IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MAKHANDIA, KIAGE & ODEK, JJ.A)

CRIMINAL APPEAL NO. 198 OF 2016

BETWEEN

FRANCIS SIMIYU.......APPELLANT

AND

REPUBLIC................RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Bungoma **(Tuiyott & Gikonyo, JJ)** dated **23*rd May, 2013* in HCCRA NO. 86 & 87 OF 2009)**

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JUDGMENT OF THE COURT

The appellant **Francis Simiyu** alias **Alim Yusuf** was one of four persons including a young woman by the name **Terry Goretti Wasike** (Terry) who were charged with two counts of robbery with violence contrary to **section 296(2)** of the **Penal Code** before the Senior Resident Magistrate's Court at Webuye. The particulars of the first count is that on 18th June 2008 at Mabanga area in Bungoma East District within the then Western Province, they jointly with others not before court robbed **Peter Wambua Mulei (PW1)** of an unregistered motor vehicle make Toyota Tracel, some Kshs. 2000 cash, a Motorola mobile phone and a rack sack bag containing a black pair of trousers, and in so doing used actual violence on the victim.

On the second count, they were alleged to have, at the same time and place and in the same manner, robbed **Charles Mutua Kilonzo (PW2)** of Kshs. 1,500 in cash, a driving licence, a national identity card and a voters cared.

There was an alternative court of handling stolen property contrary to **section 322(2)** of the **Penal Code** which related to one of the other accused persons.

After a trial in which the prosecution called six witnesses and the accused persons testified in their own behalf, the trial magistrate acquitted two of the accused persons but found the appellant and Terry guilty, convicted them and proceeded to sentence them to death.

Aggrieved, the two appealed to the High Court and by a judgment dated 23rd May 2013, Tuiyott and Gikonyo JJ, allowed Terry's appeal both on conviction and sentence and ordered her immediate release. The appellant was not so fortunate, however, as his appeal against both conviction and sentence was found unmeritorious and dismissed.

In the present appeal, his second and last, the appellant filed a memorandum of appeal through the firm of C.K. Areba & Co. Advocates. We note that notwithstanding the clear provisions of **section 361** of the **Penal Code** confining our jurisdiction to a consideration of matters of law only, the said memorandum contains grounds charging that the learned Judges "erred in law and in fact". With respect, it is wholly unacceptable that advocates should craft memoranda that defy the basics in such a manner.

The appellant's current advocates Okoyo Omondi Shem remedied that error by filing a [supplementary] memorandum of appeal raising a single substantive ground, namely; that the learned Judges erred in law in finding that the case against the appellant was proved beyond reasonable doubt. The second ground targets the sentence in curious phraseology;

> **"2. That the appellant is fully seeking refuge in the provisions of articles 165(3)(a)(b), 159(a)(b) and 22(4) of the Constitution of Kenya 2010 bearing in mind the Supreme Court decision in Francis Muruatetu & Another vs. Republic (2017) eKLR."**

In written submissions, which Mr. Omondi elected not to highlight, save to say that if we should find the appellants conviction safe we should reduce the sentence, it was argued for the appellant that the offence of robbery with violence was not proved beyond reasonable doubt. In particular, the learned Judges were faulted for improperly relying on the doctrine of recent possession to bolster the weak identification evidence in convicting the appellant. According to counsel, the Motorola phone found in the appellant's possession was not proved to have been the property of the complainant.

Counsel rested his submissions with the plea that should the appeal against conviction fail, then, the Supreme Court having declared the mandatory nature of the death sentence to be unconstitutional, we should substitute it with a favourable one considering the appellant's age, the years served and the fact that the stolen property was returned to the complainants.

For the Republic, **Mr. Muia** in written submissions contended that the evidence adduced did meet the threshold as to warrant the appellant's conviction. Citing ***OLUOCH vs. REPUBLIC*** ***[1985] KLR*** and ***AUGUSTI ERASMI vs. REPUBLIC*** Criminal Appeal No. 311 of 2012, counsel argued that the ingredients of the offence of robbery with violence were fully proved.

Regarding sentence, it was the appellant's case that the sentence of death was not unconstitutional but urged us to

> "revisit" it in view of the Supreme Court's decision in ***FRANCIS KARIOKO MURUATETU & ANOR vs. REPUBLIC*** ***[2017] eKLR.***

As this is a second appeal, we are limited to matters of law. Accordingly, we are generally bound by the concurrent findings of fact by the two courts below departing therefrom only in the rarest of cases where they are not based on any evidence or proceed from a misapprehension of the evidence or are plainly untenable.

We have carefully perused the record of this appeal and considered judgment of the High Court in light of the criticism levelled against it. What emerges is that the appellant was pointed out by the two complainants as one of the four person posing as students who flagged down the car the complainants were driving from Mombasa to Malaba in a convoy of about 10 vehicles. This was at a place called Sango in Webuye town. The four, two of whom were in full school uniform stated that they were coming from a schools sports competition and sought assistance to get to Matisi. **PW1** and **PW2,** with the former driving, graciously agreed to assist the four but little did they know that their act of kindness would be rewarded contrariously.

PW1 noted that the new passengers, all seated at the back seat were strangely quiet and when he asked why, they said they were tired. At Flyover, the girl among them, Terry, whispered to her friends that they needed to act as there was a police booth ahead. **PW1** continued driving and stopped the car at the Matisi school, only to discover that **PW2** seated at the front passenger seat had been strangled around the neck with a wire tightly held by one of the boys at the back.

At that moment a similar wire was looped around **PW1's** neck in similar fashion and his hands were tied by one of the passengers who he identified as the appellant. The appellant also tied his legs and he was then pushed from the driver's seat while **PW2** was bundled to the back of the car and his seat taken by one of the students-turned robbers. The appellant took charge of the car which he turned and drove at high speed back towards Webuye town before leaving the main road and turning into a murram feeder road, through sugarcane plantations and across the Nzoia River then stopped. **PW1** and **PW2** were then thrown, all their limbs tied, into the river as the car drove off. Only by clutching onto the cliff and embankment, respectively, were they able to survive certain death, and they eventually untied themselves.

It was about 10pm when they got free and, not knowing where they were, they nonetheless retraced their steps until they reached the tarmac road at nearly 5 am. They met a school boy near Flyover who showed them where the police station was. They reported that the car and their belongings had been stolen and recorded statements.

They were placed in police cells at first but later one policeman came to **PW1** with a Motorola cell phone and asked him if he recognized it. And he did. That phone, which was produced in court, had been recovered by police officers led by the investigating officer **Corporal Amos Gichuki (PW6)** from the person of the appellant. The police had been called in confidence that a motor vehicle suspected to be stolen had been seen hidden at Basiki area in the home of a person popularly known as

> 'Pastor'. The police went there and found the vehicle which now bore registration number KBC 704K. As they interrogated the owner of the homestead, the appellant and Terry emerged from a maize plantation nearby. The appellant was carrying a plastic container which had a liquid that was confirmed to be petrol.

The car had run out of fuel and they had gone to get some. The police arrested them and besides the cell phone they found the various items mentioned in the charge sheet in the stolen car. The duo and the owner of the homestead were arrested and taken to the police station where **PW1** and **PW2** were able to identify the various items, as well as the appellant and Terry at an identification parade that was mounted.

In upholding the appellant's conviction (who was the 2nd appellant before them), in what was to our mind a faithful discharge of the duty of fresh and independent re-appraisal of the whole evidence, (***OKENO vs. REPUBLIC*** ***[1972] EA 32***); and after taking the advisedly circumspect approach that evidence of visual identification calls for, due to the potential for mistaken identity and attendant misjustice inherent therein, (***WAMUNGA vs. REPUBLIC*** ***[1989] KLR, 424***; ***MAITANYI vs. REPUBLIC*** ***[1986] KLR 198);*** the learned Judges expressed themselves thus;

> **"31. Having said that, there is still other evidence that incriminates the 2*nd appellant. Whilst PW6 was still at the home of DW4, the appellants emerged from a nearby maize plantation. And the 2nd* appellant was carrying a yellow plastic container which contained a liquid that was later confirmed to be petrol. That alone may not have meant much. But on being arrested,**

he was found in possession of a cell phone Motorola c.50 belonging to PW1. It had been stolen at the time of the robbery.

32. We had found that the evidence of identification was not sufficiently assuring and required to be propped up by some other evidence. In respect to the 2*nd* appellant, other evidence was provided when he was found red-handed with the stolen cell phone barely 24 hours after the robbery. It did not help his case that he was also found close to a place where the stolen car had been recovered and he was carrying petrol....”

We think, with respect, that the learned Judges were thorough and quite painstaking in their analysis of the evidence as a whole and their conclusions cannot justifiably be faulted. The evidence against the appellant was overwhelming and his guilt amply proved beyond reasonable doubt. The appeal against conviction therefore fails and is dismissed.

On sentence, we note that the trial court upheld the death sentence on the basis that it was the only available sentence for the offence charged. Following the ***MURUATETU*** decision, (supra) the courts do retain a discretion and may impose a sentence other than that of death upon returning or upholding a conviction for robbery with violence. It is urged for the appellant that we should reduce the sentence and the learned Prosecution Counsel agrees that it is within our discretion of revisit it.

We agree with the learned Judges that there was much to commend the sentence of death in the instant case. They captured the callous, calculated cold-heartedness of the appellant and his accomplices as follows;

> **“The robbers threw one of the complainants [both, we think] into River Nzoia and had it not been of the complainant’s gallant efforts he would have drowned. The robbers were ruthless and heartless.”**

In consideration of the relative youth of the appellant at the time of the heinous crime and the fact that he has been in custody for over a decade, and as the death sentence is no longer mandatory post-**MURUATETU**, (supra) we set aside the death sentence and substitute it with a term of 30 years imprisonment with effect from the date of conviction.

This judgment is delivered under ***Rule 32(2)*** of the Court of Appeal Rules, Odek, JA having died before he could sign it.

DATED and delivered at Kisumu this 3rd day of April 2020.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL