IN THE COURT OF APPEAL

AT NAIROBI

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

CRIMINAL APPEAL NO. 67 OF 2016

BETWEEN

DENNIS MWANGI WANJIRU...APPELLANT

AND

REPUBLIC...RESPONDENT

(Being an appeal from the Judgment, conviction and sentence of the High Court of Kenya at Nairobi (Kimaru & Nyamweya, JJ.) dated 13th November, 2013

in

HC. CR. A. No. 552 of 2009)

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JUDGMENT OF THE COURT

This is a second appeal from the decision of the High Court of Kenya in its appellate jurisdiction. Our mandate in such an appeal is donated by **Section 361** of the **Criminal Procedure Code** and we are to deal with issues of law only if we find that there are such issues in the appeal. We are to avoid matters of fact which have been tried by the trial court and re-tried in the first appeal – See for a judicial pronouncement of this mandate the case of **Stephen M'Riungu v Republic [1982-88] 1 KAR, 360** where this passage appears:

> ***"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."***

The case before the Chief Magistrates Court, Kiambu, was rather straight-forward.

GWN (PW1 - W) owned and managed a bar called **"M"** at Karuri in today's Kiambu County. It was a small bar with a back-room and it was lit with electricity light.

The evening of 30th June, 2009 was rather quiet. W was at the counter and there was only one customer, **John Njau Gachigwa (PW2-Njau)** who was having a beer. At about 9.30 p.m. the two observed a young man who they knew as the appellant enter the bar, look around as if looking for someone and he then left. He returned moments later this time accompanied by three others. The three went to the counter and presented some money to W as they asked for a certain brand of alcohol. As W told them that she did not have that particular brand in stock the appellant banged the main door shut, produced a gun and ordered W and Njau to lie down. He demanded for money as he pointed the gun at W. The appellant and his two accomplices ransacked the place taking money, alcohol, mobile phones and other items from the counter, from W's trousers and from Njau. As the appellant demanded for more money he rolled W over, unzipped her pair of trousers and he inserted his finger in her vagina. When they were done they left and a report was immediately made to Karuri Police Station.

Those events led to the arrest of the appellant who was charged on two counts of robbery with violence. It was alleged in Count I on the charge of robbery with violence contrary to **Section 296(2)** of the **Penal Code** that on 30th June, 2009 at 9.30 p.m. at Banana Township in the then Central Province, with others not before court whilst armed with a dangerous weapon namely pistol they robbed W of Kshs.9800, two mobile phones, a DVD, assorted drinks and glasses and that immediately after the time of robbery they threatened to use actual violence to the said W. On Count II which was also robbery with violence contrary to the said Section it was alleged that the appellant with others not

before court on the said day and time while being similarly armed they robbed Njau of cash Kshs.800 and a mobile phone and immediately after the said robbery they threatened to use actual violence to the said Njau. Count III was **Indecent Act** contrary to **Section 11(6)** of the **Sexual Offences Act No. 3 of 2006** particulars being that on the said day and time the appellant intentionally and unlawfully indecently assaulted W by touching and inserting his fingers in her vagina. The appellant was tried and convicted by the Senior Principal Magistrate, Kiambu, and he was sentenced to death on the first count while the sentence on count two was left in abeyance. He was acquitted on count 3. Being dissatisfied with those findings the appellant appealed to the High Court of Kenya at Nairobi. The appeal was heard by **Kimaru** and **Nyamweya, JJ.,** who in a Judgment delivered on 13th November, 2013 did not find any merit in the appeal which they dismissed. Those findings provoked this appeal which is premised on **"Supplementary Grounds of Appeal"** drawn for the appellant by his lawyers, **M/S Ratemo Oira & Company Advocates** where nine grounds of appeal are set out. We may summarize the grounds as: that the High Court erred in law and fact in not finding that an identification parade should have been held; that the prosecution case was ridden was inconclusive evidence; that the High Court did not carry out an independent evaluation of the case as it was in law required to do; that there was doubt in the prosecution case which doubt should have been resolved in favour of the appellant; and, in what appears to be a prayer in the alternative:

> ***"9. THAT the appellant urge this Honourable Court to consider the sentence and the mitigating factors in accordance with the decision of the Supreme Court of Kenya, Petition No. 15 of 2015; Francis Karioko Muruatetu & Others –vs- Republic."***

We are therefore asked to allow the appeal, set aside the Judgment of the High Court and order that the appellant be set free.

In addition to what we have stated on the facts of the case W testified that she had known the appellant for a long time as he used to deliver water to residents of a plot which she occupied in Karuri Market. After the robbery and report to police that **"Mwangi"** was one of the robbers W spotted the appellant about two weeks later as he entered a house. The police stormed that house and arrested the appellant. W testified that:

> ***"On the day I was attacked, the people stayed in my bar for 15 minutes. I was able to recognize the accused person. The accused had entered before he returned with two people …."***

W further testified that she knew the appellant's mother.

Njau confirmed that there was electricity light in the bar and that when the appellant first entered the bar that night he recognized him as somebody he used to see in Karuri market. He told police that he had identified the appellant as somebody he knew before.

W identified various documents in court and those documents were produced as part of evidence by **Corporal Francis Opagala (PW3)** of Karuri Police Station who had been instructed by his superiors to investigate the case. He recorded statements from W and Njau and arrested the appellant.

That was the case made by the prosecution and upon evaluation the Magistrate found that the appellant should answer. He chose to give an unsworn statement where he stated that on 30th June, 2009 he remained at his work place the whole day, slept at night and continued working on subsequent days. He was surprised when on 19th July, 2009 two policemen and two women entered his house at 3 a.m. and he was arrested and charged in court on offences that he knew nothing about.

As we have stated the appellant was convicted and the first appeal was unsuccessful.

When this appeal came up for virtual hearing on 16th June, 2020 due to Covid-19, learned counsel **Mr. Ratemo Oira** appeared for the appellant while learned State Counsel **Miss Magdaline Ngalyuka** appeared for the State. Mr. Oira submitted that the High Court had not re-evaluated the evidence as it was required to do and that there were contradictions in the prosecution evidence. He asked us, if we sustained conviction, to consider an alternative sentence.

In opposing the appeal, Miss Ngalyuka supported the concurrent findings of the trial court as confirmed by the High Court. Counsel submitted that the appellant was properly identified and there was evidence that the appellant was recognized by W and Njau. According to counsel there was sufficient light to aid identification as confirmed by the investigating officer who had visited the bar. Counsel concluded her submissions by stating that ingredients of a robbery with violence had been proved as the appellant was armed; he was accompanied with others and they stole from the victims.

We have considered the whole record, submissions made and the law. The only points of law raised, in our view, are whether there was proper identification and whether the High Court reevaluated the case as it was required in law to do.

It has been held by this Court that identification of an assailant in criminal cases is of paramount importance as mistakes in identification can lead to serious misjustice being visited upon innocent persons. In the case of **Cleophas Otieno Wamunga v Republic [1989] eKLR** it was held:

> ***"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 identification 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:-***
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> > ***"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 sometimes made."

In the case before the trial court the appellant entered the bar managed by W. It was about 9.30 p.m. and the bar was well lit with electric light. W and her customer, Njau, immediately saw that the person who had entered the bar was a person they both knew before W testified that apart from seeing the appellant at Karuri market for a considerable period of time he used to supply water to residents of a plot where she resided.

Njau testified that he used to see the appellant at Karuri market and he recognized him immediately he entered the bar.

Both W and Njau on making report to police stated that they knew the appellant as Mwangi and he was one of the robbers.

It was held by this Court in the case of **Anjononi & Others v Republic [1976-1980] KLR 1566** that in cases of identification the recognition of an assailant is more satisfactory; it is more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.

In the case before the trial court both W and Njau recognized the appellant as soon as he entered the bar the first time, and again, when he returned moments later with his accomplices. When they reported to police W reported that Mwangi was one of the robbers and Njau also stated that he had recognized the appellant as one of the robbers.

We do not agree with the submission by counsel for the appellant that an identification parade should have been held. The two witnesses recognized the appellant and they reported that fact to police. There was no need for an identification parade in those circumstances.

We have gone through the record and cannot find any merit in the complaint that the High Court did not re-evaluate the evidence. The High Court re-stated the prosecution case and the defence offered by the appellant and re-evaluated the same coming to the conclusion that the appeal had no merit.

The appellant prays in the alternative that we reconsider the sentence and award a different sentence. We note that the appellant was sentenced to death on 25th November, 2009 and that sentence was confirmed by the High Court on 13th November 2013.

Section 296(2) of the **Penal Code** provides in mandatory terms that a person convicted of an offence under that Section shall be sentenced to death.

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 a mandatory sentence in an offence under **Section 296(2)** of the **Penal Code**. That court returned the answer that it was unconstitutional for Parliament to provide such a sentence.

That Judgment of the Supreme Court has freed the courts to consider the various factors in cases before them and award an appropriate sentence.

We are asked in this appeal to reconsider the sentence of death imposed by the two courts in the case leading to this appeal.

We note that, upon conviction, the appellant told the trial court that he had suffered in remand.

In the two counts of robbery with violence various items and money were stolen from the complainants. The appellant was armed with a dangerous weapon, namely a pistol, with which he threatened the victims. Items and money were stolen but no violence was visited upon the victims; they were threatened. We think, in the circumstances, that a custodial sentence is appropriate in this case.

The final orders therefore are that the appeal on conviction fails and is dismissed. We set aside the sentence of death imposed and substitute thereof a sentence of twenty (20) years imprisonment from the date of conviction.

Dated and delivered at Nairobi this 23rd Day of October, 2020.

W. OUKO, (P)

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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