



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: GITHINJI, MAKHANDIA & SICHALE, J.J.A.)**

**CRIMINAL APPEAL NO. 500 OF 2010**

**BETWEEN**

**SEIF HAMED ABDALLAH ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from the conviction and sentence of High Court of Kenya at Mombasa ((Ibrahim & Odero, JJ.) dated 19<sup>th</sup> October, 2010*

*in*

*H.C.CR.A.NO.263 OF 2005)*

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**JUDGMENT OF THE COURT**

**Seif Hamed Abdalla**, the appellant was on 28<sup>th</sup> November, 2005 convicted by the Principal Magistrate Mombasa, of the offence of robbery with violence contrary to **section 296(2)** of the Penal Code and sentenced to death. Being aggrieved, he preferred an appeal against both conviction and sentence. **Ibrahim, J.** (as he then was) and **Odero, J.**, on 19<sup>th</sup> October, 2010 dismissed the appeal, hence this second and probably last appeal.

On 26<sup>th</sup> August, 2004, **Delvan Mwarashu Kizangaone**, who was the complainant in the trial court was walking along Tamarind beach in Mombasa when he was suddenly accosted by two men who requested him to take them a photograph with his camera for a fee of Kshs.20/-. He did so but one of them suddenly moved behind him and placed a knife on his back. The other man who turned out to be the appellant and was holding an empty bottle then hit the complainant on the head and injured him seriously whilst demanding to be given the camera and money. The complainant struggled with the duo, in the process his shirt was torn and lost to them cash Kshs.200/-. Responding to his cries for help, members of the public rushed to the scene. On seeing the members of public approach, the two men took to their heels. They were however pursued by the members of public who unfortunately only managed to arrest one of them, the appellant whom they later handed over to the K.K. Security guards after administering some form of mob justice or is it injustice on him. His accomplice managed to make good his escape. K.K. Security guards in turn called police officers from Nyali Police Station who came and re-arrested the appellant from them. The appellant was thereafter charged as already stated.

Put on his defence, the appellant opted to give unsworn defence and denied the charges. He stated that he sold mangoes at Kongowea market. On the material day he went about his business as usual. At about 10 a.m. he went to Tamarind beach and met a friend who had previously taken him a photograph. He asked for the photograph but the friend told him that it had been damaged. He demanded to be taken another one, infact two as the previous one had been spoilt. A quarrel ensued and the photographer started screaming. His colleagues who had been attracted by the screams came and arrested him, administered mob justice on him before escorting him to the police station. The matter then ended up in court.

In convicting the appellant, the trial magistrate held that:-

***“... the prosecution witnesses were not shaken during cross-examination. The accused gave unsworn evidence in his defence. Same leaves unanswered questions in view of the overwhelming prosecution case. The offence charged has been proved. I find that the accused is guilty as charged and convict accordingly ...”***

In dismissing the first appeal, **Ibrahim** and **Odera, JJ.** held:-

***“Our own analysis of the evidence is that there has been shown to have been a clear, positive and reliable identification of the appellant by the complainant which identification is properly corroborated by PW2. We find no possibility of mistaken identity. We are satisfied from the evidence on record that the appellant was one of the men who attacked and robbed the complainant on the material day.”***

Once again being aggrieved by this decision the appellant now comes to this Court as already stated by way of a second appeal. The appellant in his home-made memorandum of appeal has sought to impugn the judgment of the superior court on six grounds; that the camera was not produced in evidence, that crucial witnesses were not summoned, that the charge-sheet was fatally defective, that prosecution evidence was contradictory, that the sentence of death imposed was unlawful and finally, that the case was not proved beyond reasonable doubt.

When the appeal came before us for hearing on 30<sup>th</sup> April 2013, the appellant had engaged the services of **Mr Oguk S.O.**, learned counsel, whereas the State was represented by **Oyiembo R**, Assistant Director of Public Prosecutions.

**Mr Oguk**, from the outset stated that he was abandoning the appeal on conviction but would instead pursue the appeal on sentence only. On this account, **Mr Oguk** submitted that sentence, is normally in the discretion of the sentencing Court. That the appellant was convicted under **section 296(2)** of the Penal Code whose sentence is death. However, a closer reading of the section suggested that the sentence of death was after-all not mandatory. Counsel urged us to hold that death penalty was but maximum sentence. In the premises, the trial court, the superior court and even this Court was at liberty to impose any other sentence other than death. That the appellant was convicted for stealing only Kshs.200/- and injuring the complainant in the process. That the injuries to the complainant were however minor. Counsel submitted that in the circumstances the sentence of death was manifestly harsh and excessive. Counsel conceded though, that the appellant's sentence had since been committed to life by Presidential decree. Nonetheless, he urged us to interrogate the sentence and reduce it to the level that would be insync with justice. In support of these submissions, the appellant relied on the case of **Godfrey Ngotho Mutiso vs Republic Cr.A.No.17 of 2008 (UR)**.

**Mr Oyiembo** in opposing the appeal on sentence submitted that the jurisdiction of this Court comes from **section 361** of the Criminal Procedure Code. The issue of sentence is an issue of fact which this Court has no jurisdiction to entertain. Finally, counsel submitted that it was not just a question of stealing Kshs.200/-, the appellant hit the complainant so hard with a bottle on the head that the bottle broke into pieces, thereby seriously injuring the complainant. The sentence imposed was therefore deserving in the circumstances and should not be disturbed.

**Mr Oyiembo** is, of-course right that this Court, on a second appeal, has no jurisdiction to re-examine a lawful sentence on the complaint of an appellant that it was harsh and excessive. That is the import of **section 361(1)(a)** of the Criminal Procedure Code which declares sentence a matter of fact. Nevertheless, where legality of the sentence is open to challenge, this Court will have the jurisdiction to re-open the matter. Of-course **sub-section (b)** of the same section provides the jurisdictional basis for that proposition.

In his address before us, **Mr Oguk** did not suggest that the sentence of death imposed on the appellant was illegal. Indeed he submitted that the spirit of the Constitution upholds the sentence of death. However, his only lamentation was that the trial court imposed the death on the appellant and the superior court confirmed it without considering that, that was the maximum sentence. The two courts below were at liberty to impose any other sentence upto and including the death. What this submission portend is that the trial court as well as the High Court did not consider that the sentence imposed was severe given the circumstances of the case. After-all the complainant was merely robbed Kshs.200/- and a bottle was used in the execution of the criminal enterprise which did not cause much harm on the complainant. The issue here is therefore severity and not legality of sentence. As already stated, severity of sentence under **section 361(1)(b)** of the Criminal Procedure Code, is not an issue of law which this Court as a second appellate Court is at liberty to deal with. In the premises the authority cited by the appellant in support of his submissions is irrelevant.

Finally, it is common ground that the appellant's sentence has since been commuted to life imprisonment. In view of the foregoing, it is safe to say that the appellant is no longer facing a death penalty which was the cornerstone of the appellant's appeal on sentence.

We have said enough in this appeal to show that we have found no merit at all in this appeal on sentence. Consequently, we order that this appeal be and is hereby dismissed.

**Dated and delivered at Malindi this 23<sup>rd</sup> day of May, 2013.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**