IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL No. 116 of 2015

BETWEEN

JOMO BOKE MARWA..........................APPELLANT

AND

REPUBLIC..RESPONDENT

(An appeal against the judgment of the High Court of Kenya at Migori

(D.S. Majanja, J.) delivered on 22nd July 2015 in H.C Cr. App. No. 35 of 2014)

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JUDGMENT OF THE COURT

1. This is not a second criminal appeal. It is an application grounded upon ***Article 50 (b)*** of the Constitution challenging a judgment of the High Court declining to grant an order for a new trial.

2. **Article 50 (6) of the Constitution** provides as follows:

> ***"(6) A person who is convicted of a criminal offence may petition the High Court for a new trial if:***
>
> ***(a) the person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and***
>
> ***(b) new and compelling evidence has become available."***

ANTECEDENT

3. The appellant was charged before the magistrate's court with the offence of robbery with violence. He was tried, convicted and sentenced to death. He lodged a first appeal to the High Court in **Criminal Appeal No. 278 of 2010**. His appeal was dismissed. He did not file a second appeal to the Court of Appeal. Instead, he filed a Criminal Appeal Application to the High Court under the provisions of ***Article 50 (6)*** of the Constitution in **Criminal Appeal (Application) No. 35 of 2014**. By a judgment dated 22nd July 2015, the Criminal Application was dismissed by the High Court. The instant appeal is an appeal against dismissal of his application seeking a new trial.

BACKGROUND FACTS

4. ***Jomo Boke Marwa***, the appellant, was charged with robbery with violence contrary to ***Section 296 (2)*** of the **Penal Code**. The particulars are that on the 29th day of August 2009 at Masebe sub-Location within Kuria District of Nyanza Province, jointly with others not before the court while armed with dangerous or offensive weapons namely pangas, robbed ***Joseph Boke Sinda*** cash Ksh. 36,000/= and at or immediately before such robbery wounded the said Joseph Boke Sinda occasioning him actually bodily harm.

5. In support of the charge against the appellant, ***Joseph Boke Sinda***, (PW1) testified as follows:

> ***"I recall 29th August 2009 at about 7.15 pm. I was on the way home. I was alone. On the way I met four people. They ordered me***

to sit down. I tried to resist. The people had pangas and rungus. They forced me to sit down.

One of them cut me on the left palm. Another cut me on the left hand. The first one also cut me on the elbow. The second one also cut me on the back of the neck. They were demanding that I give them money. I had Ksh. 36,000/=. I had sold some maize at Nyamaharaga. It was in my back pocket of my trousers. They removed the money. I tried to scream. I was able to recognize one of the robbers. It was not yet dark and I was able to see him. I knew him by name. I also identified him by the clothes he was wearing. He is John Boke Marwa. We stay in the same village. He was the leader and he was talking to me. He was wearing a green pair of trousers. He was also wearing a white T-shirt which had red stripes. He was wearing a black coat which was not buttoned up. When I tried looking at him, he said he would cut me and he is the one who cut me on the left palm and brow.

I did not identify any of the three others. After they took the money, they ran away. Neighbours came to the scene. I told them that I had been robbed by four people and I had identified one of them as John Boke. I was taken to Isebania Sub-District Hospital where I was admitted for one day. At 7.15 am the following day I made a report at Isebania Police Station. I was issued with a P3 Form…. Jomo Boke Marwa was arrested by members of the public and brought to the Police Station as I was making my report.

At 7.15 pm it was still not dark and there was strong moonlight. He was also right in front of me. He is the one in the dock. We come from the same village. I have no grudge against him. The money was not recovered."

6. ***Matinde Moronge*** (PW2) testified as follows:

"I am a village elder. On 29th August 2009 at about 7.30 pm I was at home. I was outside the house near the road. I heard screams from the upper area. I ran to the scene. I found Boke with cut wounds. There were many others at the scene. He said he had been robbed of some money and injured by Jomo Boke and three others. He told me he had identified Jomo Boke by clothes and appearance and that he knows him as a neighbour. He said he had been robbed Ksh. 36,000/=. He had injuries on both hands and back of the neck.

…...At 2.00 am, I was in my house. Someone called me from outside. I went outside and found Jomo Boke Murimi outside the gate. I asked him to come inside. He refused and told me that he had been attacked in his home and that he had cut someone and unclothed the person. He threw the clothes over the fence. They were a white T-shirt with red stripes on the front and a green pair of trousers with blood stains. The T-shirt also had blood stains. He then left. I kept the clothes.

At 6.00 am I went to look for Jomo Boke. I found a large number of neighbours also looking for the accused. Accused came forward. The people were trying to beat him. I restrained them. I took him together with the clothes he had thrown to me towards the Police Station. Near the Station, members of the public again attacked Boke. As I was restraining him the clothes got misplaced. We found the complainant there. We recorded our statements. Jomo Boke Murimi is the accused. I know him because I am his village elder."

7. ***Josephat Sawe*** (PW4), a clinical officer at Isebania Sub-District Hospital testified that on 29th August 2009 he attended to PW1. That upon medical examination, he established that PW1 had a deep cut wound on the forehead above the right eye. He was bleeding profusely. He had bruises on the neck. There were multiple lacerations and bruises on the back. He had a tender swelling on exterior chest wall and a cut wound on right upper arm and a deep cut on the right thumb. He completed a P3 Form which he produced as an exhibit.

8. In his defence, the appellant gave unsworn evidence. He testified that on 29th August, 2009 he was at home when *Sungu Sungu* came and arrested him and took him to Isebania Police Station where he was kept overnight. He stated that he had a case with his uncle, ***Gabriel Mwita Marwa***, and that on 7th September, 2009 he was taken to court and was shocked to be charged with the offence of robbery with violence. He denied committing the offence.

9. The trial magistrate, upon evaluating the evidence on record, convicted the appellant and sentenced him to death. In convicting the appellant, the magistrate stated:

"In this case, the prosecution alleges that the accused person was armed with a panga, was in the company of three others and wounded the complainant at the time of the said robbery.

The robbery is said to have occurred at about 7.15 pm. The complainant stated that there was still some day light left and he saw the accused person clearly. He even described the colour of the clothes the accused person was wearing. He stated that he recognized the accused person from his face, clothes and voice. Both of them come from the same village and know each other well. Furthermore, the colour of the clothes as described by the complainant matched those that PW2 stated that the accused person threw over his fence the same night at about 2.00 am.

I have carefully considered all this evidence. I am satisfied that there were sufficient conditions to enable the complainant to positively recognize the accused person. My conviction is cemented by the evidence that at 2.00 am of the same night the accused person threw some clothes over the fence of PW2 which matched in colour to the same clothes that the complainant saw the accused person wearing at the time of the said robbery. According to PW2, the clothes had blood stains…. I am satisfied that the prosecution has proved all the ingredients of the offence of robbery with violence against the accused person beyond all reasonable doubt."

There is only one sentence for the offence herein. I therefore sentence the accused person to death in accordance with the law."

10. Aggrieved by his conviction and sentence, the appellant lodged a first appeal to the High Court in **Criminal Appeal No. 278 of 2010**. The appeal was dismissed. In dismissing the appeal, the learned Judges expressed as follows:

> ***"We have ourselves carefully reconsidered and evaluated the evidence afresh; we are satisfied that the findings of the trial court were sound and the conviction safe…... In the circumstances, we find and hold that this appeal lacks merit. The same is accordingly dismissed in its entirety."***

APPLICATION UNDER ARTICLE 50 (6) of the CONSTITUTION

11. Aggrieved by the dismissal of his appeal by the High Court, the appellant did not lodge a second appeal to this Court. Instead, he filed an application before the High Court pursuant to the provisions of **Article 50 (6)** of the Constitution.

12. By Notice of Motion dated 6th June 2012, the appellant moved the High Court for an order seeking a new trial under the provisions of ***Article 50 (6) (a)*** and ***(b)*** of the Constitution. In support of the application, the appellant contended that there were compelling reasons why a new trial was to be held. He cited the following as the compelling evidence:

> ***"(a) That the appellant was not issued with initial statements of prosecution witnesses.***
>
> ***(b) That the learned judges erred in law in failing to consider that the State counsel objected that the appellant was arrested as a suspect in order to grant him liberty*** *(sic).*
>
> ***(c) That there was no O.B. for the first report and warrant of arrest issued at the trial court.***
>
> ***(d) That essential witnesses were not summoned at the trial.***
>
> ***(e) That the appellant was not represented by advocate.***

13. At the hearing of the Notice of Motion before the High Court, the appellant appeared in person. He submitted that the case against him was a result of a grudge; that he was not given a lawyer to represent him; that the complainant did not identify him properly; that the prosecutor submitted that the appellant was caught with the stolen goods; that the appellant was not shown the exhibits and that the arresting officer was biased.

14. In opposing the application for a new trial, the respondent submitted at the High Court that the appellant's conviction and sentence was proper.

15. Upon hearing the Motion, the learned judge dismissed the application for a new trial. In dismissing the Motion, the judge expressed:

> ***"The applicant has established the first limb of Article 50 (6) hence the issue is whether or not he has proved that he has new and compelling evidence that warrants a retrial. The Supreme Court in Lt. Col. Tom Martins Kibisu -v- Republic SC Petition No. 3 of 2014 [2014] eKLR discussed the meaning of new and compelling evidence as follows:***
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> ***(42) We are in agreement with the Court of Appeal that under Article 50 (6), "new and compelling evidence" means "evidence which was not available at the trial and which despite exercise of due diligence, could not have been availed at the trial" and "compelling evidence" implies "evidence that would have been admissible at the trial, of high probative value and capable of belief, and which if adduced at the trial would probably have led to a different verdict…..."***
>
> ***When the applicant's contentions, proceedings and judgments of the subordinate court and the High Court are considered side by side in light of Article 50 (6) of the Constitution, the inescapable conclusion is that the applicant has not established any new and compelling evidence to warrant the holding of a new trial. Whether certain issues relating to the analysis of evidence were considered or not is not a matter that falls within the purview of Article 50 (6) of the Constitution. I also find and hold that the applicant's case amounts to an attempt to rehear the appeal.***
>
> ***The application is dismissed."***

16. Aggrieved by the dismissal of the application for a new trial, the appellant filed a Notice of Appeal dated 11 th October 2015. The Notice clearly states that the appeal is against the judgment of the High Court delivered by Majanja, J. in **Civil Appeal Application No. 35 of 2014**.

17. We have perused the record of appeal. There is no Notice of Appeal against the judgment of the High Court delivered in **HC Criminal Appeal No. 278 of 2010** by R. Sitati and R. Lagat Korir, JJ. This aspect is very critical because the submissions made by the parties in this appeal relate to the judgment in **Criminal Appeal No. 278 of 2010**. In the absence of a Notice of Appeal against the judgment by R. Sitati and R. L. Korir, JJ., we find that all submissions made in this appeal are irrelevant to the appeal lodged in this matter since the instant appeal is against the judgment delivered by Majanja, J. on 22nd July 2015. It is further instructive to note that apart from the Notice of Appeal lodged against the judgment of Majanja, J. no memorandum of appeal was filed.

18. Further, we have analyzed the judgment of Majanja, J. and we are satisfied that on record, there are no compelling reasons and there is no new evidence that warrants a new trial of the appellant pursuant to the provisions of ***Article 50 (6)*** of the Constitution. In addition, a condition precedent to the application of ***Article 50 (6)*** is that an applicant's appeal must have been dismissed by the highest court to which

the person is entitled to appeal. In the instant matter, the appellant had a right to appeal against the decision of the learned judges in **HC Criminal Appeal No. 278 of 2010**. He has not appealed. It follows that the condition precedent for ***Article 50 (6)*** of the Constitution to apply was not fulfilled.

19. For the foregoing reasons, we find that the judgment delivered by Majanja, J. in **HCC Cr. Appeal No. 35 of 2015** remains unchallenged. We affirm and uphold the same.

20. As we have stated heretofore, the record in this appeal does not contain a Notice of Appeal against the judgment delivered in **HC Cr. Appeal No. 278 of 2010.**

21. For clarity, in his memorandum of appeal, the appellant contends that the two courts below erred when they maliciously accepted the misleading information given by **PW1** that he had been robbed; that the trial court erred in basing conviction on a poorly investigated case; that the correct information and dispute is a dispute over land as reported in OB No. 8/30/8/01; that the trial court erred in imposing the mandatory death sentence; and that the trial court did not give sufficient weight to the defence case.

22. Counsel for the appellant filed another memorandum of appeal urging several grounds *to wit:* that the learned judges erred in upholding the conviction and sentence when the plea entered was equivocal and or not properly taken; that the prosecution evidence was marred with inconsistencies and did not meet the standard of proof beyond reasonable doubt; that the judges erred in not interrogating the evidence relating to identification of the appellant; that the Judges erred in not quashing the conviction of the appellant which was obtained through gross violation of the appellant's right to fair trial; and that the death sentence meted upon the appellant was excessive.

23. At the hearing of the instant appeal, the appellant was represented by learned counsel ***Mr. Wamugonda*** holding brief for ***Ms. Olonyi***. The State was represented by Prosecution Counsel I, ***Mr. Peter Muia***. Both parties filed written submissions in relation to **HC Cr. Appeal No. 278 of 2010**.

APPELLANT'S SUBMISSIONS

24. The appellant in his written submissions contends that the evidence of PW1 was not authentic and credible and should not have been relied upon by the two courts below; that whereas the appellant does not deny that the complainant was robbed, the first report that was made at Isebania Police Station on 29th August 2009 vide OB No. 8/30/801 Exhibit MFI 1 indicates the report that was made was in respect of a land dispute between PW1 and the appellant; that no robbery incident was reported at the Police; that the information recorded in the OB report was read in court and the existence of the land dispute was affirmed; that **PW1**, **PW2**, **PW3** and **PW4** capitalized on the land dispute to frame up the appellant; that the investigation carried out in the matter was shoddy; and that the appellant's defence was not given consideration and the two courts below erred in imposing the mandatory death sentence.

25. In further submissions, the appellant contended that he was neither given witness statements nor informed of his right to legal counsel. These omissions violated his constitutional right to fair trial as per ***Article 25*** of the Constitution, the appellant's counsel submitted.

26. Challenging the veracity of the testimony of **PW1**, the appellant submitted that the prosecution did not lead evidence to prove that indeed the offence was committed at 7.15 pm. That if it was 7.15 pm, it was relatively dark and **PW1** could not positively have identified and recognized the appellant. As regards the alleged clothes worn by the appellant and identified by PW1, it was submitted that there are many people who wear similar clothes that look alike and from the same manufacturer. That for this reason, the evidence on clothing was insufficient to link the appellant to the alleged offence.

27. Lastly, the appellant reiterated that the death sentence meted out was harsh in light of the Supreme Court decision in **Francis Karioko Muruatetu & another vs. Republic, SC Petition Nos. 15 & 16 of 2015**.

RESPONDENT'S SUBMISSIONS

28. The respondent in opposing the appeal rehashed the background facts leading to the arrest, arraignment, trial and conviction of the appellant. It was submitted this was a second appeal which must be confined to matters of law; that all the ingredients of the offence of robbery with violence were proved; that the appellant's plea was equivocal and the trial court properly entered a plea of not guilty; that the procedure for plea taking was complied with; that the appellant never raised the issue before the trial court and the High Court.

29. On legal representation, it was submitted that the trial of the appellant took place before the promulgation of the 2010 Constitution and prior to enactment of the Legal Aid Act. Consequently, no injustice was occasioned to the appellant.

30. On the death sentence meted upon the appellant, it was submitted this Court is at liberty to revisit the sentence in light of the Supreme Court's decision in **Francis Karioko Muruatetu & another vs. Republic**, (supra). Nonetheless, the State submitted that the offence was committed by the appellant in a gruesome and heinous manner; that the appellant is not remorseful and therefore this Court should not interfere with the death sentence meted upon the appellant.

ANALYSIS and **DETERMINATION**

31. In this matter, there are two High Court judgments emanating from the appellant's conviction by the magistrate's court. The first is the judgment in **HC Criminal Appeal No. 278 of 2010** delivered on 29th February 2012 by R. Sitati and. R. Lagat Korir, JJ. As we have stated before, there is no Notice of Appeal against this judgment. There is nothing on record to indicate that leave to appeal out of time was granted to the appellant. There is also nothing on record to show that there was an application for extension of time to appeal out of time. In the absence of an application for extension of time and in the absence of a Notice of Appeal on record, we have no jurisdiction to hear and

determine an appeal against the judgment of the High Court in **Criminal Appeal No. 278 of 2010**. We note that all the written submissions filed by the parties in this appeal relate to **HC Cr. Appeal No. 278 of 2010**. The submissions filed do not support the appeal presently before this Court which is the appeal against **HC Cr. Appeal No. 35 of 2014**. Consequently, we refrain from delving into the merits of an appeal against the judgment delivered in **HC Cr. Appeal No. 278 of 2010** because the appeal is not before this Court.

32. In arriving at our decision, we derive comfort from dicta in the Supreme Court case of ***Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR,** where it was stated that:

> "***A Notice of Appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not. It is a jurisdictional pre-requisite."***

33. In the same case of ***Nicholas Salat vs. IEBC, 2013 eKLR*** *this Court stated that:*

> ***"The filing of a timely notice of appeal is a jurisdictional prerequisite. Unless the notice is actually or constructively filed within the appropriate filing period, an appellate court is without jurisdiction to determine the merits of the appeal and must dismiss the appeal."***

34. In this matter, we have pondered why both the appellant and the respondent filed written submissions as if the instant appeal were a second appeal against sentence and conviction. The record of appeal in this matter and the Notice of Appeal filed show that the appeal is against the judgment delivered in **HC Criminal Appeal No. 35 of 2014** by Majanja, J.

35. A baffling and perplexing state of affairs is that neither the appellant nor the respondent made submissions in relation to **HC Cr. Appeal No. 35 of 2014**. The legal consequence is that no ground or submissions were made against the judgment of Majanja, J. At the risk of repetition, we affirm and uphold the judgment of the High Court (Majanja, J.) delivered in **HC Cr. Appeal No. 35 of 2014.**

36. We hasten to add that the mix-up in this matter may have arisen from the numerous applications filed by the appellant at the High Court. We note that there is another application that had been filed by the appellant as **Kisii HC CRA No. 79 of 2010.** All these applications befuddled the appellant's case. It is advisable for an appellant and learned counsel to exercise diligence and ascertain what case and which application/appeal one is pursuing.

37. In penultimate, we are impelled to restate that ***Article 159 (2) (d)*** of the Constitution enjoins courts to deliver substantive rather than procedural justice. For a court to do so, the court must first have jurisdiction. It is the filing of a Notice of Appeal that confers jurisdiction to this Court. In the absence of a Notice of Appeal lodged in relation to **HC Cr. Appeal No. 278** of 2010, we have no jurisdiction and no option but to lay down our tools.

38. The upshot is that this appeal has no merit and is hereby dismissed.

Dated and delivered at Kisumu this 7th 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