



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KOOME & KANTAL, J.J.A.)

CRIMINAL APPEAL NO. 13 OF 2018

BETWEEN

PETER MUTHUI1ST APPELLANT

JOHNSON MUTHUSI MUTINDA2ND APPELLANT

JAMES MUSEE MWOVE3RD APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi (S.N. Mutuku

& W. Korir, J.) dated 2nd November, 2013 in

HC. C.R.A. No. 79 of 2013)

JUDGMENT OF THE COURT

The appellants **Peter Muthui, Johnson Muthusi Mutinda** and **James Musee Mwove** were charged before the Resident Magistrate's court, Mwingi with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. It was stated in the charge sheet that on the 9th of March 2009 at Makutano village in the then Mwingi District being armed with dangerous offensive weapons namely knives they robbed **Theophilus Mutinda Sua** of cash **Shs.325,700** and a Motorola mobile phone and that at or immediately before or immediately after the robbery they wounded the said person. They were tried and convicted in a judgment delivered on 12th July, 2012 and they were sentenced to death.

They filed appeals to the High Court of Kenya at Garissa which were consolidated and after hearing the consolidated appeal it was dismissed in a judgment delivered on 22nd November, 2013 (**S.N. Mutuku and W. Korir, JJ.**).

Those findings provoked this appeal which is premised on supplementary grounds of appeal filed on 15th October, 2018 by their advocates **Ratemo Oira and Company Advocates**.

When the appeal came up for hearing before us, **Mr. Ratemo Oira**, learned counsel for the appellants informed us that he was not contesting conviction of the appellants and he was to urge only ground 8 of the supplementary grounds of appeal. In that ground it said that the judges of the High Court erred in law and fact by confirming the conviction and sentence by the trial magistrate whereas according to the appellants there was no evidence to support the conviction and sentence against them.

As stated the appellants are not contesting conviction and the appeal on conviction is accordingly dismissed.

On the issue of sentence counsel for the appellants referred us to the decision of the Supreme Court of Kenya in the case of **Francis Karioko Muruatetu v Republic [2017] eKLR** and asked us to set aside the sentence of death as handed down by the trial court and affirmed by the High Court and refer the file to the lower court for re-sentencing.

Mr. Moses Omirera, learned **Senior Assistant Director of Public Prosecutions** had nothing to say on the issue of conviction and did not

take a position on whether we should send the file back to the lower court for re-sentencing.

On our own consideration we are of the respective view that we have the necessary jurisdiction to consider the issue of sentence as **Rule 31** of the **Court of Appeal Rules** donate a general power to this Court to confirm, reverse or vary a decision of the High Court or give appropriate directions to that court.

We have perused the record and note that the appellants who were represented at the trial court when asked for mitigation after conviction, the 1st appellant stated that he was married with 3 children; that his father had passed away; and that his mother and children solely depended on him. The 2nd appellant stated that he had a wife and 4 children and that his mother who was a widow together with his family all depended on him. The 3rd appellant had nothing to say in mitigation.

We have considered the circumstances of the robbery. The appellants knew the complainant before as a person who traded in cattle. They knew that he had sold cattle that day and they waylaid him and robbed him of the proceeds of sale for that day. One of the appellants stabbed the complainant in the course of the robbery but the stabbing was not serious.

In the year 2012 when the appellants were convicted the law provided for imposition of the death sentence for a person convicted of the offence of robbery with violence. That was also the position in 2013 when the appeal to the High Court was concluded.

Mr. Oira counsel for the appellants has invited us to apply the holding in **Francis Karioko Muruatetu** (supra) case in considering whether the sentence of death should remain.

The Supreme Court in that case was invited to answer the question whether imposing the death sentence as a mandatory sentence was constitutional. The Supreme Court returned an answer that imposing the death sentence as a mandatory sentence was unconstitutional. Courts have therefore been freed to consider the circumstances of each particular case and mitigation offered amongst other factors in imposing sentence.

Considering the circumstances in this appeal we are of the respective view that a sentence of 20 years imprisonment would serve the purpose intended in criminal law for this particular case. We set aside the death sentence imposed on the appellants and substitute thereof a sentence of 20 years imprisonment against each of the appellants to be served from the date of conviction.

Dated and delivered at Nairobi this 22nd day of November, 2019.

R.N. NAMBUYE

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR