



IN THE COURT OF APPEAL

AT NAIROBI

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

CRIMINAL APPEAL NO. 192 OF 2016

BETWEEN

BONFACE MUSYOKA KIOKO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi (Nyakundi & Mativo, JJ.) dated 2nd July, 2015 in **HC. CR.A. No. 35 of 2014**)

JUDGMENT OF THE COURT

On 15th August, 2012, **Danson Mulee Mwangangi (PW1-Mulee)**, a taxi driver employed by **Stephen Waweru (PW2-Waweru)** who ran a fleet of taxis was at his usual station at Nakumatt Prestige on Ngong Road when, at about 8.30 p.m. he was approached by two men and a woman (the woman was carrying a child) and after a negotiated fare they left for Kileleshwa but stopped on the way to fuel the taxi. The appellant, **Bonface Musyoka Kioko** sat on the front passenger seat while the other man and the woman sat at the back. When they reached Kenya High School in Kileleshwa, Mulee was directed to stop at a certain gate and this is when trouble began. The man at the back seat produced a pistol and placed it on Mulee's neck. The appellant got hold of Mulee, pushed him to the floor of the car, tied his legs and hands with ropes and removed his shoes. The appellant forcefully took Mulee's phone, make **Nokia 1110** and cash **Kshs.700** that was in his pocket. The man at the back seat took over control of the car; the appellant sat at the back where he forced Mulee to remain on the floor of the car. The car was driven for some time and finally the appellant and the man at the wheel threw Mulee to a stony area and they then drove off, abandoning him there. Mulee was able to untie the ropes on his hands but the ones on his legs were too tight and he was lucky that a watchman on normal patrol found him, untied the ropes, and when Mulee related the events of the night the watchman gave him a phone which he used to call **Julius Nzioka Kimole (PW3-Nzioka)**, a co-driver at Prestige, and he told Nzioka to inform Waweru of the robbery incident. A taxi was sent which rescued Mulee and when they went to report the incident to Buruburu Police Nairobi they found the appellant and the woman at the station as they had already been arrested.

These facts were established by the trial court and confirmed on 1st appeal.

These are the events that led to the appellant and the woman (she was acquitted at the trial) being charged before the Magistrate's Court at Kibera with the offence of robbery with violence contrary to **Section 295** as read with **Section 296 (2)** of the **Penal Code**, particulars being that on 15th August, 2012 along Othaya Road, Kileleshwa, Nairobi, jointly with others not before the court while armed with dangerous weapons namely pistols, robbed Mulee of a motor vehicle **registration No. KBV 513P** and other items in the charge sheet all valued at **Kshs.753,200** and immediately before the time of the robbery used actual violence to the said person.

There was an alternative charge of handling stolen goods contrary to **Section 322** of the **Penal Code** particulars being that on the said day along Kangundo road in Buruburu they otherwise than in the course of stealing, dishonestly received the said items in the charge sheet having reason to believe the items to have been stolen or unlawfully obtained.

The trial magistrate took evidence from six witnesses and in a judgment delivered on 12th November, 2013 convicted the appellant and sentenced him to death.

A first appeal to the High Court of Kenya at Nairobi being Criminal Appeal No. 35 of 2014 was heard by **Mativo and Nyakundi, JJ**, and in a judgment delivered on 22nd July, 2015 the learned judges did not find merit in the appeal which they dismissed.

The appellant is not satisfied with the findings of the High Court and has filed this second appeal premised on Supplementary Memorandum of Appeal drawn for him by his lawyers, **M/s E.B. Nyamongo & Co. Advocates** where six grounds of appeal are set out. These may be summarized thus: that the High Court erred in failing to appreciate the law on identification; that the case was not proved to the required standard; that the High Court did not exercise an independent mind in dealing with the appeal; that evidence was not properly evaluated by the High Court; that there were unresolved inconsistencies in the trial and, finally, that the High Court erred by not adequately analyzing the appellant's defence. We are therefore asked to set aside the judgment of the High Court, quash the conviction and set the appellant at liberty.

In a second appeal like this one our mandate is donated by **Section 361 Criminal Procedure Code** which dictates that we consider only issues of law and not go to matters of fact which have been established by the trial court and confirmed on first appeal – For a judicial pronouncement of this mandate see the case of **M'Riungu v Republic [1983] KLR 455** where this Court stated:

“...where a right of appeal is confined to questions of law only, an appellate court has loyally 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 decision 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 the decision is bad in law.”

We shall therefore go to the facts as established by the two courts only for purposes of establishing whether the two courts carried out their mandates as required in law.

Apart from what we have already set out, Mulee testified that on reaching Buruburu Police Station he not only found the appellant and the woman already under arrest but also found the stolen vehicle at the station and his shoes were in the car. All of them were driven to Kilimani Police Station. Challenged in cross-examination by the appellant on the issue of identification he said:

“... We were together for sometime and I saw you as we drove towards Kileleshwa. The shoes were recovered. It is you who removed me (sic) the shoes and they were found in the vehicle. I found you and the second accused in the same way you had dressed when I carried you. Police found you with the vehicle ...”

Waweru was in his house on the said day (15th August, 2012) when he received a telephone call at about 10 p.m. from Nzioka who informed him that Mulee had been carjacked. He had installed a tracking device in the seven taxis he managed and he could track them on his phone and the device could also immobilize a car if he needed to do so. He used the device to immobilize the stolen taxi and when he switched on speakers on his phone he could follow the conversation of the thieves. He heard the thieves saying that the taxi had run out of fuel. Meanwhile, he had reported the theft to police and had hurried out of home to follow the stolen taxi using the tracking device which indicated that the car was on Kangundo road in Buruburu area. On reaching that road he was assisted by police who he found already there. They found five people pushing the stolen taxi and the appellant and the woman surrendered while the others fled when they saw police shot in the air. The baby was at the back seat and was crying; there was a black bag which contained an imitation pistol. Mulee's shoes were at the back. The appellant and the woman were arrested and taken to Buruburu Police Station and, presently, Mulee arrived and identified them as the people who had hired him to Kileleshwa and then car-jacked him. He produced into evidence a letter from Trail My Car, the car tracking device company which letter explained how the device worked.

Nzioka was another taxi driver employed by Waweru and it is he who was called by Mulee (on the phone that belonged to the watchman) and informed of the robbery incident. He relayed the information to Waweru.

Cpl Hesbon Otieno (PW4) of Buruburu Police Station was the arresting officer who was on patrol on 15th August, 2012. He received communication from Police Control Room that motor vehicle KBN 513P had been stolen. At about 10:30 p.m. he was stopped by Waweru who told him that a tracking device indicated that the stolen car was on Kangundo road where they were. They found the stolen car near a petrol station where it was being pushed. He arrested the appellant and the woman who he took (with the stolen car) to Buruburu Police Station and later transferred then to Kilimani Police Station. He recovered the bag with imitation pistol and Mulee's shoes from the car.

PC Josphat Muriuki (PW5) of CID, Kilimani Police Station was the investigation officer in the case. He took custody of the recovered motor vehicle and charged the appellant and the woman with the offence before the trial court. He produced the car, the letter from Track My Car, the recovered bag and imitation pistol and shoes, into the evidence.

This was the evidence led by the prosecution and the trial court found that a *prima facie* case had been established requiring the appellant to be placed on defence.

In a sworn statement the appellant who said he was a mason by trade, denied the offences before the trial court and stated that, on the fateful date (15th August 2012) he had worked the whole day and in the evening he decided to enjoy a drink at Club Webbs Corner after which, as he walked home, he heard gunshots which shocked him and he fell to the ground. He was ordered to stand up with his hands raised and when he obliged he was forced into a vehicle and taken to Buruburu Police Station and then to Kilimani where he was forced to sign a strange document after which he was charged in court.

The trial court did not believe the defence and found that the prosecution case had been proved to the required standard the findings of which were upheld by the High Court on 1st appeal.

This appeal came up for hearing before us on 20th May, 2020 through virtual Go-to-Meeting due to the current world COVID-19 pandemic, and the appellant was represented by learned counsel **Miss Nyamongo** while learned **State Counsel Miss Matiru** appeared for the respondent. In a highlight of written submissions Miss Nyamongo submitted that the trial was not fair because the trial magistrate varied bond terms in the course of the trial. She did not give any details of how this affected fair trial rights and we doubt that this issue, which was not taken on the first appeal, can be an issue before us in a second appeal like this one. Counsel further submitted that there were five people pushing the stolen car which, according to counsel, contradicted the prosecution case where Mulee alleged that it was those people who stole

his taxi, and later robbed him. On identification, counsel submitted that the incident happened at night and there was possibility of mistaken identity.

In opposing the appeal it was Miss Matiru's submissions that the stolen car was tracked to Kangundo road and the appellant was one of those found pushing it. According to counsel, nowhere in the proceedings did the appellant claim that he was an innocent good Samaritan helping to push a stalled car and he was identified at Buruburu Police Station by Mulee.

We have considered the whole record, the submissions by both sides and the law and these are our finding in this appeal.

We find that identification is an issue of law as is the issue whether the High Court carried out its mandate of re-evaluating the evidence as was properly summarized in the case of **Okeno v Republic [1972] E.A. 32**.

On the issue of identification it has been held in a long line of case by this Court that identification in criminal cases is of vital importance as a mistake in identification can lead to serious miscarriage of justice. For instance in the case of **Cleophas Otieno Wamunga -vs - Republic - Criminal Appeal No. 20 of 1989 (UR)**, cited by the High Court on first appeal, it was held that:

"Evidence of visual identification in criminal cases can bring about miscarriage 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 way to approach the evidence of visual identification was succinctly stated by Widgery C.J. in the well known case of R - Vs- Turnbull [1876] 3 ALL ER 549 at page 552 where he said:-

"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometime made."

What was the evidence led by the prosecution on the issue of identification?

Mulee testified that when he was hired by 2 men and a woman to take them to Kileleshwa from Nakumatt Prestige on Ngong road they negotiated a fare, stopped at a petrol station to fuel and the appellant occupied the passenger front seat. When the robbery began it was the appellant who got hold of him and pushed him to the floor of the car, tied his hands and legs with ropes and removed his shoes. Further, that it was the appellant who grabbed his phone and removed money from his pocket and, in the ordeal that ended in Eastlands, the appellant sat at the back seat forcing him to remain on the floor of the car. He concluded by stating that it was the appellant and the other man who was at large who threw him out of the car and when, later that night, he went to report the matter at Buruburu Police Station he found the appellant arrested, dressed in the same clothes that he was wearing when they hired him.

Waweru and the police found the appellant pushing the stolen motor vehicle along Kangundo road and, as correctly submitted by learned State Counsel, the appellant neither claimed ownership of the vehicle nor claimed that he was an innocent good Samaritan giving a helping hand where a motor vehicle had stalled.

The evidence of a single witness must be treated with great caution – See the case of **Charles Maitanyi v Republic [1986] eKLR** where it was held:

"There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainants' aid, or to the police. ... if a witness receives a very strong impression of the features of an assailant the witness will usually be able to give some description."

The trial court and the High Court took that caution into account and found that the appellant was properly identified as one of the robbers involved in the offence before the trial court. Upon our own re-evaluation we come to the same conclusion. All the facts led by the prosecution established beyond reasonable doubt that the appellant participated in the robbery.

The High Court re-evaluated the evidence as required and upheld the findings of the trial court. There is no merit in the complaint by the appellant in that regard and that complaint is dismissed.

Counsel for the appellant did not address us on the issue of sentence. The appellant was sentenced to death by the trial magistrate on 12th November, 2013 and this was confirmed by the High Court on 2nd July, 2015.

Section 296(2) of the Penal Code provides in (mandatory terms) that a person convicted of robbery with violence shall be sentenced to death.

Section 361 (1) (a) Criminal Procedure Code allows a person convicted by a subordinate court to appeal against a decision of the High Court to this Court on a matter of law and this Court shall not hear an appeal under that Section on a matter of fact and severity of sentence is declared to be a matter of fact.

As stated the appellant was sentenced to death by the trial court and that sentence was upheld on first appeal. In sentencing the appellant the trial magistrate stated:

“..... However there is only one sentence prescribed by law for such an offence and this is the death penalty”

The High Court was of similar view.

Although severity of sentence is a matter of fact as declared by **Section 361(1) (a)** of the **Criminal Procedure Code** the imposition of a death sentence as a mandatory sentenced becomes a matter of law as has been found by the Supreme Court of Kenya and jurisprudence on this issue has taken a paradigm shift.

The Supreme Court of Kenya was asked in the case of **Francis Karioko Muruatetu & Others v Republic [2017] eKLR** to answer the question whether it was constitutional for Parliament to provide a minimum sentence for the offence of murder where a trial court had no option but to give the minimum sentence. The court returned the answer that it was unconstitutional for Parliament to do so. That finding has freed the courts to consider the circumstances of each case and award an appropriate sentence.

We have noted the circumstances of the case before the trial court where Mulee, an innocent taxi driver doing his lawful business was hired by the appellant and others to take them to Kileleshwa. The appellant had other intentions and engaged in robbery. They stole the car, a phone and money and roughed up Mulee who they eventually abandoned in Eastlands after tying him up with ropes.

Upon conviction the appellant said this to the trial magistrate in mitigation:

“I have children who depend on me. I will seek leniency of the court. This is my first time to do this.”

We have considered all those circumstances and the plea in mitigation and we find that this is an appropriate case where we should interfere with the sentence imposed.

The consequences of our findings are that the appeal on conviction fails and is dismissed. We set aside the sentence of death and substitute it with a sentence of twenty years imprisonment from the date of conviction.

These, then, are our orders.

Dated and delivered at Nairobi this 25th Day of September, 2020.

K. M'INOTI

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JUDGE OF APPEAL

A.K. MURGOR

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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