



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI, JJ. A)

CRIMINAL APPEAL NO.71 OF 2013

BETWEEN

BONFACE IKUHA ADIAGALA & 2 OTHERS.....APPELLANTS

AND

REPUBLIC.....RESPONDENT

(Appeal from a Judgment and Orders of the High Court of Kenya at Kakamega (S. J. Chitembwe & B. Thurania, JJ) dated 7th February, 2013

in

KAKAMEGA No. 31, 32 & 33 OF 2010

JUDGEMENT OF THE COURT

The appellant, **Bonface Igoho Adiagala** was charged with two others before the Chief Magistrates' Court, Kakamega, with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code particulars being that on the night of 25th January, 2009 at Butiti village in the then Vihiga district with others not before the court while armed with dangerous weapons namely pistols, pangas and swords robbed Ben Harrison Lusiji of a motor vehicle registration mark KAR 861 N and other items and that immediately before or immediately after the time of that robbery they threatened to use actual violence to the said person. The appellant was charged in the alternative with handling stolen goods contrary to Section 322 (2) of the Penal Code particulars being that on 31st January, 2009 at Khayega market in the then Kakamega District otherwise in the course of stealing he dishonestly received a mobile phone knowing it to be stolen goods.

In the second count the appellant was charged with the offence of being in possession of a firearm contrary to Section 34 (1) of the Firearms Act particulars being that on 31st January 2009 at Khayega market he was found in possession of an imitation firearm namely a pistol.

A trial took place before the Principal Magistrate (J.M. Githaiga) and in a judgment delivered on 29th January, 2010 the appellant was convicted and sentenced to death on the robbery with violence

charge, was acquitted on the firearms charge and nothing was said of the alternative charge.

The appellant appealed to the High Court of Kenya at Kakamega and in a judgement delivered on 7th February, 2013 (Said J. Chitembwe and B. Jaden Thurania, JJ) the appeal was disallowed. That provoked this second appeal which by virtue of Section 361 (1) (a) of the Criminal Procedure Code must only be confined to issues of law as has been stated and restated in many decisions of this Court such as **Stephen M'Riungu & others v Republic (1982-88) I KAR 360.**

In the homemade Memorandum of Appeal filed on 30th October, 2014 and which learned counsel for the appellant Mr. Nyamweya adopted, the appellant raised seven grounds of appeal which can be condensed to an attack on the death sentence said to be inhuman and degrading; and the charge sheet which is said to have been defective on grounds of geographical jurisdiction on where the offence occurred. The other issue raised is whether the facts of the case showed a case of robbery with violence contrary to Section 296 (2) of the Penal Code or whether the facts showed a simple robbery under Section 295 of the said Code.

We therefore visit the facts of the case that were before the two courts for purposes of establishing whether there are issues of law that call for our consideration in this appeal.

The prosecution case was that at 8:00p.m. on 25th January, 2009 **Ben Harrison Lusiji (PW1) (Lusiji)**, a retired school principal, was taking tea in his sitting room with his wife **Rachel Ngaira Lusiji (PW2) (Rachel)** and their daughter. They were surprised to see their employee brought into the house by three strangers from outside who threw her to the floor. Lusiji was also floored to the carpet and neither he nor his wives were able to recognize any of the attackers in the confusion that followed. He was robbed of two mobile phones, a watch and money as the robbers ransacked the house taking away many items including a generator, a toaster, a gas cylinder, a television set, a video deck, an iron box, clothes and seat covers. The robbers grabbed Lusiji's car keys, loaded the said items into his car and drove away in the car. Alert was sounded and neighbours arrived but the robbers had then driven away. The car was recovered the next day as Lusiji was summoned by police and identified some of his stolen items which were then at Kakamega police station. Rachel was injured in the incident.

In cross examination by the appellant Rachel stated that:

"...I saw a scar on your face. Your face is peculiar. I saw you clearly. I did not indicate I saw a mark on your face when I recorded my statement..."

And of the identification parade:

".... The persons did not look alike. Some were fat. People were wearing different clothes."

On 31st January, 2009 **No. 216389 Nehemiah Bitok (PW3)**, a superintendent of police and District Criminal Investigations Officer, Kakamega, received a tip-off from an informer that there were suspects at Khayega market suspected to possess a firearm. He with other police officers including **No. 55736 Corporal Benjamin Nyongesa (PW6)** proceeded there and found the appellant and his co-accused and arrested them after the appellant had attempted to escape but was found armed with an imitation firearm which was recovered and produced as part of the prosecution evidence.

On 2nd February, 2009 **No. 231518 Inspector of Police Godfrey Mangesa** of Kakamega Police Station conducted an identification parade where he placed eight persons at a parade where the appellant chose the position between three and four members of the parade. Rachel identified the appellant at the parade by touching him. Another parade was conducted on 5th February, 2009 by **No. 50677 Inspector of Police John Odhiambo and Susan Ajirwa**, who was not called as a witness for the prosecution, identified the appellant by touching him.

That was the case made out by the prosecution which the appellant was called upon to answer.

In an unsworn statement the appellant testified that he dealt in mangoes, sugarcane and maize which he sold at Khayega market and that on 31st January, 2009 he was confronted by strangers at the said market who beat him up, arrested him and took him to Kakamega Police Station. He denied the charges laid against him and complained about the way the identification parade was conducted stating that Rachel had not given any description of the appellant before the parade was conducted.

The learned trial magistrate found that the case against the appellant had been made beyond reasonable doubt and convicted him as we have already stated.

Mr. Nyamweya, the learned counsel for the appellant, in submissions before us when the appeal came for hearing on 18th November, 2014, was of the view that the main charge of robbery with violence had not been proved as required in law as neither Lusiji nor his wife Rachel had identified any of the robbers who entered their home on the fateful night. Counsel also attacked the way the identification parade was conducted arguing that steps had not been taken by the police to ensure that a disfigurement on the hand of the appellant was not concealed. Reliance was laid on **Ajode v Republic [2004] 2 KLR 81** where it was held inter alia that the correct procedure before conducting an identification parade is that the witness should give a description of the accused person to the police before taking part in an identification parade.

Finally counsel attacked the death sentence imposed on the appellant arguing that such sentence is inhuman and degrading and inimical to the right to life guaranteed in the Constitution of Kenya, 2010.

Mr. Sirtuy, learned Principal Prosecution Counsel, conceded the appeal arguing that the identification parade was not properly conducted. Counsel also believed that the death sentence is unconstitutional.

We begin with the death sentence imposed on the appellant which both counsel believed to be unconstitutional relying for that submission on **Godfrey Ngotho Mutiso v Republic [2010] eKLR**. In that case the appellant was charged with the offence of murder and sentenced to death. The judgment of this Court was delivered on 30th July, 2010 where it was held that Section 204 of the Penal Code which provides for a mandatory death sentence is antithetical to the Constitutional provisions of the then Constitution of Kenya on protection against inhuman or degrading punishment or treatment and fair trial. The court stated:

"...We note that while the Constitution itself recognizes the death penalty as being lawful, it does not say anywhere that when a conviction for murder is recorded, only the death sentence shall be imposed. We declare that Section 204 shall, to the extent that it provides that the death penalty is the only sentence in respect of the crime of murder is inconsistent with the letter and spirit of the constitution, which as we have said, makes no such mandatory provision ..."

That was a judgement of a bench of three judges and was delivered before promulgation of the Constitution of Kenya, 2010, which came into force on 27th August, 2010.

The right to life is protected by the said (current) constitution which by Article 26 (3) however declares that:

"A person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law." (emphasis ours)

The issue of the legality of the death sentence was subsequently reviewed by a bench of five judges of this Court in **Joseph Mwaura & 2 others v Republic Criminal Appeal No. 5 of 2008 (ur)** where the appellants had been convicted on two counts of robbery with violence and sentenced to death. Their first appeal failed and the appellants filed a second appeal to this court where one of the issues taken regarded the constitutionality of the sentence of death prescribed by Section 296 (2) of the Penal Code. The Court held that whether or not the sentence imposed by a trial court was severe or

unwarranted was a matter of fact which the court could not consider on a second appeal as it was not permitted to do so by Section 361 of the Criminal Procedure Code which declared severity of sentence to be a matter of fact. The court then examined various situations where the death sentence was allowed in law and stated that:-

"The situations in which a person's right to life may be curtailed are contained in the following sections of the Penal Code: Section 24 which provides that the punishments which may be inflicted by a court include the death sentence, Section 25 (1) which provides that *"Where any person is sentenced to death, the form of the sentence shall be to the effect only that he is to suffer death in the manner authorized by law"*.

As we have stated before, the sentence of death is imposed on those found guilty of the following offences: administering an oath to commit a capital offence, murder, and treason, robbery with violence and attempted robbery with violence. These offences are provided for in the Penal Code.

Since the Constitution, both in the former epoch and the current, clearly envisages that the right to life is not absolute, the state can limit it in accordance with any written law. The law in this case is the Penal Code.

Indeed some of the international instruments envisage a situation where the right to life may be curtailed in furtherance of a sentence imposed by a court of law. Article 6 of International Covenant on Civil and Political Rights provides that:

- 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.**
- 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime..... This penalty can only be carried out pursuant to a final judgment rendered by a competent court. Kenya has been party to this Covenant since May 1972.**

This country, however, is not a party to the Second Optional Protocol to the International Covenant on Civil and Political Rights which aims at the abolition of the death penalty. This is instructive because it points out that under our law as it stands; the death sentence continues to be a valid sentence that can be passed by a court of law."

Both counsel are therefore wrong to submit that the death sentence is illegal in Kenya. At any rate **Geoffrey Ngotho Mutiso (supra)** did not outlaw the death sentence at all. All it did was to decide that the provision of the Penal Code that prescribed the death sentence as the only sentence a court could impose for murder was unconstitutional. The death sentence remains a proper sentence to be imposed by our courts for the offences described in the Penal Code. We therefore dismiss the ground of appeal challenging the legality of the death sentence.

The gravamen of this appeal in our considered view revolves around whether there was identification of the appellant to the required standard to entitle the two courts below to hold him liable and convict him on the charge of robbery with violence.

The learned trial magistrate in the judgment we have adverted to was impressed by Rachels' evidence because, according to the magistrate, Rachel spoke with the appellant during the robbery and was able to identify him at the identification parade held at Kakamega Police Station. On the first appeal the learned Judges of the High Court, held that:

"..During cross-examination PW2 testified that she informed the police that she could

identify one of the robbers. A parade was conducted by PW4, IP Godfrey Mangesa and PW2 identified the 1st appellant. The appellant contends that the parade was not properly conducted since he was the only one with a scar. We do find that that was not a reason to nullify the parade. It would have been difficult for the parade officer to go round and look for people with scars as the one on the 1st appellant's body..."

First, we do not find the basis for these findings by either court. Rachel testified that she did not see the robbers properly and that one of the robbers took her spectacles which to us would mean that she could not see properly after her spectacles had been taken off her face.

On the issue of identification parades, Rule 6 (iv) (d) of Force Standing Orders made under the Police Act provides that:

"the accused/suspected persons will be among at least eight persons as far as possible of similar age, height, general appearance and class of life as himself. Should the accused/suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent."

It was therefore misdirection for the High Court, on the first appeal, to hold that it would have been difficult for the police to find other people with scars to participate in the identification parade. The police should have taken steps to ensure that the disfigurement on the appellants' arm was not especially apparent. In any event Rachel had not given a description of the appellant and as was stated in Ajode v Republic (supra) the identification parade was not properly conducted because the witness was not asked to give a description of the appellant to the police before the parade was mounted.

For those reasons this appeal succeeds. We quash the conviction of the appellant and set aside the sentence and order that the appellant be released from prison forthwith unless otherwise lawfully held.

Dated and Delivered at Kisumu this 5th day of February, 2015.

D.MARAGA

JUDGE OF APPEAL

F. AZANGALALA

JUDGE OF APPEAL

S. ole KANTAI

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR