IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, OKWENGU & WARSAME, JJ.A)

CRIMINAL APPEAL NO. 94 OF 2016

ELLY OPANDE NYASAKA... APPELLANT

AND

REPUBLIC ....RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Nairobi (Ngugi & Achode, JJ.) dated 5th December, 2013

in

H.C.CR. A. NO. 693 of 2010)

****

JUDGMENT OF THE COURT

On the morning of 13th November, 2009, a daring daylight robbery was carried out at the business premises of ***Basco Paints Products (K) Ltd*** at Embakasi, Nairobi. It was a normal day with company employees at their stations and customers walking in and out to make their purchases. The cashier, ***Asham Ramji Vanji* (PW1)** was in his glass-protected office at the far end where he kept the previous day's earnings of Ksh. 247, 950 in a safe. He kept a further Ksh. 59,446 collected from the sales of the morning in the same safe. Other clerks were at the counter and at their desks attending to customers. One was ***Pauline Gakonyo* (PW3)** who was issuing Orders at the customer care desk. The other was ***Isaac Karuro*** **(PW4)** who was issuing Invoices against the Orders.

At about 8.30 am, three men walked to the customer care desk and ordered for paints worth Ksh. 17, 000. One of them was called '**David**'. **PW3** issued them with the order and they went to **PW4** where they were issued with the invoice for payment before release of the goods. They walked to PW1's office. He told them to pay from outside his office. They walked out and suddenly returned to his office. Then all hell broke loose.

One of three men pulled out something looking like a pistol and ordered **PW1** to lie down. He did, face down. Another one asked for the key to the safe as the other hit him on the head with a sharp object. He sustained injuries for which he was successfully treated. They looted the cash and bolted out of the cashier's office. The alarm went off and workers started running helter skelter.

The manager, ***Suresh Shetti*, (PW2)**, who was in his office went out to check what was happening. He saw one man carrying a backpack (or rack sack), orange in colour with blue patches, and two others running towards the main gate. One worker shouted that backpack was carrying the Company’s money. And so, **PW2**, joined by other workers, gave chase. **PW2** jumped into one of the company vehicles and concentrated on the person carrying the back pack. At the National Petrol Station they parked the vehicle when they saw the man carrying the backpack climbing over a wall. **PW2** scaled the wall too followed by other members of the public and they apprehended the man.

At that moment, two police officers on patrol saw the crowd of people chasing someone and shouting 'thief'. They were ***Cpl. Ndwiga*** and ***Pc. John Langat*** **(PW5)**. They joined in after seeing a man carrying a backpack scaling a wall. On reaching the spot, they found the man having been apprehended by members of the public who were beating him up. The officers intervened and saved the man. He was re-arrested and on checking the bag in his possession, the officers found a sum of Ksh. 247,950, as well as a toy pistol and a knife. The other two men who were chased by members of the public were also caught and one was lynched. The other was also beaten up but was arrested alive. He later succumbed to the injuries and died before his trial could start. The person who remained was the appellant now before us.

The appellant was charged with the offence of robbery with violence contrary to ***section 296(2)*** of the **Penal Code** and was tried before

Makadara Senior Resident Magistrate **(Hon. A. Lorot)** who convicted him after hearing six prosecution witnesses, and the appellant. The appellant's defence was that he was merely standing at a bus stage on the Airport North road when he saw a crowd of people chasing a man. One of them shouted *'Hata huyu ndiyo mmoja wao*' ('even **3** this is one of them'), and they grabbed him and took him to Basco paints offices where they called the police to re-arrest him for an offence he knew nothing about. The defence was rejected. He was sentenced to death after conviction since, according to the trial magistrate, the wording of ***section 296(2)*** was mandatory in terms. His appeal to the High Court **(Mumbi Ngugi & Lydia Achode JJ.**) was dismissed on 5th December 2013 and the sentence was upheld. He is now before us on the second and final appeal.

A memorandum of appeal raising four grounds was filed on behalf of the appellant by ***M/S Ngumbau Mutua & Associates***, ***Advocates*** on 15th August 2017 and a supplementary memorandum raising another nine grounds was filed through his new advocates, ***M/S Ondieki & Ondieki***, ***Advocates*** on 18th February, 2019. However, in written submissions and oral highlights made at the hearing of the appeal, learned counsel, ***Mr. Evans Ondieki***, raised and urged four issues: that the charges under ***section 296(2)*** were invalid since the section has been declared invalid and in violation of the Constitution; identification of the appellant was not free from any possibility of error; the circumstantial evidence relied on by the trial court did not meet the required legal standard; and that critical witnesses were not called to testify.

The first ground of appeal was not expounded by counsel who simply stated that the Constitution has ordained that charges must be certain and without **4** ambiguity. Although a list of eight authorities was filed, none of them was cited in support of the proposition that ***section 296(2)*** has been declared invalid or in violation of the Constitution. More importantly, it was not shown in the submissions of counsel, how the charge upon which the appellant was tried was either ambiguous, illegal, or unconstitutional.

Instead Mr. Ondieki referred to what he termed as *"new jurispudence"* anchored in the **Constitution** which in ***Article 10*** directs the application of the rule of law, fairness and justice; and ***Article 159*** on substantial justice. He submitted that the appellant had legitimate expectation that his case would be tried within the confines of the constitutional edicts but the two courts below did not critically look at the entire evidence and analyse it fairly. He also referred to the Constitutionality of the death sentence imposed on the appellant which was not considered, although the sentence has since been commuted to a life sentence.

Counsel then combined the rest of the grounds and submitted that the appellant was never identified at the scene of crime by any of the witnesses. He referred to the evidence of **PW1**, **PW2**, **PW3** and **PW4** who all confessed their inability to identify the appellant at the scene. Counsel contended that the only evidence relied on was circumstantial, but in his view, it was so weak that no conviction could be based on it. That is because the assailants were being chased by a mob with all the possibilities that the wrong person could have been **5** apprehended. He referred to the evidence of **PW2** that the assailants had a 100-meter head start when the chase began; the evidence of **PW2** confusing the colour of the backpack purportedly carried by the appellant which he said in the same breath to have been *'brown'* and *'orange with blue patches'*; and the evidence of **PW5** who testified that he arrived after the mob had apprehended the appellant and started beating him up.

As for sufficiency of evidence, counsel singled out the failure by the prosecution to call as witnesses: one ***Flavia***, who told **PW2** that the back pack contained the company's money; one ***Robert*** who drove the car in which **PW2** followed the assailants; one ***Cpl. Ndwiga*** who was said to have accompanied **PW5** on patrol; and members of the public who assisted in apprehending the appellant. These witnesses, according to counsel, would have provided the necessary links in the circumstantial evidence, in the absence of which the evidence on record merely establishes suspicion against the appellant, which has never been the basis of a conviction in law.

Several cases, among them: ***Vincent Kasyula Kingoo vs. Republic Nairobi Criminal Appeal No.98 of 2014***, ***Maitanyi vs. Republic [1986] eKLR*** and ***Cleophas Otieno Wamunga vs. Republic [1989] eKLR*** were cited on the dangers of inadequate or improper identification.

Orally responding to the appeal, learned Senior Principal Prosecution Counsel, ***Ms Matiru,*** submitted that the case against the appellant was proved beyond reasonable doubt because the robbery took place in broad daylight and the possibility of mistaken visual identity was minimal. In her view, **PW2** did not lose sight of the appellant who was carrying a backpack and scaled the same wall with him shortly before apprehending him. It is the same wall that **PW5** saw the appellant scale and there was no time lapse before **PW5** arrived at the scene to save the appellant from the angry mob. Counsel submitted that the appellant's presence at the scene was supported by the recovery of the stolen money from the back pack found in his possession. As for the number of witnesses who should have been summoned to prove the charge, counsel relied on ***section 143*** of the **Evidence Act** which requires no particular number of witnesses to prove any fact. The evidence on record was properly evaluated and the appeal should fail, concluded counsel.

We have considered the appeal on the four issues of law raised before us. As always, we must respect the concurrent findings of fact made by the two courts below if they were properly so made. In the case of ***Christopher Nyoike Kangethe vs. Republic [2010] eKLR*** this Court rendered itself thus:

> ***"An invitation to this Court to depart from concurrent findings of fact by the trial and first appellate court should be declined by the second appellate court unless it is persuaded that there arecompelling reasons for doing so. And the only compelling reason(s) would be that no reasonable tribunal could on the evidence adduced have arrived at such findings, or in other words, the findings were perverse and therefore bad in law."***

The first issue of law was based on the Constitution but, as stated earlier, no legal basis was laid for the submission that ***section 296(2)*** has been declared invalid or in violation of the Constitution. More importantly, it was not shown in the submissions of counsel, or at all, how the charge upon which the appellant was tried was either ambiguous, illegal, or unconstitutional. We decline to consider an ornamental ground of appeal that is simply hoisted before us without proper grounding in law. The reference made to ***Article 10***, and ***159*** of the Constitution, and the enigmatic reference made by counsel to *'new jurisprudence'* does not take the matter further. There was no demonstration that the two Articles were flouted by the two courts below.

Turning now to the crux of the appeal, relating to identification of the appellant and the circumstantial evidence connecting him to the

offence, we think the main issue is whether there was a mistaken identity of the appellant as one of the persons chased by members of the public from the offices of the complainant to the National Petrol Station wall where he was apprehended.

Considering the same issue, the trial court made the following findings:

> ***"It is not in dispute that a chase ensued. The target of the chase was a robber carrying an orange with blue patches backpack. The backpack contained the stolen money. The back-pack was recovered and the accused was arrested. That is not in dispute. In fact, it is not stated by any witness that the accused was arrested at a stage. The evidence is that he was arrested next to National Petrol station. Immediately the public got hold of him, Pc. Langat arrived with his colleague and they rescued him from the hands of the mob. Had Pc. Langat not intervened, the accused would have been toast. The money was recovered. There was indication by PW 1 that the sales from 12.11.09, Kshs.247,950/= and that of the morning of 13.11.09 were kept separately in the safe.***
>
> ***........***
>
> ***In our case there was a recovery of the stolen loot and which Pc Langat repossessed at the scene of the near lynching of the accused. Secondly, Pc. Langat, who arrived at the scene in good time to rescue the accused testified. He explained how he had seen the accused running and scaling a wall before he was intercepted by members of public. Thirdly, PW2, Suresh who had pursued the back-pack also corroborated the testimony of Pc. Langat. There was no mistake. No one had lost sight of the accused. He was cornered, just like his 2 deceased colleagues. His days had been numbered and the day had arrived for his penchant. He was caught red-handed. I see no defence before me except a mere denial.***
>
> ***He was not arrested at the stage. There was no other person being chased besides him. Pc Langat only saw one man being chased. There were two already caught by the mob. The remaining one was the accused. He was running towards the petrol station. They caught up with him. The evidence against the accused is overwhelming. It was in broad daylight. There was no possibility of mistaken identification."***

After re-evaluating the evidence on first appeal, the High Court rendered itself as follows:

> ***"19. To begin with we observed that the offence occurred in broad daylight in the morning hours of 13th November, 2009. PW1, PW3 and PW4 who interacted with the robbers in the office were not able to identify the appellant. The appellant came to be charged because it was said that he was seen running from the premises that were robbed with a back-pack on his back, when the alarm went off.***
>
> ***20. To establish whether the appellant had been linked without a doubt, to the commission of the offence with which he was charged, we scrutinized and reconsidered the evidence on record as is our mandate as the court of first appeal, to draw out own inference and reach our own conclusions.***
>
> ***.........***
>
> ***26. Both PW2 and PW5 identified the appellant as the man who was being chased and who was running with a back pack on his back. There is no evidence that from the time each caught sight of the appellant who they noted because of the orange and blue back pack, they lost sight of him till he was arrested. The evidence also shows that there was a crowd involved in the chase but the appellant was running ahead of it. PW2 was able to catch up with him using a motor vehicle. PW5 saw him because he was running towards the direction in which PW5 was stationed.***
>
> ***27. We are therefore satisfied that his conviction was not predicated on the allegations of the female employee who said that the stolen loot was in his back pack. The conviction was based on the evidence o PW2 who chased him from the company and arrested him. That evidence was fortified by the testimony of PW5, and the fact that indeed the stolen money was found in his back pack. PW2 described the back pack as brown but corrected himself to say it was orange with blue patches. PW5 described it as orange and blue."***

With respect, we think those findings are clearly concurrent material facts and, in our view, there was a proper basis for making them. **PW2** was the star witness on the chase and he was believed in his testimony that he never lost sight of the appellant from beginning to the end. We have no reason to differ from the assessment of credibility of that witness. His evidence was supported in material particulars by **PW5** and the recovery of part of the stolen money. There was a proper basis for the conviction of the appellant and we so hold.

Ordinarily, the question of sentence does not fall for consideration on a second appeal unless there is an issue of the legality of it. See ***section 361(1)(a)*** of the **Criminal Procedure Code.** The appellant was sentenced to death by the trial court for the reason that the law so required in mandatory terms. The High Court did not reconsider that issue as it simply dismissed the appeal. It is now the law of the land as declared by the Supreme Court in ***Francis Karioko Muruatetu & another vs. Republic [2017] eKLR*** on 14th December, 2017 that the death sentence is not mandatory in a capital offence such as faced by the appellant. Before that, there existed conflicting decisions of this Court on the mandatory nature of the sentence.

We have examined the record and considered the disclosure made by counsel for the appellant that the sentence has since been commuted to life imprisonment. The appellant was given an opportunity to offer his mitigation and all he said was that he was a hustler doing odd jobs, as he continued to deny the offence for which he had been convicted. The trial magistrate considered the circumstances of the robbery which in his view were daring as the appellant and his accomplices cared little about the consequences. We have weighed the mitigation and the circumstances in which the offence was committed and would **11** have reduced the death sentence to life imprisonment. Since the appellant is

already serving that sentence, we have no intention of disturbing it.

The appeal is dismissed in its entirety and we so order.

Dated and delivered at Nairobi this 27th day of September, 2019.

P. N. WAKI

....

JUDGE OF APPEAL

HANNAH OKWENGU

....

JUDGE OF APPEAL

M. WARSAME

....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR