



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, J.J.A.)

CRIMINAL APPEAL NO. 79 OF 2016

BETWEEN

JOSEPH MWENDO KATETE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi (Muchemi & Odunga, JJ.) dated 18th February, 2014

in

HCCRA NO. 20 OF 2012)

JUDGMENT OF THE COURT

[1] **Joseph Mwendo Katete** who is the appellant was tried and convicted by the Chief Magistrate's Court at Makadara Law Courts for the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code**. He was sentenced to fourteen (14) years imprisonment. Being dissatisfied with the judgment of the trial magistrate, he appealed to the High Court against his conviction and sentence. The High Court (Muchemi & Odunga, JJ.), dismissed his appeal against conviction and having found the sentence meted against him to be contrary to the mandatory death sentence provided under section 296(2) of the Criminal Procedure Code, substituted the sentence of 14 years imprisonment with a death sentence.

[2] The appellant is now before us in this second appeal in which he is represented by learned counsel, **Mike Mutinda**. In the supplementary grounds of appeal, which was relied upon by the appellant, five grounds have been raised. In effect, the grounds challenge the judgment of the first appellate court on three main grounds. That is: that the appellant was not positively identified; secondly, that the first appellate court did not properly re-consider and re-evaluate the evidence in order to arrive at its own conclusion; and thirdly, that the learned judges erred in failing to find that the doctrine of recent possession was improperly applied.

[3] During the hearing of the appeal, learned counsel for the appellant with leave of the court, added another ground, faulting the sentence imposed by the first appellate court as harsh, and manifestly excessive. In addition, the appellant abandoned the appeal against conviction and proceeded with the appeal against sentence only.

[4] The appellant's counsel submitted that the circumstances of the offence were such that no one suffered injury; and that the appellant had been in custody for the last 8 years. Relying on the Supreme Court decision in **Francis Karioko Muruatetu & another vs Republic [2017] eKLR**, Mr. Mutinda urged the Court to consider a lighter sentence. He maintained that the sentence of death meted against the appellant was harsh and manifestly excessive and that in any case in light of the Supreme Court decision, the death sentence is no longer mandatory.

[5] **Mr. Omirema**, counsel who appeared on behalf of the Director of Public Prosecutions (DPP) acknowledged that sentencing is an exercise that is discretionary and therefore the Court of Appeal should exercise restraint in interfering with the sentence imposed. He drew the Court's attention to page 10 of the record of appeal wherein it was adverted to in the evidence that the appellant was involved in several other robberies. Counsel also submitted that at the time of the robbery, the appellant was armed with a pistol and at the time of his arrest was found in possession of an AK 47 rifle.

[6] The appellant having abandoned the appeal against conviction, our mandate is now limited to the issue of sentencing. The issue of the mandatory nature of the death sentence, has now been resolved by the Supreme Court in the **Francis Karioko Muruatetu** decision, wherein the Supreme Court held that the death sentence is not mandatory and that the trial court has the discretion to impose any sentence including death as the maximum penalty.

[7] Although the Supreme Court was dealing with a matter in which the petitioner was charged with murder, the position in this case is not any different. Section 296(2) of the Penal Code, provides that any person who is convicted for the offence of robbery with violence, “shall be sentenced to death.” This position is therefore the same as that for the offence of murder, in regard to which under section 204 of the Penal Code, a person convicted “shall be sentenced to death.” Thus, the judgment of the Supreme Court that the death sentence is not mandatory, is equally applicable to the sentence provided under section 296(2) for the offence of robbery with violence. In other words, the trial court should exercise its discretion based on the circumstances before it including the mitigating factors.

[8] The trial magistrate who convicted the appellant had the benefit of the circumstances of the case, as well as the fact, that the appellant had no previous convictions. In exercise of his discretion, the trial magistrate imposed a sentence of fourteen (14) years imprisonment. This sentence was enhanced by the first appellate court on the understanding that the sentence provided under section 296(2) was mandatory. With the Supreme Court decision, that position is no longer obtaining.

[9] We would therefore allow the appellant’s appeal against sentence, set aside the sentence of death imposed on the appellant by the first appellate court, and substitute thereto, a sentence of 14 years imprisonment effective from 19th January, 2012, being the date of sentencing by the trial magistrate.

Those shall be the orders of the Court.

DATED and delivered at Nairobi this 5th day of April, 2019

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR