



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, JJA)

CRIMINAL APPEAL NO. 49 OF 2017

BETWEEN

HAMPHREY WANYAMA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an Appeal against a Judgment from the High Court of Kenya at Eldoret, (Kariuki & Mativo, JJ) dated 24th July, 2015

in

HCCRA. NO. 34 OF 2012)

JUDGMENT OF THE COURT

[1] The appellant was convicted by the Chief Magistrate’s Court of the offence of robbery with violence contrary to Section 296(2) of the Penal Code and sentenced to death.

He appealed against the conviction and sentence to the High Court but the appeal was dismissed in its entirety.

[2] On 3rd August, 2015, the appellant filed a memorandum of appeal in person raising four grounds of appeal. The four grounds relate to conviction. Thereafter this Court assigned Mr. Miyiinda, a counsel to represent the appellant.

[3] On 19th March, 2018, the appellant’s counsel filed a supplementary memorandum of appeal in accordance with Rule 65(2) of the Court of Appeal Rules which provides:

“An advocate who has been assigned by the Chief Justice or the Presiding Judge to represent an appellant may within fourteen days after the date when he is notified of his assignment and without requiring the leave of the Court, lodge a memorandum of appeal on behalf of the appellant as supplementary, to or in substitution for any memorandum which the appellant may have lodged.”

[4] The supplementary memorandum of appeal has two grounds of appeal, namely:

“(1) The sentence meted down against the appellant is excessive in the circumstances given that the death penalty has been removed by the Supreme Court.

(2) The ... Learned Judges of the Superior Court erred in law and fact by failing to find and hold that the offence of robbery with violence was not sufficiently proved given that no medical evidence was tendered to support the allegation that the complainant was attacked and injured.”

At the hearing of the appeal, Mr. Miyiinda abandoned all the grounds of appeal filed by the appellant in person and stated that the appeal is against sentence and not against conviction. The counsel further stated that the second ground in the supplementary memorandum of appeal is in support of the first ground that the offence of robbery with violence was not proved warranting death sentence. He further clarified that

the evidence showed that there was robbery but not in the nature of robbery with violence.

[5] It is clear from the supplementary memorandum of appeal and from the submissions of the appellant's counsel that the supplementary memorandum is in substitution of the previous memorandum of appeal filed by the appellant.

It is also clear that contrary to the contention of the appellant's counsel, the two grounds of appeal in the supplementary memorandum of appeal are distinct. The first ground challenges the sentence of death while the second ground faults the conviction for capital robbery.

The Court will logically deal with the second ground of appeal first.

[6] The offence of robbery is defined in **Section 295** of the Penal Code thus:

“Any person who steals anything and at or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.”

Section 296 of the Penal Code provides for punishment for robbery.

By **Section 296(1)** – a person who commits the offence of robbery is liable to 14 years imprisonment on the other hand, **Section 296(2)** provides:

“If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other persons, or if, at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

[7] The particulars of the charge stated in part that the appellant;

“jointly with others not before court while armed with dangerous weapons namely knives robbed Patrick Dingiri of a Motor Vehicle Registration No. KZN 994 Nissan Sunny Saloon white in colour, one mobile phone Nokia1650 and cash Kshs. 700 all valued at Kshs. 97, 270 and immediately before the time of such robbery used actual violence against Patrick Dingiri.”

[8] **Patrick Ngosi Dingiri**, the complainant testified that on the night of 24th November, 2009, he was operating a taxi motor vehicle reg. No. KZN 994 at Eldoret town when a person whom he identified to be the appellant hired the taxi to be taken to Chepkanga village.

On arrival at Chepkanga the appellant who was seated at the front seat struck the complainant with his elbow. He stated that he raised an alarm and the appellant told him he would stab him with a knife if he continued raising an alarm. The complainant struggled with him and the appellant produced a knife. The rear door was then opened and three persons entered into the vehicle and tied him with a rope which they pulled causing injuries to the appellant's teeth.

He was robbed of the motor vehicle and money after which he ran away and later reported the robbery to the owner of the vehicle and to the police.

[9] **Benard Kimaiyo Opuch** testified that the appellant took motor vehicle registration No. KZH 994 to his garage at Sega market in Ugenya for repairs and replaced the registration number plate with registration number plate for KZN 032. While the vehicle was at the garage, the appellant brought a buyer – one **Fredrick Onyango Osodo (Fredrick)** who viewed the vehicle and negotiated the price with the appellant. Eventually, the appellant and Fredrick agreed on the terms of the purchase. By the agreement, Fredrick was to give the appellant his motor vehicle and in addition pay Shs 12,000/= to the appellant as consideration for the motor vehicle. Fredrick released his motor vehicle to the appellant and paid him Shs. 5,000/= leaving a balance of Shs. 7,000/=. The motor vehicle was released to Fredrick.

[10] On 9th January, 2010, **PC Geoffrey Kinambuga**, the investigating officer arrested the appellant at his home in Busia. Thereafter the appellant led police to the home of Fredrick where the stolen vehicle was recovered. It was later identified by **George Karanja**, the owner.

[11] The appellant in his evidence raised a defence of alibi – that he was in Busia on 24th November, 2009. He called one witness who testified that he was in the company of the appellant in Busia on 24th November, 2009.

[12] The appellant was nevertheless convicted and sentenced to death. The trial Magistrate stated that court had no discretion on sentence. His appeal to the High Court against conviction and sentence was dismissed.

[13] In dismissing the appeal the High Court made a finding that the offence of robbery contrary to **Section 296(2)** of the Penal Code was proved and said:

“The undisputed evidence of PW1 is that three men entered into the car moments after the appellant had turned to a robber, hit him with his elbow and produced a knife and threatened to stab him. A rope was thrown at him by the men at the back and landed into his mouth, injuring his teeth. This was confirmed by the clinical officer who produced the P3 form.”

[14] **Mr. Omwega**, learned counsel for the respondent opposed the appeal. He submitted that the appellant threatened to stab the

complainant with a knife and that the appellant was serving another sentence in Criminal Case No. 326 of 2010.

[15] We have considered the manner in which the robbery was committed. The complainant testified that the appellant produced a knife and threatened to stab him if he continued to shout.

He also testified that as he was struggling with the appellant three men entered into the back seat of the car and tied him with a rope which held his mouth and injured his teeth.

Joel Suter, the clinical officer testified that the complainant had sustained a broken lower tooth and two other teeth of the lower jaw were loose. The appellant was armed with a dangerous weapon and was also in the company of three other people at the time of the robbery.

The High Court made a finding that the offence of robbery contrary to **Section 296(2)** of the Penal Code was proved.

We are satisfied that the offence of aggravated robbery with violence contrary to **Section 296(2)** of the Penal Code was proved.

[16] Following the decision of the Supreme Court in **Francis Karioko Muruatetu & Another v. Republic – Petition No. 15 of 2015 consolidated with Petition No. 16 of 2015**, this Court held in **William Okungu Kittiny v. Republic – Kisumu Criminal Appeal No. 56 of 2013** thus:

“Thus the sentence of death under Section 296(2) and 297(2) of the Penal Code is a discretionary maximum punishment.”

The appellant now asks the Court to set aside the death sentence.

[17] At the trial the appellant admitted that he was serving a sentence of 30 years imprisonment in Criminal Case No. 326 of 2010.

The appellant was represented by a counsel at the trial who made mitigation on behalf of the appellant.

The trial court apparently sentenced the appellant to death for the reason that it had no discretion on sentence. The nature of the offence for which the appellant was serving a custodial sentence was not disclosed. In the circumstances of this case, justice will be met by an appropriate custodial sentence.

[18] For the foregoing reasons, the appeal against conviction for robbery under **Section 296(2)** of the Penal Code is dismissed.

The appeal against sentence is allowed to the extent that the sentence of death is set aside and substituted with a sentence of 20 years imprisonment to run consecutively with the sentence he is now serving.

We so order.

DATED and Delivered at Eldoret this 8th day of November, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR