IN THE COURT OF APPEAL

AT KISUMU

(CORAM: WAKI, MUSINGA & ODEK, JJ.A.)

CRIMINAL APPEAL NO. 211 OF 2018

BETWEEN

VINCENT NDUNDE MURUNGA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal against the conviction and sentence by the High Court of Kenya at Kakamega (Chitembwe and Dulu, JJ.) delivered on 30th September 2015

in

H.C.CR.A. No. 175 of 2013.)

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JUDGMENT OF THE COURT

1. This is a second appeal against the appellant's conviction and sentence for the offence of robbery with violence contrary to **Section 296 (2**) of the **Penal Code.**

2. A brief background of the matter as presented before the trial court was that on 10th February 2013 at around 6.30 a.m., whilst fueling a motor bike registration number KMCX 788D at Malava Holiday Petrol Station, the complainant, **Timothy Wanami, (PW1**), was approached by a passenger, **Ndunde Murunga,** (the appellant), whom he knew very well. The appellant requested the complainant to take him to a place known as Musalaba. On the way, the appellant strangled the complainant with a wire. The complainant lost consciousness and thirty minutes later found himself in the bush and the motor bike was missing.

3. Following that unpleasant encounter, PW 1 called out a certain lady from a nearby home and explained what had transpired. He then proceeded to Malava Police Station and reported the incident. Thereafter he was taken to hospital by his relatives.

4. PW2, **Ezekiel Boaz,** gave his narration and stated that on the material day he saw the appellant on the motor cycle being ridden by the complainant and even greeted them. He said the appellant was wearing a white suit. **PW5, Corporal Wilson Tirop**, confirmed that the complainant reported the incident and the appellant was arrested three days later and charged with the offence and was subsequently arraigned before the Principal Magistrates' court at Butali. It was reported that the motorbike was valued at Kshs.81,000 and the complainant also lost cash amounting to Kshs.1500.

5. The appellant denied the charge and following a full trial in which the prosecution called five witnesses, the trial court found the appellant had a case to answer and placed him on his defence. In his unsworn testimony, the appellant stated that he knew nothing about the alleged robbery.

6. The trial court found the appellant guilty as charged and sentenced him to death. Dissatisfied with the said outcome, the appellant unsuccessfully appealed to the High Court.

7. Undeterred, the appellant lodged this second appeal. The same is premised both on the homegrown grounds of appeal filed by the appellant himself, as well as the memorandum of appeal filed by his learned counsel. In a nutshell, the appellant faults the decision of the High Court and contends: that the trial court erred by convicting him without proper identification; that the ingredients of the offence were not proved beyond reasonable doubt; the first appellate court failed to re-evaluate the evidence tendered; and also failed to consider the

appellant's mitigation.

8. During the hearing of the appeal, **Mr. Wang'oda**, learned counsel for the appellant, took issue with the evidence of identification of the appellant. In his view, even though PW 1 claimed to have known the appellant, an identification parade could have been conducted to rule out the possibility of a mistaken identity. He further submitted that PW5 did not give evidence on how the appellant was identified, how he was arrested; and whether the complainant gave the description of the appellant.

9. Moreover, counsel added, the circumstances for positive identification were difficult. In counsel's view, the time of the incident, 6.30 a.m., was a little bit dark and therefore it was doubtful whether the complainant could have seen and recognized his assailant.

10. It was also argued that none of the ingredients of robbery with violence were proved as the alleged wire that was used to strangle the complainant was not produced. On the issue of the sentence, Counsel submitted that the trial court erred in passing the mandatory death sentence without considering the appellant's mitigation.

11. Consequently, counsel urged us to allow the appeal. In the alternative, we were urged to refer the matter back to the trial court for resentencing, in view of the Supreme Court decision in ***Francis Karioko Muruatetu & Another vs. Republic & 4 others, Petition no. 15 of 2015***.

12. Opposing the appeal was Prosecution Counsel, **Mr. Muia,** who submitted that only one ingredient of the offence of robbery with violence required to be proved. In this case, PW1 was clear that he was attacked by the appellant who he knew very well; he was choked with a wire until he lost consciousness; and lastly, his motorbike and cash were stolen. Hence, all the ingredients of the offence were established, counsel contended.

