



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, KIAGE & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 189 OF 2008

BETWEEN

JOHN NJAU NDICHUAPPELLANT

AND

REPUBLICRESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Ojwang & Dulu, JJ.) dated 12th July, 2007

in

HC.CRA No. 147 of 2005)

JUDGMENT OF THE COURT

The appellant **John Njau Ndichu** is currently condemned under a sentence of death imposed on him by the Kiambu Principal Magistrate's Court on 11th March 2005 upon being convicted of the offence of robbery with violence. He was found to have committed the offence on the night of 7th to 8th May 2004 at Kiambu Township of the former Central Province. He robbed one **Nyaguthii Ngure** (PW1) of a television set, a video deck, a radio cassette, a mobile phone, a transformer and a black handbag which had some Kshs. 500 in cash. All those items were valued at Kshs. 31,000. He was in the company of other persons and did threaten to use violence on his victim. His co-accused was found not guilty and acquitted.

The appellant's first appeal to the High Court at Nairobi was on 12th July 2007 dismissed by Ojwang, J. (as he then was) sitting with Dulu, J., and he preferred this second and last appeal. He first filed some self-crafted grounds of appeal on 15th April 2016 followed by "Supplementary Grounds of Appeal" titled and crafted in an inelegant fashion by the firm of Ratemo Oira & Co. Advocates. Some of the obvious inelegance consists in not titling the document as Supplementary Memorandum of Appeal as required by our Rules, and the reference of errors "of law and fact" yet, in a second appeal we can only deal with questions of law as spelt out expressly in **section 361** of the **Criminal Procedure Code**. Those elementary errors notwithstanding, we discern the appellant's major complaints against the learned Judges to be these;

- *Not holding that there was no proper identification parade.*
- *Failing to properly evaluate the evidence to form an independent opinion.*
- *Affirming a conviction that was supported by no evidence.*

The appellant also asked this Court to consider mitigating factors and apply the Supreme Court's decision in **FRANCIS MURUATETU & ANOR vs. REPUBLIC [2017] eKLR**.

At the virtual hearing of the appeal necessitated by the Covid-19 Pandemic, **Mr. Oira** appeared for the appellant while Ms. Wang'ele appeared for the respondent. It was Mr. Oira's case that nothing was recovered from the appellant and that his arrest was only at the complaint's instructions when she told the driver and other passengers in the *matatu* she was travelling in that he, who was going about his business in Ngara, had robbed her a few nights before. He contended that **Edwin Wahome** (PW2), who picked the appellant out at the identification parade' had seen him at the police station so that his evidence was tainted, rendering the entire identification evidence unreasonable. Counsel rested by urging us, in case we did not quash the conviction, to set aside the death sentence and substitute it with a

term of imprisonment.

Opposing the appeal, Ms. Wan’gele posited that both courts below made concurrent findings of fact based on cogent and consistent evidence, and that the appellant was properly convicted. On identification in particular, learned counsel pointed to the

evidence of PW1 which was to the effect that electric lights were on in the bedroom where the appellant spent some 10 minutes with her, with his face uncovered. He was thereafter picked out at the identification parade by PW2 who denied having had a glimpse of the appellant before the parade, and the two courts believed him. She also countered the complaint about the failure to call the driver and other passengers in the *matatu* on the basis that they would have been of no relevance, not having witnessed the commission of the offence.

Regarding sentence, it was Ms. Wangele’s view that even though this Court can alter the sentence as it deems fit, in the present case there would be no basis for interference because apart from being a first offender, there is no other basis for leniency for the appellant who showed no remorse, had not reformed, and had not put forth any mitigating factors.

In his rejoinder Mr. Oira submitted, but we think the record does not bear him out, that this was a case of identification by a single witness. To the contrary, there were two identifying witnesses namely, PW1 and PW2.

We have considered those submissions in light of the record before us. Our jurisdiction is limited to a consideration of matters of law only as we have already stated. See *NJOROGE vs. REPUBLIC [1982] KLR 388*. Where, as here, the two courts before have arrived at concurrent findings of fact in the initial evaluation of the evidence with the benefit of seeing and hearing the witnesses to assess their credibility for the trial court, and a fresh and exhaustive re-evaluation of the same to reach independent conclusions by the first appellate court, we are bound to accept those findings as correct. We can hold a contrary view and interfere with such findings only if it is shown that the same were based on no evidence or conclusions were arrived at as a result of misapprehension of the evidence or if, looked at as a whole, the same are plainly wrong and untenable. See *M’RIUNGU vs REPUBLIC [1983] KLR 455*.

We think, with respect, that the appellant was well and properly identified as one of the robbers that night. There was electric light from a bulb in the bedroom. The bedroom was quite small and the appellant was in close proximity with PW1 and PW2, the two witnesses who later identified him. He made no attempt to cover his face or otherwise conceal his identify during the entire 10 or so minutes that he was in the bedroom. Moreover, before he and his accomplice broke down the door and entered the house, PW1 had seen him under the glare of security lights. It was thus not difficult for PW1 to see and recognize the appellant twice on the day he was arrested. The first time was at Kariokor, but by the time she informed the police, the appellant had disappeared. She was fortunate, and he in equal measure unfortunate, that about an hour later she saw him at Ngara. Taking no chances this time, she mobilized the driver and other occupants of the *matatu* she was travelling in to arrest the appellant and they handed him over to the police. PW2 on his part was firm and unshaken in his testimony regarding how he was able to recognize the appellant and pick him out at the identification parade.

We have carefully considered the manner in which the learned Judges dealt with the evidence as a whole and are satisfied that they meticulously discharged their duty as a first appellate court. They properly directed themselves on the law on identification evidence and the need to approach the same with care and circumspection due to its potential for miscarriage of justice. They duly warned themselves of the danger inherent but were nevertheless satisfied, as are we, that the evidence of visual identification was strong. We think the circumstances were such that the appellant was identified and subsequently recognized without any possibility of error, and that his conviction was safe. His appeal against conviction therefore fails and is dismissed.

Regarding sentence, both courts respectively imposed and upheld the sentence of death on the basis of the legal position at the time, that the said sentence was mandatory for the offence charged and proved. As the Supreme Court has since clarified in *FRANCIS KARIOKO MURUATETU & ANOR vs REPUBLIC [2017] eKLR* that such mandatory sentences are unconstitutional for divesting courts of sentencing discretion to allow for individualized consideration of each offence in its own merits, we are bound to interfere. The appellant was a first offender but the bold, indeed impudent manner smacking of impunity, in which he and his accomplices went about gaining entry to rob while threatening violence, clearly calls for a deterrent sentence.

We accordingly set aside the sentence of death and substitute it with a term of **twenty (20) years** imprisonment to run from the date he was first sentenced.

Dated and delivered at Nairobi this 9th day of October, 2020.

M. K. KOOME

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR