IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: VISRAM, KARANJA & KANTAI, JJA]

CRIMINAL APPEAL NO. 22 OF 2016

BETWEEN

KENNEDY WANGONDU WAMWIRI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from a Judgment of the High Court of Kenya at Nairobi (Ochieng' & Achode, JJ) DATED 25TH January, 2012,

In

HCCRA NO. 432 OF 2007

****

JUDGMENT OF THE COURT

This is a second appeal from the conviction and sentence of the appellant, **Kennedy Wangondu Wamwiri,** who was arraigned before the Chief Magistrate, Kibera, Nairobi, on a charge of robbery with violence contrary to Section 296 (2) of the Penal Code. Particulars of the offence were that on 1st September, 2005 at Waithaka in Riruta within Nairobi, jointly with others not before court while armed with an offensive weapon namely a knife, they robbed **Francis Waweru Muruatetu** of a mobile phone, money and other items, all to the value of Kshs 8,700/= and that immediately before or immediately after the time of such robbery, they threatened to use actual violence to the said person.

There was a second charge of stealing contrary to section 275 of the said Code. In a Judgment delivered on 9th January, 2007 by the Principal Magistrate, Kibera, the appellant was convicted on the first count and was sentenced to death. He was acquitted on the 2nd count. A first appeal to the High Court of Kenya at Nairobi (**Ochieng&Achode, JJ**), failed in a Judgment delivered on 25th January, 2012 and being dissatisfied, the appellant filed this appeal.

Section 361(1) (a) Criminal Procedure Code mandates us in a second appeal to consider only issues of law but not matters of fact that have been considered by the trial Court and reconsidered and re-evaluated by the High Court as it is required to do as was recognized in the case of **Okeno V. Republic [1972] E.A. 32**. We should respect the findings of those courts unless it is shown that they have not considered relevant facts or that they have considered irrelevant facts or that on the whole, decisions are arrived at in a manner that a reasonable tribunal properly exercising its mind would not make – See for a judicial pronouncement on the duty of the Court in a second appeal the case of **Stephen M'Irungi V**. **Republic [1982-88]1KAR, 360** where the following passage appears:

> ***" Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decisions 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."***

Our examination of the facts of the case as recorded by the trial court and re-evaluated on first appeal will be for purposes of carrying out our mandate as we have recognized above.

The prosecution case appears to have been simple and straight forward.

In the evening of 1st September, 2005, **Francis Waweru** (P.W.1) (**Waweru**), left the City Centre and headed to Waithaka by public means arriving there at 10.00 p.m He was walking home when, on nearing the office of the area District Officer (D.O.), he was confronted by 3 people who held him forcefully and threw him to the ground. One of them brandished a knife and Waweru was ordered to remove all that he had in his pockets. According to Waweru, it was the appellant who held a knife and it was he who removed his mobile phone, money and other items from his pockets after which the robbers left him at the scene but not before they inflicted an injury to his neck. He reported the incident to police the following morning after which, as he walked in the area, he saw the appellant at a place where the appellant was drinking alcohol. He informed people at the scene including **Michael Kangethe Santole** (P.W.3) (**Santole**) that the appellant had robbed him the night before. The appellant was apprehended and when a search was carried out, Waweru's wallet, in which his National Identification Card still remained, was retrieved from the appellant's pocket.

The appellant was taken to the D.O's office where, upon further interrogation, he led police including No. 89118911 APC **Julius Burudi** (P.W.4) (Burudi) to a mobile phone shop where Waweru's stolen phone with Sim Card No. **0722-299-615** complete with Sim Card was recovered. The appellant was then led to Riruta Police Station and later charged in Court.

Santole testified that he was at a club with the appellant in the morning of 2nd September, 2005, when Waweru appeared and alleged that the appellant with others had robbed him the night before. He was present when a search was carried out on the appellant and was present when items including the mobile phone were recovered.

No. 841423 P.C. Geofrey Kahiga (P.W.5) was the investigating officer in the case and produced various recovered items in Court as part of the evidence.

We have avoided speaking to the evidence of P.W.2 which related to the offence in count 2 where the appellant was acquitted as we have already shown.

That was the evidence placed before the trial court but there was some drama before the prosecution's case was closed. The record shows that on 11th May, 2007, the appellant informed the trial magistrate that he was unwell and he requested to be taken to Kenyatta National Hospital for treatment. That request was granted. There was then one mention of the case and when hearing resumed on 6th June, 2007, the appellant applied that the case be transferred for hearing before another magistrate, reasons being that the case had taken long to be concluded and further, that he had requested for production of an Occurrence Book which had not been availed to him. The trial magistrate considered the application and refused to transfer the case holding that delay in the case had been occasioned by the prosecution and the defence but not by the Court. The trial magistrate found no proper reasons advanced for transfer of the case and disallowed the application.

When this ruling was made, the appellant refused to participate in the proceedings and removed himself to the holding cells at the Court premises. The trial magistrate invoked provisions of the repealed Constitution and took the evidence of the last prosecution witness in the absence of the appellant. It was then held that the prosecution had made out a prima facie case and when the appellant was required to indicate the nature of his defence, he is recorded thus:

> ***"Accused" I leave it to court"***

A date for Judgment was then given.

One of the grounds of appeal argued at the High Court related to whether the appellant's fair trial rights had been violated. The High Court considered the record and came to the conclusion that there had been no violation, the appellant having been accorded an opportunity to participate in the proceedings before the trial court and having chosen to remove himself from the court.

When the appeal came up for hearing before us on 29th October, 2018, Mr. **Ratemo Oira**, learned counsel for the appellant, rehashed on a "Supplementary Memorandum of Appeal" drawn by his law firm **Ratemo Oira & Co. Advocates** where nine (9) grounds of appeal are set out. It is stated among other things that the High Court erred in failing to hold that there was no proper identification of the appellant where an identification parade had not been held; that there was doubt on who carried out the robbery and that the prosecution's evidence was not free from error. Finally, we are asked to review the sentence of death imposed in line with a decision of the Supreme Court of Kenya in Petition No. 15 of 2015 in the case of **Francis Kariako Muruatetu & Others v. Republic**.

In submissions before us, it was Mr. Oira's case that Waweru had not given a name of a suspect when he reported the robbery to police and that made his evidence doubtful. In conclusion, Mr. Oira asked us to reduce the sentence.

Mr. Solomon Naulikha, learned State Counsel, in opposing the appeal on conviction submitted that there was no doubt in identification of the appellant because it was identification through recognition where Waweru knew the appellant before the incident. It was his further submissions that recovery of the Sim Card the morning after the incident was further corroboration of the prosecution's case.

We have considered the record of appeal and the submissions made and in terms of our mandate we shall consider only issues of law.

We recognize as an issue of law in this appeal whether the appellant was properly identified as one of the robbers who attacked and robbed Waweru on the material night. It was Waweru's testimony that he was attacked at about 10 p.m. and robbed, and that:

> ***"…. The following day, I went to report to police. On my way, I saw accused sitting at a stage drinking alcohol. I knew accused before. I had seen him attack and rob me the previous night …."***

He further testified that, on seeing the appellant at the local drinking joint, he alerted others present who included Santole that the appellant

had robbed him the night before. When a search of the appellant was carried out, Waweru's wallet, which had his identity card and money, was recovered from the appellant's pocket. When later that day the appellant was presented to police including P.W.4, he freely led police to a mobile shop where Waweru's stolen phone was found with Sim Card intact.

It was held by this Court in the case of **Maitanyi v. Republic [1986] eKLR 198** that:

> ***"1. Although it is trite that a fact may be proved by the testimony of a single witness, this 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.***
>
> ***2. When testing the evidence of a single witness, a careful inquiry ought to be made into the nature of light available conditions and whether the witness was able to make a true impression and description.***
>
> ***3. The Court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the Court to warn itself after making the decision. It must do so when the evidence is being considered and before the decision is made"***

The earlier case of **Anjononi and Others v. Republic [1980] KLR 59** dealt inter *alia* with the issue of recognition where it was held that:

> ***"… 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 …"***

In the case before the trial magistrate, the court found that Waweru had recognized the appellant during the robbery as a person he knew before. He later spotted the appellant who was found in possession of items stolen from the appellant the night before. The High Court re-evaluated all the evidence we have set out and agreed with the findings of the trial court.

We have considered the whole record and cannot find any error in the said findings. The appellant was identified by Waweru through recognition as he knew him before. Waweru testified that he did not report the incident to police that night as he was afraid that he could be attacked again. He reported the incident the next morning and the appellant was found with items that had recently been stolen from Waweru. There is no merit in this appeal on the issue of conviction and is hereby dismissed.

Counsel for the appellant asks us to reconsider the sentence awarded and reduce it. Although severity of sentence is a question of fact on which Section 361 Criminal Procedure Code does not give us mandate, we are aware of the decision of the Supreme Court of Kenya in the case of **Francis Muruatetu** (supra) where it was held amongst other things that imposing a mandatory death sentence was unconstitutional.

The appellant was sentenced to death on 9th January, 2007 and the first appeal to the High Court was dismissed on 25th January, 2012, both events coming before the said Judgment of the Supreme Court in 2017. In view of the said Judgment of the Supreme Court, we set aside the death sentence and order that the file be remitted to the High Court to reconsider the appellant's mitigation and award an appropriate sentence.

DATED & Delivered at Nairobi this 8th day of March, 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