IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), MUSINGA, & KANTAI, JJA.)

CRIMINAL APPEAL NO. 72 OF 2016

BETWEEN

TOBIAS OWINO OKELLO.....1ST APPELLANT

GEORGE OWINO OKELLO.....2ND APPELLANT

PETER OLENGO NANDI.....3RD APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal against the conviction and sentence of the High Court of Kenya

at Nairobi (Ogola E. & Kamau JJ.) dated 12th November 2013

in

H.C.CR.A. No. 206 & 261 of 2009.)

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JUDGMENT OF THE COURT

1. ***Tobias Owino Okello***, ***George Owino Okello*** *and* ***Peter Olengo Nandi***, the appellants herein, have preferred this second appeal challenging their conviction and sentence for the offence of robbery with violence contrary to ***section 296 (2)*** of the ***Penal Code***. Our role as a second appellate court was succinctly stated in ***Karani v. R [2010] 1 KLR 73*** wherein this Court expressed itself as follows:

> ***"This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."***

2. The brief facts of the case that led to their conviction is as follows: On 13th November 2011 at around 1.30 p.m., the complainant, ***Henry Mati Kubai***, was walking from Catholic University in Karen, Nairobi, towards Bomas bus stage when he noticed three men following him. Suddenly the complainant was attacked and robbed of cash Kshs.10,000, a Nokia mobile phone valued at Kshs 4500/=, a Safaricom Sim card, Equity Bank ATM Card and a leather belt.

3. Subsequently, the assailants, the appellants herein, were arrested and charged before the Senior Resident Magistrates' Court at Kibera. They were convicted and sentenced to death by the trial court.

4. Being aggrieved by the conviction and sentence, the appellants preferred appeals to the High Court. The appeals were unsuccessful. Undeterred, the appellants preferred a second appeal to this Court.

5. Although the memorandum of appeal consists of several grounds challenging both conviction and sentence, when the appeal came up for

hearing, ***Mr. Ratemo Oira***, learned counsel for the appellants, abandoned all the grounds of appeal against conviction and argued only one ground that challenges the death sentence. He prayed that the death sentence be reviewed in light of the Supreme Court decision in ***Francis Karioko Muruatetu & Another -v- Republic***, ***SC Petition No. 16 of 2015*** where it was held that the mandatory death sentence that denies the trial court the discretion to pass an appropriate sentence depending on the accused's mitigation is unconstitutional. Counsel urged us to set aside the death sentence and substitute therefor a custodial sentence or send the matter back to the High Court for re-sentencing.

6. Opposing the appeal, ***Mr. Obiri***, Assistant Director of Public Prosecutions, was of the view that the High Court affirmed the sentence that was passed by the trial court; and that sentencing is an issue of fact and not law. He pointed out that under the **Muruatetu's decision** (supra), it is only the trial court that can re-sentence and not this Court. It was also his view that the appellants would still have a right of appeal in respect of the sentence should the matter be remitted for re-sentencing.

7. Counsel further submitted that there was no evidence that the appellants had reformed. He suggested that a report from the prison authorities be submitted to the trial court.

8. This being a second appeal as we have already stated, our jurisdiction is limited to matters of law only. In ***David Njoroge v Republic***, ***[2011] eKLR***, this Court 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 the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also Chemagong v Republic (1984) KLR 213."***

Severity of sentence is an issue of fact, but whether the sentence that was passed was in accordance with the Constitution is an issue of law. This Court therefore has jurisdiction to consider the issue of sentence that was raised by the appellants' advocate.

9. We respectfully disagree with the respondent's contention that re-sentencing can only be done by the trial court. There is a plethora of decisions where this Court has issued re-sentencing orders in appropriate cases. For example, in ***Raphael Mourice Muriu Ngoya & Another v Republic [2019] eKLR***, where the appellants had been sentenced to death, this Court re-sentenced the appellants to 20 years' imprisonment for a similar offence as herein. Similarly, in ***Robert Mutashi Auda v. Republic***, ***Criminal Appeal No. 247 of 2014***, where the appellant had also been sentenced to death for robbery with violence, this Court considered the fact that there were no injuries inflicted on the victims and that the appellant had already served 13 years in custody. Accordingly, the Court reduced the sentence to the period already served.

10. In ***George Ndungi Thairu v Republic [2019] eKLR***, where this Court was urged to re-sentence an appellant who had been sentenced to death by the trial court, the Court stated:

> ***"In considering the appropriate sentence to mete out, the Court must consider the appellant's mitigation, the question of proportionality of the gravity of the offence committed vis a vis the nature of the sentence to be imposed, and all other relevant factors."***

The Court set aside the death sentence and substituted it with a sentence of 20 years' imprisonment.

11. For the foregoing reasons, and applying the same principles, we are inclined to interfere with the death sentence. We note that the 1st and 2nd appellants did not make any mitigation, while the 3rd appellant prayed for leniency. All the appellants were first offenders.

12. In ***GN v Republic [2019] eKLR***, this Court was of the view that there was no reason for remitting the matter back to the trial court for re-sentencing. It held:

> ***"In the instant matter, there is on record mitigation by the appellant and we see no reason to remit this matter for rehearing on sentencing. Accordingly, we find it appropriate to interfere with the life sentence affirmed by the first appellate court. We dismiss the appeal against conviction; we set aside the life sentence meted upon the appellant and substitute thereto a sentence of 20 years' imprisonment with effect from 17th July 2012 when the trial court passed the sentence."***

13. In view of the aforementioned findings, we have taken into consideration the 3rd appellant's mitigation; the fact that the appellants were first offenders; that they have been in custody since the day they were arrested in 2008; that the injuries sustained by the complainant were minimal; and that the items stolen were recovered. Consequently, we allow the appeal against sentence and set aside the death sentence imposed by the learned magistrate and upheld by the High Court and substitute therefor a sentence of 20 years' imprisonment from the date of the original conviction.

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

W. OUKO, (P)

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JUDGE OF APPEAL

D.K. MUSINGA

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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

DEPUTY REGISTRAR