



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: NAMBUYE, MUSINGA & KIAGE, J.J.A.)**

**CRIMINAL APPEAL NO. 145 OF 2016**

**BETWEEN**

**ALI JUMA LEMU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(Being an appeal from the judgment of the High Court of Kenya at Nairobi

(Mutungi & Ochieng', JJ.) dated 19<sup>th</sup> April 2005)

**in**

**H.C. CR.A. No. 875 of 2002)**

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**JUDGMENT OF THE COURT**

- 1. Ali Juma Lemu**, the appellant herein, was charged with two counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code** and sentenced to death by **Hon. Kanyangi**, Senior Principal Magistrate, Thika. His appeal to the High Court (**Mutungi & Ochieng', JJ.**) was dismissed on 19<sup>th</sup> April, 2005.
- The particulars of the charges were that on 17<sup>th</sup> May, 2002 at Landless area in Thika District of Central Province, jointly with others not before court, while armed with axes, pangas and rungus, the appellant robbed **Francis Mwaura Kamau** of a T.V make Sanyo, black and white, raincoat and assorted clothes, all valued at Kshs 50,000 and at or immediately before or after the time of such robbery threatened to use actual violence to **Alice Nyokabi Mwaura**.
- The second count was that on 17<sup>th</sup> May, 2002 at Landless area in Thika District of Central Province, jointly with others not before court, while armed with axes, pangas and rungus, the appellant and his accomplices robbed **Peter Muigi Gikonyo** of a black and white television set, great wall clock, two jackets, two bed sheets and assorted clothes, all valued at Kshs 40,000 and at or immediately before or after the time of such robbery threatened to use actual violence to the said **Peter Muigi Gikonyo**.
- In his supplementary memorandum of appeal, the appellant listed nine grounds of appeal. Learned counsel for the appellant, **Mr. Byaruhanga** opted to argue only two grounds as follows; that *there was no proper identification of the appellant and secondly, the charge sheet was incurably defective*.
- On the issue of identification, counsel submitted that **PW1** did not clearly explain how she was able to identify the appellant amongst the large number of assailants. The intensity of the light was questioned. He also stated that none of the stolen items were found in the appellant's possession, given that the arrest was soon after the alleged robbery. According to him, an identification parade ought to have been conducted. Counsel contented that the appellant was not given a fair trial as all witness statements were not provided. Further, the investigation officer did not testify and no reason was advanced for that omission.
- As regards the issue of defective charge, it was submitted that the person who was allegedly robbed was **Alice Nyokabi Mwaura** and not **Francis Mwaura (PW2)** as indicated in the charge sheet; the said **PW2** was not at the scene at the time of the robbery, hence the charge sheet was incurably defective. Counsel urged this Court to allow the appeal, acquit the appellant and issue a deportation order thereafter,

since the appellant is a Tanzanian.

7. Opposing the appeal, **Ms. Maina** learned **Senior Public Prosecution Counsel**, submitted that the defective charge was curable under **Section 382 of Criminal Procedure Code**. It was her further submission that **PW2** saw the appellant because he was the one who led the gang before he kicked the lamp. **PW3** was able to identify the appellant because of the light from the torches that the assailants had. The appellant was described as having long rasta hair. In her view, since the arresting officer testified, there was no prejudice occasioned by failure of the Investigation Officer to testify.

She urged that the appeal be dismissed.

8. We have considered the submissions by the two learned counsel. This being a second appeal, **Section 361(1) of the Criminal Procedure Code** restricts the jurisdiction of this Court to dealing only with matters of law. We shall therefore restrict ourselves to only the two issues raised by the appellant, that is, *identification and defective charge*.

9. Turning to the first issue of identification, this Court has pronounced itself in several cases. For example, in the case of **Francis Kariuki Njiru & others v Republic - Criminal Appeal No. 6 of 2001**(unreported), the Court stated that:

**“The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error.”**

10. In the present case, **PW1** testified that on or about on 16<sup>th</sup> May, 2002 at about 3 a.m., a large number of people broke into their home and she was ordered to lie facing down. She identified the accused as the one who was on the forefront and the one who broke the lamp that was lit. She told the trial court that the appellant was armed with a panga, which he used to hit her back with. The robbers demanded money and that is when she requested that the appellant give her a torch so that she could be able to retrieve some money from her purse to give to them. She recognized him as he was the one on the front. The panga was produced in court and she was able to identify it.

11. **PW2**, the complainant’s husband, also gave an account of what transpired and corroborated **PW1’s** testimony. He stated that on the same night, he, the police and some neighbours, started a search for the robbers when they found two people hiding in the bush. One had a bicycle and tried to escape but was soon arrested. The following day when **PW2** went to record a statement he identified the appellant by his Rasta hair. **PW3**, who was also robbed on the same night, testified that he recognized the appellant by his shaggy hair as he was able to see him from the light from the torches that the robbers used. **PW4**, the arresting officer, told the court that he arrested the appellant on the same night and recovered a panga and a crow bar that were used in the robbery.

12. From the chronology of events aforementioned, we are satisfied that there were favourable conditions for positive identification of the appellant. In our view, the circumstances of this case lead to only one conclusion, that the appellant was among the people who were involved in the robbery and was properly identified. We find no reason to fault the two courts below for finding that the appellant was positively identified.

13. On the second issue of a defective charge, it was argued that the name of the person indicated on the charge sheet, **Francis Mwaure Kamau**, was not the person who was robbed as he was not present at the time of the robbery, hence the charge was incurably defective. While it is indeed obvious that the charge sheet contained an error in regard to the names, we do not however consider this to be sufficient reason to set aside the conviction of the appellant. To our mind, that amounted to a typographical error that is curable under **Section 382 of the Criminal Procedure Code**.

14. It is without a doubt that a robbery took place on that fateful night. The appellant was properly identified and all the circumstances highlighted above pointed out a perfect case of robbery with violence.

15. In **John Irungu v Republic [2016] eKLR** this Court observed that:

**“The Code contemplates that there may be variations, so long as there is substantial compliance with the rules. In the same vein Section 382 of the Code focuses, not on formal compliance with the rules of framing the charge, but on whether any error, omission or irregularity that has occurred in the charge, has occasioned a failure of justice.”**

16. We are of the opinion that the error in the charge did not occasion a failure of justice and such error is curable under **Section 382 of the Criminal Procedure Code** which provides in part that:

**“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.”**

17. Ultimately, we have no reason to interfere with the concurrent findings of the two courts below. But as regards the mandatory death sentence that was pronounced by the trial court and affirmed by the first appellate court, we take cognizance of the fact that recently the Supreme Court in **Francis Karioko Muruatetu & Another v Republic, [2017] eKLR**, stated that the mandatory aspect of the death sentence as the only lawful sentence is unconstitutional. It therefore means that the Court can exercise its discretion to pass an appropriate sentence in a case where hitherto the Penal Code prescribed only death sentence upon conviction. In this appeal, considering all the

circumstances surrounding the commission of the offences and that the appellant was remorseful, we are inclined to interfere with the sentence. It is noteworthy that **Section 333** of the **Criminal Procedure Code** requires the court to consider time spent in custody when imposing a sentence. We note that the appellant has been in custody for 16 years so far. The trial court also treated him as a first offender. In light of the above, we are disinclined to remit the matter to the trial court for resentencing and, instead, we hereby set aside the death sentence meted upon the appellant and substitute therefor a jail term of 20 years with effect from 1<sup>st</sup> August, 2002 when the judgment was delivered by the trial court. Upon completion of the said jail term, the appellant shall be deported to Tanzania. It is so ordered.

**Dated and delivered at NAIROBI this 22<sup>nd</sup> day of March, 2019.**

**R.N. NAMBUYE**

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**JUDGE OF APPEAL**

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**