IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, PCA, M'INOTI & MURGOR JJ.A)

CRIMINAL APPEAL NO. 156 OF 2016

BETWEEN

GEORGE MUNYINYI KIHUYU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from judgment of the High Court of Kenya at Nairobi (Mbogholi Msagha, & Achode, JJ.) dated 23rd *June 2014 in HCCRA No. 247 of 2012)*

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JUDGMENT OF THE COURT

In this second appeal, **George Munyinyi Kihuyi**, ***the appellant***, was charged together with ***Peter Kiniu Wahinya***, the 2nd accused person, before the Chief Magistrate's Court at Kiambu, with robbery with violence contrary to ***section 296 (2)*** of the ***Penal Code***.

The particulars of the offence were that on 20th May 2011 in Kiambu County, jointly with another not before the court, they robbed ***Daniel Kamunya Mukindi*** of Kshs. 400 and a mobile phone make LG valued at Kshs. 1,500 and at or immediately before or immediately after the time of the robbery wounded the complainant, ***Daniel Kamunya Mukindi, PW1 (Daniel).***

The brief facts are that on the material day at about 11.00 p.m., after Daniel had alighted at a stage from Nairobi, he met a watchman of the Maasai ethnic community, whom he briefly spoke to after which he proceeded home. At a place called Nameless, three people, one of whom he recognized as the appellant, and the other as the 2nd accused, approached him. They attempted to strangle him and robbed him of Kshs. 400 and a mobile phone. He was able to see them with assistance of security lights from a bar and a chemist. After the robbery, he immediately reported the incident to the police and provided the names of the appellant and the 2nd accused.

Daniel was treated for neck injuries he suffered, and when ***Richard Munene (PW3),*** a clinical officer from Karuri Health Centre examined him, he noted that he had tenderness around the neck due to strangulation. He subsequently issued Daniel with a P3 Form.

On a Friday, Daniel saw the appellant at a mosque and with the assistance of ***Saiko Ndaskoi PW 2 (Saiko),*** a watchman at Ndenderu, and members of the public, arrested him and took him to the police station. The 2nd accused was later arrested, and Daniel was called to identify him having given his descriptions to the police.

PC Moses Tingoi (PW 4), was on duty at Rueno Police Post on 21st May, 2011 at about 1. 20 a.m. and received Daniel's report that he had been robbed of a mobile phone and Kshs. 400. Daniel informed him that two suspects were known to him by name and one by appearance and gave the names of George Munyinyi and Kamanda. PC Tingoi booked the report and on the following day arrested the appellant upon receiving information that members of the public were holding him.

In their unsworn statements of defence, the accused persons denied committing the offence. The appellant stated that he was a mechanic in Ngara; that on the day he was arrested, he had gone to wait for his brothers at a bar. He further stated that he was arrested on allegations that he had taken part in a robbery. The 2nd accused stated that he worked in a hotel in Kiambu, and was arrested whilst on his way home from work.

The learned trial magistrate found that the offence had been proved beyond reasonable doubt, convicted and sentenced the appellant to death

as prescribed by law, but acquitted the 2nd accused person upon concluding that he was not properly identified. The appellant appealed to the High Court, which upheld the conviction and the sentence imposed by the trial court. The appellant now prefers an appeal to this Court.

The memorandum and supplementary memorandum of appeal stated the grounds to be that, the High Court erred by failing to evaluate the evidence that the complainant was wounded, yet the P3 form was completed 4 days and 9 hours after the offence was allegedly committed and the appellant arraigned in court; in upholding the conviction on the basis of recognition by a single witness, yet the offence was alleged to have taken place at night under difficult circumstances; in failing to appreciate that the trial court did not take the appellant's defence into account; in failing to hold that the appellant was denied a fair trial as envisaged by the Criminal Procedure Code and the Constitution; in concluding that the evidence disclosed robbery with violence instead of simple theft; and in upholding the conviction without proof of ownership of the phone and money.

In submissions in support of the appeal, ***Ms. B. Rashid,*** learned counsel for the appellant began by submitting that during the hearing, the appellant's rights were contravened, as he was not provided with prosecution witness statements despite his request and an order of the court directing the prosecution to supply the same. She lamented that the crucial testimony of the 1st and 2nd prosecution witnesses was taken without the statements having been availed to the appellant.

It was further submitted that the trial court was biased, against the appellant and his co-accused because it rejected their application for adjournment accusing them of trying to delay the hearing of the case, yet she had previously readily granted applications for adjournment by the prosecution.

