IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 45 OF 2013

BETWEEN

GREGORY OUMA ..... 1ST APPELLANT

SALEHE NICOLA..... 2ND APPELLANT

MUSA SHITANI.....3RD APPELLANT

AMIDA NAMACHE..... 4TH APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya

at Kakamega ***(Chitembwe & Lenaola, JJ.)*** *dated 8th March,* 2012

in

HCCRA NO. 60 OF 2007)

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JUDGMENT OF THE COURT

On the night of 13th and 14th August, 2004, at about 2.00 a.m. the home of **AM** was invaded by thugs. In the process AM and one of his wives **ZN,** were brutally and fatally injured and one of his other wife, **MAA (PW2)** seriously injured. What actually transpired can be captured through the eyes of those who witnessed the events as they unfolded being **AM (PW4), FAM (PW5) and SA (PW6),** all children of the deceased. **MAA** (PW2), a victim of the attack was unable to give evidence as to the manner of the attack or the identity of the attackers. On the other hand, **HTW) (PW1)** merely identified the bodies of the deceased for purposes of post mortem.

According to **AM, (PW4),** at the time aged 14 years and daughter to the deceased AM, was asleep in the house of PW2 on the material night when she was awoken by noises from the roof and suddenly three people emerged. She was able to see them clearly using the light from a lamp that was lit in the house. These people had put on dark clothes and were armed with a panga, axe and jembe. They had not covered their faces though, making it easier for her to recognize them as the appellants herein whom she knew very well as they came from the neighbourhood.

The appellants descended on PW2 demanding money and when she was unable to give them, the 3rd appellant hit her on the head and left hand. The 3rd appellant soon thereafter picked a quarrel with one of his accomplices, the 2nd appellant. It was then that the 2nd appellant proclaimed that they were going to kill AM and ZN. Shortly, thereafter screams rent the air from the house of ZN but out of fear, PW4 did not venture out until her sister **FAM (PW5)** also aged 14 years called her. She went out and found her mother injured and raped. She asked to be rushed to hospital. Her father too had been seriously injured having been cut on the left eye and the penis and his hands tied at the back.

According to the witness, her mother told her that the 3rd appellant was responsible for their injuries. PW5 went to look for assistance from

one, **Ali Mukanda** and other neighbours. When the assistance arrived at 4.00 a.m., both parents had passed on.

It was also the testimony of PW4 that the 4th appellant had not slept at home but came at about 8.00a.m. and enquired from her whether her parents had been killed. She had previously threatened to kill both AM and ZN apparently out of jealousy. Though she and ZN were co-wives of AM, AM seems to have preferred ZN to her. This perhaps explains the brutality unleashed during the commission of the offence. Anyway she subsequently participated in the identification parade and was able to pick out the 3rd appellant and one "Ashika."

On her part, PW5 who was in the same house as PW4 during the incident saw the attackers enter the house. She immediately recognized the 1st and 3rd appellants who she knew very well. They immediately started assaulting PW2 demanding money. Soon thereafter they left saying that they were going to kill their parents and shortly thereafter they heard screams. Later her young sibling **SA (PW6)** then aged 11 years old called her out and she found her father had been seriously injured and so they sought help before the police arrived at the scene. She also confirmed that the 4th appellant was not at home and that she was the one who organized the killing of her parents because she had previously threatened to kill him because of the disagreement over maize that her husband had sold. According to her, she recognized the attackers and they included the 1st to 3rd appellants. She was able to recognize them courtesy of the lamp that was lit in the house.

S. P. Nehemiah Bitok (PW7), was the D.C.I.O., Butere - Mumias at the time. Upon receiving the report of robbery on 14th August, 2004, at 9.30 a.m., he proceeded to the scene and found two bodies of AM and ZN. He interviewed members of the family including PW6 who claimed to have known who the attackers were and specifically named the 2nd appellant. The 4th appellant was also at the scene being guarded by members of the public who wanted to lynch her on suspicion of having planned the robbery and the murders. The witness arrested the 4th appellant and the next day, he interrogated her and she made a statement, which according to him, amounted to a confession and in which statement, she implicated the 2nd and 3rd appellants. Indeed, she led the police to the arrest of the said appellants. He then arranged for a police identification parade which was conducted by **C.I.P. Shadrack Juma (PW8).** PW4 and 5 were able to identify the 3rd appellant. The witness also took custody of the television set said to have been stolen from the victims of the robbery and which had been recovered. After carrying out further investigations, he decided to charge the appellants with one count of attempted robbery with violence contrary to **section 297(2)** of the **Penal Code** and two counts of robbery with violence contrary to **section 296(2)** of the **Penal Code.**

It was alleged in count one that on the night of 13th and 14th August, 2004 in Butere/Mumias District, within the Western Province, jointly with others not before court, while armed with dangerous weapons namely, *pangas*, *rungus* and knives attempted to rob one **MAA** of unknown amount of money and at or immediately before or immediately after the time of attempted robbery wounded the said **MAA**.

