IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 671 OF 2010

BETWEEN

EMMANUEL ELEPUDA BARASA .....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Busia (Msagha & Ochieng, JJ.) dated 2nd July 2009

in

HC.CR. A NO. 14 OF 2006)

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JUDGMENT OF THE COURT

[1] The appellant **Emmanuel Elepuda Barasa** has appealed against the judgment of the High Court *(Msagha & Ochieng, JJ.)* in which his appeal against conviction and sentence for the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code** was dismissed. The appellant had been jointly tried together with two others, by the Senior Resident Magistrate's court at Busia. The particulars of the charge stated that on the 3rd December, 2004, the appellant and two others at Katelenyang village while armed with a dangerous weapon to wit a rungu robbed Simon Oramisi Obaras (Simon) of Kshs. 8,950/= and used actual violence on him.

[2] The trial magistrate heard the evidence of 9 witnesses who testified for the prosecution. Briefly, Simon who was a Banana trader was on the material day at Amukura market where he met Noah Echopata Ekaraniti (Noah), who was the 1st accused in the trial court. Noah lured Simon by offering to sell bananas to him at a good price. Simon who had Kshs. 8,950/= on him agreed to accompany Noah to Katelenyang village where Noah claimed his crop was. When the two reached the village, the appellant (who was the 2nd accused in the trial court), emerged from the bush and started following Noah asking him where alcohol was, so that they could go and drink. Noah invited the appellant to accompany him and Simon to his home. Shortly thereafter yet another person (identified as the 3rd accused in the trial court and herein referred to as the 3rd person) joined them. Just when the trio and Simon were about to reach the alleged home of Noah, the trio turned upon Simon, robbed him of his money and started beating him with sticks, on his head, neck and body. In response to Simon's screams, Arnold and Francis who were having lunch at the home of Arnold, rushed to the scene and found the three men still beating up Simon. Arnold and Francis confronted the three whom they recognized as Noah and appellant by their names and the third man as a member of Ocharakaches' family. The three men then fled. Arnold and Francis took Simon who was injured to Alupe Hospital where he was attended to by a clinical officer Benson Amkoa who filled a P3 Form (that was produced in evidence), assessing Simon's injuries as harm. The matter was also reported to Anaset Okiyai Okodoi the Assistant Chief who circulated information in the area, and the appellant Noah and the 3rd person were later apprehended through assistance from members of the public.

[3] When put to their defence, the appellant, Noah and the 3rd person each gave a sworn statement denying having committed the offence. The appellant also called two witnesses who testified that on the material day the appellant and one Patrick had gone to plough one Robert Oundo's land. In his judgment the trial magistrate acquitted the 3rd person but convicted and sentenced the appellant and Noah to death.

[4] Being aggrieved the appellant filed an appeal in the High Court on the grounds that the evidence of the prosecution witnesses was inconsistent and contradictory, that no identification parade was carried out, and that his defence was not considered. Upon considering the appeal, the learned judges of the High Court dismissed the appeal, finding that the appellant was properly identified by three of the prosecution witnesses who all knew the appellant before, and therefore his *alibi* was displaced.

[5] The appellant is now before us in this second appeal in which he is represented by learned counsel **Mr. Kouko Cecil Wilson**, who has filed a memorandum (wrongly entitled petition) of appeal, in which he raises four grounds faulting the High Court, on the grounds: that the conviction of the appellant was based on doubtful and questionable identification by recognition, without any identification parade having been conducted; that the trial court erred in relying on evidence of the prosecution witnesses which was contradictory and inconsistent; that the trial court erred in rejecting the appellant's sworn statement of defence which was not challenged by the prosecution; and finally that the trial court erred in law and in fact by sentencing the appellant to death without exploring other forms of punishment.

[6] During the hearing of the appeal learned counsel for the appellant relied on written submissions that he had filed on 23rd July, 2019 and abandoned written submissions that had been earlier filed by the appellant in person. In the submissions the appellant reiterated that his identification by recognition was not satisfactory as Simon testified that he was attacked by three people and that it was evident that he did not know who his attackers were. That the appellant was only implicated by Arnold and Francis who claimed to have seen Simon's attackers and mentioned the appellant. The appellant maintained that without a proper identification parade the identification by the witnesses could not be relied upon as it was no more than dock identification which as stated by the Court of Appeal in ***John Wachira Wandia & Another vs. Republic [2006] eKLR*** is worthless without an earlier identification parade.

[7] Furthermore, it was submitted on behalf of the appellant that the evidence of Arnold and Francis was not reliable as even though the two witnesses purported to have arrived at the scene together, their evidence was full of inconsistencies; that the evidence of **Anaset Okiyai Okodoi** an assistant chief to whom Arnold and Francis reported the matter was also inconsistent with the evidence of the two witnesses; and that the learned judge erred in rejecting the appellants *alibi* when the prosecution evidence failed to rebut it.

[8] Finally on the issue of sentence it was submitted that the sentence of death that was imposed on the appellant was a violation of the law as reflected in the Supreme Court decision in ***Francis Karioko Muruatetu vs. Republic [2017] eKLR*** that the mandatory nature of death sentence is unconstitutional. The court was urged to consider the circumstances of the appellant's case as the appellant and his co-accused were alleged to have used sticks to beat Simon, and that the injuries that Simon suffered were not serious. In addition, the court was urged to find that the appellant having been in prison for fourteen years since conviction he had already paid for his alleged acts or omission. The Court was therefore urged to allow the appeal.

[9] Mr. Sirtuy learned Principal Prosecution Counsel who appeared for the State also relied on written submissions in which the Court was urged to dismiss the appeal. The respondent submitted that the appeal being a second appeal it was limited to matters of law only and that the Court was bound by the concurrent findings of the two lower courts unless there was a misapprehension of the law or the two courts were demonstrated to have acted on wrong principles; that the prosecution discharged its evidentiary burden of proof by proving the ingredients of the offence of robbery with violence in accordance with the case of ***Oluoch vs. Republic [1982] KLR***; that the appellant was recognized by Arnold as the robbery took place during the day between 1pm and 2pm, and that the evidence of Arnold was corroborated by the evidence of Francis.

[9] This being a second appeal, ***Section 361 (1) (a)*** of the ***Criminal Procedure Code***, provides that only matters of law fall for this Court's determination. As was stated by this Court in **David Njoroge Macharia vs R, [2011] eKLR,** under **Section 361** of the **Criminal Procedure Code:**

> ***"Only matters of law fall for consideration and the court will not normally 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 making the findings."***

[10] Having considered the record of appeal, the grounds of appeal, and the submissions made before us by counsel, it is evident that the conviction of the appellant for the offence of robbery with violence was anchored on his positive identification through recognition by the prosecution witnesses. In the case of **Wamunga- vs- R [1989] KLR 424**, this Court while addressing the issue of identification stated:

> ***"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."***

[11] From the evidence on record, it is apparent that Simon spent a reasonable amount of time with the people who robbed him. First, he walked with the person he identified as Noah as they headed to the home where Noah claimed he had bananas for sale. Secondly, the robbery happened during the day, that is, between 1.00 p.m and 2.00 p.m when conditions were favourable for Simon to see his attackers well. Simon was also able to observe and converse with both the appellant and the co-accused who joined them later as they continued to walk towards the purported home of Noah. The identification by Simon did not stand alone but was supported by Arnold and Francis who knew the appellant who is their cousin very well.

[12] Arnold and Francis gave the name of the appellant to the assistant chief of the area as one of the robbers who attacked Simon, and this was immediately after the robbery happened. The two therefore positively identified the appellant by name through recognition and there was no possibility of mistaken identification. We reiterate what this Court stated in the case of **Lesaran –vs- R [1988] KLR 783** that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name.

[13] In regard to the appellant's defence of *alibi*, both the trial court and the first appellate court rejected the *alibi* defence finding that the prosecution evidence placed the appellant at the scene of the robbery, and that Arnold and Francis who were related to the appellant had no reason to lie against him. On our part we find no reason to depart from the concurrent findings of fact made by the two lower courts. We find that the charge against the appellant was proved beyond reasonable doubt and that his conviction was proper. His appeal against conviction has therefore no merit.

[14] On the issue of sentence, the appellant who was convicted of robbery with violence contrary to section 296(2) of the Penal Code was

sentenced to death. This Court in **William Okungu Kittiny v Republic [2018] eKLR** held that the Supreme Court decision in **Francis Karioko Muruatetu & Another v Republic – Petition No. 15 of 2015** which **found that Section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides the death sentence for murder as mandatory** applies *mutatis mutandis* to **Section 296 (2)** and **297 (2)** of the Penal Code to the extent that these provisions provide for a mandatory death sentence. The sentence of death under **Section 296 (2)** and **297 (2)** of the Penal Code is therefore a discretionary maximum punishment, and the trial court is at liberty to exercise discretion in imposing a sentence other than the death penalty, where the circumstances so deserve.

[15] The appellant was given an opportunity to mitigate but opted to say nothing. This notwithstanding, it is evident that the circumstances in which this offence was committed were not so serious as to justify the death penalty. The appellant and his accomplices were only armed with sticks, and Simon did not suffer serious injuries. Had the trial magistrate properly exercised his discretion and taken into account all these factors, he would no doubt have considered a sentence other than the death penalty. In addition, taking note that the appellant was convicted and sentenced on 17th February 2006, and has already spent over 13 years in prison, we find that this is an appropriate case for our intervention and therefore allow the appeal against sentence.

[16] The upshot of the above is that we dismiss the appeal against conviction but allow the appeal against sentence, set aside the sentence of death imposed upon the appellant and substitute therefor a sentence equivalent to the term already served. The appellant shall therefore be set free forthwith unless otherwise lawfully held.

Those shall be the orders of the Court.

Dated and Delivered at Kisumu this 3rd day of October, 2019.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR