IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE MAKHANDIA, KIAGE & OTIENO-ODEK JJA)

CRIMINAL APPEAL NO. 141 OF 2016

BETWEEN

SHADRACK SHUATANI OMWAKA....APPELLANT

AND

REPUBLIC..... RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kakamega (R.N. Sitati and Njoki Mwangi JJ.) dated 28th *January 2016* ***in H C Cr. Appeal No. 183 of 2011)***

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JUDGMENT OF THE COURT

The appellant was arraigned before the magistrate's court and charged with the offence of robbery with violence contrary to **Section 296 (2) of the Penal Code.** The particulars are that on the 2nd day of December 2010 at about 9.00 pm at Kureko village Nabongo Location in Mumias District within Kakamega County, jointly with another not before court while armed with dangerous weapons namely a panga and a club he robbed Naftali Wesonga Namamba off a Motor Cycle Registration No. KMCK 586M make TVS star black purple in colour Engine No. AF5CA1925700 chassis No. MD625KF5941C09138, one mobile phone make Nokia 110 and cash Ksh. 750 all valued at Ksh. 87,150/= and at the time of such robbery used actual violence to the said Naftali Wesonga Namamba.

The complainant PW1, Nafatali Wesonga Namamba, testified as follows:

> I am a boda boda operator. I do ride a motor bike. I do recall on 2nd
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> December 2010 around 9.00 pm I was at Shibale Mumias Road. I reached
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> Safi Guest House. I was riding motorcycle KMCK 586M. I was close.
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> Two people stopped me. They said they wanted to be passengers…. I took *them to Lureko Primary School. It is then one of then pretended to remove money from the pocket but removed a jembe pin which he used to hit me from behind. I fell down. I tried to raise my hand, one of them removed a panga and hit me across the head. Somebody also used a pin which he did use to injure my eye. There was sufficient light from Safi Guest House and there was also light at Burudika where we stopped. There were also electricity lights besides where we stopped as he pretended to take money. I saw the party very well. I heard noise, there was a lady who had come to rescue me. I gave her a number and she called a colleague who came with police. I was taken to St. Mary's Hospital. The fellows went with the motor cycle. … I was later discharged from hospital. The police called me that somebody had been arrested. I went and pointed out the accused from a group of 13 people. They were lined behind the O.B. at the Police Station.*

PW4 Wycliffe Wesechere, a clinical officer from Mumias, testified and produced a P3 Form issued in relation to the

complainant. He stated PW1 was treated at St. Mary's Hospital where he had been admitted from 3rd to 6th December 2010 and he later became an outpatient. The P3 Form indicates that upon examination, PW1 was bleeding profusely from the scalp. He had a swollen right thigh with a deep cut wound about 7 cm long. He had mild tenderness in the left lumbar region. There was no fracture. The injuries were caused by sharp and blunt objects.

PW5 Inspector of Police Joel Kibet No. 230890 testified that he conducted an identification parade on 15th December 2010. He paraded eight (8) persons of almost the same size and similar complexion. PW1 positively identified the appellant by touching him as the person who had attacked him. He duly filled the Police Identification Forms. He asked the appellant what he had to say about the parade. The appellant stated he had nothing to say and he signed the Parade

Forms.

When put on his defence, the appellant denied committing the offence as charged. He stated that he knew nothing about the offence, and that on 2nd December 2010 he was at home with his wife.

It is not in dispute that the complainant was attacked and robbed of the motor cycle and mobile phone. It is also not disputed that violence was used on the complainant during the robbery. The question is who attacked and robbed the complainant? Upon evaluating the evidence on record, the learned magistrate considered the question whether the appellant was properly identified as the person who committed the offence as charged. The magistrate held:

> In view of the accused defence that I have considered, I have also thoroughly warned myself on the dangers of convicting particularly when circumstances as to identification (sic). After thorough deliberations in this matter, I have reached an irreversible conclusion that accused was properly identified positively by the complainant. …
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> There was sufficient light at Safi Guest House from electricity. He dropped by Burudikia bar with sufficient electricity; that he was dropping from Lureko where there was light from the nearby school…. (sic). I find that the prosecution proved its case beyond reasonable doubt.
>
> The accused is convicted as charged….
>
> The accused is sentenced to suffer death as prescribed by law.

Aggrieved by the conviction and sentence, the appellant lodged a first appeal to the High Court. The appeal was dismissed. In dismissing the appeal, the learned judges expressed as follows:

> We are in concurrence with the learned trial magistrate's finding that PW1 saw the appellant and his fellow passenger with the aid of electric light at the position where he picked them as pillion passengers at Safi Guest House, they rode on to Burudika bar where they stopped, albeit briefly, the said bar was lit by electricity. There was also electricity at Lureko Primary School where PW1 was attacked…. We are satisfied that*the appellant was properly identified by PW1…. The circumstances were conducive for positive identification due to the presence of electric light at various locations. The issue of mistaken identity does not arise. The identification of the appellant was confirmed in the identification parade conducted by PW5 Inspector Joel Kibet….*
>
> We are satisfied that the appellant was properly convicted for the offence of robbery with violence…. We therefore uphold the death sentence meted *by the trial court. We find the appeal herein has no merit and hereby dismiss it.*

Aggrieved by the dismissal of his appeal, the appellant has lodged the instant second appeal citing the following grounds:

> i. That the learned judges erred in law in failing to notice that the appellant's rights under **Article 50 of the Constitution** had been violated.
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> ii. The learned judges erred and failed to subject the evidence on record to fresh scrutiny and re-evaluate the same as required by law.
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> iiii. The learned judges erred in holding that the identification of the appellant was proper when the Identification Parade that was conducted fell short of the requirements of the Forces Standing Orders.

iv. That the prosecution had failed to prove its case beyond reasonable doubt.

v. That the sentence passed by the learned judges was harsh and excessive.

At the hearing of the appeal, learned counsel Mr. Okoth Justus holding brief for Ms Imbaya appeared for the appellant. Learned counsel Ms Peris Gathu appeared for the State. Both parties filed written submissions in the appeal.

Counsel for the appellant relied in entirety on the written submissions and list of authorities filed. It was urged that the learned judges failed to notice that the appellant's rights under **Article 50 of the Constitution** were violated. The appellant was charged with robbery with violence which carries a mandatory death sentence. The appellant was not represented by counsel and during the appeal before the High Court, the appellant remained unrepresented. There is no indication from the proceedings that the appellant was supplied with witness statements and all documents that the prosecution intended to rely upon. The appellant indicated to the learned judges that he needed to have an advocate but the court failed to address the issue.

On the issue of identification, it was submitted that the Identification Parade conducted by PW5 did not comply with the Force Standing Orders. The appellant was not informed of the purpose of the parade. At the hearing before the learned judges, the appellant questioned the manner in which the identification parade was conducted and the discrepancies revealed. However, the learned judges considered the discrepancies that were highlighted as immaterial. The persons who were placed together with the appellant in the parade were of different general appearance contrary to the Force Standing Orders. The discrepancies in the manner in which the identification parade was conducted raises more questions than answers.

The appellant further contended that the prosecution never proved its case beyond reasonable doubt; that the offence of robbery with violence is basically an aggravated form of theft; that the aspect of theft was never proved by the prosecution and that the intensity of light was never looked at so as to determine if there was a positive identification of the appellant.

Counsel concluded by urging that the death sentence meted upon the appellant was harsh and excessive in light of the Supreme Court decision in **Francis Karioko Muruatetu & another – v- Republic SC Petition Nos. 15 & 16 of 2015.**

The respondent in opposing the appeal submitted that all the ingredients of the offence of robbery with violence were proved beyond reasonable doubt; the appellant was in the company of another person when the offence was committed; that appellant was positively identified by PW1 as one of the persons who attacked him; that the medical report tendered in evidence established the injuries and violence was meted upon the appellant at the time of the offence; that the complainant was with the appellant long enough to memorize his appearance; and that there was sufficient electric light that enabled the complainant to see and be able to positively identify the appellant.

On sentence, the respondent submitted that following the decision of the Supreme Court in **Francis Karioko Muruatetu & another – v- Republic SC Petition Nos. 15 & 16 of 2015,** this Court can re-consider the death sentence meted upon the appellant. The State urged us to set aside the death sentence and substitute the same with a term of imprisonment of not less than 30 years.

We have considered the record of appeal as well as submissions by the appellant and respondent. This is a second appeal that must be confined to questions of law. In **M'Riungu - v- Republic [1983] KLR 455**, this Court expressed:

> "[W]here a right of appeal is confined to question of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of fact and law and it should not interfere with the decision of the trial court or the first appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law".

We remind ourselves that there are concurrent findings of fact by the two courts below. In **Adan Muraguri Mungara - v - Republic, Cr. No. 347 of 2007 (Nyeri),** this Court set out the circumstances under which it will disturb the concurrent findings of fact by the two courts below in the following terms:

> "As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere." See **Aggrey Mbai Injaga – v - Republic [2014] eKLR**.

The ingredients of the offence of robbery with violence were clearly set out by this Court in the case of **Oluoch –vs– Republic [1985] KLR** where it was held:

> "Robbery with violence is committed in any of the following circumstances.

i. The offender is armed with any dangerous and offensive weapon or instrument; or

ii. The offender is in company with one or more 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 appellant having been charged with the offence of robbery with violence, the prosecution was duty bound to prove that the appellant was in the company of at least one or more person or was armed with a dangerous weapon. In this matter, the prosecution through the testimony of PW1 led evidence that at the time of the offence, the appellant was in the company of another person. PW1 in his testimony stated he was attacked by more than one person. He described how one person attacked him with the pin of a jembe and the other with a panga. We find no reason to doubt the testimony of PW1. We thus find that more than one person attacked and robbed the appellant.

The second ingredient of the offence of robbery with violence is proof that the accused person was armed with a dangerous weapon. The evidence on record from the testimony of PW1 shows that the attackers were armed with a jembe pin and a panga. We find that whoever attacked and robbed the appellant was armed with dangerous weapons namely a panga and jembe pin.

As regards use of violence immediately before, at or after the robbery, there is medical evidence on record that corroborates PW1's testimony that he was assaulted, injured and he bled profusely. The medical evidence corroborates the injury as stated by PW1. We thus find that there is evidence on record that proves all the three essential ingredients for the offence of robbery with violence.

The last ingredient that need be proved is that the appellant was the person who committed the offence. This perforce requires conclusive evidence on identification of the appellant.

Two issues are relevant to the identification of the appellant. The first is whether there was sufficient of light to enable PW1 to identify the appellant. The second is the cogency and veracity of the identification parade conducted by PW5.

In **Maitanyi -v- Republic, (1986) KLR 198** this Court stated that in determining the quality of identification using light at night, it is at least essential to ascertain the nature of the light available, what sort of light, its size and its position relative to the suspect. The Court stated:

"In this case there is no other evidence circumstantial or direct. The decision must turn on the need for testing with greatest care the evidence of this single witness. Is that what the courts below really did? It must be emphasized that what is being tested is primarily the impression received by the single witness at the time of the incident. Otherwise, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness, so the chances of a true impression being received improves. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and it (sic) position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by there would have been a careful inquiry into these matters by the committing magistrate, state counsel and defence counsel---------

There is a sound line of inquiry which ought to be made and that is whether the complainant was able to give such description or identification of his or her assailants to those who came to the complainant's aid, or to the police."

Comparatively, the Uganda Supreme Court in the case of **Abdulla Nabulere and another – v - Uganda Cr. Appeal No. 9 of 1978 (un reported)** stated as follows in relation to identification of an assailant at night:

"….Apart from light during the incident, and familiarity of the *assailant to the victim, other factors, such as distance between them, the length of time the victim had to observe and even the opportunity to hear the assailant are factors to look out for."….*

"All these factors go to the quality of the identification evidence. If the quality is good the danger of mistaken identity is reduced but the poorer the quality the greater the danger. When the quality is good as for example, when the identification is made after a long period of observation, or in satisfactory conditions by a person who knew the accused before, *a Court can safely convict even though there is no other evidence to support the identification evidence, provided the Court adequately warns itself of the special need for caution."*

On the issue of lighting, the two courts below made concurrent findings of fact that there was sufficient electric light at the time and place of the offence that enabled PW1 to identify the appellant. The learned judges re-evaluated the evidence of PW1 and made a finding that there was electric light at Safi Guest House; there was light at Burudika Bar and there was electric light at Lureko Primary School which was the scene of crime.

The source of light was established to be electricity. A finding was also made that there was electric light along the entire road that the complainant and appellant rode on up to the scene of crime at Lureko Primary School. Our reading and analysis of the judgment of the learned judges demonstrates that the judges properly evaluated the PW1's testimony to determine if the intensity of the electric light was sufficient for positive identification of the appellant. We are thus satisfied that the lighting that was available at the time and place of the offence was sufficient for positive identification.

The appellant has taken issue with the identification parade as conducted by PW5. On our part, even if we were to discount the results of the identification parade, the evidence of PW1 positively identifies the appellant as the person who committed the offence. On the strength of the evidence by PW1, we are satisfied that the appellant was properly identified as the person who committed the offence.

On the alleged violations of the appellant's rights under **Article 50 of the Constitution**, this is an afterthought that neither dents nor shakes the prosecution case. We thus find that the prosecution proved its case beyond reasonable doubt.

In this appeal, the appellant has urged us to revisit the death sentence on the ground that it is harsh and excessive in the individualized circumstances of this case. The law on the power and jurisdiction of an appellate court to interfere with a sentence passed by a trial court was correctly expressed in the case of **Ogalo s/o Owuora 1954 24 EACA 70** *to wit* that an appellate court has power to interfere with any sentence imposed by a trial court if it is evident that the trial court acted on wrong principles or over looked some material factor or that the sentence is illegal or manifestly excessive as to amount to a miscarriage of justice.

Comparatively, the general principles that an appellate court adopts in an appeal relating to sentence was stated by **Nicholas J** in the South Africa case of ***R - v - Rabie*** **{1975} (4) SA 855 (A) at 857D-F** as follows: -

1. "In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal-

    a. should be guided by the principle that punishment is "pre- eminently a matter for the discretion of the trial Court"; and

    b. should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been

        "judicially and properly exercised

2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."

Further, in the case of **Alister Anthony Pareira – v - State of Maharashtra, {2012}2 S.C.C 648 para 69**, the Indian Supreme Court held that:

> "Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the of the offence and all other attendant circumstances"

The Supreme Court in the case of **Francis Karioko Muruatetu & another – v- Republic SC Petition Nos. 15 & 16 of 2015** held that a mandatory death sentence is unconstitutional as it takes away judicial discretion to determine an appropriate sentence in each particular case. This Court has adopted and applied the Supreme Court decision in **Christopher Ochieng – v- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011** and in **Jared Koita Injiri – v-R, Kisumu Criminal Appeal No. 93 of 2014** to the effect that mandatory sentences take away the judicial discretion to impose a sentence commensurate with the circumstances of a particular case.

Bearing in mind the dicta of the Supreme Court, we are inclined to interfere with the death sentence meted upon the appellant. We note that the trial magistrate in sentencing the appellant to death stated that "robbery with violence is becoming rampant within the jurisdiction of the court particularly on boda boda cyclists by night." In sentencing the appellant, the two courts below did not have the benefit of the Supreme Court decision that enjoins a court to consider the individualized circumstances of each case before passing sentence. Accordingly, we hereby set aside the death sentence meted upon the appellant and substitute the same with imprisonment for a term of twenty (20) years from 5th August 2011 which is the date of sentence by the trial court.

The final order is that we affirm and uphold the conviction of the appellant for the offence of robbery with violence. We however set aside

the death sentence and substitute the same with a term of imprisonment for twenty (20) years with effect from 5th August 2011.

This Judgment is delivered pursuant to rule 32(2) of the Court of Appeal Rules since Odek, JA passed on before the delivery of the judgment.

Dated and delivered at Nairobi this 19th day of June, 2020.

ASIKE MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR