IN THE COURT OF APPEAL

AT NYERI

(CORAM: TUNOI, O'KUBASU JJ A & ONYANGO OTIENO AG JA)

CRIMINAL APPEAL NO. 107 OF 2003

BETWEEN

JAMES CHEGE MWANGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nyeri (Juma & Mitey, JJ) dated 1st March, 2002

in

HCCr Appeal No 455 of 2000)

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JUDGMENT

The appellant, James Chege Mwangi, was jointly charged with one Boniface Mwangi Ndiva alias Chief, with robbery with violence contrary to section 296(2) of the Penal Code. They were tried by the learned Senior Principal Magistrate at Muranga who found, in her view, that the evidence supported a charge of simple robbery and so convicted the appellant and hic coaccused on a charge of robbery contrary to section 296(1) of the Penal Code. The learned trial magistrate proceeded to sentence the appellant to eight (8) years imprisonment with two strokes of the cane while his coaccused was sentenced to four (4) years imprisonment.

The facts may be briefly stated. The complainant, Peter Maina Karanja (PW 1) was driving his vehicle registration No KAL 182Y Toyota Corolla saloon on 4th April, 2000 at about 7.30 am when he was waved by two people to stop to give them a lift. The two people were the appellant who was a stranger to the complainant and the co-accused who was a neighbor of the complainant. After the two people entered the complainant's car, the complainant drove for a short distance only to be threatened by these two people with a knife. The complainant jumped out of the vehicle screaming. The two drove off but the vehicle lost control and overturned. The two jumped out of the car and started running away but they were immediately arrested. The complainant arrived at the scene and identified the two people as the ones who he had a while ago given a lift. The two were then charged with robbery with violence contrary to section 296(2) of the Penal Code which charge was reduced to simple robbery contrary to section 296(1) of the Penal Code as already stated at the commencement of this judgment.

The appellant's appeal to the superior court was not only dismissed but the sentence of 8 years imprisonment with two strokes of the cane was substituted with a death sentence. The appellant now comes to this Court by way of second and final appeal.

The learned State Counsel, Mr Orinda, told us that he "conceded the appeal half-way" (whatever that meant) and went on to submit that there was disparity in sentencing without any basis.

We must state on the outset that this appeal has given us considerable anxiety. It would appear that the appellant considered the sentence imposed by the trial court to be discriminatory and hence sought relief from the superior court. He must have been shocked when the death sentence was pronounced upon him by the superior court. This being a second appeal, we are concerned with matters of law only. We must consider how the appellant's appeal to the superior court was considered which led into the appellant's tragic end when he was sentenced to death while the worst he had expected was the 8 years imprisonment with two strokes of the cane which had been he imposed by the trial court.

In *Okeno v R* [1972] EA 32 at p 36 the predecessor of this Court stated, *inter alia*:-

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R* [1975] EA 336). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post* [1958] EA 424."

The above related to the duty of the first appellate court in re-evaluating of evidence. There is yet another issue which relates to disparity in sentencing. As already stated the appellant's co-accused was sentenced to four years imprisonment. At the time the appellant was convicted (1st November, 2002) the law provided that any person convicted of robbery contrary to section 296(1) of the Penal Code was liable to imprisonment for fourteen years together with corporal punishment not exceeding twenty eight strokes. There was the automatic police supervision for a period of five years upon release from prison pursuant to section 344 A of the Criminal Procedure Code. That was the legal position prior to the enactment of the Criminal Law (Amendment) Act 2003 (Act No 5 of 2003).

As regards disparity in sentencing, we wish to point out that in *Fatehali v R* [1972] EA 158 the predecessor of this Court held *inter alia* that care should be taken not to discriminate between two accused persons where all the circumstances and facts are the same. In this appeal, the evidence accepted by the trial magistrate and the first appellate court was to the effect that the appellant was with the co-accused when they confronted the complainant on the material day. We failed to ascertain any reason or basis for dealing so leniently with the appellant's co-accused. Indeed, the sentence imposed on the appellant's co-accused was not in strict compliance with the relevant provisions of the law at the material time.

What is the end result of the appellant's journey in this matter? We have carefully considered the evidence adduced in the trial court and the manner in which the appellant's appeal was dealt with by the first appellate court and it is our view that the first appellate court fell short of its duty in reevaluating the evidence. It was not enough for the first appellate court to merely state that it has analyzed the evidence adduced. That analysis of evidence must be seen to have been undertaken rather than merely stated.

Having agonized over this matter and taking into account the fact that the State conceded the appeal, albeit "half-way" as stated by Mr Orinda, we are constrained to allow this appeal. We therefore allow the appeal, quash the conviction, set aside the death sentence imposed by the superior court and order that the appellant be set free forthwith unless otherwise lawfully held. The appellant's long journey in pursuit of justice has finally come to an end.

Dated and Delivered at Nyeri this 7th day of May 2004.

P.K.TUNOI

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JUDGE OF APPEAL

E.O.O'KUBASU

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JUDGE OF APPEAL

ONYANGO OTIENO

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Ag. JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR