



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA & GATEMBU, JJA)

CRIMINAL APPEAL NO. 27 OF 2009

BETWEEN

DANIEL GICHIMU GITHINJI.....1ST APPELLANT

SYLVESTER ODERO ONDIEK.....2ND APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Appeal from the Sentence of the High Court of Kenya at Nairobi (Ojwang & Omondi, JJ.) Dated 4th February, 2009

in

HC.CR.A. NO. 449 of 2005)

JUDGMENT OF THE COURT

The appellants, **David Gichimu Githinji** and **Sylvester Odero Ondiek** (appellants), were jointly arraigned before the Senior Resident Magistrates' Court at Kibera, charged with the offence of Robbery with violence contrary to section **296(2)** of the Penal Code (Cap 63) laws of Kenya. The particulars of the offence were that, the appellants on the 4th day of September, 2004, along Silanga Road Hardy Estate within the Nairobi Area Province (as it was then known, now Nairobi County), jointly being armed with a dangerous weapon namely, *a panga* robbed **Dorothy Awuor Bonyo**, of her handbag valued at Kshs. 600/=, and at or immediately before, or immediately after, the time of such robbery, threatened to use actual violence to the said **Dorothy Awuor Bonyo**.

The appellants denied the charge prompting a trial in which the prosecution tendered evidence through four (4) witnesses namely, **Dorothy Awuor Bonyo** (PW1) (the complainant); **Patrick Mulwa**, (PW2); **Joseph Nguta**, (PW3) and Police constable **Musyimi Mwanzia** (PW4), while the appellants were the only witnesses in their defences.

The prosecution case was that, on the material day, PW1 was walking alone on the said road. At around 1.30pm, she noticed the appellants walking the same direction as her. The first appellant came and passed her. She then felt somebody pull her handbag from behind. She turned and saw that it was the second appellant. She struggled with him over the handbag and fell down in the process. The 2nd appellant managed to snatch the handbag and took off with it. She raised an alarm. The first appellant who had by then by passed her turned back in a bid to offer assistance, pretending to be a Good Samaritan. He then suddenly pulled out *a panga* from his clothes and cut her on the hand in a bid to silence her from screaming for help. He then fled in the same direction as the second appellant. They both disappeared into a nearby bush located about three hundred (300) metres from the scene of the robbery. PW1 followed them while screaming for help. Members of the public responded to her distress call and pursued the two into the bush they had disappeared into. Among the members of the public who pursued the appellants

into the said bush was PW2. It was his testimony that when he confronted the 1st appellant, he threatened him with a *panga*, and that sensing danger from the 1st appellant, he picked up a stone and hit him with it, injuring him in the process. The 1st appellant was therefore unable to flee and was arrested from the said bush with the assistance of the members of the public who had converged at the scene in response to PW1s' distress call and subsequently handed to police.

The 2nd appellant sensing danger, abandoned the handbag in the bush, ran out of the bush into a garage and then into a nearby Red Brick Hotel. He locked himself in the reception room of the said hotel from where he was flushed out by police officers who came to the scene. The concurrent evidence of PW1 and PW2 is that both the handbag and the *panga* were recovered from the bush and subsequently handed over to the police as exhibits. The appellants were thereafter arraigned before the court for the above offence.

When put on his defence, the first appellant admitted that he was on the same road as PW1 at the material time; that there were no other persons on the said road at the material time; that he heard PW1 scream for help saying that she had been robbed of a handbag but denied seeing her carrying anything when he first saw her. He also admitted seeing PW2 at the scene and identified him as the person who hit him with a stone, injuring him in the process. He also admitted that he was beaten by members of the public. His explanation for the assault on him by members of the public was that of mistaking him for one of the robbers.

The second appellant also admitted to have been within the vicinity of the scene of the robbery on the same date and time, save that he said that he was an innocent customer at the Red Brick Hotel in whose reception room he was flushed out by the police. He explained his presence and locking in the reception room in the said Hotel as being that of an innocent customer who had been detained for failing to meet his food bill and later handed over to the police and subsequently charged jointly with the 1st appellant whom he did not know before, and also prosecuted for an offence he knew nothing about.

At the conclusion of the trial, the learned trial magistrate evaluated and analyzed the record before her, dismissed the appellants' defences, found the prosecution case proved to the required threshold, found the appellants guilty as charged, convicted and sentenced them to death.

Being aggrieved, the appellants appealed to the High Court against that conviction. The High Court (**J.B. Ojwang**, as he was then), and **H. A. Omondi, JJ.**), after re-evaluating and re-analyzing the evidence on the record before them and in the impugned judgment dated the 4th day of February, 2009 dismissed the appeals. Undeterred, the appellants are now before this Court on a second appeal. They rely on the supplementary grounds of appeal dated the 16th day of January, 2018, and filed on the 17th day of January, 2018. They complain that the learned Judges of the High Court erred in law:

(1) By failing to adequately or at all to exhibit an independent mind and to re-evaluate the evidence on record afresh.

(2) By relying on insufficient and contradictory evidence as a basis for affirming the appellants' convictions in breach of section 163 of the evidence Act.

(3) By failing to appreciate the law as it pertains to the evidence of identification especially by a single identifying witness.

(4) By relying on unproven and or wrong evidence tendered during the trial thereby occasioning a miscarriage of justice.

The appeal was canvassed by way of oral submissions. Learned counsel **Miss Mwae** appeared for both appellants, while the learned senior Assistant Director of Public Prosecutions (SADPP), **Mr. O' Mirera Moses**, appeared for the State.

In support of the appeal, learned counsel **Miss Mwae** urged us to fault the 1st appellate court Judges for their failure to appreciate properly the existence of lack of coherence in the prosecution evidence with

regard to the recovery of the exhibits tendered in evidence which in her view, were fundamental contradictions, and the failure to reconcile these by the learned Judges before affirming the appellants' convictions was fatal to the prosecution's case.

On the identification of the assailants at the scene, counsel urged us to fault the concurrent findings of the two courts below on this aspect of the appeal as they failed to appreciate that the incident lasted a very short time; that the attack was not anticipated by the complainant and was therefore sudden and from behind; that PW1 was alone at the time of the attack and was therefore the sole identifying witness; that she also fell down in the course of the attack and when she rose up she saw a person fleeing with her hand bag. It was not therefore possible in the circumstances for her to positively identify the person who was fleeing with her handbag as she definitely saw him from behind, urged counsel.

It was also counsel's submission that when PW1 rose up, she was confronted by a person who was armed with a *panga* and who cut her before fleeing in the same direction as the first person. She must have been terrified, shaken and traumatized and could not therefore have registered the appearance of the person who cut her with a *panga*. Further, that the testimonies of PW2, 3 and 4 had no probative value to the prosecutions' case on the identification and the arrest of the appellants as the same was contradictory, and which contradictions were also never reconciled by the two courts below and were therefore fatal to the prosecution's case. Second, it was not disputed that they were arrested three hundred (300) meters away from the scene of the robbery. The said evidence, in counsel's view, did not therefore oust the appellants' explanations that their presence in the proximity to the scene of the alleged robbery was innocent, and that they were therefore victims of mistaken identity.

To buttress the above submission, counsel relied on the case of **R. versus Turn Bull [1976] 3ALLER 549**, on the principles that guide the Court on the admission or otherwise of evidence on identification of an accused person in connection with the offence charged; **Erick Otieno Arum versus Republic [2006] eKLR**, on the mandate of a first appellate court; and lastly, **Michael Norman Mbacho Njoroge & Another versus Republic [2016] eKLR**, on the necessity of an identification parade in instances where the prevailing circumstances were not conducive to positive identification of the assailants.

In opposition to the appeal, the learned SADPP submitted that the 1st appellate Court Judges properly re-evaluated and re-analyzed the evidence before them and arrived at the correct conclusion which should not be disturbed; that the findings by the two courts below that the circumstances prevailing at the scene of the robbery were conducive to positive identification of the assailants was well founded both in law and on the facts as PW1's unchallenged testimony was that she never lost sight of the robbers; that PW2 who responded to PW1's distress call for help saw the 2nd appellant fleeing from the scene of the attack with a handbag before abandoning it in the bush they had taken refuge in before heading to the Red Brick Hotel through a nearby garage from where he was subsequently flushed out by the police; that the 2nd appellant conceded that he was arrested in the very hotel PW2 saw him fleeing towards; that his evidence that he was an innocent guest in the said hotel was properly discounted by the two courts below as there was no other explanation for his conduct of locking himself in the hotel reception room other than for purposes of shielding himself from the wrath of the members of the public who were pursuing him in connection with the robbery they had committed against PW1.

Turning to the defence of the 1st appellant, counsel urged that the 1st appellant's own evidence that he was a victim of circumstances was also properly discounted by the two courts below as they believed the testimony of PW1, that she saw him and the second appellant trailing her before the attack and pretended to be innocently by passing her only to turn back and cut her when she screamed for help after the 2nd appellant had snatched her handbag. Counsel therefore urged us to affirm the findings of the two courts below that it is PW2 who hit the 1st appellant with a stone in self defence as the 1st appellant was threatening to cut him (PW2) with a *panga*.

On alleged existence of discrepancies in the prosecution evidence, counsel urged that the appellants cannot use the testimonies of PW3 and 4 who arrived at the scene much later to contradict the evidence of PW1 and 2 who were the eye witnesses. Second, that the alleged contradictions if any existed in the prosecutions' case as alleged by the appellants, then these were minor and did not go to the root of the

prosecutions' case. They were therefore properly discounted by the two courts' below.

With regard to the failure to hold an identification parade, counsel urged that an identification parade was not necessary in the circumstances as PW1 never lost sight of the assailants; that the appellants admitted being arrested in close proximity to the scene of the robbery; that since the incident also took place in broad day light the possibility of mistaken identity did not therefore arise. Further, that although PW1 was a single identifying witness to the robbery, her evidence was sufficiently corroborated by that of PW2, 3 and 4. Lastly, counsel urged that the issue of recent possession was properly considered by the two courts below in conjunction with that on the identification of the appellants in connection with the commission of the offence, weighed against the appellants' defences and properly found them displaced.

In reply to the respondent's submission, learned counsel **Miss Mwae** reiterated her earlier submissions that the two courts below did not give weight to the appellants' defences; that the persons who arrested the appellants did not come to testify; that the 1st appellant's explanation that he was an innocent good Samaritan, erroneously mistaken as one of PW1's assailants; and that of the 2nd appellant that he was an innocent customer detained for his inability to meet his food bill were never ousted by the prosecution's evidence.

Turning to the severity of the sentence, counsel urged us to be guided by the Supreme Court decision in the case of **Francis Karioko Muruatetu & Another versus Republic** [2017] eKLR, and interfere with the death sentence as that was not the only appropriate sentence in the circumstances of this appeal, considering that neither life nor property were lost.

This being a second appeal, by didn't of section 361 of the Criminal Procedure Code (CPC), only matters of law fall for our consideration. See **Mwita versus Republic** [2004] 2KLR60. In **Karingo versus R.** [1982] 213 at P.219 this Court said:-

"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 unless based on no 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 Kareri S/O Karanja versus R. *1956+ 17 EACA 146."

We have given due consideration to the record in the light of our above mandate, the rival submissions set out above and the principles of law relied upon by the appellants. In our view, the following issues fall for our determination, namely:-

- (1) Whether the learned Judges of the High Court failed to re-evaluate the evidence on the record a fresh with independent minds.***
- (2) Whether the prosecution evidence was full of contradictions, inconsistencies and discrepancies.***
- (3) Whether the learned Judges' of the High Court failed to properly appreciate the evidence on identification.***
- (4) Whether the evidence tendered in support of the prosecution case met the threshold of proof beyond reasonable doubt.***

With regard to issue number 1, the correct position in law is that, a first appellate court is obligated to reconsider the evidence, re-evaluate it itself and draw out its own conclusions on the evidence before it in order to satisfy itself that there was no failure of justice. That it is not sufficient for a first appellate court to merely scrutinize the evidence to see if there was some evidence to support the trial court's findings and conclusions. See **Ngui versus Republic** [1984] KLR 729.

We have considered the record in line with the above principle. We find that the approach the learned Judges of the 1st appellate court took when determining the appellants' appeals before them was first of

all to state the offence the appellants faced before the trial court. They then reappraised and re-evaluated the evidence tendered before the trial court for and against the prosecution, issues for determination as drawn by the trial court, the conclusions reached by the trial court on those issues and the reasons given therefor, the grounds of appeal raised by the appellants against the conclusions reached by the trial Court, and the submissions by the respective parties on appeal. They then rendered themselves as follows:-

“We have carefully considered the evidence on record, and the manner in which the trial Magistrate analysed the same, in coming to her verdict. All the evidence shows agreement that the complainant, the 1st and the 2nd appellants were in the same area, the locus in quo, at the material time. The complainant then gives clear testimony that 2nd appellant violently wrenched her handbag from her, and took off with it; she also testifies that 2nd appellant was acting in cahoots with the 1st appellant who had a machete, and who threatened her if she persisted in screaming out in alarm. The complainant testifies that both appellants took off, and she followed them screaming for aid. Then at that very moment, 1st appellant with his said machete accosted PW2; but PW2 dealt upon him a blow which immobilized him, and enabled members of the public to arrest him. In the meantime, 2nd appellant who apprehended crowd ire, escaped into a hotel room; and he was securely apprehended therefrom.”

It is clear to us that the complaint’s evidence of identification for (sic) 1st appellant is abundantly corroborated by the factor of the machete; by the complaint’s perception; and by the testimony of PW2. This is overwhelming proof that 1st appellant was one of the robbers of (sic) the material day.

No less poignantly is 2nd appellant identified. Firstly the complainant’s reliable testimony shows 2nd appellant to be the man who seized her handbag, struggled with her and felled her, in broad daylight, and then took off on foot. The recovery of the said handbag close to the locus in quo is a circumstance which corroborates the complainant’s testimony. Then, not only did the complainant perceive 2nd appellant run away and coming towards members of the public brought out by the complainant’s alarm, but PW2 and PW3 of Redbrick Hotel saw him mount a ruse, by seeking refuge in the hotel where he was by no means a legitimate client. The complainant too, saw 2nd appellant avoid trouble with Good Samaritans, by nipping into the hotel. All this is overwhelming evidence supporting the charge that 2nd appellant, along with an armed gangster, 1st appellant, were involved in a robbery attack on the complaint on the material day.

It is our finding that the learned Magistrate judiciously assessed the evidence, and came to the right conclusion. We dismiss the appeal by both appellants; uphold the conviction in each case; and affirm the sentence meted out in respect of each appellant.”

From the above excerpt of the impugned Judgment, we find a clear demonstration that the sequence of the procedural steps taken by the Judges in the disposal of the appeals before them as outlined above as well as the conclusions reached thereon as to why the appellants appeals were rejected as also highlighted above, leaves no doubt in our minds that the threshold set in the **Ngui versus Republic** case (supra) was met.

With regard to issue number 2, the Court in **Joseph Maina Mwangi versus Republic- Criminal Appeal No. 73 of 1973**, held, *inter alia*, that, “in any trial, there are bound to be discrepancies and that an appellate court in considering those discrepancies must be guided by the wording of section 382 of the Criminal Procedure Code to determine whether such discrepancies or contradictions are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence. The role of an appellate Court when an issue of alleged existence of discrepancies, contradictions and inconsistencies is alleged to exist in the prosecution case is to reconcile and determine their impact on the prosecution case. See **Vincent Kasyula King’oo versus Republic Nairobi CRA. No. 98 of 2014**.

