IN THE COURT OF APPEAL

AT ELDORET

CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, JJ.A.)

CRIMINAL APPEAL NO. 22 OF 2015

BETWEEN

WYCLIFFE WANGUSI MAFURA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against a Judgment of the High Court of Kenya at Eldoret, ((Azangalala & Mshila, JJ.) dated 11th October, 2012

in

HCCRA. NO. 136 OF 2009)

****

JUDGMENT OF THE COURT

[1] This is an appeal from the Judgment of the High Court, (Azangalala & Mshila, JJ.), dismissing the appellant's appeal against conviction and sentence of death for the offence of robbery with violence contrary to **section 296 (2)** of the penal code.

[2] The particulars of the charge of robbery with violence alleged that on 24th January, 2009 at Eldoret Township, the appellant jointly with others not before the court while armed with a dangerous weapon namely, a pistol robbed Sophia Lobolei, (complainant), of Kshs. 70,000 and at or immediately before such robbery wounded her.

The complainant is an M-pesa agent running M-pesa services at the top floor of KCB building at Eldoret. On 24th January, 2009 at about 2 p.m. when she was about to take the money to the bank a person entered into the premises, removed a pistol from the waist, pointed it at her head and told her to keep quiet. Two minutes later, a second person whom she identified as the appellant entered, closed the door, went straight to where the complainant was seated, held her by the neck and blocked her mouth with his hand. The complainant struggled with him and managed to shout. The person armed with the pistol was stuffing money in his pockets. Meanwhile, Kibet Kipruto who was working in an advocate's office heard screams from the M-pesa premises. He rushed there and saw two people in the office – one holding the complainant by the neck and another standing behind her armed with a pistol. The person armed with a pistol started coming out and Kibet Kipruto ran away after which the two persons left. The complainant went to the window and shouted to the police who were on the ground floor. She then went down stairs where she found the appellant already arrested by police and members of the public and she identified him as one of the two persons who had just robbed her. The person who had the money had disappeared.

[3] The appellant stated in his unsworn defence at the trial that on 23rd January, 2009 the previous day he had gone to a M-pesa outlet to transact business but the transaction did not go through; that on the following day he went back and the transaction went through; and that as he was passing near Telecom building at about 2 p.m., he was accosted by some people, interrogated and arrested.

[4] On the basis of that evidence, the trial court convicted the appellant as charged. The appellant offered mitigation but the trial magistrate said that his hands were tied by the law and sentenced him to death as prescribed by the law.

His appeal to the High Court was dismissed.

[5] The appellant's main ground of appeal relate to identification and adequacy of the evidence. His complaint is that the High Court made a partial re-evaluation of the evidence.

Mr. Chemwok, the learned counsel for the appellant, submitted that the documents relating to the M-pesa transactions were not produced to prove that money was stolen and that the appellant was there on the previous day, and that the members of the public who arrested the appellant were not called as witnesses.

Mr. Mulati, the prosecution counsel, supported the decision of the High Court and submitted that there were concurrent findings of fact by the trial court and High Court on the identification of the appellant and that theft of money does not have to be proved by records.

[6] Under **section 361(1)** of the **Criminal Procedure Code** a second appeal to this Court can only be on a matter of law. Further, this Court does not normally interfere with concurrent finding of facts of the two courts below unless it is based on no evidence if no other reasonable tribunal could have reached such decision. The two courts below made a finding of fact that the complainant was robbed of Kshs.70,000/=.

There was clear evidence that the robbery took place in broad daylight at 2.00p.m. The complainant testified that the appellant had gone to the premises on the previous day and deposited Kshs.700/= and that she came to know his name through that transaction.

The identification of the appellant by the complainant was supported by Kibet Kipruto who went to the premises to answer the screams.

The evidence of the complainant that the appellant held her by the neck was also supported by the evidence of Kibet Kipruto.

The appellant was arrested shortly thereafter and the evidence indicated that he was arrested before he left the building.

The evidence of the complainant that the appellant's accomplice was armed with a pistol was also supported by Kibet Kipruto. The High Court evaluated the evidence and made a finding that the evidence of the complainant and Kibet Kipruto was consistent and that they had ample opportunity to observe the appellant.

[7] The prosecution case essentially depended on the credibility of the complainant and Kibet Kipruto on one hand and the statement of the appellant on the other hand. The trial magistrate believed the evidence of the two witnesses and disbelieved the statement of the appellant saying that the defence was not credible and was an afterthought. An appellate court does not normally interfere with the finding of the trial court based on the credibility of witnesses unless no reasonable tribunal would have arrived at such findings. The High Court as the first appellate court upheld the findings of the trial court such that there were concurrent findings of fact made by the two lower courts.

[8] From the foregoing, we are satisfied that the prosecution case against the appellant was overwhelmingly credible and that the High Court properly directed itself in dismissing the appeal. There are no reasons for interfering with the concurrent findings of the two courts below.

In the premises, the appeal against conviction fails.

[9] As regards sentence, the Supreme Court in **Francis Karioko Muruatetu & Another V. Republic, Petition No. 15 of 2015,** (Muruatetu's case), held at para 69;

> ***"Consequently, we find that section 204 of the penal code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum penalty."***

In addition, the Supreme Court said at para 111 of the said judgment;

> ***"It is prudent for the same court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners. For avoidance of doubt, the sentence re-hearing we have allowed applies only to the two petitioners herein …"***

[10] Section 204 of the Penal Code provides that **"Any person convicted for murder shall be sentenced to death**." Similarly **section 296(2)** of the Penal Code provides that the offender convicted for robbery with violence in circumstances stipulated therein;

> ***"shall be sentenced to death."***

[11] In **William Okungu Kittiny Vs. Republic** , **Court of Appeal, Kisumu Criminal Appeal No. 56 of 2013**, this Court recently held at para 9;

> ***"From the foregoing, we hold that the findings and holding of the Supreme Court, particularly in para. 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."***

We also said in **William Okungu Kittiny's** case (supra) that the decision of the Supreme Court in **Muruatetu's case** has an immediate and binding effect on all other courts and that the decision did not prohibit courts below it from ordering sentence re-hearing in any matter pending before those courts.

Accordingly, since this appeal had not been finalized, this Court has jurisdiction to direct a sentence re-hearing or pass any appropriate sentence that the trial magistrate's court could have lawfully passed.

[12] Although the Supreme Court did not outlaw the death sentence, we are of the view that in the circumstances of this case, the death sentence was not warranted. The appellant gave mitigating circumstances but the trial magistrate considered that the hands of the court were tied. It is not therefore necessary to order a sentence re-hearing. The appellant has been in custody for 9 years. The complainant did not sustain serious injuries. However, the robbers were armed with a pistol.

In the circumstances a sentence of imprisonment would serve the interest of justice.

[13] For the foregoing reasons, the appeal against conviction is dismissed. However, the appeal against sentence is allowed. The sentence of death is set aside and in substitution therefore the appellant is sentenced to 20 years imprisonment to take effect from 19th August, 2009 when he was sentenced.

Orders accordingly.

DATED and delivered at Eldoret this 1st day of March, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR