Case Number:	Criminal Appeal 92 of 2014
Date Delivered:	07 Dec 2018
Case Class:	Criminal
Court:	Court of Appeal at Kisumu
Case Action:	Judgment
Judge:	Daniel Kiio Musinga, Agnes Kalekye Murgor, Kathurima M'inoti
Citation:	Stanley Khakubi Songa v Republic [2019] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Kisumu
Docket Number:	-
History Docket Number:	CR.A. No. 194 of 2009
Case Outcome:	-
History County:	Kisumu
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT KISUMU

CORAM: MUSINGA, M'INOTI & MURGOR JJ.A)

CRIMINAL APPEAL NO.92 OF 2014

BETWEEN

STANLEY KHAKUBI SONGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kisumu

(Chitembwe and Thuranira, JJ.) dated 7th June 2012

in

H.C. CR.A. No. 194 of 2009)

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JUDGMENT OF THE COURT

The ***appellant, Stanley Khakobi Songa,*** is aggrieved by the judgment of the High Court ***(Chitembwe*** and ***Thuranira, JJ.***) dated 7th June 2012, which dismissed his appeal against conviction and sentence of death for the offence of robbery with violence contrary to section 296 (2) of the Penal Code. The conviction and sentence were entered on 20th November 2009 by the Chief Magistrate's Court, Kakamega.

It was alleged in the trial court that on 24th December 2008, at ***Simuli village*** in the present ***Kakamega County***, the appellant, jointly with others not before the court, and being armed with dangerous weapons, to wit, swords and *rungus*, robbed ***Geoffrey Khaemba (PW1)*** of one pair of slippers, one matchbox, cigarettes and cash, Kshs 10, and at the time of the robbery used actual violence on PW1. After pleading not guilty to the charge, the appellant stood trial, with the prosecution calling 5 witnesses to prove its case.

The substance of the prosecution case was that at about 7.00 pm on the material day, PW1 was walking home after visiting a friend when he met three people, namely, ***Ombete Ngwata***, the appellant, and ***Michael Singenge***, standing by the roadside. They were armed with long knives and a wooden plank. The three were known to PW1 as all come from the same neighbourhood. PW1 greeted them in Luhya, but they did not respond. All of a sudden he was hit on the nose and mouth and ordered to produce money. The appellant, who had in his possession a nylon sack, attempted to cover PW1's head with it. In the struggle the assailants cut PW1 on the left ring finger and the right hand, above the elbow. They also robbed him of Kshs 10, a matchbox, two *supermatch* cigarettes and a pair of slippers.

PW1 struggled with the assailants and held firmly onto the appellant, screaming for help until members of the public came to his rescue, while the other two assailants managed to make their escape. Members of the public assisted PW1 to arrest the appellant and took him to ***Kakamega police station*** the same night. PW1 was treated at ***Kakamega District Hospital***. The bloodstained clothes that he was wearing on the material day as well as the bloody sack that the appellant had were produced in evidence.

The evidence of ***PW2, Richard Wanjovu Masinde*** and ***PW3, Stephen Wanjovu,*** was that on the material day at about 7 pm, they

were attracted by loud screams from the road and upon going to inquire what was happening, they found PW1 struggling with the appellant. Both the appellant and PW1 were their neighbours and were well known to them. PW1 was screaming and bleeding profusely from the nose and hand. They assisted PW1 to arrest the appellant and took him to Kakamega Police Station.

PW4, Etiana Francis, a clinical officer at Kakamega Provincial General Hospital, produced PW1's P3 form which showed that he had sustained a swelling on the head, a lean cut at the back of the head, swollen left upper zone of the chest, a cut wound on the right lower arm and an injury on the left ring finger. He was x-rayed and stitched up. The injuries were inflicted by a sharp object and were classified as harm.

When the appellant was put on his defence, he gave a sworn statement and stated that at about 7 pm on the material day he closed his business and proceeded home. On the way he encountered five members of a vigilante group who ordered him to accompany them to the chief's office. Instead they took him to the home of PW2 where they put him in a *Pajero* vehicle with PW1 and took him to Kakamega police station, where he was locked up and subsequently charged with an offence that he did not commit.

In this second appeal, the appellant, who was represented by M***r. Mauwa,*** learned counsel, relied on the judgment of this Court in ***George Omondi v. Republic [2005] eKLR*** and submitted that the prosecution did not prove beyond reasonable doubt the ingredients of the offence of robbery with violence. He added that save for the complainant, none of the other witnesses testified to seeing the appellant in the company of other persons or being armed with any weapon, and that no weapon or stolen property was recovered from him. He dismissed the prosecution evidence as concocted because all the witnesses were members of the same family.

Next, learned counsel argued that the appellant was convicted on the evidence of only one witness without the trial court warning itself of the danger of relying on such evidence. This, he submitted was a fatal misdirection.

Learned counsel then theorized that the injuries sustained by PW1 could well have been the result of his struggle with the appellant and not necessarily inflicted in the course of a robbery. He added that PW1's property could also have been lost, not in a robbery, but in the course of the struggle between PW1 and the appellant. In his view, that was a plausible defence, which the trial and the first appellate courts ignored without any basis or justification.

Lastly, the appellant urged us to interfere with the sentence of death meted out to the appellant because the Supreme Court has since held the mandatory sentence of death for murder, which is the same case with robbery with violence, is unconstitutional.

Mr. Ketoo learned prosecuting counsel, opposed the appeal. He submitted that the ingredients of robbery with violence were proved beyond reasonable doubt. He contended that PW1, whose evidence was accepted by the two courts below, testified that the appellant was in the company of two other persons and that they were armed with long knives and wooden plank. He also submitted that the evidence of PW1 as well as the medical evidence proved that PW1 sustained injuries during the robbery.

On identification of the appellant, it was submitted that he was properly identified by PW1 through recognition and that indeed PW1 recognised all the three assailants whose names he gave out. Turning to the fact that the stolen property was not recovered, counsel urged that a conviction for robbery with violence can still be sustained if the trial court is satisfied, as it was in this case, that a robbery took place. Accordingly we were urged to dismiss the appeal, but on the question of sentence, the respondent left the issue to the determination of the Court.

We have carefully considered the record of appeal, the impugned judgment, the grounds of appeal and the submissions by learned counsel. Since this is a second appeal, by dint of ***section 361*** of the Criminal Procedure Code, our jurisdiction is limited to questions of law only. The approach of the Court in such an appeal was explained as follows in ***Karani v. Republic [2010] 1 KLR 73:***

"This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

In our estimation, this appeal raises there questions of law, namely whether the prosecution proved all or any of the ingredients of the offence of robbery with violence; whether the appellant was properly identified as a perpetrator of the robbery with violence;

and whether we should interfere with the sentence of death that was imposed by the trial court and affirmed by the first appellate court.

On the first issue, it is trite that under section 296(2) of the Penal Code, the offence of robbery with violence can be proved by showing either that the offender was armed with a dangerous or offensive weapon; or that he was in the company of one or more other persons; or that immediately before or immediately after the time of the robbery he wounded, beat, struck or used any other violence on any person. (See ***Johana Ndungu v. Republic, Cr. App. No. 116 of 1995***, ***Oluoch v. Republic [1985] KLR 549*** and ***Ganzi & 2 Others v. Republic [2005] 1KLR 52).***

From the evidence, which the two courts below believed and accepted, during the robbery the appellant was in the company of two other persons whom PW1 identified as Ombete Ngwata and Michael Singenge. They were armed with long knives and a wooden plank and during the robbery they inflicted injuries on PW1, which were confirmed by medical evidence and classified as harm. Under ***section 143***of the ***Evidence Act***, unless specifically required by a provision of the law, which is not the case here, no particular number of witnesses is required to prove any fact. Accordingly, the fact of there having been more than one assailant and their being armed, could be proved by the evidence of PW1 alone if the trial court believed his evidence. As we have already stated, the question of credibility of witnesses is a matter of fact, which has been settled by the two courts below and with which we cannot interfere. Accordingly we do not find any merit in the first ground of appeal.

On the question of identification of the appellant, again with respect, the complaint is totally bereft of merit. Other than the evidence of PW1 that he recognised the appellant and his two accomplices as his neighbours whom he knew by name and spoke to during the robbery, the appellant was arrested at the scene of the robbery. He did not have the opportunity to escape and therefore create a doubt as to his identity. PW1 testified that after the robbery he held onto the appellant as he screamed for help, until PW2 and PW3 came to his rescue and assisted in arresting the appellant at the scene. These two witnesses confirmed that they found PW1, who was bleeding profusely, struggling with the appellant, who is from their neighbourhood. We are satisfied that no question of mistaken identification arises in the circumstances of this appeal.

The last ground relates to sentence. Upon conviction for robbery with violence, the trial court sentenced the appellant to death and the High Court subsequently affirmed that sentence. While sentencing the appellant to death, the trial court expressed itself as follows:

"Section 296(2) of the Penal Code provides for a mandatory death sentence, which I hereby pronounce. The accused is sentenced to death."

On 14th December 2017, the Supreme Court has held in ***Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015*** that the mandatory death sentence prescribed for the offence of murder by section 204 of the Penal Code is unconstitutional. The Court expressed itself in these terms:

"Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Article 25 of the Constitution; an absolute right."

It cannot be gainsaid that ***Francis Karioko Muruatetu & Another v. Republic*** (supra) concerned the interpretation and application of section 204 of the Penal Code on the offence of murder. However it is equally true that section 296(2) of the Penal Code on robbery with violence proceeds on the same footing as section 204 of the Penal Code by prescribing a mandatory sentence of death for a person convicted of the offence of robbery with violence or attempted robbery with violence. In terms of legal principle, we are persuaded that there is no reason why the reasoning of the Supreme Court, which holds that the mandatory death sentence is unconstitutional, should not apply to the offence of robbery with violence, in respect of which the Penal Code prescribes a mandatory sentence of death.

That is the approach that this Court took in ***Willam Okungu Kittiny v. Republic, Cr. App. No. 56 of 2013*** and in ***George Munyuhi Kihunyu v Republic, Cr. App. No. 156 of 2016***. In the former case, this Court stated as follows:

"From the foregoing, we hold that the findings and holding of the Supreme Court particularly paragraph 69 applies mutatis mutandis to section 296(2) and 297(2) of the Penal Code. Thus the sentence of death under section 296 (2) and 297 (2) of the Penal Code is a discretionary maximum punishment. To the extent that section 296(2) and 297(2) of the Penal Code provides for a mandatory death sentence, the sections are inconsistent with the Constitution."

(See also ***Wycliffe Wangusi Mafura v Republic [2018] eKLR***)

That is the approach that we shall adopt here as regards the issue of sentence. The appellant made a mitigation statement, which is on record, before he was sentenced to death. He was a first offender and the sole breadwinner of his family. His family depended on him and his parents are deceased. The appellant has been incarcerated for almost ten years since 24th December 2008. The property that PW1 was robbed comprised a pair of slippers, a few cigarettes, a matchbox and Kshs 10. However his assailants were armed with among others, long knives and inflicted injuries on PW1 that required stitching. Taking all the foregoing into account, we are persuaded that in the circumstances the death sentence was wholly disproportionate and we are entitled to interfere with it.

The final result is that the appellant's appeal against conviction is hereby dismissed. We allow his appeal against sentence, quash the sentence of death, and substitute therefor a term of imprisonment for 20 years with effect from 24th December 2008. It is so ordered.

Dated and delivered at Kisumu this 7thday of December, 2018.

D. K. MUSINGA

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

A. K. MURGOR

JUDGE OF APPEAL

I certify that this is a true copy

of the original

DEPUTY REGISTRAR