IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KARANJA & SICHALE, JJ.A)

CRIMINAL APPEAL NO. 96 OF 2016

BETWEEN

GEORGE NDUNGI THAIRU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi

(Mbogholi & Ochieng, JJ.) dated 25th July 2013

in

H.C.CR.A. 73 OF 2009)

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JUDGMENT OF THE COURT

1. The Appellant herein has proffered this second appeal challenging conviction and sentence for the offence of robbery with violence contrary to **Section 296(2) of the Criminal Procedure Code**, his first appeal having been dismissed by the High Court (Mbogholi & Ochieng, JJ).

2. The facts of this case as presented before the trial court were that on the 23rd of August, 2008 at or about 9.00 p.m. at Ruthingiti village in the then Kiambu West District, Moses Njenga Ngugi (PW1), was walking home alone. Along the way, he was passed by one man and then saw two others emerging ahead of him. The first man hit him on the head with a big stick and the other two accosted him. After the blow on his head and fearing for his life, he fled dropping a bag containing two pairs of jeans, sugar, maize flour and a pair of shoes. When he looked behind he saw that the attackers were in hot pursuit. With the help of the electricity lighting, which shone at a 20 - meter radius, he was able to recognize one of his attackers as his neighbour, one Ndungi who he knew well before but he was unable to identify the other two attackers. He sought refuge at the house of one of his neighbour's, one Nyaga, who called the police.

3. The police responded and went to Nyaga's house where the appellant narrated to them what had befallen him earlier. They then proceeded to the appellant's house but he refused to open the door so they had to force it open. They then arrested him but none of the stolen items were recovered from his house. The appellant was later charged before the Senior Resident Magistrates' court at Kikuyu with the offence of robbery with violence contrary to **Section 296 (2) of the Penal Code**.

4. He denied the charge and trial proceeded with the prosecution calling a total of 6 witnesses. After being placed on his defence, the appellant gave an unsworn statement and called no witnesses. In his very brief statement of defence, the appellant denied having committed the offence as alleged saying that he was asleep in his house when the police officers went knocking at the door and when he opened for them, they just arrested him and took him to the police station. He maintained that he did not even know the reason for his arrest.

5. Having considered the evidence before her, the trial magistrate was satisfied that the charge of robbery with violence had been proved to the required standard. Consequently, she convicted the appellant and sentenced him to death as prescribed by the law then. As stated earlier, his appeal to the High Court was dismissed and both conviction and sentence were upheld, prompting this appeal.

6. During the plenary hearing before this Court, the appellant was represented by learned counsel Mr. Ratemo Oira, while Ms. Maina, Senior Principal Prosecution Counsel, represented the State. In support of the appeal, counsel for the appellant informed the Court that he was

relying on the appellant's homegrown grounds of appeal as well as the supplementary grounds filed by him on 24th January, 2019.

7. In a surprising move however, Mr. Oira informed the Court that he was dropping the appeal against conviction and only pursued ground 8 which was a challenge on the sentence. The said ground read as follows;

> ***"That the appellant urges this Court to consider the sentence and the mitigating factors in accordance with the decision of the Supreme Court of Kenya, Petition No 15 of 2015; Francis Karioko Muruatetu & others -vs- Republic".***

8. Addressing us on the issue of sentencing, counsel urged the court to consider that the appellant had been in custody for a period of almost 10 years and that he was remorseful and had since reformed; he prayed for leniency and entreated us to consider the appellant's mitigation in view of the decision in **Francis Karioko Muruatetu & Another v. Republic** *(supra)* where the mandatory nature of the death sentence was declared unconstitutional.

9. In response, Ms Maina seemed to concede the appeal on sentence and urged the Court to consider the fact that the appellant had already served close to 11 years in prison and also that he was a first offender.

10. From the foregoing, the only issue before this Court is whether the sentence against the appellant is justified. This Court when faced with a similar issue of sentencing in the case of **Rajab Iddi Mubarak v Republic, Eldoret Criminal Appeal No. 105 of 2015 and William Okungu Kittiny v Republic, Kisumu Criminal Appeal No. 56 of 2013** applied the Supreme Court's findings and held that although the **Muruatetu** case (supra) was in respect of a murder charge under section 204 of the Penal Code, the same findings would apply *mutatis mutandis* to **section 296 (2)** and **297 (2) of the Penal Code**. After all, a death penalty involves the taking away of a convicted person's life and there cannot be any distinction between "*the mandatory aspect"* of the death sentence provided for under **Section 204 of the Penal Code** and the death sentence under **Section 296(2)** and **297(2) of the Penal Code.** The findings of the Supreme Court in the **Muruatetu** case can therefore lawfully and logically be extrapolated to robbery with violence cases and any other cases that would by law attract mandatory death sentences.

11. In considering the appropriate sentence to mete out, the Court must consider the appellant's mitigation, the question of proportionality of the gravity of the offence committed *vis a vis* the nature of the sentence to be imposed, and all other relevant factors. In this case, we have considered the fact that the appellant was a first offender, he has been in lawful custody for a period of 11 years and the fact that he is said to have reformed. He is also said to be remorseful. We note further that no violence was used during the robbery and the property lost by the complainant was valued at a small sum of Ksh.1,900.00.

12. For the foregoing reasons, we allow the appeal against sentence and set aside the death sentence imposed by the learned magistrate and upheld by the High Court. We substitute therefore a sentence equivalent to the term already served, and order that the appellant be set at liberty unless he is otherwise lawfully held.

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

W. OUKO, (P)

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR