IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MAKHANDIA, KIAGE, & OTIENO ODEK, JJ.A)

CRIMINAL APPEAL NO. 234 OF 2018

BETWEEN

BENARD WAMALWA *ALIAS* BENO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Eldoret,

(F. A. Ochieng & G. W. Ngenye, JJ) *dated 27th May, 2014*

in

HCCRA. NO. 63 OF 2011)

****

JUDGMENT OF THE COURT

On 23rd November, 2010, **Daniel Kigomi Njenga (PW1),** a mechanic by trade, was heading home from work in Moi's Bridge at about 8.00p.m. He stopped at the town bus stage on a culvert to await a motorbike to take him home. The stage was well lit by street lights and he saw one **Beno**, a fellow he had been seeing touting at that stage, pass by him in the company of someone he did not know. Suddenly, Beno turned and boxed him on the head felling him to the ground. Beno then stepped on PW1's stomach while his friend hit him on the left ribs with a stick he was wielding.

The two robbed PW1 of his Nokia phone and some Kshs.150 in cash before he lost consciousness. He came to the next day at the Kitale District Hospital whence he was discharged 2 days later. His pain persisting, he was re-admitted to hospital and surgery done to remove his damaged spleen. While still in hospital, his relatives, to whom he had mentioned Beno as one of his assailants, gave that information to police. This led to his arrest outside a bar within Moi's Bridge by police officer Anthony Kiragu (PW3) who knew Beno as Benard Wamalwa and had in fact arrested him on previous occasions.

Beno is the appellant herein.

Following his arrest, the appellant was charged, tried, convicted and sentenced to suffer death for the offence of robbery with violence by the Senior Resident Magistrate at Eldoret. His first appeal was rejected by the High Court at Eldoret (Ochieng and Ngenye-Macharia, JJ) leading to this second and final appeal. He filed various versions of grounds of appeal done in person but those were all abandoned by his learned counsel **Mr. Angu Kitigin** who filed and urged before us a supplementary memorandum of appeal dated 3rd may, 2019 in which he complains that the lead Judges erred;

> ***1) ... in sentencing the appellant to death; the sentence which has been declared unconstitutional by the Supreme Court.***
>
> ***2) ... in convicting the Appellant without regards (Sic) to mode of identification at the scene which was weak as no adequate lighting was proven to have been available at the scene of the commission of the crime, to clearly highlight (Sic) the Appellant.***

Counsel also filed written submissions in which he questioned the correctness and reliability of the appellant's identification or recognition as there was no attempt to explain the distance, intensity or adequacy of the lighting at the bus stage where the appellant was attacked.

He cited ***KARANJA & ANOTHER -VS- REPUBLIC [2004] EKLR 140*** in which the law on visual identification or recognition was discussed and the need for special caution before convicting on the basis of visual identification as mistakes do occur and with them miscarriages of justice. Counsel was of the view that the appellant's identification by recognition was not free from the possibility of error in his address before us.

On sentence, it was Mr Kitigin's submission that following the Supreme Court's decision in ***FRANCIS KARIOKO MURUATETU & ANOTHER -VS- ATTORNEY GENERAL & ANOTHER [2016] eKLR*** the death sentence was not mandatory. He urged us to consider the appellant's mitigation on record and reduce the sentence.

Opposing the appeal **Ms Karanja**, the learned Prosecution Counsel emphasized that the case was not one of identification of a stranger but of someone that PW1 had seen regularly for a year or as he touted at that very bus stop and whom he knew by his notorious name Beno. The stage had street lights and PW1 saw the appellant, whom he recognised, and his accomplice before they attacked him inflicting serious injuries. He gave the appellant's name to his relatives leading to his arrest. His conviction was therefore safe and sound.

On sentence, it was counsel's initial view that given the seriousness of the injuries inflicted by the appellant and his partner in crime on the appellant, which necessitated hospital admission and surgery, and considering also that the appellant had a record of ten previous convictions, the death sentence was warranted. She did concede, however, that violent and vicious though the attack on the appellant was, it was not the worst of cases and was not the most gruesome, horrendous or depraved.

On the issue of identification, we note that there are two concurrent findings of fact by the two courts below that the appellant was positively and firmly recognised as one of the assailants. He was clearly seen in the glare of street lights at the Moi's Bridge bus stage. PWI saw them at close quarters as they passed him before the appellant turned and boxed him to the ground and thereafter stepped on his stomach as they robbed him of phone and cash.

Both courts found that the light at the stage was sufficient for positive, error-free identification and we have no reason to think otherwise. There was evidence supportive of their conclusions and we would have no reason to disturb them. It was a case of recognition of a well-known individual as opposed to the identification of a total stranger seen for the first time. PW1 was categorical in chief, in cross examination and in re-examination that the appellant robbed him. His evidence was unshaken.

Thus, while we appreciate the risks attendant in convicting on the identification evidence of a single witness, we are satisfied that the trial court and the first appellate court approached the entire evidence with the requisite circumspection and were correct to conclude that the appellant was safely recognised. The conviction was therefore proper and on clear evidence and we leave it undisturbed.

Regarding sentence, we note for the record that the appellant readily admitted the details of the record of his ten previous convictions that were read to him by the prosecutor.

He was no stranger to crime, no doubt. His mitigation was that he had four children who depended on him and a wife who was unwell and so sought leniency. The trial magistrate then stated as follows; which the learned Judges affirmed;

> ***"The court has noted the accused is not a first offender, plea in mitigation is noted. The offence accused committed is serious. It has no other sentence, the only sentence is Death....."***

Whereas that was the law as understood at the time, it is no longer correct to hold that the offence of robbery with violence attracts the single sentence of death. It is no longer mandatory given the apex court's authoritative pronouncement in the ***MURUATETU*** Case (supra). We have mulled over whether this is a proper case to be remitted to the High Court for re-sentencing and have come to the conclusion that it is not. The appellant's record of past convictions was before court and is on the record. So also his mitigation. It would serve no useful purpose to re-engage the High Court.

The appellant's crime is not one to be taken lightly and it deserves a sentence reflective of the law's opprobrium. But it is not deserving of death in the totality of the circumstances. We therefore allow the appeal on sentence, set aside the sentence of death imposed, and substitute therefor a term of imprisonment for twenty (20) years.

Orders accordingly.

Dated and delivered at Eldoret this 6th day of June, 2019

ASIKE MAKHANDIA

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

OTIENO-ODEK

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR