REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, W. KARANJA, KANTAI, JJA.)

CRIMINAL APPEAL NO. 25 OF 2016

BETWEEN

BERNAD MULWA MUSYOKA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal against the decision of the High Court of Kenya at Machakos delivered by Justice Mutende and Thuranira, JJ dated 23rd October, 2014

in

H.C.CR.A. Nos. 20 of 2014)

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JUDGMENT OF THE COURT

1. **Benard Mulwa Musyoka** (the appellant) was charged with the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code Chapter 63, Laws of Kenya. The particulars of the offence were that on 5th day of March, 2013 at Mutungu village, Nduu sub-location, Kithembe location in Kilungu district within Makueni county, **Benard Mulwa Musyoka** robbed **Charles Mwau Ndan'ga** of Ksh.10,000/- and one mobile phone make Samsung valued at Ksh.2,500/- and immediately after the time of such robbery used actual violence to the said **Charles Mwau Ndan'ga.**

2. The accused denied the charge and the matter proceeded to hearing with the prosecution concluding its case after calling five witnesses. After being placed onto his defence, the appellant opted to remain silent and wait for the judgment of the Court. He called no witnesses either.

3. The brief circumstances leading to the arrest of the appellant and arraignment in court were as follows: On 5th March, 2013, at around 8.00 p.m., the complainant (Charles Mwau Ndang'a) went to Kilome market to meet with **Stephen Nthuli (PW3)** to settle his debt of Kshs.15,000/-. After paying him, **PW3** called the appellant who was a boda boda operator, whose services he used to utilize before and instructed him to take the complainant to his home in Mutongu at **PW3's** cost.

4. After arriving at his destination, the complainant asked the appellant to stop. Instead of stopping as expected, the appellant ignored the request and drove 0.5 Km further ahead before he stopped. He then alighted from the motorcycle, held the complainant on his neck and squeezed him until he lost consciousness. He then dipped his hands into the complainant's right pocket trousers and took Kshs.10,000/-.

He also took the complainant's Samsung mobile phone bearing the name 'Anycall' on its face and pushed him into a 20ft gully by the roadside. After a short while, the complainant pulled himself out of the gully and walked home. The following day his children went to the scene and recovered among other things, a woven striped hat that the appellant was said to have been wearing the previous day.

5. On 6th March, 2013, the complainant went to the police station where he reported the incident. He was referred to hospital for treatment, and while on his way home from hospital he saw the appellant at Nunguni Market and alerted police on patrol who arrested him. On 14th March 2013, **PW1's** phone was recovered from the appellant's mother who admitted that it was given to her by her son (appellant). She was subsequently arrested and charged with handling stolen property. She pleaded guilty, was convicted and sentenced.

6. On the basis of that evidence, the trial court convicted the appellant as charged. The appellant offered mitigation but the trial magistrate stated that his hands were tied by the law and sentenced him to death as prescribed.

7. Being dissatisfied with the said conviction and sentence, the appellant preferred an appeal to the High court. The High court (**Mutende & Thuranira, JJ**.) upheld the decision of the trial court and dismissed the appeal in a judgment dated the 23rd October, 2014.

8. The appellant, being dissatisfied with the judgment of the High court filed a second appeal before this Court on the grounds that the Judges erred by:

a) Finding that the circumstances of identification of the appellant by a single witness was not conducive and or did not meet the required legal standards;

b) Basing the conviction on the basis of doctrine of recent possession while the same was not proved within the required standards of law;

c) Convicting the appellant while provisions of **sec 169** C.P.C was not complied with;

d) Not complying with **Article 50 (1)(2)** of the Constitution;

e) Not evaluating the whole evidence before the lower court, weighing all the evidence and drawing its own inferences and conclusions as is incumbent upon them;

9. At the hearing of the appeal, **Mr. Marube**, learned counsel for the appellant, only amplified the two grounds of appeal contained in the supplementary memorandum of appeal filed in Court on 10th January, 2018. He submitted that there was no proper identification of the appellant by the complainant given that he did not know the appellant and wrongly referred to him as 'Mwendwa'. With regards to the alleged failure to carry out proper re-evaluation of evidence by the appellate court, counsel submitted that there was uncertainty as to whether it was the complainant or **PW3** who pointed out the appellant to the police.

10. On his part, **Mr. Naulikha**, learned counsel for the State, opposed the appeal stating that it had no merit. He submitted that the identification of the appellant by **PW1** and **PW5** was proper given that it was by recognition and that both witnesses had previous dealings with the appellant. He also indicated that there was corroborative evidence in the matter and that the sentence given was within the law.

11. Being a second appeal, by dint of **section 361 (1) (a)** of the Criminal Procedure we are constrained to consider only issues of law raised in the appeal and not to consider matters of fact tried by the trial court and the appellate court on the first appeal. In the same vein, we reiterate as this Court has stated severally, that it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown to have demonstrably to have acted on wrong principles in making the findings. See ***Daniel Kabiru Thiong'o –vs- R-Nyeri Criminal Appeal No 131 of 2002 (unreported)*** where this Court stated that:-

> ***"An invitation to this court to depart from concurrent findings of fact by the trial and first appellate court should be declined by the second appellate court unless it is persuaded that there are compelling reasons for doing so"***.

See also ***Christopher Nyoike Kang'ethe –vs- R Nairobi Criminal Appeal No 306 of 2005 [2010] eKLR***.

12. We have considered the grounds raised, together with the submissions of both counsel. In our view, the main issue that falls for our determination is the identification of the appellant. We note that the two courts below made concurrent findings. The High court re-evaluated the evidence and observed that; ***"There was no misdirection on the part of the trial magistrate in reaching the finding that the Appellant was identified appropriately as the person who robbed the Complainant."*** We are alive to the fact that that the only eye witnesses to the robbery was the complainant. In ***Criminal Appeal No. 113 of 2001, Peter Kifue Kiilu & Another v. Republic [2005] 1 KLR 174*** the Court of Appeal held –

> ***"Subject to certain well-known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the 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."*** *(Emphasis ours)*

13. The evidence that led to the appellant's conviction fell into two categories; direct and circumstantial. On the direct evidence, the complainant and PW3 both told the court that it was the appellant who carried the complainant on his motor cycle on the night in question before the robbery. This was not just any boda boda rider procured from the roadside, but one who was specifically summoned by PW3 and assigned to transport the complainant. There could not have been any case of mistaken identity. The complainant was introduced to the appellant before he boarded his motor cycle, and he saw him clearly. It therefore follows that the identification of the appellant when he was arrested at the market was based on recognition. The difference in approach between identification and recognition was expressed thus by Madan J.A for the Court in ***Criminal Appeals Nos. 480, 208 and 209 of 1978, Reuben, Taabu Anjononi & 2 Others v Republic [1980] eKLR;***

> ***"This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the***

assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya Vs. The Republic (unreported.)"

The Court in the Giteya case (supra) also stated:- "***That is not to suggest of course, that cases of misrecognition cannot occur and courts are still duty-bound to examine such evidence with great care***."

14. With regards to circumstantial evidence connecting the appellant to the offence, it has long been accepted that the guilt of an accused person does not have to be proved by direct evidence alone. Circumstantial evidence, namely evidence that enables a court to deduce a particular fact from circumstances or facts that have been proved, can form a strong basis for establishing the guilt of an accused person as direct evidence. As stated in ***CR. APP. NO. 30 OF 2013***; ***Musili Tulo v. Republic*** "***Circumstantial evidence is as good as any evidence if it is properly evaluated and, as is usually can prove a case with the accuracy of mathematics***."

In the matter before us the High court in determining that the appellant was identified appropriately stated that: "***The Appellant was well known to PW3. He is the one who called him and asked him to take PW1 home***". The Court in reaching its determination further took note that the phone which was stolen from the appellant was recovered from a lady said to be the mother of the appellant and that the lady was arrested and charged in ***Criminal Case No. 119 of 2013 – Republic v. Francisca Mueni Mutua*** with the offence of handling stolen property where she pleaded guilty to the charge.

15. The issue of the complainant's cellphone being recovered from the appellant's mother was conclusively, and properly in our view, dealt with by the two courts below and in deference to their concurrent findings on that issue, we cannot interfere with the said findings. The said recovery forms part of the circumstantial evidence we have referred to earlier. It is settled law that when a case rests on circumstantial evidence, such evidence must satisfy three tests:

i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

(see *CR. APP. NO. 308 OF 2011, GMI v. Republic [2013] eKLR*)

16. Based on the foregoing, we are certain that the principles set out in the GMI case above, which echoes the locus classicus case of ***R. v. Kipkering Arap Koske & Another, 16 EACA 135*** have been met. Furthermore, there are no other co-existing circumstances which would weaken or destroy the inference made. We therefore find that the appellant was well identified

17. We are satisfied that the prosecution's case against the appellant was overwhelmingly credible and that the High court weighed all the evidence before it and properly directed itself in dismissing the appeal. There are therefore no reasons for interfering with the findings of the two courts below. In the premises, the appeal against conviction fails.

18. With regard to the issue of sentencing, learned counsel for the appellant briefly referred us to the case of ***Francis Karioko Muruatetu & Another v. Republic, Petition No. 15 of 2015,*** **(Muruatetu's case)** and urged this Court to refer this matter to the trial court for sentencing. The Supreme Court in the Muruatetu case declared mandatory death sentence unconstitutional and held at paragraph 69:

"Consequently, we find that section 204 of the penal code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum penalty."

In applying the ratio decidendi in the above case, we find the sentence of death under **section 296 (2)** of the Penal Code is a discretionary maximum punishment as affirmed in ***Criminal Appeal No. 56 of 2013, William Okungu Kittiny vs. Republic, Court of Appeal, Kisumu*** which held at para 9;

"From the foregoing, we hold that the findings and holding of the Supreme Court, particularly in para. 69, applies Mutatis Mutandis to section 296 (2) and 297 (2) of the penal code. Thus, the sentence of death under section 296 (2) and 297(2) of the penal code is a discretionary maximum punishment."

19. According to the sentencing remarks of the trial magistrate, although the appellant herein was a first offender, his hands were tied. He stated:

"Although the Accused is a first offender who assists his family, the law provides for only one sentence for the offence he committed. I have no discretion. Accordingly, I sentence the Accused to death as by law provided."

The first appellate Court also stated that there was no basis to interfere with the decision of the lower court. The Court in William Okungu Kittiny's case (supra) has stated that the decision of the Supreme Court in Muruatetu's case has an immediate and binding effect on all other courts and that the decision did not prohibit courts below it from ordering sentence re-hearing in any matter pending before those courts.

As stated by the court in ***Criminal Appeal No. 22 of 2015 Wycliffe Wangusi Mafura v Republic [2018] eKLR,*** this Court has jurisdiction to direct a sentence re-hearing or pass any appropriate sentence that the trial magistrate's court could have lawfully passed.

However, given the fact that counsel for the appellant asked us to remit the matter to the High court for rehearing on mitigation and sentencing, we are inclined to send the matter to the High court as requested.

20. Ultimately, the appeal on conviction is hereby dismissed and the matter is hereby remitted back to the High court for rehearing on mitigation and sentence.

DATED and delivered at 8th this day of February, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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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.

DEPUTY REGISTRAR