The contradictions and discrepancies complained of by the appellants are those that allegedly related to the recovery of the exhibits and the arrest of the appellants. As submitted by the learned SADPP **Mr. O'Mirera**, and correctly so in our view, matters pertaining to the recovery of the exhibits and the arrest of the appellants are issues of fact in respect of which the two courts below have made concurrent findings thereon, that the appellants were sufficiently linked to the recovery of the exhibits and the commission of the offence they faced before the trial court. It was also correctly submitted by counsel that we can only in law interfere with the above concurrent findings of fact by the two courts below if satisfied on the record before us that those facts were either misapprehended by the two courts below or that there was a misapplication of the law to those facts. See **Mwita versus Republic** (supra) for the holding, *inter alia*, that:

“an invitation to depart from concurrent findings of fact by the trial and first appellate court should be declined by the second appellate court unless, it is persuaded that there are compelling reason for doing so. The only compelling reason (s) would be that no reasonable tribunal could on the evidence adduced have arrived at such findings or in other words the findings were perverse and therefore bad in law.”

The sequence of the evidence with regard to the commission of the robbery against PW1, the recovery of the exhibits as well as the arrest of the appellants in connection with the said offence as already summarized above, when considered in the light of the principle in **Joseph Maina Mwangi versus R.** case (supra), leaves no doubt in our minds that there was no misapprehension of the evidence in relation to either the recovery of the exhibits or the arrest of the appellants in connection with the offence they faced before the trial court. Neither do we find any misapplication of the law to those facts. We therefore find nothing on the record that would have justified the first appellate court to discount the findings of the trial court on that aspect of the prosecution's case. It is also our view that if any inconsistencies or contradictions existed in the said evidence which we have already ruled above that non existed, then these did not go to the root of the prosecution case. They were rightly discounted by the two courts below as being inconsequential to the success or otherwise of the prosecution's case.

As to whether or not the appellants were positively identified at the scene of the robbery is an issue of law. In numerous decisions of this Court, the principles on identification of an accused person in connection with the commission of an alleged offence have been so well pronounced that it is now trite law that:-

“... a trial court has the duty to consider with utmost care, evidence of identification or recognition before it bases a conviction on it. In particular, if the conditions under which such identification is purported to have been made were not favourable and if the identification is by a single witness; although recognition raises less problems than identification of strangers, nonetheless even in cases of recognition; there is need to exercise caution before conviction is entered. It is this establishment that evidence of visual identification in criminal cases can cause miscarriage of justice if it is not carefully tested. In the case of Kiarie v. Republic [1984] KLR 739, this Court made it clear that before a conviction can be entered against a suspect on account of visual identification, such evidence must be water tight as it is possible for even a honest witness to make a mistake. . See the case of John Njeru Kithaka and Ibrahim Ndwiwa Murugu v. Republic. Nyeri CA 436 of 2007 (UR).

The dicta which has always been cited with approval in those cases is from **Lord Widgery CJ** (as he then was) in the case of **Republic vs. Turnbull** [1976] 2 ALL ER 549 at page 551, thus:-

“First, whenever the case against an accused person depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such warning and should make some reference to the possibility that a mistaken witness, can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the judge should direct the jury to examine

closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?

Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made”.

In the instant appeal, it is undisputed that PW1 was the only identifying witness as to the robbery committed against her. It is also not disputed that the appellants were also strangers to her as she did not claim to have known them before the robbery. In **Abdallah Bin Wendo versus R. 20 EACA**, the Court held:

“Subject to certain well known exceptions, it is trite law that, a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult.”

In **Maitanyi Versus R. [1986] KLR 198** at page 201, the Court held inter alia that: *“The strange fact is that, many witnesses do not properly identify another person even in day light....In Kariuki Njiru & 7 others Versus Republic [2001] eKLR, the Court held inter alia that: “the law on identification is well settled and this Court has from time to time said that, the evidence relating to identification must be scrutinized carefully and should only be accepted and acted upon if the Court is satisfied that the identification is positive, and free from the possibility of error.”* in **Benson Mugo Mwangi Vs. Republic Criminal Appeal Number 238 of 2008** the Court held inter alia that: *“Thus on the issue of identification, provided that the trial Court tests the evidence of a single witness with the greatest care, a conviction can be based on the evidence of such a single witness....”*

The 1st test to be applied as provided for by the Court in the same holding in the **Benson Mugo Mwangi** case (supra), is simply for the Court to ensure that the witness upon whose evidence it is proposed to rely to found a conviction is one who does not create an impression in the mind of the Court that he/she is not a straight forward person or that he/she is a witness who raises suspicion about his/her trustworthiness or he/she has done or said something which indicates that he/she is a person of doubtful integrity and therefore an unreliable witness, which makes it unsafe to accept his/her evidence in the circumstances.

The second test is that, once the Court is certain in its mind that the witness is honest, the Court must proceed to consider whether the circumstances prevailing at the time and place of the incident were favourable and conducive to positive identification of the assailant. The matters to be considered when determining whether the prevailing circumstances were favourable and conducive to positive identification of the assailants at the scene of the crime include matters such as the time when the offence took place i.e whether it was at night or in broad day light.

When the above guiding principles are considered in the light of the concurrent findings of the two courts below on the issue of the identification of the appellants in connection with their involvement in the commission of the offence they faced before the trial court, it is our finding that both courts' below were satisfied and correctly so in our view, that the incident took place in broad day light; that it was PW1 and the appellants who were first at the scene of the alleged robbery; that PW1 never lost sight of her assailants whom she chased as she screamed for help; that PW2 responded to the distress call of PW1 and with the help of other members of the public arrested the 1st appellant from the bush only three hundred (300) meters from the scene of the robbery; that the 2nd appellant when he sensed that members of the public were closing in on them ran out of the bush they had taken shelter in through a garage and into Red Brick Hotel located within close proximity to the scene of the crime, locked himself in the reception room

from where he was subsequently flushed out by the police. It is on the basis of the above factors that both courts below rejected the appellants' respective defences that they were victims of mistaken identity. We find no error in the said concurrent findings of fact on this aspect of the appeal by the two courts below as they were satisfied, as we now are that there was no reason for PW1 and the other prosecution's witnesses who did not know the appellants before to frame them up in connection with the offence charged. We find no reason to disturb those concurrent findings.

As for the last issue, it is undisputed that the offence the appellants faced was one of robbery with violence contrary to section 296 (2) of the Penal Code. The ingredients for the offence of robbery with violence contrary to section 292(2) of the Penal Code were well articulated in the case of **Johana Ndungu versus Republic-Criminal Appeal Number 116 of 2005**, as follows:-

(i) If the offender is armed with any dangerous or offensive weapons or instrument, or

(ii) If he is in the company with or more other person or persons, or;

(iii) If at or immediately after the time of the robbery, he wound, beats, strikes or uses any other violence to any person.

It is also trite that proof of any one of the above ingredients of robbery with violence would suffice to sustain a conviction under the said section. See **Oluoch Vs. Republic [1985] KLR 549**. In this appeal, the appellants were two and violence was used against PW1 as she was threatened and then cut with a panga by the 1st appellant after the 2nd appellant had snatched her handbag from her and ran off with it. We are in the circumstances satisfied as the two courts below that there was no doubt that the ingredients of the offence charged were satisfied.

On sentence, **Miss Mwae** does not dispute that the sentences as handed out by the trial Court and affirmed by the 1st appellate court is lawful. She has however, informally invited us to temper with the said sentence in line with the holding made by the Supreme Court, in **Francis Karioko Muruatetu and another versus Republic [2017] eKLR**. We have judicial notice of the fact that this is not the first such request to be similarly made for the Court to consider tempering with a lawful maximum sentence in the light of the holding made by the Supreme Court in the above case.

In **Juma Anthony Kakai versus R. Criminal Appeal No. 48 of 2015** in a judgment delivered by the Court (**Koome, G.B.M. & J. Mohammed, JJ**) as recently as the 18th day of May, 2018, the following observations were made:-

[17] In this regard this ground of appeal also fails and so is the entire appeal which we find devoid in merit. However, we must take cognizance of recent developments in the Law in this area and apply it to the present case, particularly because the same is advantageous to the appellant. In its recent decision in Francis Karioko Muruatetu and another vs Republic, (2017) eKLR the Supreme Court of Kenya, pronounced that the mandatory aspect of the death sentence as the only lawful sentence was unconstitutional. The Court therefore effectively removed the fetters placed on the courts' discretion when passing sentence in cases which hitherto carried the death penalty as the only lawful sentence upon conviction. This decision allows us to interrogate whether the death sentence herein should be maintained. We observe that the appellant was a first offender although when he was offered an opportunity to mitigate he offered none. This is understandable in our view because death sentence was the only one provided by the law, the court had no discretion to pass another sentence even if the interest of justice would not be met due to the circumstances of the appellant or under which the offence was committed. Say for instance a first offender or even a youthful offender who had just passed the threshold of the age of minority, or where the offender in the cause of committing the offence did not cause any injury or serious threat to the life or limb of the complainant and they stole items of insignificant value, in all these circumstances the court had no discretion for persons charged with the offence of robbery with violence to pass any other sentence. Luckily the Supreme Court decision has cured that imbalance in criminal law by restoring judicial function of sentencing in capital

offences.

[16] We have mulled over the prospect of whether to remit this file to the High Court for the appellant to undergo a fresh mitigation; in this regard, we also considered the delay that is attendant to such a process and the increase in backlog of cases, in the end we were satisfied that as the appellant was a first offender, was sufficient to inform us that although the offence he was charged with was serious, the ends of justice would not be served by him serving a death sentence. In the circumstances we find the ends of justice would be served if the death sentence herein is reduced to a period of 20 years. Accordingly although the appeal on conviction fails, we are inclined to interfere with the judgment in regard to the death sentence which we hereby set aside and substitute thereto with a term of twenty years effective from conviction.

In **Julius Mutei Muthama Vs. Republic Criminal Appeal No. 198 of 2016 (Ouko (P), Nambuye & Musinga, JJA)** also delivered on the same date of the 18th day of May, 2018, the following observations were made.

*“We are well aware that the judgment by the trial court was delivered long before the Supreme Court pronounced itself on the constitutionality of death sentence in **Francis Karioko Muruatetu & Anor v Republic [2017] eKLR**. In that matter, the Supreme Court held, inter alia:*

“The mandatory nature of the death sentence as provided for under section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence contemplated under Article 26(3) of the Constitution.”

The Supreme Court further held that in a murder trial the mitigating submissions of an accused person must be taken into consideration before sentence is pronounced”.

The court, having found that the appellant had not been given an opportunity by the trial court to make mitigating submissions in the **Julius Mutei Muthama** case (supra), remitted the matter to the High Court for re-hearing on sentence only.

We have given due consideration to **Miss Mwae’s** request for us to temper with the lawful maximum sentences handed out by the trial court against the appellants and affirmed by the first appellate court, in the light of the Supreme Court decision in **Francis Karioko Muruatetu & Anor Vs. Republic** (above).

In the instant appeal, we find that both appellants stated in their mitigation before the trial court that they were first offenders, a fact not disputed by the prosecution. We also take note of the fact that the infliction of violence on PW1 was minimal and the item robbed from her was also recovered. In our view, a sentence of fifteen years imprisonment would suffice in the circumstances. We therefore find it prudent to interfere with the sentence affirmed by the first appellate court, set it aside and substitute it with one of fifteen years’ imprisonment to run from the date of the arrest of the appellants. To that extent only does the appeal succeeds.

Dated and delivered at Nairobi this 13th day of July, 2018.

R.N. NAMBUYE

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JUDGE OF APPEAL

D.K. MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU FCIArb

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR