IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, SICHALE & J. MOHAMMED. JJ.A)

CRIMINAL APPEAL NO. 70 OF 2017

BETWEEN

PETER MAINGI KIOKO.....1ST APPELLANT

BENEDICT MUTUKU NGUMBI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya

at Machakos, (P. Nyamweya & L. Njuguna, JJ.) dated 17th

***September 2015* in HCCR.A. NO. 234 & 236 OF 2014)**

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JUDGMENT OF THE COURT

Background

[1] The appellants, **Peter Maingi Kioko** and **Benedict Mutuku Ngumbi** proferred this second appeal challenging conviction and sentence for the offence of robbery with violence contrary to **Section 296(2) of the Penal Code**. Their first appeal was dismissed by the High Court (P.Nyamweya & L. Njuguna, JJ).

[2] The facts of the case as presented before the trial court were that on 3rd September 2013 at Vyulya Market, Vyulya Location, Mwala District within Machakos County, the appellants jointly robbed **Mutuku Kitonyi** of Kshs. 1,408/- cash, a *Nokia* mobile phone C1230 and 200 gms of tea leaves all valued at Kshs. 3,558/, and immediately before or after the time of such robbery wounded the said **Mutuku Kitonyi**.

[3] In a nutshell, the evidence leading to the appellants' conviction was that on or about 8.30pm on 3rd September 2013, the complainant, **Mutuku Kitonyi** was walking home. When he passed by Ekaimoke bar, he saw the appellants at the veranda of the bar. The 2nd appellant greeted him and asked him whether he still traded goats. The complainant responded in the affirmative and walked on.

[4] After a few steps, someone hit his elbow and called out '*mzee*'. He looked behind and saw the appellants with the aid of light from the security bulb outside the bar. They threw sand in his eyes, grabbed him and dragged him into the bushes where they beat him up. They also robbed him of Kshs. 1,408/- cash, tea leaves worth Kshs. 50/-, a *Nokia* mobile phone C1230 worth Kshs. 2,000/- and a *Safaricom* wallet which contained his identity card. The appellants fled leaving the complainant injured and having lost three incisor teeth in the attack. The complainant left the scene and proceeded home where he informed his wife, **Virginia Ndinda Mutune** of the violent robbery.

[5] The following day, on 4th September 2013, the complainant reported the matter to **PC William Bosire (PC Bosire)** at Masii Police Station who recorded his statement in which he identified the assailants by their names The complainant claimed that he met the 1st appellant in 2005 and that the 1st appellant's grandmother is his aunt and that he had known the 2nd appellant since the 1980s. **PC Bosire** advised him to go to the hospital and issued him with a P3 form.

[6] The complainant proceeded to Masii Health Center for treatment. **Damaris Nyabuto**, a clinical officer, examined him and assessed the

degree of injuries as harm upon finding that the complainant had soft tissue injuries on his face, soil in his eyes, 3 incisors missing in the upper jaw and two weak teeth on the lower jaw. She filled a P3 form which was later produced in court by her colleague, **James Kilonzo**.

[7] On or about 5th September 2013, **Mathias Mutuku** picked up a black **Safaricom** wallet which had the complainant's identity card by the roadside. He took it to the Chief's office but found it closed. He then took it to the complainant that evening at about 7.00 pm. He later recorded a statement at Masii Police Station.

[8] On 6th September 2013, **PC Bosire** visited the scene. He saw the bar which was about 15 to 20 meters from the scene. He saw the electric bulb within the bar and he concluded that the complainant could see his assailants with the aid of the light.

[9] Subsequently, on 20th September 2013, the complainant saw the appellants at Ekaimoke bar and informed **PC Bosire**. On or about midnight on that night, **PC Bosire** arrested the appellants in the presence of the complainant who called out their names.

[10] In his defence, the 1st appellant gave unsworn evidence and that on the material day he worked in his garden then later went home and took his brother to the hospital; that the following day he went to the shops but on his way home, two people approached him in a vehicle and took him to Masii where he was arraigned in court.

[11] The 2nd appellant also gave unsworn evidence. He stated that he was a mason; that on 21st September 2013 he woke up and went to work; that at about 5:30 pm he went to the barbershop and as he left, he met the complainant and a police officer who claimed to be looking for him; that the 1st appellant was a stranger to him; that he had a dispute with the complainant over the sale of a piece of land; and that the evidence against him had been fabricated.

[12] After a full trial, the trial court found that the prosecution had proved the charge against the appellants beyond reasonable doubt. The trial court therefore rejected the appellants' defences, convicted them of the offence of robbery with violence and sentenced them to death as stipulated by **Section 296(2) of the Penal Code**.

[13] Aggrieved by the judgment of the trial court, the appellants filed separate appeals to the High Court against both conviction and sentence. At the hearing, the appeals were consolidated. The main grounds of appeal were that the appellants were convicted based on the evidence of a single identifying witness without ruling out the possibility of an error; that the victim did not mention the names of his attackers whom he claimed to know; that the provisions of **Section 169** of the Criminal Procedure Code were not complied with and that the offence for which the appellants were charged ought to have been that of assault and not robbery with violence.

[14] The learned Judges of the 1st appellate court upheld the appellants' conviction and sentence. The learned Judges found that there was no mistake in the complainant's recognition and identification of the appellants; that the complainant was consistent in his evidence that the appellants were well known to him; that there were no difficult circumstances to cloud the complainant's memory as he had seen the appellants before and during the attack; that there was sufficient evidence to convict the appellants for the offence of robbery with violence; and that at least one of the essential ingredients for the offence of robbery with violence had been met.

[15] Undeterred, the appellants filed this second appeal against the judgment of the High Court. The appellants filed a Supplementary Memorandum of Appeal on the grounds, *inter alia,* that the learned Judges of the High Court erred in law and fact: in confirming the conviction and sentence against the appellants without evaluating the evidence and forming an independent opinion whether the appellants were involved in the offence of robbery with violence; and in confirming the conviction and sentence while there was no evidence tendered in court to warrant the conviction and sentence.

Submissions

[16] At the hearing of the appeal, learned counsel **Mr. Ratemo Oira** represented the appellants. He relied on the Supplementary Memorandum of Appeal. He urged this Court to find that the evidence adduced in the trial court and confirmed by the High Court was not sufficient to safely convict the appellants of the offence of robbery with violence. Counsel contended that the High Court erred in convicting the appellants based on the evidence of a single identifying witness; that the evidence of the complainant's wife was indirect; that there was no evidence that the complainant sustained injuries; and that the evidence of the clinical officer who treated the complainant was not credible. Counsel further contended that nothing was recovered from the appellants to link them to the offence for which they were charged.

[17] Counsel urged us to reconsider the sentences meted out on the appellants following the decision of the Supreme Court of Kenya in the case of ***Francis Karioko Muruatetu v Republic, SC Petition No. 15 of 2015*** **consolidated with Petition No 16 of 2015 (Muruatetu case).**

[18] The appeal was opposed by the learned Senior Assistant Director of Public Prosecution **Mr. O'Mirera** who contended that the issue for determination in this appeal is whether the two courts below erred in relying on the evidence of a single identifying witness. Counsel submitted that the appellants were positively identified by the complainant through recognition which is more satisfactory and assuring than the identification of a stranger. For this proposition, counsel cited the case of ***Anjononi and Others v Republic (1976-1980) KLR 1566***.

[19] Mr. O'Mirera further submitted that the chain of evidence was complete pointing out that the two courts below were satisfied that the complainant was truthful and had positively recognized the appellants; that there was sufficient light to enable the complainant to see his assailants on the material night; that the complainant's evidence was consistent; and that the evidence of the complainant's wife reinforced the complainant's evidence on recognition since the appellant informed her about the incident and his assailants upon arrival at their home. Counsel further submitted that the High Court properly directed its mind in upholding the appellants' conviction based on the evidence of a single identifying witness. He therefore urged us to dismiss the appeal and not to interfere with the appellant's conviction and sentence.

Determination

[20] We have considered the appeal, the submissions, the authorities cited and the law. This being a second appeal, the jurisdiction of this Court is limited to consideration of matters of law only under ***Section 361 of the Criminal Procedure Code*** which provides that:-

> ***"361. (1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section***
>
> ***–***
>
> ***(a) on a matter of fact, and severity of sentence is a matter of fact; or***
>
> ***(b) against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7***
>
> ***to pass that sentence."***

[21] This Court in ***Karingo v R. [1982] KLR 213*** at p. 210 enunciated this principle thus:-

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari C/O Karanja -vs- R (1956) 17 EACA 146)"*** See also ***Chemagong v Republic [1984] KLR 213***

[22] The main issue for our determination in the instant appeal is whether the appellants' conviction based on the evidence of recognition by a single identifying witness was safe. It is settled law that a conviction can be based on the evidence of a single witness. In this respect, **Section 143** of the **Evidence Act** provides that:-

> ***"no particular number of witnesses shall in the absence of any provision of law to the contrary be required for the proof of any fact"***

[23] That said, a court must test the evidence of a single identifying witness with the greatest care This Court in ***Benson Mugo Mwangi v Republic Criminal Appeal No. 238 of 2008*** aptly described what it means for a court to "test the evidence of a single witness with the greatest care" as follows:-

> ***"In our view the first consideration on testing the evidence of a single witness is to consider as to whether the witness is honest and reliable. The integrity of the witness is of paramount importance before a court directs its mind to his evidence. If the witness gives the impression at the time he is testifying that he is not an honest witness or is a witness of doubtful integrity then without much ado the court cannot rely on his evidence to convict ---"***

[24] The Court further stated that:-

"once the court is certain in its mind that the witness is honest, the court must proceed to consider whether the circumstance prevailing at the time and place of the incident favoured proper identification."

[25] In the instant appeal, the first appellate court, in finding that there was no mistake in the appellants' recognition and identification, observed as follows:-

> ***"We have on this issue reminded ourselves of the guidelines in the case of Mwaura v Republic [1987] KLR 645, in which the Court of Appeal held,* inter alia*, that:***
>
> ***"In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light".***
>
> ***In addition it has been stated by the Court of Appeal in Anjononi and Others vs Republic, (1976-1980) KLR 1566 that when it comes to identification, the recognition of an assailant is more satisfactory, 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.***
>
> ***The law on identification is also replete with warnings on the need for caution before sustaining the conviction on the basis of identification of a single witness in difficult circumstances. This was explained in Maitanyi –Vs- Republic [1986] KLR 198 at 200 as follows:***
>
> ***"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 greatest care the evidence of a single witness respecting identification, especially when it is known that 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".

[26] In view of the foregoing, we are satisfied that the first appellate court properly applied the case law relating to the principles governing the admissibility of the evidence of a single identifying witness. We are also satisfied that the first appellate court properly tested the evidence of the complainant with greatest care. We therefore find that the first appellate court did not err in upholding the appellants' conviction and that there is no basis to interfere with the findings of the first appellate court on the conviction of the appellants for the offence of robbery with violence contrary to **Section 296 (2) of the Penal Code**.

[27] We now turn to the issue of the constitutionality of sentences meted out on the appellants. The appellants' counsel urged us to reconsider the appellants' sentence in view of the decision of the Supreme Court in the ***Muruatetu case.*** The trial magistrate noted the mitigating factors but found himself bound by the sentence provided under Section 296(2) of the Penal Code which in his view was a mandatory death sentence. The trial court sentenced the appellants to death and the learned Judges of the High Court dismissed the appeal against conviction and sentence.

[28] The Supreme Court of Kenya in the **Muruatetu case (supra)** stated that:-

"Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under the Article 25 of the Constitution; an absolute right."

[29] Applying the above principle, this Court in ***William Okungu Kittiny v Republic [2018] eKLR*** held that:-

"…the findings and holding of the Supreme Court particularly in paragraph 69 applies mutatis mutandis to section 296 (2) and section 297 (2) of the Penal Code. Thus the sentence of death under Section 296 (2) of the Penal Code provides for mandatory death sentence the Sections are inconsistent with the Constitution."

[30] In light of the foregoing cases, we are guided by the Supreme Court in the **Muruatetu case (supra)**, which sets out some of the factors that are to be considered in sentencing as follows:-

"[71] As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

(a) age of the offender;

(b) being a first offender;

(c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender;

(h) any other factor that the Court considers relevant."

[31] Applying the Muruatetu case, we are of the view that in the circumstances of this case, the death sentence was not warranted. The trial magistrate did not take into account the mitigation given by the appellants as he was of the view that he had no discretion.

[32] Accordingly, we have taken into account that the appellants were first offenders. We also observe that in mitigation the 1st appellant stated that he was aged 22 years and wished to go back to school while the 2nd appellant stated that he is a parent to young children. On the other hand, we also take note that the victim of the offence sustained injuries. In the circumstances, we find that a sentence of a term of imprisonment would serve the ends of justice. We note that the appellants have been in custody for seven (7) years.

[33] For the foregoing reasons, we dismiss the appeal against conviction but allow the appeal against sentence to the extent of setting aside the sentence of death imposed on the appellants and substituting thereto a sentence of twenty (20) years imprisonment for each appellant with effect from 19th November, 2014 when they were sentenced by the trial court.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR