IN THE COURT OF APPEAL

NAIROBI

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

CRIMINAL APPEAL NO. 45 OF 2016

BETWEEN

JOSEPH MUTUKU MUTISYA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An Appeal from the Judgement, Conviction and Sentence of the High Court of Kenya

*at Machakos, (**Makhandia, J.)** delivered on 13th June, 2013* in

H.C.CR.A. NO. 4 OF 2010)

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JUDGMENT OF THE COURT

[**1**] The appellant ***Joseph Mutuku Mutisya*** was arraigned before the Chief Magistrates Court at Machakos for robbery with violence contrary to **section 296(**2) of the Penal Code. The particulars of the offence were that on the night of 2nd and 3rd April, 2009 at Machakos town in Machakos district, jointly with others not before the court, robbed ***Richard Jonathan Mutiso*** of cash Kshs.6,000/=, Nokia mobile phone, safari boots, National Identity card, administration police identity card and ATM card all valued at Kshs. 10,000. After the trial, the appellant was convicted and sentenced to death.

[**2**] The appellant appealed to the High Court which re-evaluated the evidence on record and found that the appellant was positively identified by the victim. The court dismissed the appeal and upheld the conviction and sentence, prompting this second appeal.

[**3**] The prosecution case was in summary as follows:

On 2nd April, 2009 at about midnight, ***APC Jonathan Mutiso*** (complainant) an administration police officer left a night club at Machakos town and started walking about looking for a taxi to take him to his home. As he was looking for a taxi, he met five people who stopped him and started beating and strangling him. The people robbed the complainant of a police ID card, National ID card sash, Kshs.6,000/-, mobile phone and safari boots. The complainant claimed that there was electricity light at the scene.

PC Aaron Cheruiyot who was in a police patrol vehicle and other police officers heard screams. The police vehicle stopped and ***PC Cheruiyot*** and other police officers ran to where the screams were coming from. As they approached the scene, ***PC Cheruiyot*** saw two people running away and on arrival at the scene they found the complainant holding and struggling with the appellant. The complainant reported that the appellant was among the people who had robbed him and he was arrested. ***PC Cheruiyot*** stated at the trial that there was security light at the scene and that the complainant had bruises on the neck, his trouser was badly torn and he had no shoes.

[**4**] In his defence at the trial, the appellant denied the offence and stated that he was dancing at the bar when, due to drunkenness, he fell on a table where three people were seated. The people assaulted him and when the police went there, they arrested him.

[**5**] In his submissions before this Court, the appellant through his counsel ***Mr. Wachira,*** relied on the grounds of appeal filed on 12th August 2013 which are in summary as follows;

a) that the court failed to properly re-evaluate the evidence on record before affirming the conviction and sentence;

b) that the court upheld the conviction based on unreliable evidence;

c) that the court discounted the appellant's defence that he was a victim of circumstance.

[**6**] With regard to the prosecution evidence, ***Mr. Wachira*** submitted that it was inconsistent as to how many attackers were involved, how many items were stolen and whether there were any other witnesses to the crime other than the complainant. He submitted that at the time the appellant is said to have attacked the complainant, he had in fact been involved in a bar brawl and should therefore, have been charged with the offences of affray rather than with robbery with violence. As regards sentence, counsel urged the Court to be guided by the Supreme Court decision in **Francis Karioko Muruatetu & another v Republic [2017] eKLR (*Muruatetu*)** and reduce the appellant's sentence. He submitted that this decision was applied by this Court in the case of **Daniel Gichimu Githinji & Another v Republic [2018] eKLR** where this Court interfered with a sentence affirmed by the first appellate court, set it aside and substitute it with one of fifteen years' imprisonment to run from the date of the arrest of the appellant in that appeal. Counsel further relied on the cases of **Jubilee Insurance Company of Kenya Ltd v Zahir Habib Jiwan & Another [2017] eKLR** on the value of documentary evidence; and **Bernard Munungi Njau v Republic [1979] eKLR** on corroboration of evidence.

[**7**] In opposing the appeal, ***Mrs. Murungi*** **(SADPP)** for the prosecution submitted that the appellant was properly convicted as positive identification had been made at the scene and evidence that a struggle had occurred had been produced to satisfy the conditions necessary to prove the offence of robbery with violence. Furthermore, counsel contended that the appellant's defence had been properly analyzed and there was no possibility of an error. In light of the decision in ***Muruatetu,*** she requested that the appellant's case be sent back to the trial court for re-sentencing because at the time the appellant was convicted, the death penalty was mandatory.

[**8**] This is a second appeal and by dint of **section 361** of the **Criminal Procedure Code**, only matters of law fall for our consideration. In **Karingo -vs- R (1982) KLR 213 at p. 219** this Court said:-

> **"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari S/O Karanja -vs- R (1956) 17 EACA 146)"**

[**9**] Having considered all the evidence, submissions and principles of law, we find that following issues fall for our determination: whether the learned judge failed to re-evaluate the evidence on record afresh; whether the first appellate court upheld the conviction on the basis of sufficient and credible evidence; and whether the appellant should have been convicted of another offence rather than robbery with violence based on his defence.

[**10**] With regard to the first issue, the position in law is that a first appellate court is obligated to reconsider the evidence, re-evaluate it itself and draw its own conclusion on the evidence recorded at the trial. It is not enough for the court to merely scrutinize the evidence to see if there was some evidence to support the trial court's findings and conclusions. See **Ngui v Republic [1984] KLR 729.**

We find that the first appellate court re-evaluated the evidence tendered before the trial court on the identification of the appellant and in its judgment rendered itself thus;

> **"We have re-evaluated the evidence on record afresh. The conviction of the appellant was predicated on the evidence of a single identifying witness, the complainant. He is the only person who identified the appellant as one of the robbers….The incident herein occurred at midnight. The complainant (PW1) did not know the appellant before. Five people pounced on the complainant. Though PW1 and PW2 mentioned the existence of light at the scene, no description of the intensity of light and where the source was situated was given in evidence. We observe that in the judgment, the learned trial magistrate cautioned himself on the evidence of identification by the single witness….Our own evaluation of the evidence on record leads us to the conclusion that the appellant was positively identified as one of the robbers. Firstly, the complainant (PW1) had no reason to frame the appellant. Secondly, though it was at midnight and conditions might not have been bright, the appellant was held and restrained by the complainant on the spot. The complainant was seen by PW2 and PW3 struggling with the appellant. PW2 and PW3 arrested the appellant on the spot while he was still in the grip of the complainant."**

[**11**] From the above excerpt, it is evident that the first appellate court was aware of its duty and did in fact re-examine and re-evaluate the evidence before accepting the findings of the trial court. There is no set format for re-evaluation of evidence. This Court has previously followed the dicta by the Uganda Supreme Court in the case of **Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634**, stating thus:

> **"The extent and manner in which evaluation may be done depends on the circumstances of each case and the style used by the first Appellate Court."**

[**12**] With regard to the second issue, the appellant submitted that the first appellate court failed to consider the discrepancies in the evidence of the prosecution witnesses which ought to have led to impeachment under **section 163(1)(c)** of **the Evidence Act** which provides as follows;

> **"163 Evidence to impeach the credit of a witness –**
>
> **(1) The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the court, by the party who calls him—**

(a)…

(b)…

(c) by proof of former statements, whether written or oral, inconsistent with any part of his evidence which is liable to be contradicted.

[**13**] The discrepancies being alluded to involve the number of assailants who are said to have attacked the complainant. In some statements there were five assailants while in other statements there were three assailants, including the appellant. The other discrepancy is in the details of how many items were actually stolen from the complainant. In our considered view, issues pertaining to the number of assailants involved in the robbery and the type of exhibits presented in court are matters of fact. The two courts below have made concurrent findings on these facts and agreed that the appellant was sufficiently linked to the robbery. The trial court had the advantage of seeing and hearing the prosecution witnesses. The first appellate court accepted the chain link of events found by the trial court where the appellant was held by the complainant and was immediately after re-arrested at the scene. Consequently, this Court can only interfere with the above concurrent findings if satisfied on the record that those facts were either misapprehended by the two courts below or that there was a misapplication of the law to those facts. In **Dzombo Mataza vs. R [2014] eKLR** this Court set out the confines of its jurisdiction in such an appeal 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 dint of the provisions of section 361(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 considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong".

[**14**] The question that this Court has jurisdiction to answer is whether the two courts below subjected the evidence of identification to the requisite critical analysis. The crux of the prosecution case was that the appellant had been arrested in the process of committing the offence of which he was charged. The first appellate court applied the law on evidence of identification as held by this Court in **Raymond Hermes Odhiambo v Republic [2002] eKLR** to find that although the incident happened at midnight, and no evidence was given as to the source of light, the identity of the appellant was certain. The law on identification has been settled by this Court in various judicial decisions. In **Maitanyi v Republic [1986] KLR 198** this Court set out what constitutes favorable conditions for a correct identification by a sole testifying witness as follows;

"The strange fact is that many witnesses do not properly identify another person even in daylight... It is at least essential to ascertain the nature of light available. What sort of light, its size and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care? It is not a careful test if none of these matters are unknown because they were not inquired into.... 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".

Further, the guidelines for courts when evaluating evidence of a single witness were articulated in the case of **Mwaura v Republic [1987] KLR 645** in which the Court of Appeal held, *inter alia*, that:

"In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light".

[**15**] It is clear from the record that the first appellate court was alive to the fact that the conviction of the appellant was predicated on the evidence of a single identifying witness, the complainant. However, the court following the guidelines set by the ***Maitanyi*** case, considered the circumstances surrounding the appellant's arrest where the complainant's evidence was supported by the evidence of ***PC Cheruiyot*** as to the events that took place on the night in question. Based on that evaluation, the court found as follows;

"Our own evaluation of the evidence on record leads us to the conclusion that the appellant was positively identified as one of the robbers. Firstly, the complainant (PW1) had no reason to frame the appellant. Secondly, though it was at night and conditions may not have been bright, the appellant was held and restrained by the complainant on the spot. The complainant was seen by PW2 and pw3 struggling with the appellant. PW2 and PW3 arrested the appellant on the spot while he was still in the grip of the complainant. The trouser of the complainant which was produced in court as exhibit was torn evidencing signs of a serious struggle…."

Therefore, we find that the facts were neither misapprehended nor the law misapplied and that the court reached the correct finding that the appellant was positively identified.

[**16**] Regarding the issue of whether the appellant should have been charged with a different offence, the first appellate court affirmed the conviction of robbery with violence. In his submissions, counsel for the appellant contended that the prosecution had not met the threshold of the offence of robbery with violence and that rather the offence committed was affray which carries a lesser sentence. The necessary elements of the offence of robbery with violence have been elaborated by this Court in **Juma Mohamed Ganzi & 2 others v Republic [2005] eKLR, Johana Ndungu v Republic [1996] eKLR** and **Oluoch v Republic [1985] KRL 549** as follows:

"1. If the offender is armed with any dangerous or offensive weapon or instrument, or

2. If he is in the 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."

[**17**] It is clear that the two courts below were not convinced that the incident was a mere drunken brawl. The two courts thoroughly evaluated the evidence and satisfied themselves that the elements of the offence of robbery with violence were proved. Giving reasons for dismissing the appellant's version of events, the first appellate court rendered itself as follows;

"We do not believe in the defence of the appellant that the struggle was in the bar where there were other patrons. In our view, if the struggle resulting in the tearing of the complainant's trousers to pieces was in the bar, such a struggle would have attracted the involvement of other patrons in the bar. There was no evidence of attraction of other patrons in the bar. In our view, the restraining of the appellants by the complainant, at the scene, the circumstances of his arrest by PW2 and PW3 on the spot and the admission of the appellant that he had a struggle with the complainant resulting into the tearing of the complainant's trousers, leads us to the irresistible conclusion that there was no possibility of mistaken identity of the appellant. We agree with the learned trial magistrate that the appellant was one of the people who attacked and robbed the complainant PW1."

[**18**] On the issue of sentence, learned counsel for appellant invited this court to tamper with the sentence in line with the Supreme Court decision in ***Muruatetu*** which removed the fetters placed on courts' discretion when passing sentence in cases which previously carried a mandatory death sentence as the only lawful sentence upon conviction. This is not the first of such requests for this Court to interfere with the death penalty for robbery with violence sentence as evidenced in the recent Court of Appeal decisions in **Juma Anthony Kakai v Republic [2018] eKLR** and **Julius Mutei Muthama v Republic [2018] eKLR.** In these cases, the court took cognizance of the developments in the law brought about by the decision in the ***Muruatetu*** case that in a murder case, the mitigating submissions of an accused person must be taken into consideration before sentencing. This principle applies to robbery with violence cases such as the appeal before this court. (See **William Okungu Kittiny vs. Republic [2018] eKLR)**.

[**19**] In the instant appeal, learned counsel for appellant stated in mitigation that the appellant has been in custody for 10 years and that he is a first offender. The first fact was not disputed but regarding the second, a certificate of previous conviction had been produced as exhibit before the trial court and it showed that the appellant has two previous convictions. The court in ***Muruatetu*** recommended that the possibility of reform and social re-adaptation of the offender is to be considered in sentence re-hearing. This implies that where an appellant or a petitioner has been in custody for a considerable period of time the court ought to consider calling for a pre-sentencing report and possibly the victim impact report in order to inform itself as to whether the appellant/petitioner is fit for release back to the society. As appreciated by the Supreme Court in **Muruatetu** case (supra):

"Comparative foreign case law has also shown that the possibility of review of life sentences and the fixing of minimum terms to serve a life sentence before parole or review, is intrinsically linked with the objectives of sentencing. In Kenya, many courts have highlighted the principles of sentencing. One such case is the High Court criminal appeal decision in *Dahir Hussein v. Republic Criminal Appeal No. 1 of 2015; [2015] eKLR*, where the High Court held that the objectives include: 'deterrence, rehabilitation, accountability for one's actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim.' The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:

"Sentences are imposed to meet the following objectives:

1. Retribution: To punish the offender for his/her criminal conduct in a just manner.

2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.

4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met.

Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.

5. Community protection: To protect the community by incapacitating the offender.

6. Denunciation: To communicate the community's condemnation of the criminal conduct."

The sentencing policy states at paragraph 4.2 that when carrying out sentencing all these objectives are geared to in totality, though in some instances some of the sentences may be in conflict."

[**20**] From the above recommendation, we are of the opinion that the death sentence is excessive in the present case. As was held in **Bachan Singh vs. The State of Punjab (Bachan Singh) Criminal Appeal No. 273 of 1979 AIR (1980) SC 898** a decision cited in the ***Muruatetu's*** case (supra):

> **"It is only if the offense is of an exceptionally depraved and heinous character, and constitutes on account of its design and manner of its execution a source of grave danger to the society at large, the Court may impose the death sentence."**

Similarly cited was the decision of the Privy Council in **Spence vs. The Queen; Hughes vs. the Queen (Spence & Hughes)** (unreported, 2 April 2001) where **Byron CJ** was of the view that:

> **"In order to be exercised in a rational and non-arbitrary manner, the sentencing discretion should be guided by legislative or judicially-prescribed principles and standards, and should be subject to effective judicial review, all with a view to ensuring that the death penalty is imposed in only the most exceptional and appropriate circumstances. There should be a requirement for individualized sentencing in implementing the death penalty."**

[**21**] This means that whereas the death sentence has not been declared unlawful and may still be lawfully imposed where there exist *the most exceptional and appropriate circumstances*, it is no longer mandatory to impose such a sentence where the facts do not cry out for the same. In our view, in situations where the law prescribes a grave sentence, the court in imposing the sentence ought to give reasons for imposing a particular sentence so that the act of sentencing does not become arbitrary.

[**22**] In conclusion, having found that the appellant's conviction was proper in law, we dismiss the appeal on conviction. However, we are cognizant of the fact that the conviction by the trial court was made before the ***Muruatetu*** decision when it was still lawful as prescribed by **section 204** of the **Penal Code.** Therefore, as this Court contemplated in the case of ***Kakai*** (above), the matter can either be remitted to the High Court for the appellant to undergo a fresh mitigation or, in the interests of justice, interfere with the judgment in regard to the death sentence. The Court in ***Kakai*** considered the delay that is attendant to the process of remitting the matter to the High Court and found that even though the offence with which the appellant was charged was a serious one, the ends of justice would be better served if the sentence was reduced to 20 years.

[**23**] Similarly, we have given due consideration to ***Mr. Wachira's*** request for us to tamper with the sentence handed out by the trial court against the appellant and affirmed by the first appellate court. The appellant has already served 10 years imprisonment. As we have already said, he had two previous convictions. The complainant sustained a minor injury.

[**24**] For the foregoing reasons, the appeal against conviction is dismissed. However, the appeal against sentence is allowed. The sentence of death is set aside and in substitution thereto the appellant is sentenced to 20 years imprisonment to take effect from 3rd February, 2010 when he was sentenced.

Dated and delivered at Nairobi this 28th day of June, 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