13. On the issue of the sentence, counsel concurred with the appellant's contention and urged us to consider the mitigating factors in light of **Muruatetu's case** (supra) or refer the matter to the High Court for resentencing.

14. This Court is alive to the fact that by dint of ***Section 361 (1)*** of the ***Criminal Procedure Code***, its jurisdiction is confined to matters of law only. We are also cognizant of the fact that this Court will normally not interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown, demonstrably, to have acted on wrong principles in reaching their findings. This much was restated in ***Alvan Gitonga Mwosa vs. Republic [2015] eKLR***.

15. The first issue for our determination is whether the appellant was properly identified as the perpetrator. In this regard, the appellant contended that there was no proper identification evidence and no identification parade was conducted. The evidence adduced by the complainant was that the appellant was a person known to him for about 3 years and he was at the time of the robbery able to recognize him by virtue of the fact that he carried him on his motorbike. PW2 also testified that he saw the appellant on the motorbike and greeted him.

16. From the foregoing, it is evident that this was a case of recognition and not just mere identification of a stranger. An identification parade was therefore not required at all. In the case of ***Wanjohi & 2 Others v. Republic [1989] KLR 415***, this Court held that;

> *"**Recognition is stronger than identification but an honest recognition may yet be mistaken**."*

17. In addition, in the words of Lord Widgery, CJ. in ***R v. Turnbull and Others [1976] 3 All ER. 549;***

> ***"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made...***
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> ***All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger."***

18. This principle was applied by both courts below in arriving at their conclusion and we therefore find no plausible reason to interfere with those findings.

19. On the allegation that the prosecution failed to satisfy the ingredients for a charge of robbery with violence, we refer to the case of ***Odhiambo & Another v Republic*** **[2005] 2 KLR 176** where this Court explained the ingredients of the offence of robbery with violence as follows:-

> ***"The act of being armed with a dangerous or offensive weapon is one of the elements or ingredients which distinguishes a robbery under section 296(2) and the one defined under section 295 of the Penal code. Other ingredients or elements under section 296(2) include being in the company of one or more persons or wounding, beating etc the victim and since all these are modes of committing the offence under section 296(2), the prosecution must choose and state which of those elements distinguishes the charge from the one defined in section 295."***

20. In this appeal, not only was the appellant proved to have been armed with a dangerous weapon but he also occasioned grievous harm to the complainant during the commission of the offence. The medical report confirmed that there were lacerated marks on his neck, hand and part of the head caused by both blunt and sharp object. Therefore, the appeal against conviction is without merit and is dismissed.

21. With regard to sentence, as submitted by both parties, we must take cognizance of recent jurisprudence in this area and apply it to the present case. In ***Francis Karioko Muruatetu and another vs Republic*, *(supra)*** the Supreme Court of Kenya held that the mandatory aspect of the death sentence as the only lawful sentence is unconstitutional.

22. This Court in ***Johana Lwebe Muyugo v Republic [2019] eKLR*** observed as follows:-

> ***"[20] The analogy that has been drawn from the Muruatetu case by this Court in the aforesaid cases is that sentencing remains a judicial function and is determined by the severity, proportionality of the offence and the mitigating factors. Thus, in our view, the mandatory aspect of the sentences especially "death penalty" is what was declared unconstitutional. Life imprisonment is also close to "death penalty" as one remains incarcerated for the rest of their life their age notwithstanding. We think the age of an offender should form a central factor in the determination of sentencing…***
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> ***In the circumstances of this case where the mitigation of the appellant was not factored in, when he was sentenced, we are inclined to interfere with the life imprisonment and substitute thereto with a sentence of 25 years (twenty five years)."***

23. We observe that the appellant is a first offender and in mitigation he pleaded that after his arrest his wife went away and left him with three young children. We have considered the appellant's mitigation and the fact that he was sentenced in September 2013, he has barely served six years in prison.

24. Accordingly, taking all the circumstances of this case and the gravity of the offence, the appeal against conviction fails; but the appeal against sentence succeeds only on the aspect of the death sentence, which we hereby set aside and substitute therefor with sentence of imprisonment for a period of twenty (20) years from the date of conviction and sentence.

Dated and delivered at Kisumu this 24th day of October, 2019.

P. N. WAKI

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JUDGE OF APPEAL

D. K. MUSINGA

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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.

DEPUTY REGISTRAR