IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, MURGOR & ODEK JJ.A)

CRIMINAL APPEAL NO. 157 OF 2015

BETWEEN

ROBERT ODHIAMBO AKUMU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from judgment of the High Court of Kenya at Homabay (Majanja, and Nagillah, JJ) dated 22nd May 2015

in

HCCRA No. 134 of 2014)

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JUDGMENT OF THE COURT

Robert Odhiambo Akumu, ***the appellant*** was charged with two counts of robbery with violence contrary to ***section 296 (2)*** of the ***Penal Code***. The particulars of Count 1 were that on the 28th August 2013 at North Kanyamwa Location in Ndhiwa District of Homabay County, the appellant being armed with a dangerous weapon, robbed Sophia Atieno Okongo of cash Kshs. 20,000 and immediately before or immediately after the robbery wounded ***Sophia Atieno Okongo.***

The particulars of Count II were that on the 29th August, 2013 at North Kanyamwa Location in Ndhiwa District of Homabay County, the appellant being armed with a dangerous weapon, namely, a panga, robbed John Okongo Otieno of cash Kshs. 10,200 and immediately before or immediately after the robbery wounded ***John Okongo Otieno.***

The appellant denied committing the offences.

Upon finding that both offences of robbery with violence were proved, the trial magistrate convicted the appellant on both counts and sentenced him to death as prescribed by law, with the sentence in Count II being held in abeyance. The appellant was dissatisfied with the decision, and appealed to the High Court (Majanja and Nagillah, JJ), which upheld the conviction and sentence of the trial court.

The appellant now prefers a 2nd appeal to this Court on grounds that the trial court failed to appreciate

that the ingredients necessary for a conviction for the offence of robbery with violence were not proved; that the inference of guilt was not established as no documents were produced to prove that the stolen items existed; that the prosecution's case was fabricated, inconsistent and lacked any probative value and that the trial court wrongly relied on circumstantial evidence which did not meet the threshold. Finally, regarding the death sentence, it was submitted that the death penalty imposed on him was inhuman and against the principles of international law and the Constitution.

Mr. R. Maua, learned counsel for the appellant and ***Mr. Muia,*** learned counsel for the State both filed written submissions. Both counsels did not highlight their submissions, but instead chose to rely on them entirely.

The focus of appellant's submissions was the failure of the prosecution to prove that money was actually stolen; that the appellant's conviction was based on complainant's evidence which did not show that they were robbed, of Kshs. 20,000; or that the complainant in the second count was in possession of the money he claimed was stolen; that coupled with the existence of grudges arising from a boundary dispute, it was evident that the complainants' claims were fabricated; that without the element of stealing having been proved, the offence of robbery with violence was not established.

In his submissions, opposing the appeal, the respondent pointed out that this was a second appeal where this Court is mandated to consider matters of law only. The submissions identified two issues for determination in this appeal which were whether the prosecution satisfied the ingredients for the offence of robbery with violence, and whether the sentence imposed was harsh and excessive.

On whether the prosecution satisfied the ingredients of the offence, it was asserted that the requirements as set out in ***section 296 (2)*** were all satisfied; that the evidence showed that the appellant robbed the complainants of their money whilst armed with a panga, and that at the time of robbing them he violently attacked them, causing them to sustain serious injuries.

With regard to the sentence, it was observed that the appellant was sentenced to death, but notwithstanding the decision of the Supreme Court in the case of ***Francis Karioko Muruatetu & Another vs Republic, SC Pet. No. 16 of 2015*** which declared the mandatory nature of death sentence to be unconstitutional, this Court still had the discretion to impose the death sentence in deserving cases. The respondent asserted that the offence was committed in a gruesome and heinous manner, and despite the mitigation to the High Court, and his prayer for leniency, this Court should uphold the death sentence ordered by the trial court.

We have considered these submissions and carefully read the record of appeal. This being a second appeal and by dint of ***Section 361(2)*** of the ***Criminal Procedure Code***, this Court can only address a point or points on law only. In the case of ***Karingo vs Republic (1982) KLR 213*** this Court stated,

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below based on evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari C/O Karanja vs R (1956)17 EACA 146."***

The main issue for consideration in this appeal is whether the prosecution proved the offence of robbery with violence, particularly as the appellant claims that the money alleged to have been stolen did not exist.

In this regard the High Court concluded;

> ***"The findings confirm that PW1 was violently attacked on 28th August 2013 with a panga by the appellant which attack was corroborated by PW2. A mobile phone and cash of Kshs. 20,000 was stolen in the process, PW6 confirmed that PW1 was in possession of Kshs. 20,000 as she had taken a loan from Marela Kinda Women Group of which she was a member. The appellant, himself admits that he assaulted PW1 and hoped to be charged with a lesser offence fo (sic)***

either assault causing grievous harm, not robbery with violence under section 296 (2) of the Penal Code."

The ingredients necessary for a finding of the offence of robbery with violence are explicitly set out in ***section 296 (2)*** of the ***Penal Code*** which provides;

"If the offender is armed with any dangerous or offensive weapon or instrument, or is in the company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats strikes or uses any other personal violence to any person, he shall be sentenced to death."

The case of ***Johana Ndungu v. Republic Criminal Appeal No. 116 of 1995 (unreported)*** addressed the above requirements in these words;

"(i) Therefore, the existence of the afore described ingredients constituting robbery are pre-supposed in three sets of circumstances prescribed in section 296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section.

1) If the offender is armed with any dangerous or offensive weapon or instrument, or

(2) If he is in company with one or more other person or persons or

(3) If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person."

Bearing the above in mind, we now apply the provisions to the facts of the instant case. It was the 1st complainant's evidence that at about 5.00 p.m. on the 28th March 2013, the appellant came to her home armed with a panga. He proceeded to cut her on her right arm and left shoulder, on both breasts and on the left side of her neck with the panga, He then demanded that she gives him money and her Nokia phone. Sophia instructed him to go into the house to get her phone and also told him where he would locate money that she had borrowed.

Beryl Auma Okongo, PW2 was at home with her mother, the complainant above, when the appellant came towards them wielding a panga in his hand. When he was close to the complainant, he used the panga to cut her on the arm, right neck, left shoulder, her breast and her right leg. It was at that moment that PW2 raised the alarm and called for help. One Ann Opondo responded to her screams, causing the appellant to run away. By this time the complainant was bleeding profusely, and so Anne Opondo organized for a motorbike rider to take her to the hospital.

On the other hand, the complainant in count two stated that he was at home at about 8.00 a.m on the 29th August 2013 when the appellant came to his home armed with a panga and demanded money from him. He responded by accusing him of having attacked his wife, the complainant in count one. He also demanded to know where the appellant had taken her money. The response incensed the appellant who then told him that he would kill him. At that point, the appellant raised the panga to chop his head off, but he shielded his head with his hand causing two of his fingers to be chopped off instead. The appellant also cut him on his arm. He fell down unconscious, and only gained conscious when he was in hospital. ***Petro Odiwour Okongo PW 4*** was present and witnessed the appellant attack the complainant.

Moses Nyambane, PW 5, who was in charge of St. Camilus Hospital examined the complainant in count one. He reported that she had multiple wounds on the head, she had wounds on her abdomen and thorax, her left breast was cut, as was her right upper arm and the lower left leg.

In his defense the appellant denied committing the offence. He contended that the charges preferred against him were fabricated and arose out of a boundary dispute with the two complainants.

The evidence is unequivocal. The appellant attacked the complainant in count one with a panga as a result

of which she sustained severe injuries. PW2 and PW5 confirmed that she sustained severe injuries from the attack. In addition, the P3 form clearly indicated that she had suffered grievous harm. In the 2nd complainant's case, PW4 witnessed the appellant violently cut off two of his fingers with a panga, and the P3 form corroborated that evidence. It indicated that he had suffered harm. In both cases the courts found that the attack on both complainants satisfied the requirements for the offence of robbery with violence, in that immediately before the robbery, the appellant cut them them using a panga, causing them to sustain serious injuries.

Did the appellant steal the complainants' money? In the 1st complainant's case the evidence of ***Rose Amudo Omenya PW 6,*** the Chairlady of Marela Kinda Women's Group was categorical. She had borrowed Kshs. 20,000 on 15th August 2013 from the Group's funds. According to the 1st complainant, this was the money that the appellant had stolen. And when the 2nd complainant demanded to know where he had taken the 1st complainant's money, he became furious and attacked him with the panga and cut off two of his fingers. In 2nd complainant's case he gave the appellant Kshs. 10,200 to save his life. The two courts below were satisfied that the appellant robbed the complainants.

In view of the concurrent findings of fact of the two courts below with respect to the stolen money, we reiterate this Court's mandate as pronounced in the case of ***Gichuru vs R. [2005] 1 KLR 685*** at ***p. 694*** thus:-

> ***"As this is a second appeal, only points of law may be raised since this Court will not disturb concurrent findings of facts made by the two courts below unless those findings are shown to be based on no evidence – see*** *Njoroge vs. Republic* ***[1982] KLR 388;*** *Karingo v. Republic* ***[1982] KLR 213."***

As concerns the alleged grudge arising from a boundary dispute, since the issue was not canvassed during the trial, we consider it to be an afterthought and it is accordingly rejected.

As such, the ingredients for the offence of robbery with violence having been proved to the required standard, we find no merit in the appeal against conviction and it is hereby dismissed in its entirety.

With respect to the sentence, the appellant asserts that it was inhuman and against the Constitution. Since the delivery of the judgment of the High Court, the Supreme Court in the case of ***Francis Karioko Muruatetu & Another vs Republic, (supra)*** has declared the mandatory nature of the death sentence prescribed for the offence of murder by ***section 204*** of the ***Penal Code*** to be unconstitutional. In this regard, as the appellant has sought for a review of his sentence we substitute the sentence therefore with a custodial sentence of 20 years' imprisonment to run from the date of conviction and sentence in the trial court.

In the upshot, having regard to the circumstances of this case, we uphold the decision of the High Court and dismiss the appeal against conviction, but we substitute the sentence of death with 20 years' imprisonment to run from the date of conviction and sentence in the trial court.

It is so ordered.

Dated and delivered at Kisumu this 21st day of November, 2019.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.