IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 42 OF 2010

BETWEEN

SAMUEL MWAMBUKI.....1ST APPELLANT

HORWARD KIVOLWE MUSANYI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kakamega, (Muchemi and Chitembwe, JJ.) dated the 21st May, 2009

in

H.C.CR.A. NOS. 28 AND 29 OF 2005(CONSOLIDATED)

****

JUDGMENT OF THE COURT

Background

1) **Samuel Mwambuki and Horward Kivolwe Musanyi**, (the 1st and 2nd appellants respectively), were tried and convicted for the offence of robbery with violence contrary to ***Section 296 (2)*** of the ***Penal Code***.

2) The particulars of the offence were that on 25th January, 2004 at Matsigulu village, Central Maragoli Location in Vihiga District within the Western Province jointly with others not before court while armed with dangerous weapons namely pangas, axes and rungus robbed **James Kabaka Likenya, (James)** of Kshs 2,000/= and one torch valued at Kshs. 80/= all valued at Kshs. 2,080/= and at or immediately before or immediately after the time of such robbery used personal violence on the said **James Kabaka Likenya**.

3) In a nutshell, the prosecution case was that on 25th January, 2004 at Matsigulu Village, Central Maragoli Location in Vihiga District within the Western Province, **James** who was the area chief went outside his house intending to go to the pit latrine; that there was moonlight; that while outside his house he flashed his spotlight and saw about seven (7) people behind the latrine; that one of them whom he identified as the 1st appellant cut him with a panga on the hand, while the 2nd appellant cut him behind the elbow on the right hand; that two other assailants who were not before the court also assaulted him; and that the assailants robbed him of Kshs.2,000/=.

4) **Zerephatha Musembe (Zerephatha),** wife to James was in the house when she heard her husband scream. She testified that she went out with a lantern lamp to check on her husband; that she saw a crowd of people armed with various weapons; that she identified Mwambuki (the 1st appellant), Kivolwe (the 2nd appellant) and Ananda and Nandwa; and that she knew the appellants as they were from the same neighbourhood.

5) **Francis Wasike (Wasike)**, a clinical officer then attached to Mbale Hospital testified that he treated the complainant in hospital; that the complainant was in a bad state and had a swelling on the left cheek and had partial hearing on the left; that he had two cuts on the thorax, back and other cuts on the left and right forearms; that the injuries had been inflicted by a sharp weapon; that the complainant was admitted in hospital for one week; that he assessed the injuries sustained by the complainant as grevious harm; and that he filled, signed and produced the P3 form.

6) **Cpl Ezra Serem (Cpl Serem),** the investigating officer testified that James was attacked on the night of 25th January, 2004; that on 26th January, 2004 at about 8.00am **Cpl Serem** accompanied other police officers to the scene of the robbery with violence; that they found a lot of blood near the toilet where James had been accosted; that by then James had been taken to the hospital; that James identified the 1st appellant as one of his assailants and 1st appellant was arrested; and that the 2nd appellant was also arrested and both appellants were charged with the offence of robbery with violence.

7) The appellants gave unsworn evidence and did not call any witnesses. The 1st appellant denied the offence and stated that he was a farmer; that on 26th January, 2004 he travelled from Eldoret to Kakamega to visit an aunt; that he felt unwell and passed through Mukumu Hospital for treatment and that he was arrested at the hospital. The 2nd appellant also denied the offence and stated that on 28th October, 2004 he was at Mbale town where he was arrested.

8) The trial court having considered the evidence, found that the prosecution had proved its case beyond reasonable doubt, convicted the appellants and sentenced each to death.

9) Aggrieved by the decision of the trial court, the appellants lodged an appeal in the High Court on the grounds that they were not properly identified by the witnesses and that the circumstances for identification were not favourable to lead to positive identification. The learned Judges of the High Court, (*Muchemi and Chitembwe,* JJ.), re-examined the evidence that was tendered before the trial court and concluded that the ingredients of the offence of robbery with violence under ***Section 296(2)*** of the **Penal Code** were met and that the evidence of recognition of the two appellants by James, and his wife, Zerephatha was satisfactory. The learned Judges thus dismissed the appeal and upheld the appellants' conviction and the sentence imposed by the trial court. This precipitated this second appeal to this Court.

10) The 1st appellant in his memorandum of appeal raised the grounds *inter alia* that the conditions for proper identification of the appellants were not favourable; that James failed to state the identity of the appellants in his first report to the police; that the appellants were not availed legal representation in the two courts below; that the charge sheet was incurably defective in that it was not signed by the prosecution; and that the appellants were not availed witness statements as required under Article 50 (2) (1) of the Constitution.

11) The 2nd appellant in his memorandum of appeal filed through his advocates, Messers L. G. Menezes & Co. Advocates raised grounds of appeal *inter alia* that the ingredients of the offence of robbery with violence were not proved during the trial; that sections 169, 210, 211 and 213 of the Criminal Procedure Code (CPC) were not complied with; and that the 2nd appellant was convicted of the offence of robbery with violence on unsworn evidence.

12) When the appeal came up for hearing of the appeal before us, learned counsel Mr. Kowindi appeared for the 1st appellant while learned counsel Mr. Mshindi appeared for the 2nd appellant. Counsel informed the court that they had agreed to consolidate the two appeals and that Mr. Kowindi would submit on the issue of identification of the two appellants while Mr. Mshindi would submit on the issue of non-compliance with ***Sections 210*** and ***211*** of the **CPC** on behalf of both appellants**.**

13) Mr. Kowindi submitted that the circumstances were not conducive for positive identification; that according to the James the incident took place at about 10pm; and though there was moonlight but it was not bright; that the attack was almost instant after James flashed his torch; that there was no evidence of the distance between complainant and the appellants; that there were contradictions and inconsistencies between the evidence of the complainant and that of **Zerephatha** with regard to the weapons that the 1st appellant was wielding at the time of the robbery. According to the complainant it was a panga while **Zerephatha** said it was an axe. Counsel further contended that whereas the charge sheet indicated that Kshs. 2,000/= and a torch were stolen from the complainant, it was the complainant's evidence that only money was stolen from him and nothing else.

14) On his part, Mr. Mshindi relied on the 2nd appellant's written submissions. Counsel submitted that the two courts below erred in not considering the omission to observe the law as provided by sections 210, 211 and 213 of the Criminal Procedure Code (CPC).

15) It was counsel's submission that the appellants were not supplied with witness statements, medical records and all evidence that prosecution intended to rely on contrary to ***Sections 70*** and ***77 (1) (2) (c) (d) and (e)*** of the former Constitution. Counsel further relied on ***Article 50 (2) (j)*** of the ***Constitution*** as well as the case of ***Thomas Patrick Gilbert Cholmondeley vs. Republic [2008] eKLR***, to support his contention that the appellants' fundamental rights to a fair trial were violated by the failure to be supplied with witnesses' statements as well as the documentary evidence to be produced at the trial.

16) It was counsel's further submission that when the matter came up for defence hearing, ***Section 211 (1)*** of the **Criminal Procedure Code (CPC)** was not complied with. Counsel cited a litany of authorities in support of his argument that the failure by the trial court to comply with ***Section 211*** of the **CPC** rendered the entire trial a nullity; that the failure by the trial court to comply with ***Section 210*** and ***213*** of the **CPC** violated the appellants' right to a fair hearing; that by the trial court failing to observe ***Sections 210*** and ***211*** of the **CPC** it should not have relied on the unsworn evidence by the appellants; that the trial court failed to adhere to ***Section 169*** of the **CPC** in writing the judgment; that this failure together with non-adherence to ***Sections 210, 211*** and ***213*** of the **CPC** indicated that the entire trial was marred by laxity on the learned magistrate's part which laxity was not pointed out by the High Court resulting in the absence of a fair hearing under both the retired and new Constitutions.

17) Regarding section 210 of the CPC, counsel submitted that at the close of the prosecution case, the trial court did not make a ruling on whether there was a case to answer but proceeded to defence hearing; that the court is required in mandatory terms to make a ruling on whether there is a case or no case to answer; that failure to make a ruling on whether or not an accused person has a case to answer at the close of the prosecution case is an incurable defect.

18) On section 211(1) of the CPC, it was counsel's submission that when the matter came up for defence hearing, section 211(1) was not complied with; that failure to inform an unrepresented accused of his right to call witnesses may result in the conviction being quashed.

19) In respect to section 213 of the CPC, counsel submitted that the 2nd appellant was not given an opportunity to put in oral or written submissions which violated section 213 of the CPC; and that the failure of the trial court to comply with the sections 210, 211 and 213 violated the 2nd appellant's right to a fair hearing.

20) Ms. Jacinta Nyamosi, the Assistant Director of Public Prosecutions (ADPP) opposed the appeal. Counsel submitted that the identification of the appellants was not mistaken; and that James and Zerephatha were able to recognize the assailants who attacked them. On the issue of the distance between the complainant and his assailants, counsel submitted that according to James, he and the assailants were at close range. Counsel concluded that the light at the scene of the crime was sufficient for positive identification and the distance between James and the assailants was close. On the issue of contradiction by James and Zeraphatha, with regard to the weapons wielded by the assailants, counsel contended that James testified that the assailants had pangas and axes and therefore there was no inconsistency regarding the weapons used by the assailants in the attack.

21) Counsel further submitted that the appellants were accorded a fair trial and that they were not prejudiced as the record indicates that they extensively cross-examined the witnesses and gave their unsworn defences. On the issue of failure by the trial court to comply with ***Section 169*** of the **CPC,** counsel argued that the trial court evaluated the prosecution evidence, examined the defence case and arrived at a right conclusion and ***Section 169*** was therefore strictly adhered to.

Determination

22) We have perused the record of appeal and considered the respective submissions of learned counsel as well as the authorities cited and the law. ***Section 361*** of the ***CPC*** enjoins this Court to consider matters of law only when hearing and determining a second appeal. In ***Karingo v Republic [1982] KLR 219,*** this Court stated the principle underpinning **Section 361** of the ***Criminal Procedure Code*** as follows:-

> ***"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."***

23) The appellants faulted the trial court and the High Court for convicting them on the strength of the evidence of recognition by James and Zerephatha. The appellants argued that the prevailing circumstances were not conducive for a positive identification as the incident took place at at about 10pm and that though there was moonlight, it was not bright. In ***Wamunga –vs- R, [1989] KLR 424*** this Court whilst dealing with the issue of identification by recognition stated as follows:

> ***"It is trite law that where the only evidence against a defendant is evidence onidentification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."***

24) *In* ***Shalen Shakimba Ole Betui & Shadrack Koitimet Ole Betui V R, [2009] eKLR*** *this Court* stated as follows:

> ***"The present case was a case of recognition rather than identification and on our part we have considered this issue and are satisfied that in view of the concurrent findings of the two courts below the appellants were positively identified, and recognized by PW1 and PW2. There could be no possibility of a mistaken identify. We are satisfied that the appellants were convicted on very sound evidence of recognition in circumstances which were conducive to proper identification/recognition,*** *see* ***Anjononi and Another v. R, [1980] KLR 54 at p. 60."***

25) Whilst dealing with issue of identification of the appellants the trial court stated thus:

> ***"PW1 (the complainant) said he had a torch which he spotlit on his assailants and recognized them. PW1 said the accused persons were not strangers to him….Equally PW3 the wife to PW1 said she saw the accused persons and others using a lantern lamp. The accused persons did not challenge that piece of evidence. That being so, there was enough source of light to be able to recognize the persons involved in beating up PW1 and I find so."***

The trial court went on to state:

> ***"No doubt the culprits were positively identified by the victim and the one witness PW3. PW1's evidence was consistent even his statement to the police."***

26) The High Court on its part rendered itself as follows:

> ***"We find that the magistrate convicted appellants on the evidence of recognition rather identification….the two key witnesses testified that they knew the appellants before the incident. PW1 led the police to arrest the two appellants and pointed them out to the police before the arrest….Similarly we find that the magistrate in the lower court correctly found that the two key witnesses saw and recognized the two appellants. The conditions and the distance described by PW1 as "at close range" were favourable for such recognition."***

27) In his evidence James stated as follows:

> ***"They were variously armed with machetes, sticks, pangas and even axes <u>when I spotlit them with a three battery torch they were at close range.</u> I knew all whom I spotted. One was Mwambuki who is accused 1. I also identified Kivolwe. I also saw Nandwa, Fwatuu and Imbuga Kennedy and another Imbuga."*** (Emphasis added).

James proceeded to narrate how and where each of his assailants assaulted him. On cross-examination by the 1st appellant, James maintained that he knew the 1st appellant and stated:

> ***"I recorded your names to the police. I saw your face when I spotlit you on the face. You hail from a neighbouring village Mulundu."***

On cross-examination by the 2nd appellant, James stated:

> ***"I know you very well. You are known at home as 'kevo'. You are kevolwe…You come from a Kegoye village near my home....you sometimes operate a bicycle taxi."***

Zerephatha on her part stated that:

> ***"When I was on the first step of the door, I saw a crowd of people I had a lantern lamp. They had various weapons…..I saw Ananda. He is not in court. I saw Mwambuki he is in court as the 1st accused…. I also saw Nandwa who is also not in court. I also saw Kevolwe. He is accused 2 in court."***

28) We agree with the two courts below that indeed this was a case of identification by recognition. We also agree with the analysis by the two courts below on the issue of recognition. The above events as stated by James clearly demonstrate that he recognized the appellants with the assistance of a three battery torch, and that he knew them by name. It is also apparent from the evidence of James that he was in close proximity with his assailants, before they attacked and robbed him at the time of the robbery; using pangas and axes to assault him. The evidence adduced by James was also consistent and he not only identified his assailants to the police but also told Wasike, the clinical officer who examined him, that he had been attacked by people known to him. Zerephatha on her part corroborated the evidence of James. Consequently, we are satisfied that the circumstances of identification by recognition of the appellants by James and Zerephatha were favourable and free from possibility of error.

29) On the issue whether the right of the appellants to a fair hearing was violated; it was the appellants claim that the trial court failed to comply with Sections 210, 211 and 213 of the **CPC** and the appellants were therefore not subjected to a fair hearing under both the former and current Constitutions.

30) On the ground that the trial court did not comply with ***Section 213*** of the **CPC**, it was the appellants' contention that they were not given an opportunity to put in oral or written submissions and this was a violation of Section 213 of the CPC. In addition that Section 169 of the CPC was not complied with in that the trial court, wrote the judgment with laxity.

Section 169 (1) of the CPC states as follows;-

> ***"Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it."***

This Court in the case of **<u>HAWAGA JOSEPH ANSANGA ONDIASA V R</u> Criminal Appeal no. 84 of 2001** held as follows:

> ***"It is true that the trial magistrate may be criticized for the perfunctory way in which he expressed himself in his judgment. However, even if we were to hold that he did not prepare his judgment strictly in accordance with section 169 of the Criminal Procedure, this would not, of itself mean that the conviction of the appellant was wrong or <u>is to be invalidated</u>."***
>
> ***See <u>R V Edward Kirui [2014] eKLR</u> at pg 12-13.***

As stated in the case of **<u>Samwiri Senyange V R [1953] 20 EACA</u>**;-

> ***"Where there had not been a strict compliance with the provisions of Sections 168 and 169 of the Criminal Procedure Code that will not necessarily invalidate a conviction and the court will entertain an appeal on its merit in such a case if it can be done with justice to the parties."***

In the circumstances of this case, we find that the judgment of the trial court complied with the provisions of Section 169 of the CPC save for the absence of the points for determination. The appellants' conviction is therefore not invalidated on that ground.

31) It was the appellants' contention that the trial court failed to comply with the provisions of Section 210 of the CPC.

Section 210 of the CPC provides as follows:

"If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him."

This Court perused the original trial court file and at page 41 of the proceedings the trial court stated:

"Ruling

Having heard evidence adduced before me, I am satisfied that a p.f.c. (prima facie case)

has been made out against the accused who is hereby put on defence."

Signed by the SPM on 13th January, 2005.

That is sufficient compliance of Section 210 of the CPC, as the trial court could not at that state engage in to a detailed analysis and reasoning for that conclusion.

32) On the issue that the charge sheet was incurably defective as it did not have the signatures of the Officer Commanding Station (OCS) or the DCIO, in the case of **Isaac Nyoro Kimita and Another V. Republic, [2014] eKLR** this Court found as follows:-

"…in the circumstances, we find that the defects in the charge were minor and did not prejudice the appellant. They did not occasion any miscarriage of justice or violate the appellant's Constitutional right to fair trial."

In the circumstances of this case, we find that the defects in the charge did not prejudice the appellant.

33) On the ground that all the ingredients of the charge of robbery with violence were not present, we find that all the ingredients of the offence of robbery with violence were proved. Section 296 of the Penal Code provides;

"296. (1) Any person who commits the felony or robbery is liable to imprisonment for fourteen years.

(2) If the offender is armed with any dangerous or offensive weapon or instrument. Or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

34) In the case of **Oluoch V R [1985] KLR** it was held that robbery with violence is committed in any of the following circumstances;

"(a) The offender is armed with any dangerous and offensive weapon or instrument; or

(b) The offender is in company with one or more person or persons; or

***(c) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person ….."* (**Emphasis supplied).

The use of the word "or" implies that if any of the three conditions is fulfilled then the offence would be said to have been committed.

This is the position taken by the High Court In **Mohamed Ali v Republic (2013) eKLR** where it was held **"the use of the word OR in this definition means that proof or any one of the above ingredients is sufficient to establish an offence under section 296 (2) of the Penal Code."**

35) In the instant appeal, the two appellants were in the company of others. They were also in possession of pangas and axes, and robbed James inflicting actual violence upon him and injuring him during the robbery. We therefore find that all the ingredients of the offence of robbery with violence were present and proved by the prosecution beyond all reasonable doubt.

36) From the foregoing, we are satisfied that the prosecution evidence against the appellants was overwhelmingly and credible, and that the High Court properly directed itself in dismissing the appeal. We find no justification for interfering with the concurrent findings of the two courts below. In the premises, the appeal against conviction fails.

37) As regards sentence, the Supreme Court in **Francis Karioko Muruatetu & Another V Republic**, **Petition No 15 of 2015,** (Muruatetu's case), held at para 69;

"Consequently, we find that section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum penalty."

38.**Section 204 of the Penal Code** provides that "Any person convicted for murder shall be sentenced to death." Similarly, **section 296(2) of the Penal Code** provides that the offender convicted for robbery with violence in circumstances stipulated therein;

> ***"shall be sentenced to death."***

39. In **William Okungu Kittiny Vs Republic, [2018] eKLR,** this Court recently held at para 9;

> ***"From the foregoing, we hold that the findings and holding of the Supreme Court, particularly in para. 69, applies Mutatis Mutandis to section 296 (2) and 297 (2) of the Penal Code. Thus the sentence of death under section 296 (2) and 297 (2) of the Penal Code is a discretionary maximum punishment."***

40.In **William Okungu Kittiny's** case (supra) this Court also stated that the decision of the Supreme Court in **Muruatetu's case** has an immediate and binding effect on all other courts and that the decision did not prohibit courts below if from ordering sentence re-hearing in any matter pending before those courts. Accordingly, since this appeal had not been finalized, this Court has jurisdiction to direct a sentence re-hearing or pass any appropriate sentence that the trial magistrate's court could have lawfully passed.

41.Although the Supreme Court did not outlaw the death sentence, we are of the view that in the circumstances of this case, the death sentence was not warranted. The appellants gave mitigating circumstances but the trial magistrate considered that the hands of the court were tied. We have taken into account the mitigation that was given by the appellant. None the less, we note that both were armed by pangas and axes and seriously injured James. We note that the appellants were first offenders and have been in custody for 15 years. In our view, a sentence of imprisonment rather than the death penalty would serve the interest of justice.

42.For the foregoing reasons, the appeal against conviction is dismissed. However, the appeal against sentence is allowed and the sentence of death against each appellant is set aside. We substitute a sentence of twenty (20) years imprisonment on each appellant to take effect from 17th February, 2005 when the appellants were sentenced. Those shall be the orders of the Court.

Dated and delivered at Kisumu this 27th day of June, 2018.

E. M. GITHINJI

…….……...…..

JUDGE OF APPEAL

HANNAH OKWENGU

……..……

JUDGE OF APPEAL

J. MOHAMMED

…….……..……..

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR