IN THE COURT OF APPEAL

AT NYERI

SITTING AT MERU

(CORAM: GITHINJI, KARANJA & KIAGE JJ.A)

CRIMINAL APPEAL NO. 38 OF 2015

JULIUS MURITHI M'MANYARA……...…....…..APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

(Appeal against Judgment of the High Court at Meru (Makau & Musyoka, JJ) dated 4th December 2013

in

H. C. Cr. A. No. 6 of 2013)

****

JUDGMENT OF THE COURT

The appellant, **Julius Murithi M'Manyara**, was charged and convicted before the Senior Resident Magistrate's Court at Tigania, **Criminal Case No.149 of 2011**, on the offence of robbery with violence contrary to **Section 296(2) of the Penal Code**, **Cap 63 Laws of Kenya**. His first appeal to the High Court (**Makau & Musyoka, JJ**) was dismissed and the death sentence awarded by the trial court confirmed. The appellant has now preferred this second appeal.

The particulars of the offence were that on 1st April, 2009 at Buuri Location in Tigania East District, within Meru County, the appellant jointly with another not before court, while armed with dangerous weapons namely pangas and clubs robbed Edward Thuranira of Kshs. 3,000/= and immediately before the time of such robbery slashed the said Edward Thuranira on his left hand and head using a panga causing him grievous harm.

In a nutshell, the evidence led before the trial court was as follows.

On the material day at about 6:30 p.m Edward Thuranira (PW1) was at home in the company of his wife Salome Thuranira (PW2) when they were attacked by two persons, one of who they identified as the appellant, who they said they knew well before as a neighbour. The appellant and his accomplice demanded to be given money and mobile phones. The appellant was said to have been armed with a panga which he used to administer several cuts on PW1's head and left arm after he failed to produce the

cash as demanded. PW1's left hand was almost completely amputated. Pleading for her husband's life PW2 gave them Kshs. 3,000/= belonging to PW1. With assistance from neighbours, PW2 managed to get PW1 to Tigania Police Station where the incident was reported.

Thereafter, PW2 was referred to Miathene District Hospital and later to Meru District Hospital where he was admitted for two weeks. The Hospital couldn't save his left hand and it had to be amputated from the wrist. Both PW1 and PW2 identified their attackers to their neighbours and to the police on the same day. The appellant is said to have disappeared from the area, but was arrested later and taken to the police station where he was charged with the offence in question.

In his defence which was tendered on oath, the appellant denied the charge against him and identified PW1 as his uncle. He told the Court that on the material day he was at his home with his wife, working in the shamba. He told the Court that his wife later deserted him and he was therefore unable to call her as a witness. He intimated that the matter was a frame up against him by the complainant and his wife as there existed a land dispute between their families.

From the totality of the evidence the trial court was satisfied that the prosecution had established all the essential ingredients of robbery with violence. The appellant was accordingly convicted and the mandatory death sentence meted.

Aggrieved by that decision the appellant lodged his appeal to the High Court by way Petition of Appeal filed on 6th February, 2013 on which there were no grounds of Appeal. Later, on 17th October, 2013, through the firm of Ashford G. Riungu and Company Advocates, the appellant filed a supplementary Petition of Appeal by which he was not challenging the conviction, but the sentence.

In his two grounds of appeal, the appellant stated that the death sentence was excessive, and an infringement of the appellant's right to life contrary to **Article 26(3) of the Constitution of Kenya, 2010.**

The second ground, was also a challenge on the death sentence, on the ground that it was tantamount to degrading and inhuman treatment, and hence, inconsistent with the letter and spirit of the Constitution. He therefore urged the High Court to set aside the death sentence and substitute the same with any other penalty that the court may deem fit and just to grant.

Learned counsel for the appellant, pleaded with the court to alter the sentence awarded stating that the appellant was remorseful for his actions which led to PW1 losing his hand. Further that the appellant was a married 30-year old with one child who wanted to integrate back into society. Counsel relied on the Court of Appeal case of **Godfrey Ngotho Mutiso v R, Criminal Appeal No. 17 of 2008 [2010] eKLR** that the death sentence was no longer mandatory but discretionary.

In a brief judgment which turned on the issue of sentence alone, the High Court (Makau & Musyoka JJ) held that the decision in **Godfrey Ngotho Mutiso v R (supra)** had been overruled by a five-judge bench decision **Joseph Njuguna Mwaura & 2 Others v Republic, Criminal Appeal No. 5 of 2008 [2013] eKLR** which maintained that the penalty described for capital offences is a mandatory death sentence. The High Court asserted that it lacked jurisdiction to award any other sentence, following conviction on a charge of robbery with violence and dismissed the appeal as unmeritorious.

Still aggrieved, the appellant has now preferred this second appeal on the ground that his rights under **Article 50 of the Constitution, 2010** were violated thus rendering the trial a nullity. This ground was advanced by learned counsel, Ms. Jacqueline Nelima holding brief for Mr. Kenneth Muriuki, on behalf of the appellant. Counsel submitted that **Article 50(2)(m) of the Constitution, 2010** was not complied with as there was no indication from the record that the evidence of PW4, Martha Njeri Murumba, a clinical officer at Miathene District Hospital and PW5, P.C Mark Kipkoech attached formerly at Tigania Police Station, was translated from English to 'Kimeru' for the appellant. Counsel argued that as a result the appellant was unable to participate in the proceedings and was prejudiced. Counsel referred the Court to the authorities of: **James Maina Wanjiru v R, C. A. Nakuru Criminal Appeal No. 300 of 2006**; and **Leskei v R [2006] 2 KLR 119**.

The appeal was opposed by Senior Prosecution Counsel Mr. Kariuki Mugo on behalf of the State. Mr. Kariuki referred the Court to the proceedings to show that the appellant cross-examined PW4 and PW5 and therefore it could not be argued that the appellant did not understand their evidence. Counsel urged the Court to dismiss the appeal and uphold the conviction, and in the event that the Court would allow the appeal, Counsel prayed for a re-trial.

Being a second appeal, this Court, by dint of **Section 361 of the Criminal Procedure Code** is enjoined to consider matters only. Further as we have held in a long line of authorities, this Court will not normally interfere with concurrent findings of fact by the two courts below, unless such findings were based on no evidence, or were based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings: See **Chemangong v R, [1984] KLR 611**.

In **Kaingo v R [1982] KLR 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 Karari C/O Karanja -vs- R, [1956] 17 EACA 146)".***

From the onset, we wish to point out that this appeal is a non starter. We say so because, in his appeal before the High Court, the appellant, through his advocate then on record, Mr Riungu, dropped his appeal against conviction and challenged only the sentence. This is what he told the court:

> ***"Our only ground is against sentence. I wish to appeal for the reduction of sentence in line with provisions of section 354(3) (a) (ii) of the Criminal Procedure Code....***

Indeed, in his response to that submission, learned counsel appearing for the state, Mr. Motende, opened his address by stating that learned counsel for the appellant had conceded the appeal on conviction. Mr Riungu did not contradict that submission or change his mind. All he did was mitigate for leniency on behalf of the appellant. This in our view means that as the appeal against conviction was abandoned at the High court, the door was slammed shut against the appellant, and that aspect of the appeal cannot lie before this Court.

The jurisdiction of this Court in criminal matters, on second appeal, is to consider matters that have been determined by the High Court. The first appellate court did not have the opportunity to make a determination on the issue raised by the appellant before this Court.

Entertaining any grounds of appeal on the issue of conviction, after it was abandoned before the High court and with no determination on conviction by the High Court is tantamount to appealing the decision of the subordinate court straight to this Court while bypassing the High Court. That is simply not permissible. Our law clearly sets out the hierarchy and structure of our court system, and parties are enjoined by law to respect that system. There is no short cut to that. It is actually a jurisdictional issue that cannot be wished away.

This Court faced with a similar situation more than a decade ago In **Abdalla Ahmed Abdul Rashid V Republic, Criminal Appeal 103 of 1995 [1995] eKLR** in a very short judgment succinctly pronounced itself as follows:

> "***The appellant's appeal in the superior court was against sentence having abandoned his appeal to that Court against conviction. His second appeal to this Court therefore against the decision of the first appellate court could only be against sentence. In the circumstances of the sentence imposed against him. Section 361(1) (b) of the Criminal Procedure Code debars this Court from hearing his appeal against sentence. The appellant's appeal is therefore incompetent and the same is struck out.***"

This is still the position in law. We are debarred from dealing with any grounds challenging the appellant's conviction. It will therefore be unnecessary and superfluous for us to deal with the issue of whether the appellant understood the language used during the trial or not.

For the foregoing reasons, we are satisfied that this appeal is devoid of merit, and we dismiss it.

Dated and delivered at Meru this 21st day of December, 2016.

E. M. GITHINJI

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR