IN THE COURT OF APPEAL

AT NAIROBI

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

CRIMINAL APPEAL NO. 92 OF 2016

BETWEEN

SIAT NASSIR OMAR ….…….....…….……APPELLANT

AND

REPUBLIC ……...……..……RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi (Kamau & Ogola, JJ.) dated 22nd November 2013) in H.C.CR.A 154 OF 2011)

JUDGMENT OF THE COURT

1. The appellant herein was charged and subsequently tried, convicted and sentenced by M.A. Murage, Senior Principal Magistrate, Limuru court on three counts of robbery with violence contrary to **Section 296(2)** of the Penal Code with an alternative charge of handling stolen goods contrary to **Section 322(2)** of the Penal Code. The details of the charges were as particularised in the charge sheet dated 18th August, 2010 which forms part of the record of appeal.

2. He denied all the charges and trial proceeded with the prosecution calling six witnesses in support of its case. On his part, the appellant proffered an unsworn statement of defence and called no witnesses.

3. A brief background of the facts before the two courts below is necessary to place this appeal in perspective. On or about the 3rd of May, 2010 at around 7.45 a.m. on Mai Mahiu road, at Mutarakwa Trading Center, Joseph Karuri (PW1), Mustafa Mohammed (PW2) and Simon Muriithi (PW3) were aboard motor vehicle reg. no. KAT 219Z and trailer reg. no. ZC 2436 on their way from Malaba where they had gone for documentation of the said motor vehicle. The trailer was loaded with skins whose value was given as Ksh 11million.

4. Somewhere on the road before they reached Kamandura market, a small saloon vehicle overtook their lorry and blocked them. The appellant and his confederates were in the said car. One of them was armed with a pistol and another had a radio. They accosted PW1 and his colleagues and forced them into the small vehicle. The appellant then took over the lorry as the other culprits fled the scene in the small vehicle towards Kwa Mbira area taking PW1, PW2 and PW3 with them. Taking advantage of traffic jam, PW1 jumped out of the small vehicle and with the help of members of the public he was able to capture the appellant who was taken to Tigoni Police station. The appellant's accomplices managed to escape and PW2 and PW3 were found abandoned in Mwiki after being robbed of various personal items.

5. Having been convicted and sentenced to death, the appellant unsuccessfully proffered an appeal before the High Court on the 17th of June, 2011 which appeal was premised on among other grounds, that the learned trial magistrate erred in law and fact: by presiding over the matter in which the appellant's rights under **Article 49(1)(f)** had been contravened; in denying the appellant a fair hearing contrary to **Article 50(2)(b)(c)(h)(j)** and **(m)**; by imposing an extreme sentence: by failing to consider all evidence on record contrary to the provisions of **Section 169** of the Criminal Procedure Code and by convicting the appellant based on uncorroborated and contradictory evidence.

6. The High Court (E. Ogolla and J. Kamau, JJ) re-evaluated the evidence adduced before the trial court in its entirety along with the grounds of appeal we have adverted to earlier and submissions by learned counsel for the appellant and the state and found that there was no violation of the appellant's constitutional rights as alleged as he had been arrested and charged during the pendency of the old constitution which allowed an accused person to be remanded for 14 days upon arrest before being presented to court for plea; that there was no right to free legal representation under the old constitution and that the trial magistrate had ordered the State to supply the appellant with witness statements and there was nothing on record to show that the same had not been supplied. Furthermore, the appellant had not informed the trial court that the said statements had not been supplied pursuant to the magistrate's directive.

7. On the second issue the court found that the trial court had analyzed the evidence before it and come up with a conclusion that the

prosecution witnesses positively identified the appellant as the person who had committed the robbery. Also, that the appellant's allegations of contradictions on the value of the stolen goods and the registration number of the subject motor vehicle were not supported by evidence before the court and that the appellant had misled the court. It further found that even if there were such alleged contradictions, the same were not fatal to the prosecution case as they were curable under section 382 of the Criminal Procedure Code. The court found that the prosecution had proved the ingredients required to be proved in a charge of robbery with violence as against the appellant as provided for under **Section 296/2** of the Penal Code and ultimately dismissed the appeal save for quashing the conviction and sentence in respect of counts 2 and 3 holding the same in abeyance.