In count two, it was claimed that on the same night and same place armed with the same weapons, they robbed **AM** of one television set - Great wall, one radio cassette, make National and a car battery all valued at Kshs. 20,000/= and at or immediately before or immediately after the robbery, killed the said AM.

In count three, it was alleged that on the same night and place and armed with the same offensive weapons, robbed **ZN** of one television set - Great wall, one radio cassette make National and a car battery, all valued at Kshs. 20,000/= and at or immediately before or immediately after the robbery, killed the said ZN.

The appellants denied the charges. In his defence, the 1st appellant only recalled his arrest on 16th August, 2004 at about 4.30 a.m. He also recalled that when his home was searched, nothing was recovered. He denied being identified at the identification parade by any of the witnesses.

As for the 2nd appellant, he claimed that on 20th December, 2004, he was arrested for having stolen a shaving machine and was later charged in Mumias Law Courts with the offence of handling stolen property. Later he was charged with the offence leading to this appeal yet on the night in question, he was at home.

With regard to the 3rd appellant, he described the circumstances of his arrest and proclaimed his innocence on the basis that when his house was searched, no recovery was made and that during the identification parade, PW6 who was well known to him purported to identify him.

The 4th appellant denied confessing to the charges, knowledge of the incident and the 2nd appellant charged alongside her.

The learned magistrate having assessed the prosecution case as well as defences put forth by the appellants, returned a verdict of guilty on counts one and two and sentenced them to death.

The appellants were dissatisfied with the conviction and sentence. They therefore mounted separate appeals to the High Court that were later consolidated. Upon hearing the consolidated appeals, **Onyancha** and **Lenaola, JJ**. dismissed them in their entirety.

Undeterred, the appellants are now before us on the second and perhaps their last appeal. In the supplementary memorandum of appeal, the appellants have raised two grounds of appeal and which were urged by **Mr. Omondi T**, their learned counsel; that the learned judges erred in law and fact by failing in their duty to re-evaluate and subject the entire evidence on record to fresh scrutiny and analysis as mandated by law before reaching their decision and secondly; that the judges failed to scrutinize the evidence of identification with great circumspection. In support of these grounds learned counsel filed written submissions which he orally highlighted.

On identification, counsel submitted that the robbery took place at night and conditions were not conducive for positive identification of the attackers. That PW4 testified that when the attackers broke into the house, they put off the lamp. They were dressed in black and it was very dark. That there was no description of the lamp. Given those circumstances, it was counsel's view that it would not have been possible for this witness to identify the appellant. He cited the case of **Maitanyi v Republic [1968] KLR 198** for the proposition that:

"… a court of law ought to be conscious of the fact that many witnesses do not properly identify another person even in day light and it is therefore prudent for such court to ascertain the nature of the light available, the type of light, its size and its position in relation to the suspect when dealing with the issue of identification."

On evaluation of evidence, counsel submitted that all key witnesses were minors whose evidence ought to have been evaluated with great circumspection. He accused the judges of failing to undertake that exercise. Further, the possibility of the said witnesses being influenced by other people to falsely testify against the appellants could not be ruled out.

Counsel also faulted the guilty plea entered against the 4th appellant on count one. It was counsel's view that the said appellant was a wife to the deceased AM. She was traumatized at the time. It was therefore incumbent upon the trial court to refer her to the psychiatrist to evaluate her mental state. It was counsel's take that the caution administered to the 4th appellant by the trial court before entering a plea of guilty was insufficient.

Opposing the appeal, **Mr. Kakoi,** Principal Prosecution Counsel, submitted that the appellants were positively identified by PW4, 5 and 6. That this was a case of recognition as opposed to identification. That the appellants confirmed that they were known to PW4, 5 and 6. On the plea of guilty by the 4th appellant, counsel submitted that the appellant was cautioned and given 24 hours to think through the plea of guilty that she was about to offer. Come the following day, the 4th appellant still maintained a plea of guilty in respect of count I. To counsel, the plea of guilty entered against the 4th appellant cannot therefore be impugned. Counsel further submitted that the High Court subjected the evidence tendered during the trial to fresh and exhaustive re-evaluation and reached its own independent conclusion regarding the guilt or otherwise of the appellants. Counsel further submitted that even though the key witnesses were minors, they were allowed to testify on oath, were subjected to intense cross-examination but never wavered. On sentence, counsel urged us not to interfere with the same as it was merited, considering that two innocent lives were lost in the commission of the crime by the appellants.

This is a second appeal and the jurisdiction of this Court is limited by dint of **section 316(a)** of the **Criminal Procedure Code** to dealing with matters of law only and not delve into matters of fact which were dealt with by the trial court and re-evaluated by the first appellate court. In the case of **Njoroge v Republic [1982] KLR,** this Court observed that, on second appeal, the Court should focus on points of law, accepting and being bound by concurrent findings of fact by the two courts below, unless those findings were not backed by evidence, or are based on misapprehension of the evidence, or the two courts are shown demonstrably to have acted on wrong principles in reaching those findings. See also **Chemagong v Republic [1984] KLR 611.**

So what are matters of law in this appeal? We are of the view that the plea of guilty, identification and re-evaluation of the evidence by the High Court fall within this category.

With regard to count one and indeed the plea of guilty, the record shows that the 4th appellant pleaded guilty to the same. Essentially she is now saying that although she pleaded guilty to count one, the plea was unequivocal. That she was so traumatized by the death of her husband and therefore not of a proper frame of mind to withstand the rigours of the trial.

To determine whether this complaint is valid we have to resort to the proceedings of 19th August, 2004, for that is when the 4th appellant offered to plead guilty to counts one and two in the charge sheet. On that day it was recorded thus:

"Court

Charge read over and explained to the accused and explained to the 1st accused herein in Kiswahili to which she says:

1st accused

It is true we attacked her with weapons. I was one of them and we stole from her.

Count II

It is true I was involved in the robbery against AM and ZN.

Court:

The court would have to inform and warn the accused of the consequences of admission and will give her time to think about her plea. Case will be mentioned tomorrow for reading of facts."

The next day, though the court did read the charges again, it does appear that the 4th appellant maintained her plea of guilt. The facts were consequently read and the appellant in response stated:

"Accused

The first count is true. I and those mentioned did attempt to rob her MAA as has been stated. It is mine. I gave the names of Bakari and the other three but the second count we did not kill.

Court

Court enters plea of guilty in the first count.

Prosecutor:

She would be treated as a first offender. However, the offence is serious. They shall be convicted of each offence.

Accused in Mitigation

I have four children.

Court

Although I consider the mitigation herein, the nature of offence is serious. My hands are also tied as the sentence given by the law is only one for such offenders. Accordingly, the court rules that sentence of death to the accused person on 1st count.

P. SULTAN

SENIOR RESIDENT MAGISTRATE"

As stated in **Paul Matungu v Republic, Criminal Appeal No. 127 of 2006,** there is no statutory provision to the effect that a person charged with an offence the penalty for which is death cannot plead guilty to such a charge. To such a charge the Court observed: -

> **"where the offence charged carries with it a mandatory sentence of death, then it is only fair that before an accused pleads guilty to the charge and thus puts his life on the line, he is informed about this and then left to make an informed choice on whether he voluntarily wishes to put his life on the line or whether he wishes to have those who make the allegation against him prove that allegation. If he is fully informed on all these matters and the record of the trial court shows that he has been informed but has nevertheless chosen to plead guilty then there cannot be any genuine complaint thereafter. Even the Constitution itself does not debar anyone from pleading guilty to any offence whether punishable by death or otherwise …"**

From the record of the trial court it is readily apparent that the court warned the 4th appellant the consequences of pleading guilty to the charge of attempted robbery with violence, and robbery with violence and reminded her that they both carried mandatory death sentences upon conviction. The learned trial magistrate even went out of her way to allow her ponder over the plea overnight. Come the following day and the 4th appellant did not change her plea. The facts were thereafter read to her which she readily admitted and in the process even mentioned though unsolicited, her accomplices. She went ahead to explain her role in the commission of the offences. It is also instructive that on the previous day she had pleaded guilty to counts one and two. But this time around, she chose to plead guilty to count one only. It cannot therefore be said as urged by her counsel that she was not in her right faculties when she pleaded to count one. We are satisfied just like the High Court that guilty plea on count one was properly entered after the 4th appellant was only cautioned on the consequences of pleading guilty to the charges. In any event both courts below reached concurrent findings that the plea was taken in a most unequivocal manner and we have no reason to depart from these concurrent findings.

In the case of **Wamunga v Republic [1989] KLR 424,** this Court observed:

> **"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depend wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification."**

In this case, the evidence of identification, nay recognition can be captured through the persons of PW4, 5 and 6. According to all of them the robbery took place past midnight and the robbers accosted them in the house. PW4, stated thus on the identity of the robbers:

> **"There was light from a house lamp. Three people had a panga, axe and a jembe …. They had not covered their faces …. I knew these people physically and by their names … they were Shitawa, Nicholas, Ouma and Amida. Shitawa is the third accused, Ouma is second accused, Nicholas is the fourth accused. Amida is first accused …. My mother told me that she had identified Shitawa. She held him on the leg. It was then that Shitawa cut her on the hand …."**

As for PW 5 on the same question of identification, she testified thus:

> **"… I identified them with the light from the lamp. They were Ouma, Shitawa, Nicholas and Washika. I knew them before …, they said they were going to kill our parents."**

Finally, on the same question, PW6 testified that:

> **"I knew them before. They were Ouma and Shitawa. There was also Nicholas and Ashika …."**

From the foregoing narrative, this was clearly a case of recognition as opposed to identification. The appellants confirmed that they were

known to all these witnesses. As stated in the case of **Anjononi & Others v Republic [1980] KLR 59.**

> **"… 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 from or other ..."**

Both courts below weighed with the greatest care the issue of the appellants' recognition by the witnesses. They also considered the relationship of these witnesses to the deceased. Indeed, the trial court warned itself of the possible danger of the witnesses being influenced by the desire to have someone pay for the grave crime of murder of their parents, a point hammered and strongly driven home by counsel for the appellants in this appeal. Nonetheless, the two courts returned a concurrent verdict that there was sufficient light in the house that enabled these witnesses to positively recognize the appellants. Indeed, the fact that all the appellants were known to the witnesses made their recognition all the easier. The appellants never bothered to disguise their appearances, and never put off the lights in the house immediately they entered. Finally, they stayed in the houses for a while and even talked to the witnesses as they left proclaiming that they were now going to kill their parents. We have no doubt at all in our minds just like the two courts below that the obtaining environment was such that it accorded the witnesses opportunity to see and positively recognize the appellants.

On the re-evaluation of evidence, we are satisfied that this complaint is without merit. The judges of the High Court were alive to their statutory duty to re-evaluate and subject the entire evidence on record to a fresh scrutiny and analysis. The judges duly summarized the evidence tendered before the trial court. They adverted to the famous case of **Okeno v Republic [1972] E.A 32,** on the question of exhaustive re-examination of the evidence, which they quoted extensively and thereafter delved into the re-evaluation of the evidence starting with the plea of guilty with regard to the 4th appellant. Next they addressed at length the evidence of identification and or recognition of the appellants at the scene of crime. They looked at the prevailing circumstances and whether they accorded the identifying witnesses a good environment for positive recognition of the appellants and they were satisfied that the recognition of the appellants could not be mistaken or impugned given the presence of the light in the house.

On the whole therefore, we find that on the evidence on record the appellants were properly convicted. Accordingly, we dismiss the appeal on conviction.

As regards sentence, we are aware that the Supreme Court in **Francis Karioko Muruatetu v Republic [2017] eKLR,** held that:

> **"… the mandatory nature of the death sentence as provided for under section 204 of the Penal Code is unconstitutional …"**

Based on this holding, counsel for the appellants has urged us to interfere with the sentence on account of 12 years that the appellants have been behind the bars and in custody. The appellants believe that they have been sufficiently punished and ought to be set free now. The respondent has on the other hand asked us not to interfere with the sentence given that two lives were lost in the commission of the offence.

As a result of the reckless criminal acts of the appellants, two innocent lives were lost in a grisliest and gory manner and PW2 was seriously injured. Given those circumstances, the sentence of death imposed on the appellants was in our view, deserving and merited. The appeal on sentence is in the premises also dismissed.

The upshot is that the appeal is dismissed in its entirety.

DATED and delivered at Kisumu this 19th day of June 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

ASIKE MAKHANDIA

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.