IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & MUSINGA, JJ.A)

CRIMINAL APPEAL NO. 256 OF 2007

BETWEEN

PETER MWANIA MUNYWOKI

COSMAS MUINDI KATAMA.....APPELLANTS

AND

REPUBLIC.....RESPONDENT

(An appeal from a Judgment of the High Court of Kenya at Nairobi (Mbaluto & Onyancha, JJ) dated 30th May, 2003

in

H. C. Cr. A. No. 1094 & 1095 of 2001)

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JUDGMENT OF THE COURT

Peter Mwania Munywoki is the only appellant remaining in this appeal after the death of his co-appellant **(deceased),** on 7th August, 2003. The appeal by the deceased was duly marked as abated. The two had been charged, tried and convicted by the Principal Magistrate in Thika, on one count of the offence of robbery with violence contrary to ***section 296 (2)*** of the **Penal Code** and were sentenced to death. Their first appeals to the High Court **(Mbaluto & Onyancha, JJ.)** were dismissed on 30th May, 2003, hence this second and final appeal before us.

On the night of 20th July, 2000 a group of robbers armed with dangerous and offensive weapons, including metal bars, *rungus* and axes, struck Katulani village of Matuu location, Machakos County. At about 1.30 am they violently smashed the outer door of the house of **PW1** and his wife, **PW2** who, with their small children were asleep. They all woke up and started screaming but then the robbers smashed their bedroom door and warned them to stop screaming or they would be killed. There were five assailants and three of them had lighted torches with them. They demanded money. PW1 pleaded with them to spare the family because he did not have any money in the house. He asked his wife to give them some church offering money she had, and she did so. It was only Sh.850 and the robbers were livid. They took two torches from the victims and all five of them embarked on a thorough search around the house. They found no money. They asked for food and they were shown where it was. They took time eating it and started collecting various items of clothing which they stuffed in two bags. Then they left after the one hour ordeal.

After they left, the family members screamed hard to attract attention but only a few women responded and PW1 did not feel confident enough to follow the robbers on his own. He waited until morning when he and PW2 reported the incident to Matuu Police station, confirming that they would be able to identify the robbers if they saw them again.

The group of robbers had earlier, at about 12.30 am waylaid another businessman in Matuu, **PW3**, as he drove into his home compound. Fortunately he spotted one of them in his car headlights before alighting and he quickly reversed the vehicle as they tried to stop him. He was able to escape. He drove straight to the police and reported the incident but when they arrived in the homestead, the robbers had left. The police, among them **PW5**, mounted a search around Matuu town until 3 am without success. Among those who joined the police was the Assistant Chief of Matuu, **PW4**.

As fate would have it, PW4 decided to go home at about 3 am. There was bright moonlight. As he cycled home along the main road, he saw a group of five men hurdled on a side road. He stopped and went towards them. They appeared strange to him and so he enquired who they

were, what they were doing there and where they were from. One of them told him he was asking stupid questions. By then he was about two feet away from them and he decided to fight them. He struck one of them hard and fell him. The others attacked him and he fought back. Just then, a vehicle appeared on the main road and the robbers ran off towards it. He gave chase. They stopped in front of the vehicle in an effort to stop it, but it veered away and drove past. The vehicle headlights had enabled PW4 to see two of them carrying bags and what they wore. Three of the robbers ran across the road as the two, who were carrying bags ran into a maize plantation. PW4 followed the two, caught up with one, punched him hard in the back and fell him. He turned on the other one and hit him in the mouth and he also fell. The two then took off and he could not catch up with them. He went into nearby houses alerting them about the presence of robbers in the village and also called for the village vigilante group to hunt them down.

PW4 went home at about 4 am and wore his uniform before boarding a *matatu* which took him to Kithimani police road block, a few kilometers away. He alerted the officers there about the robbery and requested for searches to be made on all vehicles leaving Matuu area. One of the vehicles stopped at about 6 am was a Matatu known as *'Kifaa Escort'*. PW4 went in with the police and was able to recognize the two assailants whom he had earlier fought. They wore the same jackets he had seen and they were soiled. A swollen lower lip also gave away one of them, while a green bag carried by the other confirmed the suspicion. They were arrested and taken to Matuu police station. Enroute to the station they went to the maize plantation and collected another bag which the robbers left during the struggle with PW4. The bags and the contents were later shown to PW1 and PW2 and they confirmed that the bags and all the items of clothing in them were theirs.

On 14th August, 2000, identification parades were organized by PW6 and both PW1 and PW2 were able to pick out the appellant herein and the deceased. In his unsworn defence in the trial, the appellant said he sells *mitumba* clothes in Matuu town. He had boarded a *matatu* in the town at 6 am on 20th July, 2000 but on reaching the police road block in Kithimani, the vehicle was stopped. A man went inside, looked around and ordered him to alight. He was taken to the police station where he was kept for one month before being charged with an offence he knew nothing about. The defence was rejected, and the conviction earlier referred to followed. The appeal to the High Court against that conviction was also rejected.

Before us, the appellant was represented by learned counsel, **Ms. Jepkorir** who took up two grounds of appeal to urge on his behalf. Firstly, counsel challenged the evidence on identification, submitting that it was not beyond reasonable doubt. That is because, in her view, the surrounding circumstances did not favour positive identification of the assailants. Counsel referred to the evidence of PW1 and pointed out that he never gave any description of the assailants in his first report to the police. In her submission this was a necessary predicate to any proper identification parade. She cited the case of ***Fredrick Ajode Ajode vs Republic [2004] eKLR*** where this Court expressed itself as follows:

> ***"It is trite law that dock identification is generally worthless and a court should not place much reliance on it unless it has been preceded by a properly conducted identification parade. It is also trite law that before such a parade is conducted, and for it to be properly conducted, a witness should be asked to give the description of the accused and the police should then arrange a fair identification parade (see case of Gabriel Kamau Njoroge vs Republic (1982-88) 1*** KAR ***1134)."***

The second complaint was about the evaluation of evidence. On this, counsel submitted that the first appellate court was bound to re-evaluate the evidence to come to its own conclusion but did not do so. If it had, it would have noted material contradictions in the evidence, for example, the number of the robbers who according to PW1 were five but according to PW2 were four. The nature of lights which enabled the two to see the robbers was also not explicit and fell short of the standard set in the case of ***Karanja & Another vs Republic [2004] 2 KLR 140*** where an appellant was acquitted on account of lack of evidence of brightness or intensity of the moon and torch lights which were the basis of his identification.

For his part, learned Senior Assistant Director of Public Prosecutions, **Mr. O'Mirera,** found no reason to fault the concurrent findings of fact made by the two courts below. In his view, the findings were based on the credibility of the witnesses which the trial court was in a better position to assess. On identification, counsel submitted that PW1 and PW2 had a good opportunity to see the assailants in the house through the torches which were flashed in a white-painted house for more than an hour. There was further corroboration through recovery of the stolen items and the evidence of PW4 which is not challenged, even on appeal. He urged us to dismiss the appeal.

We have considered the main legal issue raised by the appellant on his identification, especially by PW1 and PW2 who were the victims of the robbery. Generally, identification remains an indispensable element in any criminal trial, and the need therefore to examine it carefully. In ***Cleophas Otieno Wamunga vs Republic (1989) KLR 424***, this Court stated as follows:-

> ***"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 the 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 on reliance on the correctness of the identification".***

This Court elaborated it further in the case of ***Paul Etole & Another vs Republic [2001] eKLR*** thus:

> ***"The appeal of the second appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, the Court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weaknesses which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the Court should remind itself that mistakes in recognition of close relatives and friends are sometimes made."***

We have examined the evidence on record and it is clear to us that the case before us did not depend wholly on visual identification by PW1

and PW2. The conviction was not based solely on it either. Nevertheless, the two courts below examined the circumstances in which the identification of the appellant came to be made by the witnesses. The trial court examined the evidence of **PW1**, thus:

> ***"He says he was with the attackers for one hour, so he marked them. He explains that his room is painted white, so with five torches, it was bright light in the room".***

And **PW2**:-

> ***"How was she able to identify them on the night in question? She says, "our room was full of lighting from the torches the thugs were using" - this corroborating what PW1 states with regards to opportunity for identification. On XX she says Accused 1 was the one searching for clothes, as she sat on the bed and she saw him well. He is the same one who took the two watches"***

In evaluating that evidence, the court found that the circumstances were proper for positive identification. It stated:

> ***"(1) a. PW1 was able to see them because of the several torches illuminating the room, then the very bags and clothes belonging to them were recovered from them.***
>
> ***b. He later picked them at the identification parade.***
>
> ***c. He was with the attackers for one hour, so he had sufficient time too see them.***
>
> ***d. The room is painted white, so with the illumination of five torches, it became bright.***
>
> ***(2) PW2 Dorcas gives similar conditions leading to her ability to identify the accuseds and which corroborates the evidence of PW1. She specifies Accused 1 as the one who was searching for the clothes as she sat on the bed and so she saw him very well".***

If there were any doubts on the evidence of PW1 and PW2, they were cleared by the heroic encounter of PW4 with the robbers and his identification of the appellant. The trial court found thus:

> ***"(4) Paul Mutisya Kisese was able to follow up the accuseds.***
>
> ***a. He gave chase, fought them. One of them dropped a bag which upon recovery was identified by PW 1 and PW 2 as the very one which had been stolen from their house and indeed contained their property - that cannot be a coincidence.***
>
> ***b. He chased them and as they ran by the motor vehicle the lights shone on them - just apart from the moonlight.***
>
> ***c. When he fought them he inflicted some injuries on them, which he was able to positively use to identify the accuseds and indeed the bag he had indentified was recovered from them. Surely the evidence is overwhelming and sufficiently proves the charge against the accuseds and they are convicted as charged on Count 1."***

Upon re-evaluating the evidence, the first appellate court stated as follows:-

> ***"We of course recognized that the robberies took place at night when conditions for positive identification are not ideal. But as detailed above, we think in this case the evidence of identification coupled with that relating to the recovery of the items as well as the arrest of the appellants particularly the condition of their jacket shows beyond any doubt that the two appellants were amongst the group of robbers who invaded the house of PW1 and PW2 and committed a robbery therein".***

With respect, we think there was sufficient basis for the concurrent findings that the appellant was properly identified and that he was one of the people who robbed PW1 and PW2. The facts and circumstances in the ***Ajode case (supra)*** are not comparable to this case and it is therefore distinguishable. We have no basis to interfere with the conviction.

It follows that the appeal has no merit and is hereby dismissed.

Before we pen off, however, we note as a matter of law that the sentencing of convicted persons in capital offences was irreversibly altered by the Supreme Court in the case of ***Francis Karioko Muruatetu & Another vs Republic [2017] eKLR***. The death sentence has since ceased to be mandatory and trial courts were set free to consider other sentences depending on the circumstances of the particular case and mitigating factors. The Court declared:

> ***a) The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26 (3) of the Constitution.***

The Supreme Court directed that cases raising a similar issue ought to be remitted back to the trial court for recording any mitigating circumstances before sentencing. It also directed the Attorney General to guide the process, stating thus:-

> ***"a) Remitting the matter back to the High Court for the appropriate sentence seems to be the practice adopted where the mandatory death penalty has been declared unconstitutional. We therefore hold that the appropriate remedy for the petitioners in***

this case is to remit this matter to the High Court for sentencing. It is prudent for the same Court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners.

.....

c) The Attorney General, the Director of Public Prosecutions and and other relevant agencies shall prepare a detailed professional review in the context of this Judgment and Order made with a view to setting up a framework to deal with sentence re-hearing cases similar to that of the petitioners herein. The Attorney General is hereby granted twelve (12) months from the date of this Judgment to give a progress report to this Court on the same.

There is no clarity on whether the Attorney General has heeded that directive and, if so, what measures have been put in place. The matter before us was decided by the trial court 18 years ago and by the High Court 16 years ago. The trial court was careful to record the mitigation put forward on behalf of the appellants which it could not consider owing to its understanding at the time, of the mandatory nature of the death sentence. Remitting the case back to the High Court or the trial court to reconsider the sentence would, in our view, cause further delay in the matter and add to the back log of cases. As the mitigation is already on record, we think it is in the interests of justice that we consider it, and have done so, with the result that the sentence of death imposed on the appellant is hereby set aside. We substitute therefor a sentence of imprisonment for **twenty five (25) years**. The sentence shall run from the date of the appellant's first conviction on 4th October, 2001.

We so order.

Dated and delivered at Nairobi 25th day of January, 2019.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR