), SICHALE & KANTAL, JJ.A]

CRIMINAL APPEAL NO. 16 OF 2019

BETWEEN

PATRICK MWANGI MWAMBA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kiambu (Mutende, J) dated 15th June, 2017

IN

HC. CRA NO. 157 OF 2016)

JUDGMENT OF THE COURT

The appeal herein is against the judgment of **Mutende, J** dated **15th June, 2017**. A brief background will give context to this appeal. **Patrick Mwangi Mwamba** (the appellant herein), **Boniface Kisiva Mbuli** and **Pius Irungu Ndungu** were charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code, the particulars being that on **27th February, 2013** at Makuyu-railway line in Murang'a County within the Republic of Kenya, while armed with offensive weapons namely, knives and rungu, jointly robbed **Sylvia Wanjiku** cash of Kshs 1,000 and a mobile phone make Techno, valued at Kshs 2,000 and at or immediately after the time of such robbery used actual violence on **Sylvia Wanjiru**.

In a trial conducted by **A.Lorot**, the then Senior Principal Magistrate, Thika Law Courts, the appellant was found guilty as charged and sentenced to death as per the law then prescribed. The 2nd and 3rd accused persons were, however, acquitted.

Dissatisfied with the conviction and sentence of the trial court, the appellant appealed to the High Court of Kenya at Kiambu and in a judgment delivered on **15th June, 2017**, **Mutende, J** dismissed the appeal in its entirety.

Undeterred, the appellant moved to this court and filed a notice of appeal and filed a list of authorities dated **6th June, 2019**. In his undated Memorandum of Appeal, the appellant listed five grounds of appeal faulting the learned judge for affirming his conviction and sentence without considering that the evidence adduced at the trial was contradictory and inconsistent; for affirming the appellant's conviction without considering that his identification by the complainant was erroneous; for affirming the appellant's conviction without considering that the case against the appellant was not proved to the required standard and finally, for shifting the burden of proof to him (the appellant).

The appeal came up before us for plenary hearing on **13th November, 2019**. **Miss Mutune**, learned counsel for the appellant submitted that although P.W.1's items that were stolen at the time of the robbery were recovered, there was no witness who told the trial court where and from whom they were recovered. In the alternative, counsel was of the view that the appellant was deserving of a lenient sentence given that the death sentence is no longer the only available sentence for such an offence, (see **Francis Karioko Muruatetu & another vs. Republic [2017] eKLR**).

In opposing the appeal, **Mr. Muriuki**, the learned Senior Public Prosecution Counsel (SPPC) was of the view that since P.W.1 had known the appellant for about two (2) years, this was a case of identification by recognition; that the appellant owned up to the fact that he worked in a car wash; that although the time of the robbery was about 7 pm, P.W.1 indicated that it was not dark and further that P.W.1 gave the assailant's name as **Mwangi** at the time she made the report at the police station. In conclusion, counsel contended that severity of sentence

is a matter of fact in which case we are precluded as a 2nd appellate court from considering it.

The appeal before us is a second appeal. As pointed out by **Mr. Muriuki**, our mandate as regards a second appeal is clear. By dint of Section 361 (1) (a) of the Criminal Procedure Code we are mandated to consider only matters of law. In **Kados vs. Republic Nyeri Cr. Appeal No. 149 of 2006 (UR)** this Court delivered itself thus on this issue:

“...This being a second appeal we are reminded of our primary role as a second appellate court, namely to steer clear of all issues of facts and only concern ourselves with issues of law ...”

In **David Njoroge Macharia vs. Republic [2011] eKLR** it was stated that under Section 361 of the Criminal Procedure Code:

“Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (see also Chemagong vs. Republic [1984] KLR 213).”

However, in order to determine whether the trial court and the 1st appellate court failed to analyze and re-analyze the evidence adduced, it is important to subject the entire evidence to a fresh review. It is only then that we can be able to determine whether the conviction was based on no evidence, or on a misapprehension of the evidence or that the two courts below acted on wrong principles in arriving at the conclusion thereof.

The evidence tendered in the trial court was that on **27th February, 2013**, at about 7 p.m, **Sylvia Wanjiru** (P.W.1), an **Mpesa** shop owner was on her way home when a person behind her walked slightly past her, stopped and turned to face her; that the person was armed with a knife which he raised above P.W.1's head and ordered her not to scream; that she panicked, screamed and threw her bag to two (2) people who had emerged from a nearby farm; that the person with the knife who was well known to her (as she used to see him at a car wash) stabbed her on the right side near the hip; that she had Kshs 1050 in her bag, a mobile phone make Techno among other items. Shortly, **Daniel Karanja Mwangi** (P.W.2), a motorcycle rider appeared having heard P.W.1's wailing that she had been stabbed. P.W.2 carried P.W.1 on his motor-cycle to Makuyu Health Centre. On their way to the Health Centre, they were joined by P.W.1's mother **Scholastica Wairimu** (P.W.3). Later on, P.W.1 reported the matter to the police and gave the name of **Mwangi** as one of the assailants.

No. 79192, **Christopher Saina** (P.W. 4) was the investigating officer. According to him, the name of “**Mwangi**” was recorded in the OB at the time P.W.1 made a report at the police station. P.W.4 also received exhibits recovered which were produced in evidence.

Dr. Emily Wangechi Njuno (P.W.5), a medical officer at Thika Level 5 hospital filled and produced a P.3 form in respect of P.W.1 together with treatment notes from Makuyu Health Centre. She assessed the degree of injury as grievous harm and the probable weapon used as sharp object.

In his defence, the appellant gave unsworn statement and alleged that on **2nd April, 2013**, he worked as usual upto 8.00 p.m. and on **3rd April, 2013**, while he was asleep in his house, his door was kicked open and police officers stormed into his house and arrested him without any explanation; that he was taken to Makuyu Police Station and later charged. He denied having any knowledge of the offence.

In his evaluation of the evidence, the learned judge stated:

“However, the 1st accused was properly identified. He was with the complainant for a considerable period. She screamed. He had warned her not to. His accomplices came out. They robbed her. He stabbed her”.

On its part, the 1st appellate court re-evaluated the evidence and rendered itself as follows:

“In this case, the complainant stated that the offence was committed at 7.00 pm. The complainant stated that it was the month of February when the sun sets late. It was not dark, there was light. She went on to state that she faced the person directly as there was no distance between them.

The person had not covered his face. She recognized him to be Mwangi, a person she knew for a period of two (2) years. She used to see him at the car wash. The information she gave the police regarding the suspect enabled them to arrest the appellant.

Taking into consideration the sunrise and sunset worldwide calendar, per the sunset and day length time in Nairobi, Kenya and its environs on the 27th February, 2013: sunrise was at 06.41 hours and sunset at 18.49 hours. This would support the complainant's evidence that it was not dark.

It is admitted by the appellant that he operates a car wash business. Right at the onset the complainant told the police that her attacker was Mwangi who operated a car wash business therefore her evidence was satisfactory and it was safe for the trial court to act upon it.”

In our view, the trial court evaluated the evidence and the 1st appellate court re-evaluated the evidence and came to the conclusion, and rightly so in our view, that the appellant was guilty of the offence charged. P.W.1 knew the appellant as **Mwangi**. She said she used to see him at a car wash for more than a period of two years. At the police station, she gave the name of **Mwangi** as one of her assailants. There was, in the circumstances evidence of identification by recognition. The conditions that enabled P.W.1 to do so were favourable. The

appellant in his defence admitted that he worked in a car-wash. In our view, the appeal against conviction is bereft of merit and it is dismissed.

However, as regards sentence, although the State Counsel contended that this was outside our purview (as severity of sentence is a matter of fact and not the law), we are of the view that the decision of *Muruatetu* case (supra) raises issues of law as regards the mandatory nature of the death sentence which the Supreme Court in the decision found to be unconstitutional. The appellant's challenge on sentence is against its mandatory nature then.

Accordingly, we note that the appellant was a 1st offender. In mitigation, he asked the court to take into consideration that he had no family of his own; that he is young and the fact that he was helping his parents. Taking into account the said mitigation and in view of the Supreme Court decision of *Francis Muruatetu* (supra), we set aside the death sentence and substitute it with a sentence of twenty (20) years imprisonment from the date of conviction (22nd December, 2015).

It is so ordered.

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

W. OUKO (P)

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JUDGE OF APPEAL

F.SICHALE

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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.

Signed

DEPTY REGISTRAR