IN THE COURT OF APPEAL

AT NAIROBI

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

CRIMINAL APPEAL NO 78 OF 2016

BETWEEN

OBWORI ERICK MUTURI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the Ruling/Judgment of the High Court of Kenya at Machakos (**J.M. Ngugi & L.N. Mutende, JJ**) delivered on 28th January 2014

in

H.C.C.R.A No. 50 of 2011)

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JUDGMENT OF THE COURT

[**1**] This is an appeal against the judgment of the High Court at Machakos (**Ngugi & Mutende, JJ**) whereby the appellant's appeal against conviction and sentence was dismissed. The appellant was charged with three counts of robbery with violence contrary to section 296(2) of the Penal Code. He was convicted in respect of count II and count III and acquitted in respect of the offence in count I.

[**2**] The complainant in count II was ***Charles Muinde Mule (Mule***). The particulars of the charge stated in essence that on 31st October 2008 near Kasina Estate along Mombasa Road, the appellant jointly with others not before court while armed with a dangerous weapon, namely a pistol robbed the complainant of his motor vehicle reg. No. KBC 763F, wedding ring, mobile phone, license, cheques book and two ATM cards.

The complainant in count III was ***Winifred Wamuyu Gathigia* (*Gathigia***). The particulars of the charge were the same as in count II save that the appellant was charged with robbing the complainant in count III of wedding ring, cash Shs. 1000, three ATM cards, two mobile phones and 40 sterling pounds all valued at Shs. 80,000/-.

[**3**] The prosecution case in respect of robbery in count II and III was briefly as follows:

On 31st October 2008 at about 10 p.m. Mule was driving motor vehicle registration No. KBA 763F towards Nairobi along Mombasa/Nairobi Road. ***Gathigia*** was a passenger in the motor vehicle. On arrival near Mlolongo they were stopped by about six people who were in police attire. When the vehicle stopped, three of them entered into the car, stopped the engine and hit Mule with a gun on the stomach. One of the robbers drove the motor vehicle to Syokimau area where they robbed the two complainants of their personal properties, abandoned them in the area and drove off the motor vehicle.

On 9th November 2008, the appellant was arrested on information in Kisii while driving a suspected stolen motor vehicle Reg. No. KAP 404 Q. Later, the appellant took police to his house at Kitengela near Nairobi. The house was searched and police recovered properties suspected to be stolen which included a travelling bag and three trousers which ***Mule*** identified as his and a driving licence which ***Gathigia*** identified as hers; ***Mule*** also identified a mobile phone recovered from the appellant as his. On 20th November, 2008, ***Gathigia*** identified the

appellant at an identification parade as one of the persons who robbed them.

[**4**] The appellant gave sworn testimony at the trial and stated, among other things, that the charges were a frame up and that nothing was recovered from his house in Kitengela. However, the two courts below made concurrent findings of fact that the appellant was identified as one of the robbers and that the properties belonging to the two complainants were recovered in his house at Kitengela.

[**5**] The trial court acquitted him in count I but found him guilty as charged in counts II and III and sentenced him to death for each count. The appellant appealed to the High Court against the convictions and sentences but the appeal was dismissed save that the death sentence in count III was quashed and held in abeyance. The conviction and death sentence with regard to count II still stands hence this appeal.

[**6**] In his submissions, the appellant, through his counsel ***Mr. Dome***, informed the court that he had been instructed by the appellant to abandon the appeal against conviction and requested to proceed with the appeal against sentences only.

Accordingly, the appeal against convictions is for dismissal. ***Mr. Dome*** referred the court to the landmark Supreme court decision in **Francis Karioko Muruatetu** & **another v Republic [2017] eKLR** (*"Muruatetu case")* where mandatory death sentence was declared unconstitutional and to the decisions in **Juma Anthony Kakai v Republic [2018] eKLR** and **Robert Mutashi Auda v R, Court of Appeal - Criminal Appeal No. 247 of 2014** (**Auda case**) where the court of appeal interfered with the judgments of the High Court in regard to the death sentence.

[**7**] ***Mr. Dome*** argued that the appellant was a first offender, that the victims had not been injured during the robbery and that the appellant had served 10 years in prison since his conviction in 2008. The learned counsel further argued that the purpose of prison sentence is to act as a deterrence and to encourage an offender to reform and as such, the appellant had learnt his lesson. He pleaded for the sentence to be reduced to the term already served or any other fair sentence.

[**8**] ***Mr. Omirera*** for the prosecution opposed the appeal arguing that sentencing is discretionary and each case should be considered on its own unique circumstance. He pointed out that although this case has some parallels to the ***Auda case*** the two courts below had fastidiously gone through the facts which are unique to this case. By contrast, this Court has no power to investigate the facts and therefore cannot make a ruling on sentence.

[**9**] We have carefully considered the submissions made by counsel for the appellant and Counsel for the respondent and the authorities cited. We note that this being a robbery with violence case, this Court in **William Okungu Kittiny vs. Republic [2018] eKLR** held that the impact of the *Muruatetu Case* apply ***mutatis mutandis*** to robbery with violence under **Section 296 (2)** and **297 (2)** of the Penal Code. We therefore agree that following the decision in *Muruatetu*, the appellant is entitled, under **Articles 50(2)(q) and 165(3)(b)** of the **Constitution** to a sentence re-hearing so as to have an appropriate sentence imposed in his situation.

[**10**] Regarding the mitigating factors raised in the appellant's submissions, the court in *Muruatetu* stated thus;

> **"[52] We …agree with the High Court's statement in *Joseph Kaberia Kahinga* that mitigation does have a place in the trial process with regard to convicted persons pursuant to Section 204 of the Penal Code. It is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness."**

[**11**] On the sentencing discretion of courts, the Supreme Court in *Muruatetu*

stated that;

> **"…And in *Spence v The Queen; Hughes v the Queen* (*Spence & Hughes*) (unreported, 2 April 2001) where the constitutionality of the mandatory death sentence for the offence of murder was challenged, the Privy Council held that such sentence did not take into account that persons convicted of murder could have committed the crime with varying degrees of gravity and culpability. In the words of Byron CJ;**
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> **"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."** (*Emphasis supplied*)

[**12**] Further, while making it clear that it was not replacing judicial discretion, the Supreme Court in *Muruatetu* advised the Courts as follows;

> **"[71] As a consequence of this decision, paragraph 6.4-6.7 of the [Sentencing Policy guidelines] are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:**

(a) age of the offender;

(b) being a first offender;

(c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender;

(h) any other factor that the Court considers relevant.

[**13**] The trial magistrate sentenced the appellant to death for the reason that death sentence was mandatory for the offences. That is also the reason why the High Court did not interfere with the sentence. In view of the new development of the law, and in the circumstances of this case, it is just that a sentence rehearing should be conducted to determine the appropriate sentence.

[**14**] In the premises, the appeal against convictions having been withdrawn is dismissed. The appeal against sentences is allowed. The sentences of death in count II and III are set aside. The case is remitted to the Chief Magistrate - Machakos for sentence hearing and sentencing only.

We so order.

Dated and delivered at Nairobi this 28th day of June, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

H. M. 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