IN THE COURT OF APPEAL

AT KISUMU

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

J. MOHAMMED JJ.A.)

CRIMINAL APPEAL NO. 293 OF 2012

BETWEEN

DENIS OLE SITIMA.....FIRST APPELLANT

MICHAEL MAIGURA.....SECOND APPELANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kisii, (Musinga & Makhandia, JJ.) dated 7th May, 2010

in

HCCRA NO(S). 9 & 10 OF 2007)

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JUDGMENT OF THE COURT

[1] On the night of 5th and 6th May, 2006, there was a spate of robberies at Kipsoruwet Village in Murgan Sub-Location, Transmara. Joel Bor (Bor), who operates a shop in the village was one of the victims of the robbery. The robbers who posed as Police Officers asked for his shop licence, and using torches searched the house and took Kshs.2,300/= which were proceeds from the sales for the day. The men tried to tie Bor with a rope, but he managed to escape and ran to a nearby maize plantation. C C N (C) was another victim. She was woken up by her daughter one C who had been asleep together with her other siblings, C C (C) and N C in an outside kitchen. Upon opening the door, C was followed into the house by three people wearing police uniforms. C had lit a lamp and was therefore able to see the three people who entered. One of the men asked for money threatening to kill her, and she gave him Kshs.800/= which she removed from her pocket. The men also broke into her wooden box and took Kshs.1,000/=.

[2] In the meantime, from his hiding place, Bor who was following the activities of the robbers, raised an alarm and the villagers including Wesley Kipsang Bii (Bii) responded. By then the robbers had taken off. On his way back to his house, Bii saw torch lights at the house of one Philip Kimeto. He peeped into the house, and saw three (3) men who were all in jungle uniform. Bii alerted other villagers, and they all stormed into Philip's house and confronted the three men. After a struggle, the villagers managed to apprehend one of the men who was the 1st appellant. The other two (2) managed to escape. The villagers including Joel Bett Kipyegon split into two groups and followed the footprints. Kipyegon's group recovered a pair of police uniform. The 2nd appellant was arrested by the second group of villagers.

[3] An identification parade was subsequently conducted, and Joel Bett Kipyegon (Kipyegon) identified the two (2) appellants as having been among the three men whom they struggled with in the house of Philip. The two (2) were handed over to Shadrack Kiplang'at Kirui, an Assistant Chief of Mugundu Sub-Location, who handed them over to Ogembo Police Station. Among the witnesses who testified, was 12 year old C, who confirmed that she had been asleep in the kitchen with her siblings before the robbers came to the home.

[4] PC. Duncan Njuguna and Inspector Mutua, both officers attached to Kigoris Police Station, re-arrested the accused persons whom they noticed were both fully dressed in jungle clothing. The clothes were produced in evidence as exhibits. Japheth Chelimo, a clinical officer attached to Kilgoris Hospital also testified that she had examined Bii and confirmed that he had injuries on the right leg, left leg and on the hip joint.

[5] When put to their defence, each accused gave unsworn evidence and called no witness. Their line of defence was basically the same. That is that the two accused are livestock traders. On the material day, the two each went to visit Philip Kimeto who had herds of cattle to sell. Both did not have enough money to buy the cattle so Kimeto introduced them with a view to putting the money together. They decided to sleep at the house of Kimeto so that they could buy the animals the following morning. Philip left them, came back at 2.00a.m. and thereafter they slept until 5.00a.m. when someone called Philip, Philip went out and talked to the people, thereafter some people came into the house and accosted the two appellants claiming that they were cattle rustlers. The appellants each denied having committed the alleged offences.

[6] In her judgment, the trial magistrate found each of the appellants guilty of the two counts of robbery with violence contrary to **section 296(2)** of the **Penal Code** involving Bor and C respectively; wearing police uniform without authority contrary to **section 184(1)** of the **Penal Code**; and assault causing actual bodily harm contrary to **section 251** of the **Penal Code**. The appellants were each convicted of the offences and sentenced to suffer death in regard to the two robbery charges but the conviction in regard to other counts were held in abeyance.

[7] Being dissatisfied, with the conviction and sentence, the appellants both lodged an appeal to the High Court. In support of their appeals in the High Court, both of the accused filed written submissions. The grounds of appeals canvassed by the appellant in the High Court included their conviction being based on a defective charge sheet as the particulars of the charge in regard to robbery charges did not state that the appellants were armed with dangerous or offensive weapons. Secondly, that **section 198(4)** of the **Criminal Procedure Code** was not complied with as the record of the proceedings in the trial court do not show the language that was used; that the evidence of identification, relied on by the court was grossly irregular, unsatisfactory, and based on mere suspicion; that the prosecution evidence was full of contradictions, inconstancies and material discrepancies; and that there were material witnesses who were not called to testify.

[8] In their judgments, the learned judges of the High Court noted that the particulars of the robbery charges against the appellant stated that the two jointly robbed both of the complainants. The learned judges were satisfied that the fact that the appellants were two satisfied the requirements of section 296(2) of the Penal Code. They therefore rejected the contention that the charge sheet was defective. With regard to the evidence of identification, the learned judges noted that Bor testified that the robbers who accosted him were dressed in jungle uniform, and that he spent 10 to 15 minutes with them and was able to see their faces with the aid of a torch light. Similarly, C was also able to see the robbers using a torch light and was also able to identify them. The court noted that the robbers were arrested while still dressed in police jungle uniform which both Bor and C had referred to. The judges of the High Court therefore found that the appellant's conviction was well founded and rejected their appeals.

[9] The appellants are both dissatisfied and have now moved to this Court. During the hearing of the appeal, the appellants were both represented by Ms Macella Onyango, who relied on the supplementary memorandum of appeal that she had filed. In the supplementary memorandum, the appellants raised five (5) grounds contending that the learned judges of the High Court erred in upholding the conviction of the appellants when the evidence on record shows that the prosecution had failed to prove their case beyond reasonable doubt; failing to find that the identification of the appellants was improper and not in accordance with the law; failing to carefully reevaluate the evidence on record as required by law; upholding the conviction of the appellants when the appellants constitutional right to a fair hearing has been infringed; upholding the conviction and sentence of the trial court when the trial court had failed to indicate the coram when taking the evidence of PW1, PW2 and Pw3.

[10] In arguing the appeal Ms. Onyango, submitted that the charge against the appellants being one of robbery with violence, the prosecution had a duty to prove that there was a theft. However, the evidence adduced did not show that the appellants stole any money from the complaints as evidence indicated that the money was given to a third party. In regard to identification, it was argued that the evidence was inadequate as the circumstances were not suitable for a positive identification.

[11] Counsel stated that the identification by Bor was not watertight as he claimed to have seen the appellant at the time of his arrest and claimed to have identified him by his clothing and a scratch on his head which description Bor had not given earlier. It was noted that C did not describe the robbers and therefore the identification remained that of a single witness that is Bor.

[12] It was submitted that the appellant was not accorded a fair hearing by an independent and impartial tribunal, because a police officer was used as an interpreter. It was argued that the proceedings in which the police officer was the interpreter were a nullity.

[13] Mr. Sirtuy, Public Prosecuting Counsel, conceded the appeal on the grounds that the particulars on the charge did not support the offence of capital robbery and also that the proceedings were vitiated by the use of a police officer as an interpreter. We appreciate the position taken by counsel, however, this Court is not bound by the opinion of the prosecuting counsel. The Court must therefore satisfy itself regarding the propriety of the appellants' conviction.

[14] We wish to address the submission that the proceedings in the trial court were vitiated by the use of a police officer as an interpreter. Under Article 50(2((m) of the Constitution an accused person has a right during the trial, to have the proceedings interpreted to him if the proceedings are held in a language that he or she does not understand. In this case, the court records indicate that the proceedings were conducted in Ekegusii/Kiswahili/English except for one witness Joel Bor who gave his evidence in Kipsigis. This is the evidence that was interpreted by No.81099 PC. Kipkoech Korir, a police officer from Ogembo Police Station. The witness was sworn and interpreted the evidence of Bor. The appellants have now taken issue with the interpretation on the grounds that the interpretation by a police officer was highly irregular and a violation of their rights to fair trial, as the police officer could not be relied on to fairly translate the proceedings. We have perused the court record and we do not find any explanation as to why the police officer was used. It is not however, uncommon in criminal cases to have interpretation done during trial by police or prison officers. While this is highly undesirable, it may be justified by necessity.

[15] In this case, although the appellants have complained, the court record shows that only Bor gave his evidence in Kipsigis language which was translated by PC Kipkoech Korir, the witness was cross-examined by both the appellants using the same medium of translation. The record confirms that before undertaking the interpretation the witness was duly sworn. There was no complaint or any evidence that the witness acted contrary to the oath of interpretation. Nor is there any evidence that the witness had any connection with the investigations or any other interest in the case. We find that the appellants failed to establish that the use of the police officer as an interpreter prejudiced them

in any manner. The irregularity was a technical irregularity which has not caused any injustice and can be cured under section 382 of the Criminal Procedure Code.

[16] In regard to the hearing of this appeal, we wish to state that the hearing of the appeal has taken long because there was a problem with the court record. The appeal first came for hearing in 2013 but the hearing could not proceed as it was discovered that the charge sheet in the record was incomplete as it did not have counts 2, 3, 4, 5, 6, 7 and 8. It was also noted that some parts of the record were illegible. Efforts to trace this charge sheet at the police station or the DPP office or in the lower court record have been completely fruitless and therefore this Court was forced to proceed with the hearing of the appeal with that limitation.

[17] We note that the judgment of the trial court, made reference to all the eight counts which were in the charge sheet. This is a clear indication that the trial court had an appropriate charge sheet before it. Indeed, the appellants were acquitted of counts 2, 4, 5 and 6. In the judgment of the first appellate court, the learned judge refers to the robbery charges as follows:

> **"On the first count of robbery with violence contrary to section 296(2) of the Penal Code, it was alleged that on the 6th day of May, 2006 at Kibisowet Trading Centre, in Transmara District of the Rift Valley District jointly with another not before court the appellants robbed Joel Buogo cash Kshs2,300/=. On the second count of robbery with violence contrary to section 296(2) of the penal code the appellants were alleged to have robbed C C N Kshs.1,800/= on the same day and place as in the first count."**

[18] This shows that the learned judges of the High Court, had an appropriate charge sheet before them. The appellants have contended that they were convicted on a defective charge sheet. This ground was raised unsuccessfully before the first appellate court. A new argument has now been raised in support of this ground contending that there was no evidence of theft to support the robbery charge. This is based on Bor's evidence that he gave the money to the third party and not to any of the two appellants.

[19] We have perused the record in regard to the evidence of Bor and C. It was apparent that both were accosted by robbers who were three in number. In regard to Bor, all the three robbers who accosted him carried maasai swords and were all dressed in police jungle uniform. Although it is only one of the robbers who took the amount of Kshs. two thousand three hundred (Kshs.2,300/=) from the shelf, it is clear that the three were acting in concert and had a common intention to rob Bor. Similarly, C was also accosted by the three robbers who were dressed in police jungle uniform and although the 1st appellant is the one who spoke to her demanding money, and to whom she gave the amount of Kshs. eight hundred (Khs.800/=) it is clear that the robbers had a common intention and proceeded to break an empty wooden box belonging to C from where they recovered the amount of Kshs. One thousand (Kshs.1,000/=). We are therefore satisfied that there was sufficient evidence that the robbers stole from both Bor and C.

[20] **In Johana Ndungu v Republic [1996] eKLR,** this Court considering what constitutes a charge of Robbery with Violence stated as follows:

> ***In order to appreciate properly as to what acts constitute an offence under section 296(2), one must consider the sub-section in conjunction with s.295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s.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.***
>
> ***Analyzing the first set of circumstances the essential ingredient, apart from the ingredients including the use or threat to use actual violence constituting the offence of robbery, is the fact of the offender at the time of robbery being armed with a dangerous or offensive weapon. No other fact is needed to be proved. Thus if the facts show that at the time of commission of the offence of robbery as defined in S.295 of the Penal Code, the offender was armed in the manner afore-described then he is guilty of the offence under sub-section (2) and it is mandatory for the court to so convict him.***
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> ***In the same manner in the second set of circumstances if it is shown and accepted by court that at the time of robbery the offender is in company with one or more person or persons then the offence under sub-section (2) is proved and a conviction thereunder must follow. The court is not required to look for the presence of either of the other two sets of circumstances.*** (Emphasis added).

[21] In this case, the evidence indicated that the robbers were three; that they were armed with maasai swords; that they stole money from both Bor and C; and that during the process of stealing, both Bor and C were threatened with violence. In the circumstances, all the necessary elements of the offence of Robbery with violence contrary to section 296(2) were established. We therefore find no substance in the submission that the charge was defective.

[22] As regards the issue of identification, the offence occurred at night and therefore the nature of the lighting that assisted the complainants to identify their assailants was important. Bor insisted that he was able to see the robbers by the aid of a torch light. The evidence of Bor was consistent with that of C who explained that she had lit her hurricane lamp and therefore was able to see her assailants. Moreover, it is evident that the first appellant was arrested on the same night of the robbery within the same area. At the time of arrest, he was dressed in the

police jungle uniform which was consistent with the description that had been given by the complainants.

[23] The evidence regarding the arrest of the 2nd appellant was not very clear as the persons who arrested him did not testify. However, Kipyegon identified both the appellants at the identification parade as the two robbers who were arrested by the villagers. Both appellants stated in their defence that they were in the house of Philip Kimeto from which they were apprehended, for the purposes of buying livestock. Both the trial magistrate and the learned judges of the appellate court, rejected the appellant's defence that they were in Kimeto's house for the innocent mission of buying livestock.

[24] In light of the above, it is evident that the appellant's conviction was not just anchored on their identification, but was anchored on the totality of the evidence that was before the trial court. It is for this reason that we disagree with the position taken by the learned prosecuting counsel. We are satisfied that there was sufficient evidence upon which the appellants' conviction could be sustained. The missing charge sheet has not in any way prejudiced the hearing of this appeal.

[25] As regards sentence, the learned judges of the High Court appear not to have addressed the appeal in this regard. The appellants were sentenced to death, on both the two counts of robbery with violence. This was an error on the part of the trial magistrate as it was practically impossible to execute both sentences. The proper approach would have been to sentence the appellants on one robbery count, and thereafter, order the sentences in regard to all the other counts that the appellants were convicted of (including the second robbery charge), to remain in abeyance.

[26] From the proceedings of the trial court, it is apparent that the trial magistrate did not give the appellants opportunity to address the court in mitigation before the sentence was passed. The magistrate proceeded on the premise that the death sentence in regard to robbery with violence was a mandatory sentence. The learned judges of the High Court erred in failing to address this. In **William Okungu Kittiny, Criminal Appeal No. 56 of 2013,** (Kisumu), this Court applying the Supreme Court decision in **Francis Karioko Muruatetu & another vs Republic, Petition No. 2015** stated thus:

> ***"The appellant was sentenced to death for robbery with violence under section 296(2). The punishment provided for murder under section 203 as read with 204 and for robbery with violence and attempted robbery with violence under section 296(2) and 297 is death. By Article 27(1) of the Constitution every person has, inter alia, the right to equal protection and equal benefit of the law. Although the Muruatetu's case specifically dealt with death sentence for murder, the decision broadly considered the constitutionality of the death sentence in general.***
>
> ***From the foregoing, we hold that the findings and holdings 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 sentence."***

[27] For the above reasons, we find that both the trial court and the first appellate court erred in failing to properly address the sentencing herein.

[28] Accordingly, we dismiss the appellants' appeal against conviction but allow the appeal against sentence, to the extent of setting aside the sentence of death imposed upon both of the appellants and remit the record of the trial court back to the Chief Magistrate's Court at Kisii for sentence re-hearing before the Chief Magistrate.

Those shall be the orders of the Court.

Dated and delivered at Kisumu this 25th day of October, 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.