



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A.)

CRIMINAL APPEAL NO. 24 OF 2014

BETWEEN

CHARLES MURIUKI MWANGI..... APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyeri (Wakiaga & Ombwayo, JJ.) dated 15th December, 2011

in

H.C.CR. A. No. 62 of 2009)

JUDGMENT OF THE COURT

The only issue of law that fall for our determination in this second appeal is the legality or otherwise of the sentence of seven years that was imposed upon the appellant by the trial court, and on appeal before the High Court, it was enhanced to death. Charles Muriuki Mwangi the appellant in this appeal was charged with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code** before the Principal Magistrate at Karatina. Upon trial, he was convicted of a lesser cognate offence of simple robbery and sentenced to 7 years. Being dissatisfied only with the sentence, the appellant appealed before the High Court, Wakiaga and Ombwayo, JJ., enhanced the sentence from seven years to death sentence pursuant to the powers donated under the provisions of **Section 354(3)** of the **Criminal Procedure Code**.

The background information was that on 15th August, 2007 at about 8 p.m., Anthony Nginga Kimini (PW 2) who was the complainant in this matter was walking home alone. He passed three men; he recognized one of them whom he knew by a nickname “Sagana”. The three men attacked him and robbed him Kshs.400/- and a mobile phone. Anthony said he was able to identify the appellant with the aid of

electricity lights which were about 5 metres away from where he was attacked. This is basically the only evidence the trial court relied on to reach a conclusion that the prosecution proved its case to the required standard.

The appellant was arrested by the police on a totally different matter and was held at the Karatina Police Station. The complainant was called at the police station on 26th August, 2007, to record a statement regarding his complaint. While at the police station, he was shown the appellant by PC Josphat Muthee, (PW3) and he was able to identify him as the person who had attacked him and robbed him a few days ago. The appellant was thus charged with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. In their bid to prove the case against the appellant, the prosecution relied on the evidence of three witnesses. The complainant, PC Josephat Mutura who recorded the statement and charged the appellant, and the Clinical Officer who completed the P3 Form in regard to the injuries suffered by the complainant. The appellant was also placed on his defence, he gave a sworn statement of defence and denied having committed the offence.

After considering the evidence, the learned trial magistrate, found the offence that was proved against the appellant was the lesser offence of simple robbery. The appellant was convicted under **Section 296(1)** and sentenced to 7 years imprisonment.

This is what the learned trial magistrate stated in part of the judgment:

“In the instant case, I find that though it was 8.00 p.m. and hence night time, P.W.2 the complainant has averred that the particular place where attack took place had electricity lights even though the road leading to his home was not lighted. Further, the accused is someone he knew by the nickname “Sagana”. Accused has not in any way rebutted that evidence of PW 2 regarding identification. In particular, accused has not clarified whether he is the man called “Sagana”. I am inclined to find that indeed, accused had been identified by PW 2 as one of the assailants. The foregoing notwithstanding, I find that PW 2 has not stated that the assailants were armed with any weapon, which is one of the ingredients of a robbery with violence case contrary to Section 296(2).

Consequently, I do reduce the charge to that of robbery contrary to Section 296(1). I hence find that the prosecution has proved its case beyond reasonable doubt against accused whom I find guilty of the offence of robbery with violence contrary to Section 296(1) of the Penal Code and he is convicted accordingly under Section 215 of the Criminal Procedure Code”.

Being aggrieved by that conviction and sentence, **(a decision the appellant perhaps regrets)** he appealed before the High Court. The appeal was dismissed and in addition the learned Judge invoked the powers under **Section 354** of the **Criminal Procedure Code** and enhanced the sentence meted upon the appellant of 7 years to death. This is what the learned Judges stated in their own words:

“After correctly finding that the appellant was properly identified and was in the company of others when he committed the offence, the learned magistrate went further to misdirect (sic) himself by finding that PW 2 had not stated that the assailants were armed with any weapon which is one of the ingredients of a robbery with violence case contrary to Section 296(2) of the Penal Code.

The powers of this court on appeal under Section 354 of the Criminal Procedure Code include the powers to alter the finding, maintaining the sentence, or with or without altering the finding, reduce or increase the sentence. This court in exercise of the above said powers finds the appellant guilty of the offence of robbery with violence contrary to Section 296(2) of the Penal Code as the offence was committed with more than one person and he is hereby sentenced to death.

The appeal is hereby dismissed”.

This is the gravamen of the appeal lodged by the appellant and argued by Mr. Kiminda, learned counsel for the appellant based on the following 4 supplementary grounds of appeal:

1. ***The first appellant court erred in law by failing to address itself on the issue of conditions favouring correct identification of the appellant to rule out the possibility of mistaken identity.***
2. ***The first appellate court erred in law by shifting the burden of proof.***
3. ***The first appellate court erred by failing to warn the appellant of the consequences of proceeding with the appeal before it.***
4. ***The first appellate court erred by not subjecting the evidence before the trial court to a fresh re-evaluation and re-examination in its judgment.***

To augment the above grounds Mr. Kiminda submitted that the appellant's sentence was enhanced from 7 years to death before he was given a hearing. The appellant had appealed against sentence only. For the Judges to review the sentence upwards, they must have addressed their minds to the issue of conviction which was not appealed against. Thus the Judges were faulted for addressing themselves to the issue of conviction, when there was no appeal or a cross-appeal by the State. More fundamentally, the appellant was not given a warning of the court's intention to enhance the sentence.

Counsel made reference to the case of *JJ W –vs- R, [2013] eKLR* where the Court of Appeal sitting in Kisumu allowed an appeal in a case where the High Court enhanced a sentence from seven years to ten years. In that case as in the instance case, the prosecution did not urge enhancement of sentence and did not file a cross appeal to that effect. The court also did not warn the appellant or indicate to him during the hearing of the appeal that there was a possibility that the sentence would be enhanced. According to counsel, the court was obligated to warn the appellant of the possibility that the sentence would be enhanced. The proceeding before the High Court do not indicate that any warning was issued to the appellant, nor was there a cross appeal or an appeal against the conviction.

This appeal was also argued in the alternative; counsel submitted that the appellant was convicted based on the evidence of the complainant when circumstances for positive identification were difficult. The attack happened at 8.00 p.m. when it was dark. The court ought to have weighed the evidence of the source of light, its distance, intensity and the position of the complainant when the attack took place. This is in accordance with the well-laid principles in the case of *Maitanyi v R, [1986] KLR*, where it was held:

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

When testing the evidence of a single witness, a careful inquiry ought to be made into the nature of the light, available conditions and whether the witness was able to make a true impression and description”.

Further counsel argued that the underlying principle that underscores the need for a trial court to subject the evidence of a single identifying witness to a closer scrutiny was not observed. For this reason, there was a possibility of a mistaken identity especially because the attack took place at night and the circumstances of positive identification were difficult. This possibility of mistaken identity was not remote given the evidence of the complainant who told the trial court that he was about 5 metres away from the electric post where there was light. Also the report made to the police station by the same complainant was to the effect that the offence took place in a small road where there were no lights. Moreover, the complainant testified that he knew the appellant by a nickname of “Sagana” and yet he did not record that in the statement when the report was first made to the police. The name “Sagana” was not given and there was no evidence that the appellant was known by the name “Sagana” or alias. Thus, the court shifted the burden of proof when it was indicated that the appellant did not offer any evidence to

prove that he was not known by the nickname.

On the part of the State, Mr. Kaigai, learned Assistant Director Public Prosecutor, conceded to one aspect of this appeal; that is, the High Court erred by failing to warn the appellant of a possibility of enhancement of the sentence. The appellant was not represented and the consequences of the enhanced sentence were a death sentence which was by no means a grave matter. The State conceded that failure to warn the appellant prejudiced him. He urged us to revert to the sentence of 7 years meted out by the trial court. Counsel opposed the other ground of appeal regarding the evidence of identification arguing that although the offence occurred at night time, the scene of crime was well illuminated and the complainant recognized the appellant who was well known to him as “Sagana”.

We have considered the submissions, the record and the law; we agree the State rightly conceded to the aspect of the enhancement of sentence because there was no appeal or cross appeal on the sentence and the learned Judges did not warn the appellant.

We quote verbatim the appeal that was before the learned Judges:

“Appeals against the sentence of 7 years for offence of Robbery with Violence contrary to Section 296(1) of the Penal Code passed upon me by Senior Resident Magistrate Karatina on 10th March, 2009.

I pleaded not guilty to the charge.

I wish to be present during the hearing of this appeal”.

It is plain if this was the appeal by the appellant, he had only appealed against sentence which is clearly conveyed by the statement of appeal reproduced above. We also agree with the decision of this Court in Kisumu in the case of *JJ W –vs – Republic* (supra) especially the following observations:

“The Notice of Appeal shall constitute the appeal and then what it specifically states it is appealing against in Rule 59(2) is what the appellant is bound to pursue as that is what the appeal is instituted on and not any other. There are no clear decided cases on this aspect, particularly in respect of criminal cases but a decision of the Court of Appeal in England may be of some help. That is the decision of Lord Parker, CJ Widgery LJ and Lawton J. in the case of R v Bardoe 1960 1 ALL ER Page 948 where a matter had been referred to that court for review of sentence only as appeal against conviction had been rejected but the appellant’s age was found to be under 18 years when the appellant sought to introduce the appeal against the conviction, the Court held:-

“...since in the present case the part that was referred was the review of sentence the court would not hear argument in regard to conviction”.

In the instant case, the appeal that was before the learned Judges was only on sentence, the appellant was not represented and he did not present any arguments at all regarding conviction. If the Judges were intent on dwelling on the issue of conviction of simple robbery under **Section 296(1)** to robbery with violence under **Section 296(2)** which conviction and sentence highly prejudiced the appellant; it was imperative for the Court to warn the appellant of the consequences of his appeal and to invite him either to elect to withdraw the appeal or to address the court on conviction.

Before the High Court, the State had opposed the appeal and made submissions to support the conviction although they had not cross-appealed. This in our view was inappropriate as there was no appeal on conviction. The least the learned Judges could have done after allowing the State counsel to submit on an issue that was not appealed against was to give the appellant an opportunity to respond. There is no indication that the appellant was given such an opportunity. A right to a hearing is a fundamental right that is not only highly regarded but provided for in the Constitution especially where somebody’s fundamental right to life is concerned. See **Article 50** of the **Constitution** that provides for

the elements of a fair trial that include information to be used against an accused person should be availed to him or her in advance. A further requirement is that he should be given adequate time and facilities to prepare for his defence or response. In the instant case, the State did not even urge for enhancement of sentence, nor was it mentioned to the appellant in addition to the fact that it was not a ground of appeal.

In the result, we have come to the conclusion that the enhanced sentence was unlawful and it calls for interference. The issue of conviction based on the evidence of identification was argued in the alternative. As this was not the appellant's ground of appeal before the High Court and having found the High Court erred by not warning the appellant of the possibility that there would be interference with the conviction, we are not inclined to address this issue of conviction in this appeal.

Consequently, the appeal on sentence is allowed to the extent that the enhanced death sentence is set aside and in its place the original sentence meted out to the appellant of seven (7) years is reinstated with effect from the date the subordinate court issued it.

Dated and delivered at Nyeri this 20th day of January, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO- ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR