



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, M'INOTI & KANTAL, J.J.A.)

CRIMINAL APPEAL NO. 200 OF 2016

BETWEEN

KIMBIYA MBITI.....APPELLANT

AND

REPUBLIC..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Machakos (Jaden, J.) delivered on 28th November, 2014

in

HC. CR.A. No. 42 of 2011)

JUDGMENT OF THE COURT

The appellant, **Kimbiya Mbiti** was charged (with another) before the Senior Principal Magistrate's Court, Kitui, on one count of robbery with violence contrary to **Section 296(2)** of the **Penal Code** particulars being that on 23rd September, 2009 at about 3.00 a.m. in Masoa village in the then Kitui District while armed with dangerous weapons namely bows, arrows and knives jointly robbed **David Nding'u** of **Ksh.40,850** and immediately before or immediately after the time of such robbery used actual violence to the said person. Both were tried, convicted and sentenced to death. It is not clear from the record what became of the co-accused but the appellant filed an appeal at the High Court of Kenya at Machakos. That appeal was heard by **Ngugi and Jaden, JJ**, who in a judgment delivered on 28th January, 2014 did not find merit in it and dismissed the appeal both on conviction and sentence. The appellant is still dissatisfied with those findings and has filed this appeal premised on a "Supplementary Grounds of Appeal" drawn by his counsel, **Ratemo Oira & Company Advocates**. There are 9 grounds of appeal and we summarize them thus: that there was no proper identification parade conducted; that the evidence was inconclusive and the High Court erred in relying on that evidence; that the High Court did not evaluate the evidence to reach its own independent conclusion as was required in law. The last ground appears to be in the alternative – the appellant urges us to:

".... consider the sentence and mitigating factors in accordance with the decision of the Supreme Court of Kenya, Petition No. 15 of 2015; Francis Karioko Muruatetu & Others –vs- Republic."

This is a second appeal from that decision of the High Court sitting as an appellate court and our mandate is drawn from **Section 361(1) (a) Criminal Procedure Code** where we are to consider only issues of law if we find that such issues are raised by the appellant. We are prevented from considering matters of fact which have been tried by the Magistrates' Court and evaluated by the High Court in the first appeal. That mandate has been stated and re-stated in many judicial pronouncements of this Court and was well captured in the case of **Stephen M'Riungu v Republic [1982-88] 1 KAR, 360** where it was summarized that:

"Where a right of appeal is confined to questions of law only, an appellate court has to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not

interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law.”

We shall go through the record for purposes of satisfying ourselves, as per the identified mandate, whether the two courts below carried out their mandates as required in law.

David Nding’u Kasesa (PW1 – Nding’u) was asleep with his wife **Lydia Mwikali Ndingu (PW2 – Mwikali)** in their two-roomed house on the night of 23rd September, 2009 when, at 3.00 a.m. when they were rudely woken by a loud bang on the main (wooden) door which had been hit and forced in. Three men, two who had half-concealed their faces with scarfs, were already in the bedroom. They were armed with bows, arrows and knives. Nding’u observed that the appellant, a man he had known for over 10 years and had engaged him often to drive livestock to the market as per his trade had fitted a torch to his temple. According to him the torch gave a strong light which illuminated the room. The appellant stabbed Nding’u several times as he demanded for money and when Nding’u gave him cash Kshs.8,000 the appellant threw the money to the ground in disgust, stabbed him once more as he demanded for money.

Nding’u produced more cash (Kshs.20,000) but this was still not enough. To avoid more injury Nding’u told the appellant and his accomplices that there was more money in a canteen located within the compound which was managed by his wife Mwikali. He asked Mwikali to go to the canteen and get the money. She obliged and went with one of the accomplices and gave him cash. She recognized him as the other accused, their neighbor. According to Nding’u the ordeal took over 15 minutes and of the appellant he said:

“..... I recognized his voice very well....”

That version of facts was corroborated by Mwikali who after handing over money and recognizing the co-accused who ran away, fled to a neighbor, **Mulevi Muli (PW3 – Muli)**, while screaming and shouting for help. Muli gave first aid to Nding’u and assisted him to go to hospital and to the police station.

The Investigating Officer, **Charles Kingori (PW4)** received report of the robbery, visited the scene and recovered some exhibits which were produced into the evidence. He arrested the appellant who was identified to him by Nding’u.

A Clinical Officer at Mutitu District Hospital (**Michael Makau – PW5**) received Nding’u, examined him and found injuries to the forehead, lower and upper limbs amongst other injuries. The evidence of the last witness (PW6) related to events regarding the co-accused.

The trial Magistrate, being satisfied that a prima facie case had been established by the prosecution put the appellant on defence. In an unsworn statement the appellant stated that he was a green grocery dealer and that on the day previous to the date of the offence and on the day of the offence he was at home and only visited his canteen. He denied committing the offence. He further stated that on 23rd September, 2009 (the date of the robbery) he met with Nding’u who was in company of others as they were pursuing robbers; that later that day Nding’u approached him and asked him to implicate the co-accused as one of the robbers; that he declined to be a false witness and he was therefore surprised to be arrested when he had done nothing wrong. The trial Magistrate considered the case by the prosecution against the defence offered by the appellant and, as we have seen, convicted the appellant whose first appeal was dismissed.

We have considered the record and the grounds of appeal raised by the appellant and we recognize as issues of law whether there was proper identification of the appellant; whether the High Court evaluated the evidence to reach its own independent finding and, lastly, the sentence imposed by the trial court and confirmed on first appeal.

The trial Magistrate warned himself of the danger of convicting the appellant on the evidence of a single witness but still found that the circumstances obtaining on the fateful night were favourable for a positive identification of the appellant by Nding’u. The High Court, on evaluation of the evidence, found that the trial Magistrate had relied on both visual and voice recognition. The High Court found that the robbery took more than 15 minutes; the torch the appellant had illuminated the room allowing Nding’u to see and recognize the appellant. It stated at paragraph 17 of the judgment:

“We note that David had known the appellant, who is a distant relative, being a member of Lydia’s clan, for more than ten years. David testified that he saw and heard Kimbiya for some time as Kimbiya demanded for money from him. All this while, Kimbiya was hardly two feet away from David, since he was close enough to severally stab him. While the general visibility could not have been great at 3:00 am at night, the flashlight tied to Kimbiya’s forehead illuminated the room. According to David, the fact that Kimbiya’s face was only half-masked made it easier for him to recognize Kimbiya. We also note that David named the Appellant as the assailant shortly after the robbery.”

A fact may be proved by the evidence of a single witness depending on the circumstances of the case – See the case of **Maitanyi v Republic [1986] eKLR** citing **Roria v Republic [1967] EA 583** where the following passage appears:

“Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”

In the case before the trial court, Nding'u testified that the appellant was well known to him and was a distant relative; that he had known him for well over 10 years and would engage him periodically to drive livestock to the market for sale. He further testified that he had recognized the appellant's voice during the robbery – this voice recognition is the “other evidence” the **Roria** (supra) case is talking about to strengthen evidence of a single witness.

In dealing with evidence of identification by voice, the court should ensure that the voice was that of the accused; the witness was familiar with the voice and recognized it and that the conditions obtaining at the time were such that there was no mistake in testifying to what was said and who said it – See the case of **Choge v Republic [1985] KLR 1** where it was held:

“Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure it was the accused's voice, that the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it.”

In the case before the trial court, Nding'u had known the appellant for over 10 years and the appellant spoke to him several times on the fateful night as appellant demanded for money. Nding'u recognized the appellant's voice and this was further evidence to fortify the evidence of the single witness on the issue of identification. In the circumstances we are satisfied that the two courts reached the correct conclusion that the appellant was properly identified as one of the robbers who attacked and robbed PW1 and PW2 on the material night.

On the issue whether the High Court carried out an evaluation of the evidence, as it was required to do, we have gone through the record and are impressed with the way the High Court relooked at every piece of evidence given before the trial Magistrate and evaluated the same reaching the conclusions which it did. Clearly and to our satisfaction the evaluation, analysis and conclusion reached by the High Court was exemplary impressive and to the point. There is no merit in the complaint in that regard and that ground of appeal is rejected.

The last issue is that of sentence.

The appellant was convicted on 10th February, 2011 and sentenced to death on 18th February, 2011. The appeal to the High Court was dismissed on 28th January, 2014. **Section 296(2)** of the **Penal Code** provides in mandatory terms that a person convicted under that section shall be sentenced to death which is to say that the two courts reached the proper determination. Yet the jurisprudence in our jurisdiction has had a paradigm shift after the Supreme Court of Kenya was asked in **Francis Karioko Muruatetu & Others v Republic [2017] eKLR** to answer the question whether it was constitutional for Parliament to provide minimum sentences in an offence of murder. That court returned the answer that it was unconstitutional for Parliament to do that. It was held that courts should retain the discretion to sentence offenders depending on the peculiar circumstances of the case before the court. We take the view that the judgment of the Supreme Court has freed trial courts to look at the case before the court; whether there are peculiar circumstances; what mitigating factors obtain, amongst other factors, in awarding a sentence to a convicted person.

In the case before the trial court subject of this appeal the appellant with others broke into the house of the complainant and the appellant attacked the complainant inflicting injuries on him as he demanded money. The attack was unprovoked. When the appellant was asked to offer mitigation upon being convicted he said:

“Accused 1 in mitigations (sic) – Nothing. I am 33 years old and have a wife who rely on me.”

He was then sentenced to death.

We have considered the sentence awarded and the circumstances obtaining in the case and in line with current jurisprudence as set out in the **Muruatetu** (supra) case we think that this is a fitting case calling for our inference with the sentence awarded. The appeal on conviction is dismissed. The appeal on sentence is allowed to the extent that we set aside the sentence of death awarded and substitute thereof a sentence of twenty (20) years imprisonment from the date of conviction.

In conclusion, the appeal against conviction fails in its entirety, while the appeal against sentencing succeeds to the extent hereinabove.

Those are our orders.

Dated and delivered at Nairobi this 7th day of August, 2020.

M. WARSAME

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JUDGE OF APPEAL

K. M'INOTI

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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