IN THE COURT OF APPEAL

AT NAIROBI

CORAM: NAMBUYE, MUSINGA & KIAGE, JJ.A.)

CRIMINAL APPEAL NO. 122 OF 2015

BETWEEN

ALI MUSTAFA AHMED.....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi **(Muchemi & Mutuku, JJ.)** dated 18th *September, 2014* **in H.C.C.R.A. NO. 17 OF 2013)**

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JUDGMENT OF THE COURT

The appellant, **Ali Mustafa**, and another were charged, tried, convicted and sentenced to suffer death for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** by the Principal Magistrate's Court at Mandera. Their first appeals against conviction and sentence were dismissed by the High Court at Garissa (Muchemi & Mutuku JJ), leading to the present appeal.

The facts as presented by the prosecution and accepted by both courts below were plain enough.

On 28th June, 2011, one **Siyat Jelle Maalim (PW1**), a *miraa* trader, was at the *miraa* market in Mandera town waiting for payment from a customer he had supplied the previous day when a man he did not know before picked his back pocket of some Kshs.7,500 in cash. As PW1 turned back, having felt that theft, the pickpocket threw the money, which was tied by a rubber band, at another man who started running off with PW1 in pursuit. As PW1 was about to catch the runaway receiver of his money, the pickpocket attacked him and struck him on the head with a stick slowing him as the man with the money made his escape. At this point PW1 raised alarm and people responded, including **Abdi Noor (PW2)**. He had witnessed the pickpocket snatch the money from PW1 and throw it at his accomplice. He also saw the pickpocket hit PW1 with a walking stick. PW2 tried pursuing the accomplice who however turned, attacked him by scratching his face and then picked a stone which he threw at PW2 hitting him on the waist and causing him to abandon the chase.

PW2 did not give up on catching the thieves, however, and it was not long afterwards that he saw the duo on a donkey cart which PW2 discreetly followed at a distance with the pickpocket driving it. His accomplice alighted but the pickpocket drove on before stopping near a Petrol Station to graze his donkey. PW2 telephoned PW1 who in turn reported to the police. They came and arrested the pickpocket right there by his donkey and later charged him.

When the pickpocket was arraigned in court, his accomplice also came to court, apparently on account of a different case, and was recognized by both PW1 and PW2 who alerted the police, leading to his arrest. He was then charged and tried alongside the pickpocket.

That accomplice is the appellant herein who, on being placed on his defence, denied the charge but admitted to have been at the court where he was arrested.

In his self-crafted grounds of appeal, the appellant complains that the learned Judges of the High Court erred in;

- **Failing to find that he should have been charged with simple robbery,**
- **Shifting the burden of proof to him,**

- **Failing to evaluate and analyse the evidence and misconstruing the evidence of PW1 to reach a wrong finding,**

- **Failing to find that the investigating officer did shoddy or no investigations.**

The appeal was canvassed on the appellant's behalf by his learned counsel, **Mr. Onyancha,** who faulted the courts below on the question of the appellant's identification, especially because the incident occurred too fast to allow for the safe identification of a stranger. He also contended that the appellant's only involvement in the matter was to intervene in a scuffle over a debt which should have absolved him but the investigating officer did not investigate and did not record a statement from him.

The Republic opposed the appeal with **Mr. Hassan Abdi,** the learned Prosecuting Counsel, stating that there is no requirement that a statement be taken from an accused person. The appellant's defence of intervention in a scuffle was misplaced as it related to a different date altogether and he was properly identified, the incident having taken place in broad daylight. He contended that the learned Judges did analyse and evaluate the evidence. Moreover, there is no standard formula as to how such an exercise should be undertaken.

Mr. Onyancha's brief reply was that daylight alone does not exclude the possibility of mistaken identification.

As this is a second appeal, our jurisdiction is statutorily limited to a consideration of matters of law only, by dint of **Section 361** of the **Criminal Procedure Code**. We seldom interfere with the concurrent findings of fact of the trial and the first appellate court and our approach is as was expressed in ***DAVID NJOROGE MACHARIA -VS- REPUBLIC [2016] eKLR;***

> **"Only matters of law fall for consideration and the Court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or the courts below are shown demonstrably to have acted on wrong Principles in making the findings. (See also Chemagong vs Republic [1984] KLR 213)."**

Central to the outcome of this appeal is the adequacy of the evidence of identification which is a very critical issue which, as was stated by this Court in ***WAMUNGA -VS- REPUBLIC [1989] KLR 424,*** *"can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger."* Having examined the record for ourselves, we think there definitely was ample evidence to justify the findings made by the courts below that the appellant was the man who, together with the pickpocket, robbed PW1 of his money. The events occurred at 9.30 a.m., in broad daylight. PW1 saw the appellant clearly as the man who received the money from the pickpocket and made to run off with it. He was able to identify him at the court where he had come for another case.

Besides PW1's identification of the appellant in circumstances not presenting any difficulties, there is the eye-witness account of PW2. He saw the appellant receive the money and gave chase. He saw the appellant turn, and hit him with the stick he had and, by thus intimidating and assaulting PW2, he was able to escape with the money. The said PW2 saw the appellant aboard the donkey - drawn cart that was being driven by the pickpocket and he also saw him at the court before he was arrested. The combination of the evidence of these two witnesses leaves no doubt at all that the appellant was one of the robbers who robbed PW1 his money and their conviction by the trial court upheld by the first appellate court is quite faultless.

We think there is no substance in the allegation that the charge of robbery with violence was improperly laid. Granted that there is a sense in which that capital charge as defined in the statute is too wide for comfort, its essentials were nonetheless present in the present case. There was theft. It was accompanied by an assault on both PW1 by the pickpocket and of PW2 by the appellant in order to retain the money stolen or prevent its recovery. And at all times the perpetrators of the crime were more than one. Those elements satisfy the offence of robbery with violence under **Section 296(2)** of the **Penal Code** and the appellant was properly charged with and convicted of the same.

The final aspect of the appeal which was raised before us concerns the sentence of death imposed by the trial court and endorsed by the High Court. The trial court considered itself bound to impose the penalty of death as it was the only sentence the law prescribed. The High Court on its part ruled that, on the basis of this Court's decision in ***JOSEPH NJUGUNA MWAURA & 2 OTHERS -VS- REPUBLIC [2013] eKLR***, courts had no discretion but to impose the sentence of death mandatorily. Those positions are no longer the law, the Supreme Court having determined in ***FRANCIS KARIOKO MURUATETU & ANOTHER -VS- REPUBLIC [2017] eKLR,*** that the mandatory death sentence is unconstitutional, and affirmed the trial court's discretion in sentencing.

That being the law and having noted that the trial court did grant the appellant and his co-accused an opportunity to

mitigate, it is quite clear that the sentence of death imposed herein is untenable. We set it aside and substitute it with a term sentence of fifteen (15) years imprisonment from the date of sentence by the High Court. Save as to sentence, therefore, this appeal stands dismissed.

DATED and delivered at Nairobi this 7th day of June, 2019.

R. N. NAMBUYE

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTR