IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & MUSINGA, JJ.A.)

CRIMINAL APPEAL NO. 109 OF 2009

BETWEEN

ALEX AFANDE SALAMBA.....1ST APPELLANT

JULIUS THATHI MUNGUTI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi (Ojwang & A.

Omondi, JJ.) dated 5th May, 2009

in

HC. CR. Appeal No. 495 & 497 of 2006)

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JUDGMENT OF THE COURT

1. **Alex Afande Salamba**, the 1st appellant, and **Julius Munguti**, the 2nd appellant, were convicted on three counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code** and sentenced to death.

2. The appellants, being aggrieved by the said conviction and sentence, preferred an appeal to the High Court, which dismissed it. Undeterred, the appellants preferred a second appeal to this Court.

3. The brief facts of the prosecution case before the trial court were that on 8th September, 2005 along Lang'ata road in Nairobi, jointly with others not before the court, while armed with dangerous weapons namely; pistols, robbed **Isaack Ngugi Gathanyo**, (PW1) of a motor vehicle registration number KAQ 202R, a Nissan Caravan matatu, on the same date and place and under similar circumstances robbed **Peter Ngechu Muhutia** (PW4) of one mobile phone make Nokia valued at Kshs.4,500/= and cash Kshs.500/= and also robbed **Moses Mayaka Momanyi** (PW3) of one mobile phone make Nokia valued at Kshs.5,500/= and cash Kshs.5,000/=.

4. PW1 testified that on the material day at about 2.00 p.m., while driving the aforesaid motor vehicle along Lang'ata road, as he approached Sunshine High School one passenger indicated that he wanted to alight. Before the passenger alighted, another passenger who was seated behind PW1 pointed a pistol at him and ordered PW1 to swop places with the passenger who wanted to alight. PW1 obliged. He identified the person who jumped onto the driver's seat as the 1st appellant. The 1st appellant took an unlawful u-turn and headed towards town.

5. Shortly thereafter the matatu was flagged down by traffic police officers. PW1 and his accomplice began firing at the police officers and they drove on towards Upper Hill. They encountered

traffic jam and the robbers abandoned the matatu and started running away.

6. **Sergeant Sammy Ngelwa** (PW6) and **PC Ezekiel Serem** (PW8) testified that the 1st appellant was the person who was driving the matatu and he fell down when he was fleeing. The police managed to arrest him and recovered a firearm two metres away from him.

7. **Anthony Kariuki Mureithi**, (PW2) who was the matatu conductor also identified the 1st appellant as the person who was drove the matatu. PW3 and PW4, who were passengers in the matatu and were robbed of their mobile phones and cash, identified the 2nd appellant who was seated next to them, as the one who robbed them. Their evidence was corroborated by **Priscilla Wambui Ngumo (PW5),** who was also a passenger in the same matatu. The identification of the 2nd appellant by the three witnesses was at Lang'ata Police Station where they saw him after his arrest.

9. Regarding arrest of the 2nd appellant, PW8 testified that after they arrested the 1st appellant and took him to Lang'ata Police Station, as they were there, the 2nd appellant was brought by police officers from central C.I.D. It was however not clear how the arrest had been effected. Some of the passengers who were there, PW3, PW4 and PW5 identified the 2nd appellant as the person who had robbed them.

9. In his defence, the 1st appellant stated that on the material day he was walking towards his house at Kibera. At Lusaka roundabout he saw a group of people running towards him. They pushed him and he fell into a culvert and broke his leg. He was taken unconscious to Kenyatta National Hospital. When he came to, he found himself handcuffed. Later he was escorted to Lang'ata Police Station. He denied having committed any robbery.

10. The 2nd appellant equally denied having participated in the robbery. He testified that on the material day he was walking to South B when he was arrested by police officers and taken to Lang'ata Police Station.

11. As earlier stated, the first appellate court was satisfied that the appellants' conviction was safe and dismissed the appeal in its entirety, hence this second appeal.

12. Although the appellant's memorandum of appeal (titled supplementary grounds of appeal), filed through Mwangale & Company Advocates contains four (4) grounds of appeal, challenging both conviction and sentence, when the appeal came up for hearing, the appellant's advocate, **Mr. Mwangale**, told the Court that the appellant had conceded his conviction. The appellant's counsel therefore argued ground 4 only which reads as follows:

> **"4. That the sentence imposed is harsh, manifestly excessive and unconstitutional."**

13. Mr. Mwangale submitted that the 1st appellant was not granted an opportunity to make mitigation submissions before the trial court passed the death sentence. Counsel cited the Supreme Court decision in **FRANCIS KARIOKO MURUATETU & ANOTHER v REPUBLIC [2017] eKLR** and urged this Court to remit the matter to the trial court for mitigation hearing and sentence.

14. The 2nd appellant's appeal was premised on grounds that the first appellate court erred in law by: failing to analyse and re-evaluate the evidence on record and draw its conclusion; failing to find that the prosecution had not proved its case beyond reasonable doubt; confirming the sentence on the basis of evidence that did not meet the required legal standard; failing to find that the prosecution case had material inconsistencies; shifting the burden of proof; and failing to consider the 2nd appellant's defence.

15. The appellant's advocate, **Mr. Mutuma**, filed written submissions and orally highlighted the same, albeit briefly.

16. The gravamen of the 2nd appellant's appeal was that there was no sufficient evidence to link him to the commission of the robberies since PW3, PW4 and PW5, who purported to have identified him as the person who robbed then gave contradictory evidence. Further, no evidence was tendered by the arresting police officers as to the circumstances leading to his arrest.

17. Counsel further submitted that the three witnesses who testified as having identified the 2nd appellant did not tell the trial court for how long they had seen him. The witnesses may have been honest but mistaken; counsel added. He cited, inter alia, this Court's decision in **CLEOPHAS OTIENO WAMUNGA v REPUBLIC [989] eKLR**, where the Court said, inter alia:

> **"What we have to decide is whether that evidence was reliable and free from possibility of error so as to found a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent to the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification."**

18. Mr. Mutuma faulted the first appellate court for having failed to re- evaluate the prosecution evidence regarding arrest and identification of the appellant. The 2nd appellant, unlike the 1st appellant, was not chased to his point of arrest, but as per his defence, he was arrested hours after the robbery while walking to South B. He was then taken to Lang'ata Police Station where the three prosecution witnesses, upon seeing him, purported to have

identified him. No identification parade was ever conducted.

19. Lastly, Mr. Mutuma submitted that **Section 211** of the **Criminal Procedure Code** was not complied with by the trial court.

20. In response to those submissions, **Mr. O'mirera, Senior Assistant Director of Public Prosecutions**, stated that in respect of the 1st appellant he had no objection to his appeal being remitted to the trial court for mitigation hearing and sentence. As regards the 2nd appellant, he conceded that the arresting officer ought to have been called to testify regarding the time and circumstances under which the 2nd appellant was arrested. That notwithstanding, he submitted, the 2nd appellant had been positively identified by PW3, PW4 and PW5. He urged the Court to dismiss the 2nd appellant's appeal.

21. We have carefully considered the submissions made by counsel and the entire record of appeal. This being a second appeal, we are only concerned with matters of law and not fact, in terms of **Section 361(1) (a)** of the **Criminal Procedure Code**. We are satisfied that the issues that the appellants have raised are matters of law, which are within our jurisdictional remit.

22. As regards the 1st appellant's appeal, his appeal is only against the death sentence. In **FRANCIS KARIOKO MURUATETU & ANOTHER v ANOTHER** (supra) the Supreme Court held that the mandatory death sentence prescribed for the offence of murder by **Section 204** of the **Penal Code** is unconstitutional. The Court expressed itself thus:

> **"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."**

23. Although that decision concerned the interpretation and application of **Section 204** of the **Penal Code** on a charge of murder, by parity of reason it is equally applicable in respect of a charge of robbery with violence under **Section 296(2)** of the **Penal Code,** where upon entry of a conviction the trial court has to pass the death sentence, without any room for exercise of discretion.

24. We agree therefore in a matter such as the one before the Court where the 1st appellant was not given any opportunity to mitigate before sentence was pronounced, the appropriate step to take is to remit the appeal to the first appellate court to hear and consider mitigation submissions before passing whatever sentence it would deem appropriate. To that extent, we allow the 1st appellant's appeal against sentence. We hereby set aside the death sentence that was pronounced by the trial court and direct that this appeal be remitted to the High Court to conduct a mitigation hearing and pass sentence.

25. We now turn to consider the 2nd appellant's appeal. The 2nd appellant's conviction was based on his visual identification by PW3, PW4 and PW5. It is trite law that before an accused person can be convicted on such evidence the court must examine that evidence very carefully to ensure that it is free from possibility of error. See **DAVID MAKOKHA v REPUBLIC [1989] eKLR.**

26. PW3 told the trial court that when he boarded the matatu he sat at the back seat next to the appellant, who he had not seen there before. On the other hand, PW5 testified that he was seated at the back seat and he had seen the 2nd appellant in the vehicle, as he was seated in front on the left side. Those two versions of the two witnesses' testimony were contradictory.

27. The robbers were brandishing guns and the robbery took a very short while. The passengers in the matatu must have been terrified by the happenings and it is doubtful if indeed they were in a state of mind to carefully fix their eyes on the robbers as to be able to identify them thereafter. We cannot say that the 2nd appellant's identification by the three prosecution witnesses was free from error. An identifying witness may be honestly mistaken. See **R. v TURNBULL [1976] 3 ALL E.R. 549.**

28. One other issue that in our view weakened the prosecution case was that the arresting police officers did not testify before the trial court. The trial court was not therefore able to know the circumstances under which he was arrested. The 2nd appellant said that he was arrested at the railway station. PW8 told the trial court that the 2nd appellant was arrested by police officers from central C.I.D. officers and taken to Lang'ata Police Station. **P.C. Joseph Mucheru (PW9),** the investigating officer, was not helpful to the trial court in so far as the 2nd appellant's arrest was concerned. He simply stated: **"The accused had been arrested at the scene by the arresting officer."** He said no more concerning his arrest.

29. In **BUKENYA v UGANDA [1972] E.A. 549** the Court of Appeal held that a failure to call a crucial witness by the prosecution entitles the Court to make an adverse conclusion against the prosecution case. The failure by prosecution to call the arresting police officers

compromised its case. The gap created by such failure further weakened the evidence of PW3, PW4 and PW5. We agree with Mr. Mutuma that had the first appellate court carefully re-evaluated the evidence tendered before the trial court it would have come to the conclusion that it had vital gaps that required to be addressed but were not.

30. Having considered all the grounds of appeal, we do not think that the 2nd appellant's conviction was safe. Consequently, we allow the 2nd appellant's appeal, quash the conviction and set aside the death sentence that was passed by the trial court. We order that the 2nd appellant be and is hereby set at liberty unless otherwise lawfully held.

Dated and Delivered at Nairobi this 20th day of December, 2018.

P.N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR