IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), MURGOR & SICHALE, JJ.A)

CRIMINAL APPEAL NO. 110 OF 2017

BETWEEN

ZACHARIA KIMEU SAMSON…..…….……. 1ST APPELLANT

KENNEDY THUKU PETER……..……..……2ND APPELLANT

AND

REPUBLIC ……..……..……..…… RESPONDENT

(Appeal from a Judgment of the High Court at Nairobi (F. Ochieng & L . Achode JJ.) dated 17th December, 2012 in H.C.CR.A 210 & 211 of 2008)

JUDGMENT OF THE COURT

Aggrieved by the rejection of their first appeal by the High Court (F. Ochieng & L. Achode JJ.), the appellants have proffered this second appeal against their conviction and sentence for the offence of robbery with violence contrary to **section 296(2**) of the Penal Code.

In dismissing the appellants' first appeal, the High Court confirmed the factual conclusions by the trial court that on 10th October, 2005 at Biafra Estate, the appellants, who were in a group of 8 others, attacked the two complainants and stole from them personal documents, an engagement ring, money and a mobile phone; that in the course of the robbery, the 2nd appellant struggled with one of the complainants and in the process was stabbed on the thigh; that that very night, they were called to Shauri Moyo Police station, where, in an identification parade, the appellants were identified.

Both appellants denied involvement in the commission of the offence; and that before the time of their arrest, they had never met.

The learned trial Magistrate was satisfied that the appellants were positively identified, both at the scene and at the police identification parade; and that the offence of robbery with violence was proved to the required standard. With those conclusions, the appellants were convicted and sentenced to death. Dissatisfied by this outcome, the appellants bring this second appeal and have urged this Court to find that both courts below erred in law by: not finding that the identification parade was conducted below the required standard; failing to observe that **section 150** of the Criminal Procedure Code was violated; not finding that the case was not proven beyond reasonable doubt and; rejecting their defences.

For these reasons, Mr. Ratemo, learned counsel for the appellants, submitted that there were no investigations prior to the arrest of the appellants; that reliance was placed on the alleged identification parade when it was apparent that the appellants had been seen by the victims before the parade was conducted, and at the same time, the appellants were not granted the right to be represented by counsel, contrary to the Force Standing Orders. He maintained that the victims were called to the police station in the evening where they saw the appellants; that from the prosecution evidence, the complainants were attacked by 8 people whose description were not given, and that if indeed, as shown in the P3 Form that the attackers were known to PW1, then it was not necessary to conduct an identification parade. In any case, counsel went on to submit, the particulars of the officer on whose instructions the parade was conducted was not given. Counsel pointed out that there was doubt as to the involvement of the appellants in the robbery hence, the complainants' desire to withdraw the charges at some point in the proceedings. He also submitted that the arresting and investigating officers were not called as witnesses to shed light in some of the allegations. In conclusion, he posited that there were serious contradictions and several gaps in the prosecutions case.

Opposing the appeal, Mr. Gitonga, learned counsel for the respondent submitted that the only issue for determination was that of identification. In this regard, he maintained that the 1st appellant was picked out by PW1 in the identification parade; that PW2 in his evidence stated that PW1 did not hesitate in picking out the 1st appellant and that PW1 explained how he was able to identify the appellant; that the 2nd appellant was picked by both PW1 and PW3 who explained that he was the one who stabbed PW1 and threatened PW3. His

identification was based on his physical appearance. Further, the appellants were easily identified as the conditions were favourable, being daylight, in addition to corroborating evidence of PW1 and PW3; that after robbing the complainants, the appellants simply walked away casually and leisurely as the complainants watched giving the former ample time to identify them. Counsel maintained that, contrary to appellants' counsel's argument, there was no evidence that the complainants saw the appellants before the identification parade was conducted. Lastly, based on the now famous Supreme Court's decision in the case of **Francis Karioko Muruatetu** & **another vs. Republic** (2017) eKLR, counsel asked the Court to bear in mind that death is not a mandatory sentence and to consider substituting it with a custodial sentence.

This being a second appeal, by the provisions of **section 361(1)** of the Criminal Procedure Code this Court is expected to consider only issues of law. Where the two courts below have made concurrent findings of fact, this Court is required to respect those findings unless the conclusions are not supported by the evidence or are based on a misapplication of the evidence. See: **M'Riungu vs. Republic, (**1983) KLR 455.

From the submissions by parties, the main issue for determination is whether the prosecution proved its case beyond reasonable doubt. To prove the commission of the offence of robbery with violence, the prosecution has to prove three elements as was stated thus by this Court in the case of **Juma Mohamed Ganzi & 2 others vs. Republic** (2005) eKLR:

> **"This Court has said in several decisions (see particularly the case of Oluoch v Republic [1985] KLR 549 that the offence of robbery with violence under section 296(2) of the Penal Code is committed in any of the following circumstances namely:**
>
> **(i) The offender is armed with any dangerous or offensive weapon or instrument; or**
>
> **(ii) The offender is in the company with one or more other 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 appellants' main grievance, which is the crux of this appeal, is that they were not properly identified by the complainants. The only evidence was that of visual identification of the appellants by the complainants. This Court has emphasized that evidence of identification must always be treated with extra caution to avoid miscarriage of justice. In the case of **Cleophas Otieno Wamunga V. R**, (1989) eKLR, this Court cautioned that;

> **"Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification".**

The appellants maintained that identification was not proper as the identification parade was conducted contrary to chapter 46 of the Force Standing Orders; that there were no descriptions of the assailants; that the parade was not duly conducted; that there were contradictions and inconsistencies in the evidence of identification; that there were no recoveries made of the items stolen from the complainants; and that the appellants' defence was not considered.

The offence was committed at 10.00 am. Both courts below were satisfied that the conditions for proper identification were favourable as the attack took place in broad daylight; that PW1 struggled with the 2nd appellant before he was stabbed which gave the former sufficient opportunity to see the 2nd appellant well; and that both appellants were clearly seen by PW1 and PW3. In view of these factors, the courts were satisfied that there was proper evidence of identification. With that, both courts below were satisfied that the appellants were at the scene and that they participated in the daylight robbery.

For our part, we agree that the conditions of identification were favourable as the offence took place during the day. The appellants were in close proximity to the complainants. The latter were able to identify them by their appearance and the clothes they wore. Further, the incident took about ten minutes after which the appellants leisurely walked away from the scene as the complainants watched. In addition, the appellants were positively identified from two separate identification parades, which the two courts below found to have been properly conducted. The evidence of PW2, the officer who conducted the identification parade, shows that there were two separate parades conducted on 11th October, 2005, that there were 8 members of each parade; that the appellants were informed of the parade and each selected the position where he wished to stand; that the appellants were both positively identified by PW1 whilst PW3 was only able to identify the 2nd appellant. The Identification Parade Forms on record corroborate PW2's testimony. There was no evidence, as alleged by the appellants, that the complainants saw the appellants the night before the identification parade was conducted.

The totality of the evidence is that both appellants were at the scene. Their defences were properly considered and dismissed as they amounted to mere denials.

On the failure to call the arresting and investigating officers, the answer is in the proviso to **section 143** of the Evidence Act, which states that there is no particular number of witnesses required to prove a fact. Both courts below, just like us, were satisfied that the prosecution's case had been proven beyond reasonable doubt, hence the failure to call the arresting and investigating officers did not affect that conclusion

With the appellants having been placed in the *locus in quo*, together with the evidence that they were armed with knives, and were in the company of 6 others, and used actual violence and caused personal injury to PW1, the offence of robbery with violence as charged was established beyond any reasonable doubt. We find nothing in this appeal to warrant our interference with the concurrent findings of fact by the two courts below.

Having found that all the elements of the offence of robbery with violence were proven, what then would be an appropriate sentence? Until the decision in **Francis Karioko Muruatetu & Anor** (supra), the courts approached the death sentence in capital offences as the only sentence prescribed by law. Since the decision it is now settled that that is not so: that sentencing is a function of the court exercised as a matter of discretionary. In this appeal, we take into consideration the fact that the appellants were first offenders; that the injury to PW1 was not severe; and the value of the stolen items being only Kshs. 7,000. For these reasons, we areinclined to interfere with the death sentence imposed by the trial court and substitute it with a custodial sentence.

Accordingly, we dismiss the appeal on conviction. It however succeeds to the extent that the death sentence is set aside and in its place we sentence the appellants to serve twenty (20) years imprisonment. This sentence shall take into account the period in which the appellant has been in custody pursuant to **section 333 (2)** of the Criminal Procedure Code.

This judgment is delivered in accordance with **Rule 32(2)** of this Court's Rules, **Sichale, JA** being of a different opinion having declined to sign it.

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

W. OUKO, (P)

JUDGE OF APPEAL

A.K. MURGOR

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR