IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE& KIAGE, JJA)

CRIMINAL APPEAL NO. 6 OF 2009

BETWEEN

YOHANA HAMISI KYANDO.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi (Ojwang &Warsame, JJ.) Dated 28th January, 2009 in

HC.CR.A. NO. 400 of 2006)

****

JUDGMENT OF THE COURT

This is a second appeal arising from the Judgment of the High Court at Nairobi, (**J.B. Ojwang & M. Warsame, JJ** (as they were then), dated 28th day of January, 2009.

The background to the appeal is that, the appellant was arraigned before the Chief Magistrate's court at Makadara on two counts of Robbery with violence contrary to **section 296(2)** of the Penal Code. The particulars of the offence in count 1 were that, on the 17th day of June, 2001 at Komarock Estate, within Nairobi area, jointly with another not before court, and while armed with a pistol robbed one **Paul Nzomo Mbaluka** of his Motor Vehicle Registration No. KAK 322K Toyota Corolla grey in colour, one mobile Phone make Erickson, one shirt, one pair of shoes, one wedding ring and cash Kshs. 32,000/ all valued at Kshs. 732,000/- and immediately at or immediately after such acts used actual violence on the said **Paul Nzomo Mbaluka.** On count 2, it was alleged that, on the same date, place and in a similar manner, he robbed one **Stephen M. Makau** of one trouser, one shirt, a pair of shoes, cash Kshs.4,500/ all valued at Kshs. 7,810/.

The appellant faced a third count of being in possession of an imitation fire arm contrary to **section 34(1)** of the Fire Arms Act, Cap 114 of the laws of Kenya, in that, on the 17th day of June, 2001 at Komarock estate Nairobi, within Nairobi area he was found in possession of an imitation firearm namely homemade gun.

The appellant denied all the three charges prompting a trial in which the prosecution called a total of five (5) witnesses in support of the charges, while the appellant gave sworn testimony in his defence.

In summary, the prosecution case was that on 16th June, 2001, **Paul Nzomo Mbaluka** (P.W.1) drove his motor vehicle Registration No. KAK 322K to the studio of **Stephen Mutua** (P.W.2). While in the course of a conversation, two men came and passed them without uttering a word to them. The two men returned shortly afterwards and one of them asked for a cigarette. P.W.2 referred the man to a nearby kiosk where he could buy cigarettes. The two men then left and upon their return for a third time, one of them drew a pistol, pointed it atP.W.1 and 2 and directed them to the back seat of P.W.1's car. The car was then driven to some bush where the complainants were robbed of the items enumerated in the respective counts in the charge sheet, and then abandoned. The robbers drove off in P.W.1's car. The two victims of the robbery got assistance and reported the robbery to Kayole, Ruai and Nyayo police stations. Following the said reports, Car Trackers personnel started trailing PW1s' car. With the help of **P.C. Abel Mwarania** (P.W.3) then attached to **Muthaiga Police Station**, they traced the stolen vehicle parked outside a club on Thika Road. Upon checking the said vehicle, P.W.3 noticed two persons seated in the vehicle. One was in the driver's seat, while the other was in the passenger seat. One of the two men was the appellant herein. P.W.3 searched the vehicle and recovered from therein an imitation of a pistol, a wallet and a Tanzanian driving licence bearing the name of the appellant. The two men were arrested and taken to the police station where an identification parade was conducted by **C.I. Albert Muthuani**P.W.5, in which P.W. 2 identified the appellant as one of the robbers who had robbed them on the material day. The appellant, together with a co-accused who was acquitted at the trial, were charged with the aforementioned offences.

When put to his defence, the appellant gave sworn evidence. It was his testimony that he left Tanzanian on the same day of 16th June, 2001, arriving in Nairobi at 10.30 p.m. He hired a taxi and headed to Leon's Club where he met a lady friend who was working at the said Club. The lady friend kept his luggage for him in the store at the said club. The two then went drinking and continued drinking till around 2.00 a.m. when police pounced on him and arrested him. It was his testimony that what was recovered from him were his personal items and nothing in connection with the robbery which he knew nothing about. He denied being arrested while inside the alleged stolen motor vehicle.

At the conclusion of the trial, the trial magistrate assessed and analyzed the record and made findings thereon *inter alia*, as follows: that the complainants in both counts were robbed as particularized in each count; that the robbers were armed and not only threatened, but also injured the complainants; that all the ingredients for the offence charged in count 1&2 had been satisfied. The trial magistrate then concluded as follows:

> ***"The accused had denied all the three counts. However, I find that first and foremost, the arresting officers have corroborated each other's evidence that he was found driving the stolen motor vehicle. Secondly, all the witnesses have confirmed his driving licence, bearing his photograph in a wallet was found in the stolen motor vehicle, and thirdly, a toy pistol was found on his body. How does he explain his presence and his personal documents having been found in the complainant's vehicle. Finally, when an identification parade was conducted, the 2nd witness and complainant PW2-Mr. Stephen Makau was able to identify him on the identification parade. The robbery took place on the 16th day of June, 2001. The motor vehicle was recovered hardly 24 hours thereafter. In fact, the scene of crime personnel visited and photographed the motor vehicle on 18th June, 2001. I believe, there is more than adequate evidence to prove that the accused was involved in the commission of the offences as charged. The motor vehicle was stolen on 16th June, 2001 night and recovered by 17th June, 2001. He was found driving it. He was found with a toy pistol and near a club where a pistol and rounds of ammunition were recovered. I am satisfied that the prosecution has proved its case on the required standard of beyond reasonable doubt and I find the accused's defence a mere denial, tainted with untruths and not convincing. I find the accused guilty as charged and I accordingly convict him on all the three counts".***

The appellant was sentenced to suffer death in the manner prescribed by law on both count 1 and count 2, and to serve five (5) years imprisonment on count 3.

Being dissatisfied with that decision, the appellant appealed to the High Court raising various grounds of appeal. The learned Judges of the first appellate court re-assessed, re-analyzed and re-evaluated the record in light of the complaints, the appellant had raised and proceeded to make findings thereon *inter alia* as follows: that a robbery had been committed against the complainants on the material night and at the material place; that PW2 recognized the appellant as the one who approached him twice at the time he was standing in front of his studio, talking to PW1; and even directed the appellant to a shop where he could buy cigarettes; that both PW1 and PW2 spent time with the appellant when they were driven to various places in P.W.1's car; that PW5 conducted an identification parade wherePW2 was able to pick out the appellant from the parade as one of the robbers; that although, PW1 was not able to identify the appellant on the identification parade; the identification of the appellant by PW2 left no doubt that the appellant was one of the attackers who robbed both PW1 and PW2 on the material night; that the evidence of PW5 on the positive identification of the appellant at the identification parade by PW2 had been sufficiently corroborated by the finding of the appellant in the stolen motor vehicle and the recovery of items belonging to the appellant inside the car, a few hours after the robbery of the said car from P.W.1;that the appellant himself confirmed in his testimony that he was arrested at the scene where the motor vehicle earlier stolen from PW1 was recovered; that the appellant failed to give a reasonable explanation for the recent possession of the stolen car; that the trial court correctly analyzed all the evidence in detail and came to the firm conclusion that the appellant was one of the persons who was involved in the robbery against both PW1 and PW2, and on that account, dismissed the appeal.

Undeterred the appellant is now before this Court on a second appeal raising five (5) grounds of appeal. It is the appellant's complaint that the learned High Court Judges erred in law:

> ***(1) By failing to find and/or hold that circumstances were not favorable for positive identification of the appellant;***
>
> ***(2) By failing to find that the charge that was preferred against the appellant was not proved beyond reasonable doubt;***
>
> ***(3) By failing to find that ingredients of section 296(2) of the Penal Code were not fully met;***
>
> ***(4)By failing to adequately give due weight to the appellant's defence which was cogent and plausible to displace prosecution's case;***
>
> ***(5) When they failed to discharge the burden bestowed on them of re-evaluating exhaustively the entire recorded evidence as required.***

The appeal was canvased by way of oral submissions. Learned counsel **Mr. John Swaka** appeared for the appellant, while the learned senior Assistant Director of Public Prosecution (SADPP) **Mr. O'Mirera Moses** appeared for the State.

In support of the appeal, learned counsel **Mr. John Swaka** urged us to allow the appeal on the grounds that the two courts below failed to warn themselves of the dangers of convicting the appellant on the basis of the evidence of a single identification witness; that the identification parade was not properly constituted; that the doctrine of recent possession should not have been applied as a basis for finding the appellant guilty for the commission of the offences charged as no inventory of the items allegedly recovered from the appellant in connection with the alleged robbery was given; and also that the appellant's sworn defence was cogent as he sufficiently explained the circumstances under which he came to be arrested and therefore displaced the doctrine of recent possession.

Turning to the issue of sentence, counsel invited us to be guided by the Supreme Court's decision in the **Muruatetu case** and interfere with the sentence should we affirm the appellant's conviction.

Opposing the appeal, **Mr. O'Mirera** submitted that both courts below made concurrent findings of fact both on the identification of the appellant in connection with the commission of the offence and recent possession; that, although PW1 did not identify the appellant on the identification parade, he positively identified the motor vehicle robbed from him upon its recovery; that P.W2 conversed with the appellant in relaxed circumstances where there was sufficient lighting which sufficiently enabled P.W.2 to register the appearance of the appellant; that the identification parade in which the appellant had been positively identified by P.W. 2 in connection with the commission of the crime was properly conducted by P.W.5 as concurrently found by the two courts below.

Turning to the issue of recent possession, counsel submitted that the application of the said doctrine was well founded as the appellant was found seated in a recently stolen motor vehicle. His driving licence was also found in the same vehicle; and lastly that he also failed to give an account of how he came to be found in a recently stolen motor vehicle.

As for sentence, counsel left the matter to court.

In reply to the respondent's opposition to the appeal, learned counsel **Mr. Swaka** submitted that the two courts below erroneously used the doctrine of recent possession to down play the issue of identification which should be resolved in favour of the appellant.

As this is a second appeal, our mandate under **section 361 (1)** of the Criminal Procedure Code is limited to considering matters of law only. In **Dzombo Mataza V. R [2014] eKLR**, the Court stated *inter alia* as follows:-

> ***"As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court- see Okeno V. Republic [1972] E.A.32.***
>
> ***By didn't of the provisions of section 361 1(1) (a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below consider or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong."***
>
> ***"Accordingly, we must not "interfere with the decision 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.***"See also ***NjorogeMacharia V. R[2011] eKLR and Chemagong V. Republic [1984] KLR 213).'***

We have considered the record in light of the above principles and the rival submissions already highlighted above. In our view, the issues that fall for our determination are the same as those raised in the grounds of appeal set out above.

With regard to the identification of the appellant, we bear in mind the guidelines given in the case of **R vs. Turnbull and others** ***(1976) 3 All ER 549***, by **Lord Widgery C.J**. as follows:-

> ***"First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance?"***

See also **Abdalla Bin Wendo vs. Republic 20 EACA 166 at page 168**, where it was held as follows:

> ***"Subject to certain 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 the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring 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".***

In **Kariuki Njiru and 7 others vs. Republic [2001], eKLR**, the court was categorical that the law on identification was well settled; that as the court has from time to time stated that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon as a basis for finding a conviction against an accused person if the court is satisfied that such identification of an accused person is positive and free from the possibility of error. That the Court is also obligated to consider circumstances surrounding the identification. Among the factors that a court is enjoined to take into consideration is whether the eye witness gave a description of the attackers to the police at the earliest opportunity.

In **Benson Mugo Mwangi versus Republic, Criminal Appeal No. 238 of 2008**, the Court added that there was need for the court to test the

evidence of a single witness with the greatest care, and only act on such evidence to found a conviction where the court is satisfied that precaution with regard to admitting and acting on such evidence has been observed and that it was safe to act on such evidence to found a conviction.

The guidelines on the test provided for in the above case were as follows, first:

> " T***he witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straight forward person or raise a suspicion about his trustworthiness or do (or say) something which indicates that he is a person of doubt, integrity and therefore an unreliable witness which makes it unsafe to accept his evidence"; and:***

Second:

> ***"Once the court is certain in its mind that the witness is honest, the court must proceed to consider whether the circumstances prevailing at the time and place of the incident favoured proper identification. The matters to be considered are such as the time when the offence took place i.e whether it was at night or in broad day light".***

In **Maitanyi vs. Republic [1986] eKLR**, the court added that ***"it is also essential to ascertain the nature of light available. What sort of light, its size and its position relative to the suspect".***

Lastly, in **Nelson Julius Irunguvs. Republic, Criminal Appeal No. 24 of 2008**, the court added that the credibility of a witnesses is also another crucial factor to be considered before acting on evidence of identification.

Bearing all the above guidelines in mind and considering them in light of the findings of the two courts below on the identification of the appellant, it is our finding that P.W.2 was a single identifying witness for purposes of the identification parade, while P.W.1's evidence remains that of dock identification. We have not traced on the record where the two courts below warned themselves of the dangers of acting on the evidence of P.W.2 in support of the appellant's conviction. The above finding notwithstanding, it is our finding that the failure on the two courts below to administer such warning did not of itself vitiate the conviction.

The reason is that the appellant's conviction was not solely based on P.W.2's identification of him. There was additional evidence that he was not only found inside a recently stolen car but also that his driving licence was found inside the stolen motor vehicle, shortly before his arrest. The two courts below were also satisfied thatP.W.1 tendered cogent evidence to prove the ownership of the stolen motor vehicle as confirmed by the evidence of **P.C. George Okero Aleka** (P.W.4). His testimony was also corroborated by that of P.W. 2. Both courts below found the testimonies of both P.W. 1 & 2 as well as that of the police officers involved in the recovery of the motor vehicle and the items belonging to the appellant in connection with the offence charged, credible. We find no reasons to upset those concurrent findings of fact.

With regard to the issue as to whether the ingredients of the offence charged were fully met, section **296** of the Penal Code states as follows:

> ***"(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.***
>
> ***(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death"***

In ***Johana Ndung'u -vs- Republic [Criminal Appeal No. 116 of 1995] UR***, the Court succinctly set out the ingredients of the offence of robbery with violence as opposed to that of simple robbery as follows:

> ***"In order to appreciate properly as to what acts constitute an offence under Section 296 (2), one must consider the sub-section in conjunction with Section 295 of the Penal Code. The essential ingredient of robbery under Section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore described ingredients constituting robbery are pre-supplied in the three sets of circumstances prescribed in Section 296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:***
>
> ***1. If the offender is armed with any dangerous or offensive weapon or instrument, or***
>
> ***2. If he is in company with one or more other person or persons, or***
>
> ***3. If at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person".***

In light of the above threshold, it is our finding that P.W.1 and P.W.2 were categorical that the persons they saw at least on three occasions with the help of electricity light and in circumstances when they were not under any apprehension of fear were two; that one of them pulled out a pistol and pointed it at them before they were bundled into the back seat of PW1's car and driven off. They were also threatened with death and suffered the humiliation of being robbed of all their clothing and abandoned while naked. In light of the above reasoning, we find as did the two courts below that the elements of the offences provided for under **Section 296(2)** and which the appellant faced in count 1 and 2 were fully met and the offences were therefore proved beyond reasonable doubt.

As to whether the appellant's defence was considered and given adequate weight, the trial court held as follows:

> ***"I am satisfied that the prosecution has proved its case on the required standard of beyond reasonable doubt and I find the accused's defence a mere denial, tainted with untruth and not convincing"***

The 1st appellate Court on the other hand had this to say:

> ***"It is our position that the learned Principal Magistrate Mrs. Nzioka correctly analyzed all the evidence in detail and came to the firm conclusion that the appellant was one of the persons who was involved in the robbery against PW1 and PW2. The evidence before her was compelling, leaving the trial court in no doubt of the involvement of the appellant in the said robbery. As was correctly stated by the trial court, the evidence against the appellant was entirely direct and incriminating and that he was clearly and properly identified by PW2 after he was found in possession of items stolen from the complainants".***

The above observations leave no doubt in our minds that the appellant's defence was adequately considered by the two courts below, which were also satisfied on the facts on the record that it did not dislodge the prosecution's case. We find no basis to interfere with that finding. We accordingly affirm the appellant's conviction as safe.

As for the appropriate sentence, counsel for the appellant seeks for reconsideration in light of the Supreme Court decision in **Francis Karioko Muruatetu & Another v Republic** ***SCK Pet. No. 15 OF 2015 [2017] eKLR***. *counsel* contends that the mandatory nature of the death sentence was declared unconstitutional. There is therefore need to recall the death sentence and substitute it with a lesser sentence; and that the courts hands are no longer tied. This is not the first time this Court is being confronted with such a request to intervene in matters of death sentence similarly imposed as the then lawful sentence.

In **Juma Anthony Kakai vs. Republic, Nairobi Criminal Appeal No. 48 of 2015,** the following observations were made:

> ***"However, we must take cognizance of recent developments in the Law in this area and apply it to the present case, particularly because the same is advantageous to the appellant. In its recent decision in Francis Karioko Muruatetu and another vs Republic, (2017) eKLR the Supreme Court of Kenya, pronounced that the mandatory aspect of the death sentence as the only lawful sentence was unconstitutional. The Court therefore effectively removed the fetters placed on the courts' discretion when passing sentence in cases which hitherto carried the death penalty as the only lawful sentence upon conviction. This decision allows us to interrogate whether the death sentence herein should be maintained. We observe that the appellant was a first offender although when he was offered an opportunity to mitigate he offered none. This is understandable in our view because death sentence was the only one provided by the law, the court had no discretion to pass another sentence even if the interest of justice would not be met due to the circumstances of the appellant or under which the offence was committed. Say for instance a first offender or even a youthful offender who had just passed the threshold of the age of minority, or where the offenders in the cause of committing the offence did not cause any injury or serious threat to the life or limb of the complainant and they stole items of insignificant value, in all these circumstances the court had no discretion for persons charged with the offence of robbery with violence to pass any other sentence. Luckily the Supreme Court decision has cured that imbalance in criminal law by restoring judicial function of sentencing in capital offences"***

Further, in **Julius Mutei Muthama versus Republic, Nairobi Criminal Appeal No. 189 of 2016**, the following observation was made:

> ***"25. We are well aware that the Judgment by the trial court was delivered long before the Supreme Court pronounced itself on the Constitutionality of death sentence in Francis Muruatetu & Another versus Republic [2017] eKLR. In that matter, the Supreme Court held inter alia:***
>
> > ***"The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared Unconstitutional. For avoidance of doubt, this order does not disturb the validity of the death sentence contemplated under Article 26 (3) of the Constitution.***
>
> ***26. The Supreme Court further held that in a murder trial, the mitigating submission of an accused person must be taken into consideration before sentence is pronounced. The count having found that the appellant had not been given an opportunity by the trial court to make mitigating submissions, remitted the matter to the High Court for rehearsing on sentence only"***

In the instant appeal, mitigation was received save that it was treated as in inconsequential for the reason that the death penalty was the only lawful sentence capable of being handed down against the appellant as at the material time. This is no longer the position as demonstrated above. In the Muruatetu case, the Supreme Court examined comparative jurisprudence on consequential orders and in the end stated thus:

> ***"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 therefore our view that, the proper order to make upon dismissing the appeal against conviction is to remit the matter back to the High Court for rehearing on sentencing only consistent with the guidelines pronounced by the Supreme Court in the **Muruatetu case**. To that end, the case shall be mentioned before the High Court within 14 days of the delivery of the Judgment herein for appropriate directions on sentencing.

It is so ordered.

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

P.N. WAKI

.....

JUDGE OF APPEAL

R.N. NAMBUYE

…….....

JUDGE OF APPEAL

P.O. KIAGE

…….....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.