IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 156 OF 2014

BETWEEN

CHARLES LUCHETI.....1ST APPELLANT

ALEX ACHIANGA.....2ND APPELLANT

BENARD MUSUNDI.....3RD APPELLANT

SHEM ALUSA.....4TH APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an Appeal against the Judgment of the High Court of Kenya

at Kakamega(Onyancha and Lenaola, JJ.) dated 8th March, 2015

in

HCCRA Nos. 83, 84, 85, 86 & 87 of 2008)

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JUDGMENT OF THE COURT

The appellants were jointly charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars were that on 12th August, 2007 at Shirulu sub-location in south Kakamega District within Western province while jointly armed with pangas and rungus they robbed **Bernard Imbayi** Kshs. 1000 and immediately before or immediately after the time of such robbery wounded the said Bernard Imbayi. The appellants denied the charge but after a full trial, they were found guilty, convicted and sentenced. Whereas 1st and 4th appellants were detained at the president's pleasure the 2nd and 3rd appellants were sentenced to death.

The facts that informed the prosecution case were briefly that on 12th August, 2007, at about 10:00pm Benard Imbayi *"the complainant"* was walking home when he saw a group of people ahead of him whom he recognized upon flashing his torch as local boys whom he knew quite well. They were all armed but he had no reason to worry hence he walked on. They, however, menacingly asked him to stop and demanded money from him but when he questioned what the money was for, they set upon him and cut him on the face, hit him with a club, and stole from him Kshs. 1000 and ran away. As they did so, he heard one of them shouting *"that is Bernard"*. A motor vehicle came by and the occupants led by the driver **Phineas Bichenje Mackenzi *(PW3)*** helped the complainant by taking him to nearby Mukumu Mission hospital. He immediately told PW3 who his attackers were. PW3 knew the attackers, who are the appellants as they were his relatives and neighbours at home. **Venezanda Akhunga Lubayi *(PW2)*** received a report from PW3 at about 10.30 pm regarding the attack on her husband on his way home. She rushed to the scene and found the complainant injured who immediately told her that the appellants were the ones who had attacked him. She knew all of them. Together with PW3 they took the complainant to Mukumu Mission hospital and later she gave to **Julius Shirotsi** the names of the appellants. **Cedric Ibwana Heyi *(PW5),*** the Assistant Chief of the area received the report of the complainant's attack from a village elder, **Benard Andayi** who also furnished him with the names of the appellants. He thereafter led members of the public in apprehending all the appellants. **Francis Wasike *(PW4)*** a clinical officer at Kakamega Referral Hospital examined the complainant, noted his injuries and assessed them as grievous harm. The appellants were subsequently arraigned before the Chief Magistrates Court at Kakamega to answer to the charge already stated.

In their defences, the 1st appellant denied the charge and faulted the complainant's evidence that he had seen him at the scene; the 2nd appellant denied the charge as well and stated that he had initially been charged with assault and later with robbery with violence; the 3rd appellant stated that he had initially been charged with grievous harm before being charged with robbery with violence, an offence he had no knowledge of. The 4th appellant simply denied the offence.

As already stated, the foregoing notwithstanding the trial court found the appellants guilty of the offence charged and sentenced them as appropriate. The appellants aggrieved by their conviction and sentence preferred appeals to the High court. Their appeals were consolidated and heard together. However the learned Judges ***(Onyancha & Lenaola, JJ.)*** in dismissing the appeals observed that the complainant upon flashing his torch, recognized the appellants as local boys and confidently walked past them before being viciously attacked. Soon thereafter, he told the rescuers and later his wife who the attackers were. The information was then relayed to the local Assistant Chief and subsequently led to the arrest of the appellants. The court found no reason to disturb that evidence of recognition. The learned Judges also doubted the defences tendered by the appellants and found that the case against the appellants had been proved beyond reasonable doubt.

Dissatisfied with the judgment of the High Court, the appellants filed the present appeal on grounds that that the appellate court erred in law by failing; to reconsider and re-evaluate the evidence afresh; to appreciate that the prosecution had failed to prove its case to the standard required in law; to find that the charging of the appellants with the offence of robbery with violence was an afterthought as the issue of robbery had not featured in the initial report to the police; to appreciate that it was not safe to convict the appellants based on the testimony of a single identifying witness; to find that the prosecution evidence was uncorroborated and finally, to find that the mandatory nature of the death sentence was no longer tenable.

When the appeal came up for hearing, **Mr. Omondi,** learned counsel appeared for the appellants while **Mr. Kakoi,** principal prosecution counsel appeared for the State. Counsel relied on their written submissions with Mr. Omondi preferring to highlight and Mr. Kakoi opting not.

Mr. Omondi submitted that it had been declared in **Francis Karioko Muruatetu & another v Republic (2016) eKLR** that the mandatory nature of the death sentence was unconstitutional; the circumstances in this case did not deserve the death penalty imposed and he therefore urged us to intervene and reduce the same. On identification, counsel submitted that the circumstances obtaining at the scene were not favourable for positive recognition. The complainant merely flashed his torch once and given the number of the appellants he could not have been in a position to recognize all or any one of them. Further, counsel submitted that there were contradictions as to whether the people who attacked the complainant were 5 or 6. That the conviction was thus not safe. That the recognition might have been innocent but mistaken.

Mr. Kakoi, in opposing the appeal stated in his written submissions that there was no single procedural lapse in the manner in which the High Court re-analyzed the prosecution's evidence. That all the essential ingredients of the offence of robbery with violence were proved; that the appellants were positively recognized by the complainant; that they were armed with rungus and pangas; that they robbed him of Kshs. 1000; and in the process attacked and occasioned him grievous injuries. It was counsel's submission that both courts below warned themselves of the danger of convicting the appellants on the evidence of a single identifying witness and came to the conclusion that the identification was safe. Finally, counsel submitted that the offence a person is charged with is dependent upon the conclusion of investigations and not the initial report.

This being a second appeal, **section 361(1)** of the **Criminal Procedure Code** binds us to consider only questions of law. In **Karani v Republic [2010] 1 KLR 73** this court observed thus:

> ***"This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."***

We have carefully considered the record of appeal, submissions by counsel and the law. The issues of law that fall for our determination are whether the conviction of the appellants on the evidence of a single identifying witness was safe and whether this Court should reduce the sentence in view of the Supreme Court's decision in the **Muruatetu case** (supra).

It is common ground that the appellants were convicted on the evidence of a single identifying witness, the complainant. It is trite law that a conviction may be founded on the evidence of a single identifying witness. However, such evidence must be approached and weighed with caution and great circumspection. In **Peter Kifue Kiilu & Another v Republic [2005] 1 KLR 174** this Court held that:

> ***"Subject to certain well-known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude."***

In this case, it was clear that the complainant was able to recognize the appellants as local boys after flashing his torch at them. Based on that recognition the complainant walked on towards the appellants knowing that being people he knew, nothing would happen to him only, for him to be viciously attacked and robbed. At some point one of the appellants actually recognized the complainant and called out his name as they ran away. The appellants were well known to the complainant. The complainant was also able to mention the appellants' names to PW3 and later to his wife after she came to the scene following the incident. The wife passed same names to PW5 and 6 which led to the arrest of the appellants. We are therefore in agreement with the concurrent findings of the trial court as well as the first appellate court that this was a case of recognition as opposed to visual identification of a stranger. Further that the circumstances obtaining at the scene of crime were such that they enabled the complainant to positively recognize the appellants. He had a sport light which emitted bright light. He directed it at the appellants and being local boys, he could not have failed to recognize them. Further, when they attacked him, they were in close proximity

thereby rendering their recognition much easier and safer. As stated by this Court in the case of **Anjononi & 2 Others v Republic [1980]eKLR**:-

> ***"…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 form or other. We drew attention to the distinction between recognition and identification…"*** Emphasis ours.

Further, we are alive to the fact that though evidence of recognition is generally more reliable than identification of a stranger, mistakes may sometimes be made by witnesses as was held in ***Wamunga v Republic*** **[1989] KLR 424,** thus:

> ***"It is trite law that where the only evidence against a defendant is of identification 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 the possibility of error before it can safely make it the basis of a conviction."***

Similarly in ***Republic v Turnbull & others*** **[1976] 3 All ER 549**, the court held that mistakes can be made even in cases of recognition; and that an honest witness may nonetheless be mistaken. In ***Kiarie v Republic*** **[1984] KLR 739**, this court once again observed that:

> ***"It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction."*** *Emphasis ours.*

We are satisfied with the detailed examination of the evidence of identification by recognition by the two courts below and their concurrent findings that the complainant was in a position to properly recognize the appellants.

The complaint by the appellants that the High Court failed to reconsider and re-evaluate the evidence in regard to that aspect of identification by recognition has no basis at all. Indeed the record shows that the High Court carefully re-analyzed the prosecution evidence on that aspect as well as the defences put forth by the appellants. It was then that it came to its own conclusion before dismissing the appeal. We agree with the submissions of the respondent that there was no single procedural lapse by the High Court in the manner it dealt with the evidence tendered before the trial court on recognition of the appellants by the complainant. The complainant's evidence, no doubt was credible and watertight to found a conviction. In the premises, the appeal against conviction must fail.

As regards the sentence of death imposed, we can only observe that at the time the appellants were convicted and sentenced, death penalty was a mandatory sentence prescribed upon conviction for the offence of robbery with violence. However, in 2016 the Supreme Court declared that the mandatory nature of the sentence was unconstitutional in the case of **Francis Karioko Muruatetu (supra).** The Supreme Court observed thus:-

> ***"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."*** Emphasis ours.

In the case of **William Okungu Kittiny v Republic Criminal Appeal No. 56 of 2013**, this Court recently held that:

> ***"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."***

As was held in **William Okungu Kittiny's** case (supra) the decision of the Supreme Court in **Muruatetu's case** (supra) has an immediate and binding effect on all other courts below. However the decision did not prohibit courts below from ordering sentence re-hearing in any matter pending before those courts. Accordingly, this Court has jurisdiction to direct a sentence re-hearing or pass any appropriate sentence that the trial court could have lawfully passed and as was held in **Muruatetu's case** (supra):

> ***"Remitting the matter back to the High Court for the appropriate sentence seems to be the practice adopted where the mandatory death penalty has been declared unconstitutional. We therefore hold that the appropriate remedy for the petitioners in this case is to remit this matter to the High Court for sentencing. It is prudent for the same Court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners…."***

We therefore have two options; to either remit the matter back to the trial court for resentencing or to alter sentence in line with section 354 of the Criminal Procedure Code. In our view the appropriate thing to do is for us to interrogate the issue of sentence bearing in mind that the appellants' mitigation are on record and that they have been in custody for the past 12 years.

With regard to the 1st and 4th appellants who were child offenders at the time, and therefore subject to the Children Act, we find that the sentence of being held at the pleasure of the President was not in their best interest as children. In terms of Section 4 (2) of the Children Act, we are entitled to interfere with the detention sentence as imposed by the trial court and upheld by the High Court.

Section 4(2) aforesaid provides *inter alia*:-

> **"In all actions concerning children whether undertaken by public or private social welfare institutions, courts of law,**

administrative authorities or legislative bodies, <u>the best interest of the child shall be a primary consideration."</u> Emphasis ours.

We note that there have been instances where the courts have dealt with Section 25(2) of the Penal Code and set aside the detention of a convict at the President's pleasure. In the case of **A. W. M v Republic, Criminal Appeal No. 156 of 2006** for instance, the appellant was 17 years old when she was convicted of murder and was sentenced to detention at the President's pleasure. This Court set aside the sentence and held as follows:

> ***" In view of the foregoing, we are satisfied that the appellant was wrongly convicted before the superior court on a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. Accordingly, the conviction is set aside and substituted with one of a finding of guilty of infacticide*** *(sic)* ***contrary to Section 210 of the Penal Code. We also set aside the order of detention under President's pleasure apparently imposed pursuant to Section 25(2) of the Penal Code and it its place we substitute a discharge under Section 191(1) (a) of the Children Act taking into account the long period the appellant has been in custody. The appellant is to be set free forthwith unless otherwise lawfully held".***

We were informed by the State, which information was confirmed by counsel for the appellants as well as the appellants themselves, that the 4th appellant had passed on even before the lodging of this appeal. Accordingly his appeal was a nullity *ab initio*. That leaves only the 1st appellant with regard to the review of the sentence imposed. Whereas we uphold the guilty finding of the 1st appellant, we nonetheless set aside his detention at the President's pleasure as the sentence. In lieu thereof we direct that he be detained for 15 years. As for the 2nd and 3rd appellants, we set aside the sentence of death imposed on them and instead sentence them to 20 years imprisonment respectively. The sentences shall take effect from 21st October, 2008 when they were first sentenced.

Orders accordingly.

Dated and delivered at Kisumu this 3rd day of July, 2019.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

<u>DEPUTY REGISTRAR.</u>