IN THE COURT OF APPEAL

AT NAIROBI

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

CRIMINAL APPEAL NO. 102 OF 2005

BETWEEN

KELVIN ADIKA…..……..... APPELLANT

AND

REPUBLIC…….....RESPONDENT

***(An appeal from the judgment of the High Court of Kenya at Nairobi (Makhandia, & Ochieng, JJ.) dated 25th May, 2004* in**

H.C.CR.A. Nos. 1438 & 1441 of 1998)

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JUDGMENT OF THE COURT

1. This is an appeal against the decision of the High Court, (Makhandia & Ochieng, JJ.) affirming the trial court's decision to convict and sentence the appellant to death.

2. The facts of the case that was before the trial court, briefly stated, were that on the night of 10th and 11th August 1998, the appellant and others were arrested and jointly charged for robbery with violence under **Section 296 (2)** of the **Penal Code**. On the aforesaid night and following the robbery, the appellant was found hiding on the roof of a house next to a home where the robbery had taken place. Sniffer dogs led to his arrest. In a bid to exonerate himself, the appellant stated that he was forced into the robbery by other people he did not know. Upon the lower court's finding that he was one of the robbers, the appellant was sentenced to suffer death as provided by the law under **Section 296 (2)** of the **Penal Code**. He appealed to the High Court but the first appellate Court upheld the lower court's decision.

3. Being dissatisfied with that decision, the appellant appealed against the High Court's decision vide his supplementary memorandum of appeal dated 12th June, 2007 and raised the following grounds of appeal:

> ***"1. The learned judges erred in law and fact in admitting evidence of an accomplice to convict the appellants.***

2. The learned judges erred by failing to uphold that the identification of the appellants was not sufficient other than dock identification.

3. The superior court erred in law and fact by not finding it necessary to review the lower court's findings.

4. The learned judges erred in law and fact by not finding that it was within the appellant's rights to be furnished with exhibits in possession of the prosecution whenever requested for by the appellant's during trial.

5. The learned superior court judges erred in law and fact in failing to hold that the prosecution case was not proved beyond reasonable doubt to sustain conviction against the appellants."

4. The appellant further filed other supplementary grounds of appeal dated 23rd March, 2011 stating:

1. That the learned judges erred in law in the imposition of a mandatory death sentence upon the appellant as it was arbitrary and unconstitutional and the execution of the same in the instant case would amount to:-

a) An inhuman and degrading punishment in breach of section 74 (1) of the Constitution of the Republic of Kenya.

b) An arbitrary deprivation of life in breach of Section 71 (1) and 70 (a) of the Constitution of the Republic Kenya.

c) A denial of the appellant's rights to fair trial in breach of Section 77 of the Constitution of the Republic of Kenya.

5. At the hearing of this appeal, **Mr. Swaka**, learned counsel for the appellant, submitted that it was alleged that the appellant was arrested at a neighbour's compound yet the neighbor was not called. Further, the appellant's finger prints were allegedly left at the scene but no such evidence was presented during trial and that the alleged owner of the items that were about to be stolen was also not called during the trial. The alleged owner of the said items, in his view, ought to have been a key witness.

6. Counsel stated that the issue of identification was not properly addressed. At the trial in the lower court, PW1 said that he saw the appellant at about 2.00 a.m., yet it is said that the robbery took place at about 5.00 a.m. when the appellant was arrested. According to counsel, an identification parade was not conducted and this was a case of identification by one witness. He further contended that the trial court and the High Court failed to warn themselves of the danger of convicting on a single identification witness.

7. Counsel further submitted that it was inhuman and degrading to convict and pass death sentence when the appellant was unrepresented, which was against **Sections 70 (a), 71** and **74** of the **repealed Constitution**. He relied on the case of **GODFREY NGOTHO MUTISO vs. REPUBLIC [2010] eKLR**. According to counsel, the sentence was very harsh, considering that nobody was injured or harmed and that the appellant was not given any chance to mitigate. Further, it was an unfair trial having fouled the provisions of **Section 77** of the **Constitution**.

8. According to counsel, the appellant was illiterate, young and sickly at the time of the trial and the court ought to have directed that he be provided with free legal representation, considering the nature of the charge he was facing.

9. **Mr. Monda,** learned counsel for the respondent, submitted in support of the trial and the High Court decisions. He stated that the High Court properly evaluated the evidence on record before it confirmed the trial court's decision. The appellant admitted having participated in the commission of the

crime, save that he had allegedly been compulsorily enlisted into the robbery by some unknown people. However, the appellant added that he had been promised Kshs.2000/= if he assisted in carrying the stolen items. With regard to legal representation, counsel stated that the old Constitution did not provide for such and therefore the appellant's rights were not violated. He added that such argument ought to have been raised before the trial court.

10. With regard to the issue of death penalty, counsel submitted that its legality has been settled by this Court. The High Court delivered its Judgment on 25/5/2004 whereas the **Ngotho case** (supra) was decided in 2010 and the findings therein cannot therefore apply retrospectively. Counsel further submitted that the appellant made oral submissions before the High Court and understood the nature of evidence against him and set out to rebut it. Further, the death penalty is provided for both in the repealed Constitution and in the new Constitution. Counsel urged the court to dismiss the appeal.

11. We have carefully considered the submissions on issues of law that were made by Counsel, this being a second appeal. The question of identification of a suspect in the commission of an offence is no doubt an essential element in ascertaining whether the suspect was at the scene of the crime or otherwise, especially if it is alleged that the crime was committed at night. See **CHARLES O. MAITANYI vs. REPUBLIC [1986] 2 KAR 75.** In this instance, the appellant admitted having been at the scene of the crime at the material time. Sniffer dogs led the police to the roof of a neighbour's house where he was found hiding. We do not think that it was necessary to call the owner of that house to testify as the appellant did not dispute that fact. His only defence was that he had been forced into the robbery by some people he did not know. In view of the appellant's defence which actually amounted to an admission that he had participated in the robbery, the appeal against conviction cannot stand. Consequently, we dismiss all the five (5) grounds of appeal challenging the conviction.

12. We now turn to the supplementary grounds of appeal dated 23rd March, 2011 which challenged the legality of the death sentence that was meted out against the appellant. **Section 70** of the **repealed Constitution of Kenya** provided for protection of all fundamental rights and freedoms of the individual. It stated in part that:

> ***"70. Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely –***
>
> a. ***life, liberty, security of the person and the protection of the law;"***

On the other hand, **Section 71 (1)** provided that:

> ***"No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted."***

13. **Section (1)** stated that no person shall be subject to torture or to inhuman or degrading punishment or other treatment. Further, **section 77** of the **repealed Constitution** provided that:

> ***"(1) If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.***
>
> ***(2) Every person who is charged with a criminal offence –***
>
> ***(a) shall be presumed to be innocent until he is proved or has pleaded guilty;***
>
> ***(b) shall be informed as soon as reasonably practicable, in a language that he***

understands and in detail, of the nature of the offence with which he is charged;

(c) shall be given adequate time and facilities for the preparation of his defence;

(d) shall be permitted to defend himself before the court in person or by a legal representative of his own choice;

(e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and

(f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge, and except with his own consent the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence."

14. According to the appellant, all these provisions were violated. He cited and relied on the case of **GODFREY NGOTHO MUTISO vs. REPUBLIC, (supra)** where this Court held thus:

"On our own assessment of the issue at hand and the material placed before us, we are persuaded, and now so hold, that section 204 of the Penal Code which provides for a mandatory death sentence is antithetical to the Constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial. We note that while the Constitution itself recognises 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.

We have confined this judgment to sentences in respect of murder cases, because that was what was before us and what the Attorney General conceded to. But we doubt if different arguments could be raised in respect of other capital offences such as treason under section 40 (3), robbery with violence under section 296 (2) and attempted robbery with violence under section 297 (2) of the Penal Code. Without making conclusive determination on those other sections, the arguments we have set out in respect of section 203 as read with section 204 of the Penal Code might well apply to them."

15. **Section 296 (2)** of the **Penal Code, CAP 63, Laws of Kenya**, provides that:

"If the offender is armed with any dangerous or offensive weapon or instrument, or is in the company with one or more other person or persons, or if, at or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."(Emphasis supplied)

16. In recognising the existence of the death penalty, this Court in **Ngotho's case** (supra) made reference to the decision by the Supreme Court of Uganda in the case of **ATTORNEY GENERAL vs. SUSAN KIGULA & 417 OTHERS [2009] UGSC 6** where the court recognised that the death penalty has existed for as long as human beings have been on earth. The court cited several international instruments on human rights including the **"UNIVERSAL DECLARATION OF HUMAN RIGHTS"** which was adopted and proclaimed by the United Nations General Assembly on 10th December 1948; the **"INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS",** adopted on 16th December 1966; the **"AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS"** of 1981, to name a few; to illustrate that the death penalty remains despite strong proclamations about the *"right to*

life, liberty and security of the person".

17. **Article 26** of the **Constitution of Kenya, 2010** provides that:

> ***"(1) Every person has the right to life.***
>
> ***(2) The life of a person begins at conception.***
>
> ***(3) A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law."*** *(Emphasis supplied)*
>
> ***(4) Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law."***

18. Death penalty is still prescribed in our laws. The coming into force of the **Constitution of Kenya, 2010** has not outlawed the punishment by death. Suffice it to say, it has provided for the right to life under **Article 26**. However, that right is not absolute, it is subject to the provisions in sub-articles (3) and (4). "Other written law" referred to under (3) above may well be in reference to the **Penal Code** which stipulates death sentence as the punishment for capital offences.

19. In this instance, the **Penal Code** and in particular **Section 296 (2)** makes provision for punishment by death for the offence of robbery with violence. We note that the punishment has not been meted out since the **1980's**. This question was raised and dealt with in the **Ngotho case** (supra) where the court was alive to the fact that a blanket commutation of sentences had been granted by the President to death row inmates in August, 2009. The appeal was decided before promulgation of the new Constitution.

20. If death sentence needed to be outlawed, then the chance to do so came shortly before the promulgation of the **Constitution of Kenya, 2010**. The **Committee of Experts** tasked with collecting views from the citizens of this Republic went round the country doing so. The views were finally presented and given life when Kenyans passed the **2010 Constitutional referendum**. Most Kenyans wanted the death penalty retained in our laws. The **Constitution of Kenya, 2010,** makes provision for the death penalty. Jurisdictions world over may be abolishing the death penalty, but in Kenya it is still provided for by the new Constitution. The Judiciary is tasked with the responsibility of interpreting the law and is further bound by the **Constitution** as in the words under **Article 2 (1)** which states that:

> ***"2 (1) The Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government."***

21. If the law with regard to punishment by death needs to be outlawed, then the Legislature, which is the people's representative, shall by Article 94 of the Constitution do the needful.

22. Until that time, the court shall continue to apply the law as it exists. We decline to make a finding that the death sentence that was passed by the trial court and confirmed by the High Court is unconstitutional or amounts to inhuman and degrading punishment. For the reasons stated above, we dismiss this appeal in its entirety.

Dated and Delivered at Nairobi this 26th day of July, 2013.

D.K. MARAGA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

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