8. Being aggrieved by this decision the appellant has now proffered this second appeal to this Court hoping to take a second bite of the cherry. Learned counsel Prof. Wilson Hassan Nandwa who represented the appellant in this appeal informed us that he was abandoning the grounds of appeal filed earlier and was going to rely on the supplementary grounds filed in court on 8th August, 2018. In these grounds, the learned Judges are faulted for failing to analyse the evidence before them in its entirety; violating the provisions of section 213 and 310 of the Criminal Procedure Code and failing to consider the appellant's mitigation when passing sentence.

9. In support of the appeal, counsel for the appellant relied on the written submissions filed in Court on 8th August, 2018 and his list of authorities filed on 27th August, 2018. He also made brief oral highlights. On the first ground he posited that the High Court had failed to properly exercise its duty as a first appellate court as it did not properly re-evaluate the entire evidence on record to determine whether all ingredients for the offence of robbery were established. Citing the provisions of section 297(1), (2) and section 389 of the Penal Code and relying on the case of **Joseph Njuguna Mwaura & 2 Others v. Republic (2013) eKLR** and **Paul Katana Njuguna v. Republic (2016) eKLR** he submitted that for the offence of robbery with violence to be complete, the assailants must depart from the scene of crime. He contended that the appellant was arrested before he could depart from the scene of crime making the robbery an aborted venture and an incomplete offence of robbery with violence, hence the appellant ought to have been charged with an offence of attempted robbery and not robbery with violence under section 296(2) of the Penal Code. Citing the case of **Republic v. Samuel Kilele Musembi & Anor. (2017) eKLR** and **Eunice Musenya Ndui v. Republic (2011) eKLR** counsel contended that the High Court erred in convicting the appellant for the offences under count II and count III, as there was no common intention of the commission of the said offences between the appellant and the alleged co-assailants.

10. On the second issue he submitted that the High Court erred in law by affirming the convictions and sentences without observing that section 213 and 310 of the Criminal Procedure Code was grossly contravened occasioning prejudice to the appellant. Relying on the case of **Abdalla Kitengo Otieno v. Republic Criminal Appeal No. 175 of 2002** and **Henry Odhiambo Otieno v. Republic Criminal Appeal No. 83 of 2005** he submitted that the prosecution's written submissions issued in court after the close of defence case were improper as the same were not appropriate in a criminal trial as such practice denied the appellant an opportunity to hear what his counsel was saying and therefore denied him an opportunity to make any clarification if necessary hence he was prejudiced.

11. On the third ground he urged that the sentence was unconstitutional as the High Court failed to consider the appellant's mitigation. Calling in aid the Supreme Court decision in **Francis Karioko Muruatetu & Another v. Republic (2017) Eklr** counsel emphasized on the unconstitutionality of the mandatory death sentence and added that the appellant was a first offender and that he had since shown remorse for his transgressions and the death sentence was in the circumstances of the case disproportionate.

12. The appeal was opposed by Ms. Maina learned Senior Principal Prosecuting Counsel appearing for the State. On the first issue she contended that the High Court properly carried out its mandate as a first appellate court. She submitted that the offence of robbery with violence was proved as the offence was committed by three people, the appellant included; they were armed and; PW2 was assaulted hence suffering bodily injuries, a fact that was attested to by PW 4, the medical officer who attended to him. She further urged that the appellant was properly identified in broad daylight, as the one who was driving the subject motor vehicle after the crime was committed.

13. On the second issue, she posited that the trial court was not wrong in considering the prosecution's written submissions. She cited the case of **Katana Kaka alias Benson & 2 others v Republic [2017] eKLR,** where the Court held that there was no prejudice where written submissions had been admitted in a criminal trial.

14. On the third issue she said she was not opposed to a review of the sentence as the appellant had already served 9 years in custody.

15. We have carefully considered the totality of the evidence on record, the impugned judgment of the High Court, the grounds of appeal, submissions by both counsel, the authorities cited and the law. We remind ourselves that this is a second appeal and our remit is confined to points of law only as circumscribed by section **361(1)(a)** of the Criminal Procedure Code. Further, where the two courts below have made contemporaneous findings of fact, this Court is bound by those findings unless it is satisfied that the conclusions are not supported by the evidence on record or are based on a misapprehension of the evidence. This is a well settled principle which this Court has judiciously adhered to. For instance, in the case of **Karani vs. R [2010] 1 KLR 73** this Court expressed itself as follows: -

> ***"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."***

16. On the submission that the ingredients that constitute the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code** were not established**,** this Court succinctly addressed that issue in **Johanna Ndung'u v. Republic Criminal Appeal No. 116 of 2005 (unreported)** and listed the ingredients as follows:-

> ***a) if the offender is armed with any dangerous or offensive weapon or instrument, or;***
>
> ***b) if he is in the company with one or more other person or persons, or;***

c) if at or immediately after the time of the robbery he wounds, beats, strikes or uses any other violence to any person.

The word "or" is disjunctive and denotes that proof of any one of the ingredients of robbery with violence is enough to sustain a conviction. See: **Oluoch v. Republic (1985) KLR 549**. However evidential facts tendered for proof of the ingredients of the offence must be cogent and consistent save for such minor flaws as are curable under section 382 of the Criminal Procedure Code.

17. Although learned counsel for the appellant asserted that there was no proof of commonality of purpose between the appellant and the other persons in the small car, there is abundance of evidence to show that the appellant was one of the occupants of the said vehicle which had blocked one of the complaint's vehicle and it was the appellant who was actually driving the stolen truck when he was accosted by PW1 and members of public. This was a fact upheld by both courts below. Other contemporaneous findings by the two courts below include that the appellant was positively identified by PW2, who was a victim of the robbery and that he was arrested at the scene of crime. Further, as testified by PW1the appellant was arrested on the material day just a short while after he and his co-assailants had committed the crime. The crime occurred at about 7.45 am meaning that it was in broad daylight. PW1 together with members of the public also captured the appellant while he was in the subject motor vehicle hence his defence of mistaken identity is not compelling. All these findings by the two courts below are strongly founded on the evidence on record. We find no basis for interfering with the same. We are satisfied that the ingredients of robbery as we have enumerated earlier were proved. We are also satisfied that the offence of robbery had been completed because the appellant and his accomplices had actually moved the truck. The fact that it was recovered before they could get away with it does not make the offence incomplete. That ground therefore fails.

18. We also find that both courts below fully considered the appellant's defence but the evidence adduced by the prosecution was overwhelming and the same proved the case beyond reasonable doubt as by law established. We have no hesitation whatsoever in finding the appeal on conviction is totally devoid of merit. Consequently, the appeal against conviction is hereby dismissed.

19. On the issue of sentencing this Court has previously applied the findings and holding of the Supreme Court in **Muruatetu (supra)** particularly regarding the unconstitutionality of the mandatory nature of the death sentence in considering whether or not a death sentence ought to be substituted with a lesser sentence. It has found that the findings and holding apply *mutatis mutandis* to **Section 296 (2)** and **297 (2)** of the Penal Code **(See 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).**

20. In the instant appeal it is evident from the record that neither the trial court nor the first appellate court considered the appellant's mitigation.

This would of course be attributable to the fact that the trial and the appeal were concluded before the **Muruatetu** decision. The appellant's mitigation before the trial court was that he was a young man with three children who was remorseful for the offence he had been convicted for. In his mitigation address before us on behalf of the appellant, learned counsel told the Court that the appellant has atoned for the offence and is now a reformed man having engaged in Islamic studies in which he has obtained certificate level 1. He entreated us to reduce the sentence.

21. We have considered the appellant's mitigation and in view of the foregoing and the fact that the prosecution does not oppose the appellant's prayer for the review of the sentence, we are inclined to allow a review of the sentence. We however note that the daring robberies were committed in broad daylight and the experience undergone by the complainants was very traumatizing. The sentence that commends itself to us is one of 20 years imprisonment. Having set aside the death sentence, the suspension of the death sentences for the other 2 counts falls by the way side and it behooves us to pronounce sentence on them. Accordingly, we set aside the death sentence imposed against the appellant on all three counts and substitute therefor a term of 20 years imprisonment on each count from the date of conviction. The sentences will run concurrently.

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

W. OUKO, (P)

JUDGE OF APPEAL

W. KARANJA

JUDGE OF APPEAL

F. SICHALE

JUDGE OF APPEAL

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

DEPUTY REGISTRAR