Counsel also submitted that prior to the appellant's arraignment on 26th May 2011, the prosecution had sought to rectify and amend the charge sheet on 23rd May 2011. However, instead of amending the charge sheet, the prosecution subsequently introduced a new charge sheet, which the appellant pleaded to on 19th May 2011. Counsel argued that this was a fundamental irregularity, which gave rise to two charge sheets in respect of the same charges, thus resulting in a mistrial.

Counsel further asserted that the appellant was not properly identified because the evidence did not disclose the intensity, direction, or the distance of the light, which rendered the circumstances unfavourable for positive and safe identification.

On re-evaluation of the evidence, counsel submitted that the High Court wrongly concluded that the complainant was found to have been wounded, yet there was no evidence to support the finding, and that the only evidence noted by the clinical officer was tenderness on the complainant's neck, which injury was assessed as 'harm'. It was further argued that the High Court failed to appreciate that the appellant was arraigned in court on 25th May 2011, and that the P3 form was obtained on 30th May 2011, which was subsequent to his arraignment. In the appellant's view, that this was intended to fabricate evidence to support the framed up charges against him. Counsel also submitted that the High Court failed to appreciate that the evidence of the place where the appellant was arrested was contradictory, as the complainant stated that it was in a mosque, while Saiko stated that it was in a bar.

The final complaint was that, both the trial court and the High Court did not take into account the appellant's defence.

On his part ***Mr. Wanyonyi***, learned counsel for the State opposed the appeal and submitted that there was no violation of the appellant's right to a fair hearing because, after he applied and the court directed that he be supplied with witness statements, the appellant never raised the issue again. Counsel also submitted that there was no basis for the claim that the court was biased against the appellant when it declined to grant his application for adjournment, because it was only trying to balance the interests of all the parties.

On the submission that there was no evidence to support the complainant's injuries that were classified as harm, it was submitted that the P3 form showed that the injuries were caused by a blunt object on the neck, and following the concurrent findings of both the trial and the High Court, the ingredients of the offence of robbery with violence were established. Regarding the delay in seeking medical treatment, it was argued that no timeframe is specified in that regard, and with respect to the amendment of the charge sheet, counsel argued that the appellant understood the charges he was facing, he was not prejudiced, and did not raise any complaint about the charge sheet.

On identification, the respondent submitted that the complainant knew the appellant and that there was sufficient lighting at the scene, which assisted in his identification. Regarding ownership of the phone, it was the respondent's submission that the issue was not raised either in the proceedings before the trial or the first appellate court.

In a second appeal, the jurisdiction of this Court is confined to questions of law only. See ***Joseph Njoroge vs Republic [1982] KLR 388.*** We have carefully considered the grounds of appeal and the parties' submissions and consider the issues for determination to be;

i. whether the appellant was accorded a fair hearing;

ii. whether his trial was vitiated by the existence of more than one charge sheet;

iii. whether the appellant was properly identified;

iv. whether the High Court properly re-evaluated the evidence; and

v. whether the trial court took into account the appellant's defence.

We begin with the issue whether the appellant was denied a fair trial, since he was not supplied with witness statements, and further because the trial court was allegedly biased. The record shows that on 15th September 2011, the appellant requested for witness statements. Pursuant

to this request, the trial court adjourned the trial and ordered the prosecution to supply the appellant with witness statements. The appellant made no further reference to the witness statements until on 28th February 2012, when his co-accused indicated that he was not ready to proceed with the trial and applied for adjournment. In support of that application, the appellant stated that he had not been supplied with a charge sheet. He did intimate to the court that he had not been supplied with the witness statements were as ordered.

If indeed the appellant had not been supplied with the witness statements, we expect that nothing would have been easier than for him raise the issue before the commencement of the trail as he had done before. Instead his complaint was limited to the charge sheet. We are satisfied that is complaint has no merit and was a mere afterthought, which is not borne out by the record.

On whether the trial court was biased, the record shows that from the taking of plea on 19th July 2011 until the commencement of the hearing, the prosecution applied for adjournment on two occasions, while the appellant and 2nd accused applied for adjournment on four times, twice on account of illness. On the basis of the evidence on record, we do not consider the observation by the trail court that *"It is surprising that the accused persons do not want to proceed when they have seen the witnesses in court yet they have been objecting to adjournments..."*, is demonstration of bias against the appellant. It is evident that the trial court was endeavoring to balance the interest of the parties, and to ensure that the trial was not delayed for no good reason. Accordingly, we are satisfied that this complaint also no basis and lacks merit.

Concerning the existence of two charge sheets, the record shows that at the appellant's first appearance in court on 23rd May 2011, C/P Nyamae informed the court of a problem with the charge sheet which he required to rectify upon consultation with the investigating officer. At the mention of the case on 26th May 2011, the charge was read and explained to the appellant, following which the trial court entered a plea of not guilty. On 19th July 2011, an amended charge sheet which include the 2nd accused was again read to both the appellant and 2nd accused, whereupon, both pleaded not guilty to the charges of robbery with violence contrary to ***section 296 (2)*** of the ***Penal Code***. Though the charge sheets of 23rd May 2011 and 26th May 2011 were not included in the record before us, we called for the original record and confirmed that the appellant and his co-accused were tried jointly for the offence of robbery with violence on the basis of the charge sheet dated 19th July 2011.

Section 214 (1) (i) of the **Criminal Procedure Code** requires that in instances where the charge sheet is substituted, the accused must be called upon to plead afresh. It reads;

> **"Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:**
>
> **Provided that-**
>
> **i. where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge."**

From the trial court's record, it is apparent that the appellant did not take a plea in respect of the charge sheet of 23rd May 2011 because the prosecution applied to amend it. Thereafter on 25th May 2011, the appellant took plea for the offence of robbery with violence. This was subsequently substituted with the charge sheet of 19th July 2011, which charged the appellant and his co-accused with the offence of robbery with violence contrary to ***section 296 (2)*** of the ***Penal Code***. Upon substitution, both the appellant and 2nd accused pleaded not guilty to the charges, and the trial court entered their pleas as such. It is on the basis of this charge that the appellant was tried, and subsequently convicted and sentenced. We can find no anomaly in the manner in which the charge sheet of 25th May 2011 was substituted with that of 19th July 2011. The substitution was in accordance with ***section 214 (1) (i)*** of the ***Criminal Procedure Code***, and as such we find that this ground lacks merit and is accordingly dismissed.

On the evidence of identification, the trial court having duly warned itself that Daniel was a single identifying witness, came to the conclusion that the appellant was properly identified. The court observed that there was evidence of security lighting at the scene, and that Daniel recognized the appellant as a person he knew by name through his voice and appearance. After re-evaluating the evidence, the High Court concluded as a follows on the issue:

> **"We observe that the appellant was known to PW1 prior to the attack and that identification was by recognition of his voice and appearance. From the testimony of PWI there was light at the scene coming from the security lights at Nameless bar and a chemist nearby. He testified that "the lights were very near the scene.'"**

From the foregoing, both courts below concluded that the appellant was properly identified through visual recognition, which identification is *"…more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."* See ***Anjononi & others vs Republic [1980] KLR***.

Since Daniel recognized the appellant, with the aid of security lights at the scene as a person who was known as George Munyinyi, which name he gave to PC Moses Tingoi when he first reported the incident, we are satisfied that the courts below rightly concluded that this was a case of recognition.

Finally, we turn to the question of whether the High Court properly evaluated the evidence. In this regard the court stated;

> **"Having given careful consideration to all the circumstances of this *case, we find that PW1 was indeed attacked by three***

persons who included the appellant on the ill-fated night. That he was robbed of cash Kshs 400/= and a mobile phone make LG worth Kshs. 1,500/=. That although the robbers were not apparently armed, they wounded him in the course of the robbery, as evinced from the evidence of PW3 the Clinical Officer who examined him 4 days later and still noted tenderness in his neck region. In view of the aforegoing the ingredients of Section 296 (2) of the Penal Code were satisfied."

The appellant has complained that the High Court did not re-evaluate the evidence, to determine whether Daniel suffered actual harm as indicated in the P3, or whether the injuries indicated in the P3 form that was completed 4 days and 9 hours after the appellant was arraigned in court, were fabricated so as to support the framed up charges.

Contrary to the appellant's assertion, after analyzing the medical evidence, the High Court was satisfied that Daniel had sustained neck injuries, when it stated"*…that although the robbers were not apparently armed, they wounded him in the course of the robbery, as evinced from the evidence of PW3 the Clinical Officer who examined him 4 days later and still noted tenderness in his neck region."*

As to whether he had sustained the injuries, it was Daniel's testimony that he was strangled, as a consequence of which he suffered injuries on his neck and pain in his throat for which he was treated. This evidence was corroborated by the testimony of ***Richard Munene, PW3***, the Clinical Officer at Karuri Health Centre, who stated that Daniel had sustained injuries on his neck, and that on examination, there was tenderness around the neck secondary to strangulation. From the foregoing, it is clear that that the evidence pointed to the fact that Daniel sustained the neck injuries following the attack.

Concerning the appellant's submission that the P3 form was completed 4 days after the appellant was charged in order to lend support to the framed up charges on the basis of non-existent injuries, an examination of the P3 form discloses that, Daniel was *"…treated at Karuri Health Centre on 25th May 2011 at around 8 .00 a.m. by a medical practitioner…"*, which evidence was also supported to by Richard Munene. Clearly, this was prior to the date when the appellant was first arraigned in court.

At this juncture, it must be observed, that the appellant did not at any time challenge the medical evidence or object to the production of the P3 form. Without evidence to the contrary, both the trial court and the High Court cannot be faulted for concluding that Daniel was injured in the course of the robbery, and that he was examined and treated prior to the date of arraignment of the appellant in court, and consequently issued with the P3 form. And as a consequence, we find that we have no reason to interfere with the concurrent findings of fact of the two courts below on the injuries Daniel sustained.

In addressing the contradiction between the evidence of Daniel and Saiko on the place of arrest, the High Court observed that;

"… as to whether the appellant was arrested at a mosque or at a bar, it is evident that PW1 first saw him at a mosque and went to enlist the help of PW2 in effecting the arrest..."

Thereafter with the assistance of Saiko and other members of the public, the appellant was arrested in a bar. In fact, the appellant's defence lends further support to the place of arrest, as he stated that he went to wait for his *"…brothers in a bar."* Like the High Court, we can find no material contradiction in the evidence surrounding the place of arrest.

Turning to the appellant's defence, we are not persuaded that the courts below ignored to take the same into account. The trial court observed that in his defence the appellant had gone to wait in a bar for his brother when he was arrested. The High Court went further to add that the appellant's defence did not raise an *alibi* because his testimony was concerned with the date of his arrest. We therefore find that this complaint is without merit.

All in all, we are satisfied that the High Court properly reevaluated the evidence, and rightly concluded that the requisite ingredients of ***section 296*** (2) of the ***Penal Code*** were met, and that the prosecution had accordingly proved its case beyond reasonable doubt.

For the offence for which the appellant was convicted, he was sentenced to death. Since the delivery of the judgment of the High Court challenged in this appeal, the Supreme Court has held in ***Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015*** that the mandatory death sentence prescribed for the offence of murder by ***section 204*** of the Penal Code is unconstitutional. The Court expressed itself in these terms:

"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 an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, 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."

While the ***Muruatetu*** decision concerned the interpretation and application of ***section 204*** of the ***Penal Code*** on the offence of murder, it is not lost to us that ***section 296(2)*** of the ***Penal Code*** on robbery with violence proceeds in much the same way as ***section 204*** in prescribing a mandatory sentence of death for a person convicted of the offence of robbery with violence or attempted robbery with violence. In terms of legal principle, there is no reason why the reasoning of the Supreme Court should not apply to the offence of robbery with violence, in respect of which the Penal Code prescribes a mandatory sentence of death. Indeed in ***Willam Okungu Kittiny v. Republic, Cr. App. No. 56 of 2013*** this Court concluded as follows:

"From the foregoing, we hold that the findings and holding of the Supreme Court particularly 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 a mandatory death sentence, the sections are inconsistent with the Constitution."

(See also ***Wycliffe Wangusi Mafura v Republic*** ***[2018] eKLR***)

The appellant was a first offender, and a fairly young man at that. From the evidence on record, neither he nor his co-accused was armed with any weapon, dangerous or otherwise. The property stolen from the complainant was Kshs. 400 and a mobile phone. The complainant did not suffer any significant injury, only superficial ones, inflicted by bare hands in the course of the robbery. In these circumstances, we are satisfied that the death sentence imposed on the appellant is completely disproportionate. The appellant has been incarcerated since May 2011, a period of more than seven years.

In the premises, the appellant's appeal against conviction hereby fails and is dismissed in its entirety. As regards sentence, we hereby allow the appeal, set aside the sentence of death imposed on the appellant and substitute therefor an order sentencing the appellant to the period already served. It is so ordered.

This judgment is signed and delivered pursuant to ***rule 32(2)*** of the Court of Appeal Rules.

Dated and delivered at Nairobi this 31st day of July, 2018.

K. M'INOTI

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR