IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, JJ. A.)

CRIMINAL APPEAL. 98 OF 2015

BETWEEN

PETER ESOKON MEJA *ALIAS* **UNCLE 'P' …..……..… APPELLANT**

AND

REPUBLIC ……..…… RESPONDENT

(*Appeal from the judgment of the High Court of Kenya at Kitale* ***(Karanja & Kimondo, JJ.)*** *delivered on 18th November, 2014*

in

HCCRA NO. 15 OF 2014

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JUDGMENT OF THE COURT

[1] Peter Esokon Meja Alias Uncle 'P' (hereinafter referred to as the appellant), together with his co-accused Jackson Ekiru, were tried and convicted by the Principal Magistrate's Court at Lodwar for the offence of robbery with violence contrary to **section 296 (2)** of the **Penal Code**. He was sentenced to life imprisonment while his co-accused was put on probation for a period of eight months.

[2] Being dissatisfied, the appellants appealed to the High Court. The High Court (Karanja & Kimondo, JJ.) heard the appeal, upheld the appellants' conviction and set aside the appellant's sentence of life imprisonment, on the ground that the offence of robbery with violence under section 296 (2) of the Penal Code carries a mandatory death sentence. Accordingly they substituted the life imprisonment with a death sentence.

[3] The appellant is now before us in this second appeal. In his memorandum of appeal that was filed in person on 28th November, 2014, the appellant raised six grounds. Mr. Bichangi, counsel representing the appellant, subsequently filed a supplementary record of appeal in which 7 grounds were raised. In brief, the appellant challenges the judgment of the 1st appellate court on the grounds that the learned judges erred in upholding his conviction as his identification was not proper; the prosecution case was not proved as it was full of contradictions; the charge was not established beyond reasonable doubt; the evidence of recent possession and circumstantial evidence was inadequate; the appellant's defence of alibi was improperly rejected; **section 200** of the **Criminal Procedure Code** was not complied with; and that the appellants constitutional right to a fair trial were violated.

[4] During the trial, six witnesses testified for the prosecution these were: Sadia Hussein (complainant) who stated that she was robbed of her Nokia mobile phone, beaten and threatened by the appellant and his co-accused, Manleed Isaac, a boda boda rider who was with the complainant at the time of the assault; Dr. Stephen Chelo, a medical officer who produced the P3 form prepared by Dr. Victoria who examined the complainant following the incident, Ahmed Saibu, a security guard who received a report of the robbery from a boda boda cyclist and called the police who went to the scene; PC Samuel Kanyi, who was one of the police officers who responded to the call and who gave chase to the robbers and arrested the appellant from whom he recovered a phone and a knife and Inspector Simon Kirui, an officer attached to Kakuma police station who produced the recovered exhibits in court.

[5] When put on their defence, the appellant gave unsworn evidence while his co-accused gave sworn evidence. They did not call any witnesses. The appellant's defence was that he had just alighted from Lodwar where he had spent the night and was walking home when he

was confronted by three people who arrested him and took him to a police station. He was shocked to be charged with the offence of robbery with violence. He produced receipts for his travel from Lodwar to Kakuma.

[6] The appellant's co-accused testified that he was a standard seven (7) pupil at Pokom Primary School. On the 1st June, 2012, he left the school as Hon. William Ruto was to be at Kakuma on 2nd June, 2012, and as a choir member, they were to perform for him. He went to town to buy school uniform but did not find the material for his school uniform. He then went into Lamada Hotel where he ate and after he left the hotel, three people followed him. Upon the men learning that he had money in his pocket, they claimed that he had stolen the money and arrested him. He was later charged alongside a stranger he did not know.

[7] In his judgment, the trial magistrate, found that the complainant was attacked beaten up and robbed of her phone in broad daylight by three people who were armed with a knife and a rungu. The trial magistrate rejected the defences of the appellant and his co-accused finding that the evidence tendered by the prosecution, overwhelmingly confirmed that the complainant was robbed by the appellant and his co-accused and this was confirmed by the recovery of the knife and the complainant's phone from the appellant. He therefore convicted the appellant and his co-accused and sentenced them.

[8] During the hearing of his 1st appeal, the appellant contented that the charge against him was defective as there were inconsistencies in the serial number of the mobile phone given in the charge sheet, and the mobile phone produced in court; that there were contradictions in the prosecution case; that the allegedly dangerous weapons that the appellants used were not produced in court; that the charges against him were framed due to an old grudge; that there was no first report made to the police or a description of the complainants assailants and that the sentence imposed by the trial magistrate was inequitable.

[9] In their judgments, the learned judges of the High Court found that the case against the appellant was fully established by the evidence adduced by the prosecution witnesses; and that the defence of the appellant was discredited by the prosecution evidence; that both the complainant and the boda boda operator confirmed that the appellant was involved in the commission of the offence; that the offence having occurred in broad daylight, the conditions were favourable for a positive identification and that the recovery of the complainant's stolen phone from the appellant a few minutes after the theft constituted sufficient and credible circumstantial evidence against the appellant.

[10] This being a second appeal, our mandate is limited to considering issues of law only and we have to give due deference to the concurrent findings of the 1st appellate court and the trial court and only interfere if there was no evidence at all upon which such findings were based. ***(Boniface Kamande & 2 Others vs Republic [2010]*** eKLR.)

[11] In arguing the appeal, Mr. Bichangi, counsel for the appellant submitted that the appellant's right to a fair trial was contravened as the proceedings were conducted in Somali language which the appellant did not understand and no interpretation was provided as required under Article 50(2)(n). Counsel further pointed out that, the appellant was taken to court long after the stipulated period of 24 hours and that the court ignored these constitutional violations.

[12] In regard to the appellant's identification, counsel submitted that the appellant was arrested at a distance not far from the scene, and that at the time of the arrest, the complainant was not present and no details were given about the description of the 3rd person who was alleged to be in the company of the two.

[13] It was submitted that the appellant's alibi defence was ignored including the receipt produced to support this defence. It was further posited that section 200 of the Criminal Procedure Code was not complied with, as the magistrate who wrote the judgment did not have the opportunity of hearing the complainant's evidence. As regards the recovery of the phone and a knife, it was maintained that the prosecution evidence was not clear on how the recovery was done or who had which weapon.

[14] Mr. Mulati, Senior Principal Prosecuting Counsel, opposed the appeal. He pointed out that from the record of the proceedings in the lower court, it was clear that the appellant understood the proceedings as he cross examined the witnesses at length; that although the 24-hour requirement may not have been complied with, it could not be a basis for allowing the appeal; that there was clear evidence of identification of the appellant and recovery of items which the complainant had been robbed of from the appellant, shortly after the robbery; and that the alibi defence was properly rejected as it included the period that the appellant was in custody.

[15] In regard to the appellant's complaints that his constitutional right to a fair trial were violated, it is evident from the court record that no such complaints were made either to the trial court or to the 1st appellate court. In his defence, the appellant testified that he travelled back to Kakuma on 3rd June, 2012, and that he was arrested and taken to Kakuma Police Station and arraigned in court on 5th June, 2012. That does not reflect any violation of the 24-hour requirement given that the appellant had to be tried at Lodwar Law Courts.

[16] With regard to the language used during the trial, the record reflects that during the plea the interpretation was done for English/Kiswahili/Turkana. That appeared to have been the position when the matter came to court on 20th December, 2012 for hearing. However, the complainant and Manleed Isaac, gave their evidence in Somali language. Although there is no indication of interpretation having been done from Somali/English/Kiswahili, the appellants and his co-accused both extensively cross examined the complainant and Manleed Isaac. There is no way these two witnesses could have been extensively cross examined if the appellant and his co-accused were not understanding the proceedings. It is evident to us that there was interpretation to a language that the appellant understood. Indeed, the appellant did not complain about the interpretation in the 1st appellate court. It is evident that the appellant is simply trying to capitalize on an inadvertent omission in the record of proceedings.

[17] The appellant also complained that the trial court did not comply with section 200 of the Criminal Procedure Code. A perusal of the proceedings of the trial court indicates that there were two magistrates who heard the appellant's case. The second magistrate, took over on the 3rd of September, 2013. The court record indicates that the provisions of section 200 of the Criminal Procedure Code were explained to the appellant and his co-accused, and the appellant responded that he wanted the case to proceed from where the matter had reached.

Thereafter the court ordered proceedings to be typed and the hearing proceeded after the proceedings were typed. Therefore the appellant's complaint has no basis.

[18] Both the complainant and Manleed Isaac identified the appellant as having been one of the three men who attacked and robbed the complainant. The incident happened in broad daylight. Therefore, the possibility of a mistaken identification was minimal. The appellant's fate was further sealed by the recovery of the complainant's mobile phone from him shortly after the robbery. The mobile phone was recovered from the appellant by PC Samuel Kanyi who arrested the appellant. The recovery was witnessed by the complainant and Ahmed Sadia and the phone was positively identified by the complainant. In the circumstances, there was overwhelming evidence against the appellant and his defence of alibi could not therefore stand. Accordingly, we uphold the appellant's conviction.

[19] As regards the sentence, the appellant was given an opportunity to mitigate and all he said was that he was the sole bread winner and that he was sorry. Instead of the death sentence the trial magistrate, sentenced him to life imprisonment. This was not comparable with the sentence of eight months' probation imposed on the appellant's co-accused. But the disparity is explained by the co-accused's defence that he was a primary school student implying that he was a very young man.

[20] Be that as it may, the learned judges of the High Court relying on the Court of Appeal decision, in ***Joseph Njuguna Mwaura & Others vs Republic [2013]*** eKLR (**Mwaura** decision) for the proposition that section 296(2) of the Penal Code carries a mandatory death sentence, interfered with the sentence of life imprisonment imposed on the appellant by the trial court and substituted a death sentence. In the **Mwaura** decision, a five (5) judge bench of this Court disagreed with the earlier position taken by this Court in the ***Godfrey Ngotho Mutiso vs Republic [2010]*** eKLR, (**Mutiso** decision), that section 204 was unconstitutional to the extent that it provided for a death penalty as the only sentence for the crime of murder.

[21] In the recent Supreme Court decision in ***Francis Karioko Muruatetu & Another vs Republic [2017]*** *eKLR,* Petition No.15 of 2015, the Supreme Court affirmed the **Mutiso** decision and held that although the Constitution recognizes the death penalty as being lawful, it does not provide that when a conviction of murder is recorded only a death sentence should be imposed. Consequently, the Supreme Court declared the mandatory nature of the death sentence provided under section 204 of the Penal Code as unconstitutional.

The following extract from the judgment in the **Muruatetu** decision is instructive:

> **"[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust, and unfair. The mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has nonetheless to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Article 25 of the Constitution; an absolute right."**

[22] Section 204 is similar to section 296 (2) of the Penal Code that provides a mandatory death sentence. Therefore, the arguments in the **Muruatetu** decision can be extended to cases of robbery with violence under section 296 (2). That is what we recently did in ***William Okungu Kittiny vs Republic***, Civil Appeal No. 56 of 2013 (unreported), where applying the **Muruatetu** decision, we held as follows:

> ***"… the findings and holding of the Supreme Court particularly in paragraph 69 applies mutatis mutandis to section 296 (2) and 297 (2) of the Penal Code. Thus, the sentence of death under section 296 (2) and 297 (2) of the Penal Code is a discretionary maximum punishment. To the extent that section 296 (2) and 297 (2) of the Penal Code provides for mandatory death sentence the sections are inconsistent with Constitution".***

[23] For this reason, we find it appropriate to interfere with the death sentence imposed on the appellant by the 1st appellate court. In our view, given the circumstances of the offence, and the mitigation that was offered by the appellant, a sentence of 10 years imprisonment would be appropriate.

[24] The upshot of the above, is that we dismiss the appellant's appeal against conviction, but allow his appeal against the sentence. Consequently, we set aside the death sentence imposed upon him and substitute thereto a sentence of 10 years imprisonment to take effect from the date of his conviction.

Those shall be the orders of the Court.

Dated and delivered at Eldoret this 22nd day of March, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

……..……

JUDGE OF APPEAL

J. MOHAMMED

…….…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.