Case Number:	Criminal Appeal 71 of 2016
Date Delivered:	24 Apr 2020
Case Class:	Criminal
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Martha Karambu Koome, Daniel Kiio Musinga, Jamila Mohammed
Citation:	Mbithi Kioko Mutua v Republic [2020] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	Criminal Appeal 46 of 2011
Case Outcome:	Appeal allowed.
History County:	Nairobi
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, MUSINGA & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO 71 OF 2016

BETWEEN

MBITHI KIOKO MUTUA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgement of the High Court of Kenya at Nairobi

(Mwongo & Achode, JJ.) dated 25th November 2013)

in

HC.CR. A. 46 of 2011)

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JUDGMENT OF THE COURT

[1] On 21st September, 2009 ***George Mutiso Kyengo,*** **(PW1),** the complainant herein, woke up early at about 5am. He worked as a mason and resided within Ongata Rongai Township. As he opened his door to go to work, he was confronted by an assailant who grabbed him and pulled him outside. The assailant hit him with a metal rod on the chest and knocked him down. The assailant then stole from him a cap and a wallet which was in his pocket. PW1 struggled and managed to free himself and ran towards the road as the assailant chased him for a distance of about 100 meters while shouting the name of a person called ***Mkaka*** to come and help him deal with PW1. Luckily, PW1 met with some people and when he narrated to them what had transpired, he was advised to report the matter to the Police.

[2] PW1 immediately went to Ongata Rongai Police Station, where he met ***PC Francis Gitonga,*** **(PW3),** and reported to him that he has been attacked by somebody called ***Mbithi*** who stole from him a wallet containing Ksh. 1,750, his bank card, identity card and a cap. After recording the incident, PW3 advised PW1 to go to hospital and seek treatment for the injuries he had sustained. PW1 said he went to a hospital called ***Kwa Saitoti*** where he was treated and was later issued with a P3 Form that was filed by ***Dr. Zephania Kamau,*** **(PW4)**. As at the time the doctor examined PW1 eighteen (18) days had elapsed. The doctor found PW1 had some tenderness on the right shoulder and upper part of the left breast which was inflicted with a blunt object and he classified the injury as harm.

[3] When PW1 made the report at the police station, he was advised by PW3 to report back at the station if he spots the assailant anywhere. Thus, a month later, on 19th October, 2009, PW1 spotted the assailant at a construction site and he immediately went to

notify the police. PW3 asked his colleague, ***PC Erickson Nyamwega,*** **(PW2),** to accompany him and in the company of **PW1** they went to the construction site but when the assailant saw PW1 in the company of the police, he attempted to escape. The police managed to apprehend the assailant, who later led the police officers and PW1 to his house where they made recoveries of PW1's cap and a wallet. However, the ID, bank cards and his money were not recovered.

[4] Consequently, the assailant, who was identified by PW1 as **Mbith**i ***Kioko Mutua,*** (the appellant) was charged before the Chief Magistrates' court at Kibera with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of the charge stated that: -

"MBITHI KIOKO MUTUA: On 21st September 2009, at Ongata Rongai township, in Kajiado North District within Rift Valley Province, while armed with a dangerous weapon namely a metal rod, robbed GEORGE MUTISO KYENGO of one cap, a wallet containing ID, voters card, bank card and cash Ksh 1,750, all valued at Ksh. 2,400 and at or immediately before or immediately after the time of such robbery wounded the said GEORGE MUTISO KYENGO."

[5] The appellant also faced an alternative charge of handling stolen goods contrary to ***Section 322(1)*** of the Penal Code. The particulars of the alternative charge were that on 19th October 2009 at Ongata Rongai Township in Kajiado North District within Rift Valley Province, otherwise than in the course of robbery, the appellant dishonestly retained one cap, wallet containing ID card and bank card knowing or having reasons to believe them to be stolen goods. The appellant denied the offence but after trial he was found guilty of the main count, convicted and sentenced to suffer death.

[6] In the said trial, the prosecution relied on the evidence of four witnesses who were basically formal witnesses except for PW1 who was the complainant to support the charge. After the prosecution's case, the learned trial magistrate found the appellant had a case to answer. In his unsworn statement of defence the appellant denied having robbed the complainant. He stated that the charge against him was framed up by PW1 who owed him money after failing to pay for work he had done for him. That was the totality of the evidence that was presented before the trial court. After considering this evidence, the trial court found the appellant guilty as charged, convicted him, and sentenced him to suffer death.

[7] The appellant was aggrieved by the said conviction and sentence, and in his appeal before the High Court at Nairobi, he principally challenged the conviction which he contended was not safe as it was predicated on unreliable evidence; that there were serious inconsistencies and apparent contradictions in the evidence and that there was no proof of violence. On sentence, the appellant urged the court to exercise its discretion and interfere with the death sentence as the constitutionality of the death penalty had been faulted by the Court of Appeal decision in **Godfrey Ngotho Mutiso vs. Republic [2010] eKLR**.

[8] The High Court **(*Mwongo & Achode, JJ.)***, being cognizant of its duty to reconsider and re-evaluate the evidence adduced before the trial court, was of the opinion that the appellant had been properly convicted for robbery with violence and on the death penalty stated as follows: -

"On the back of the Mutiso case, the appellant's counsel urged the court to exercise its discretion under section 354(3)(b) of the Criminal Procedure Code to render a sentence other than the death penalty. Although none of the parties so argued, we are aware that the Mutiso case was recently overturned by a five judge bench of the Court of Appeal in the case of Joseph Njuguna Mwaura & 2others v R, Criminal Appeal No 5 of 2008, delivered on 18th October 2013. The court discussed the right to life under Article 26 of the Constitution, 2010 and concluded that no person may be deprived of their life intentionally, except as authorized by the Constitution or other written law. They held that the Penal Code was one such law. The court held that; "The decision in Godfrey Mutiso v R to be per incuriam in so far as it purports to grant discretion in sentencing with regard to capital offences" The Court finally decided that 'the sentence of death shall continue to be imposed in case of conviction where the law provides.' This court is bound by the above decision of Joseph Njuguna Mwaura. We therefore cannot exercise any discretion in

respect of the sentence imposed by the learned trial Magistrate in this case, which was in accordance with the Penal Code. Accordingly, this ground of appeal cannot stand."

[9] In sum, the High Court found the evidence presented to the trial court was cogent and safe to sustain a conviction of the appellant on the charge of robbery with violence. Following this Court's decision in **Joseph Njuguna Mwaura & 2 Others vs. R [2003] eKLR,** where the appellant challenged the charge sheet because he was charged under ***Section 296 (2)*** of the Penal Code ***without Section 295*** and drawing an analogy thereto, the Judges stated that they had no discretion to impose any other sentence but death upon such conviction. The conviction and sentence of the trial court were therefore upheld and the appeal dismissed, thereby provoking this second appeal.

[10] By his home-made memorandum of appeal, the appellant has mainly faulted the trial court for '***failing to appreciate that the prosecution had failed to prove its case to the standard required in law, that is prove beyond reasonable doubt***'. Two supplementary memoranda of appeal were subsequently filed on 9th November, 2017 and 13th November, 2017 through **Mr. Oira,** learned counsel for the appellant. The said grounds faulted the learned Judges for failing to find that there was no identification parade that was carried out; basing a conviction on the evidence of a sole witness and ignoring the defence by the appellant that there existed a grudge between him and the complainant and failure to re-evaluate the evidence and failing to find there were substantial contradictions that should have been resolved to the benefit of the appellant.

[11] During the plenary hearing, **Mr. Oira** made some oral submissions in support of the grounds of appeal and relied on a list of authorities. He submitted that the evidence by PW1 was weak, it was very early in the morning and moreover there was no identification parade that was conducted. The prosecution's case was based on the evidence of a sole identifying witness which was made weak by the appellant's defence which showed there were elements of a grudge between the appellant and the complaint due to a disagreement over payment for work done by the appellant for which PW1 had refused to pay for. In the alternative, counsel urged us that in the event the conviction is upheld, to consider the sentencing principles enunciated by the Supreme Court in **Francis Karioko Muruatetu & another vs. Republic [2019] eKLR** and interfere with the sentence which is not proportionate to the minor offence as the complainant did not suffer any aggravated injuries.

[12] Opposing the appeal was **Ms. Wang'ele**, learned Senior Principal Prosecution Counsel. She submitted that the issue of identification parade did not arise as PW1 recognized the appellant during the attack, and gave his name to the police when he made the report at the police station. PW1 kept searching for the appellant until he spotted him at a construction site and immediately the appellant saw the police, he attempted to escape but was apprehended. Besides identification, the appellant took the police to his house where the stolen items namely, the cap and wallet belonging to PW1, and which he positively identified as his, were recovered. The appellant did not offer any explanation as to why he was found in possession of items that were recently stolen from PW1. On sentence, counsel urged us to maintain the death sentence as the offence carried all the aggravating elements of the ingredients of robbery with violence. For these reasons, **Ms. Wang'ele** urged us to dismiss the appeal.

[13] This being a second appeal, our jurisdiction is limited by ***Section 361*** of the **Criminal Procedure Code** to consider only matters of law. Our role as the second appellate court was succinctly set out in **Karani vs. R [2010] 1 KLR 73** wherein this Court expressed itself as follows: -

"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."

[14] Having considered and deliberated on the record of appeal, submissions and principles of law, we have distilled the following issues for our determination;

whether conviction of the appellant was supported by credible evidence and whether the appellant should have been convicted of another offence rather than robbery with violence based on his defence.

[15] With regard to the first issue, it is common ground that the main evidence that links the appellant to the commission of the offence is by PW1 who was the sole identifying witness. This evidence was augmented by the fact that the police recovered two items that were stolen from PW1 during the attack from the house of the appellant. According to PW1 he was attacked at 5 am as he opened his door to go to work and he was able to recognize the appellant as his attacker. On the part of the appellant, he denied the offence and contended that PW1 framed him up due to a dispute over payment of the money for some work he had done for the accuser. The question therefore is whether the two courts below erred in relying on that evidence in convicting the appellant. Where a court relies on the evidence of identification or recognition, especially if such evidence is of a single witness, it must examine that evidence carefully in order to satisfy itself as to the correctness of the evidence. In **Francis Kariuki Njiru & 7 Others vs. Republic [2001] eKLR (Criminal Appeal No. 6 of 2001)** this Court rendered itself as follows:

"… The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from possibility of error. The surrounding circumstances must be considered. Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all."

[16] In this appeal, both courts below found the evidence of identification by recognition, free from error. We find that the learned Judges fastidiously revisited the evidence of PW1on this issue and agreed with the trial magistrate that there was no error as far as identification of the appellant was concerned. This is what the pertinent portion of the said evidence stated: -

"The man who pulled me is called Mbithi. I knew him before. He hit me using a metal rod on the chest and I fell down. He then got my wallet from back pocket of my trouser. He took my wallet and cap. He hit me again and pulled me towards the road"

This was evidence of identification through recognition that was not taken alone but with other evidence in particular, recovery of stolen items from the house of the appellant. See **Hamisi Swaleh Kibuyu vs. R [2015] eKLR** in which this Court stated as follows in regard to evidence of identification by recognition**:**

"On this issue of recognition, we are alive to the fact that even the most honest of witnesses can be mistaken when it comes to identification (see KAMAU versus REPUBLIC (1975) EA 139). In light of this, conviction on evidence of recognition or identification should only ensue when it is crystal clear and when there is no room for doubt, and hence possible error. The evidence must be beyond speculation or assumption and must positively and irresistibly point to the accused as the culprit." See also R. vs. Turnbull [1976] 3 ALL E.R. 549.

[17] On the second issue of whether the appellant should have been charged with a different offence other than robbery with violence, it was the appellant's submission that the prosecution did not present sufficient evidence that he beat the complainant with a metal rod in order to meet the threshold of the offence of robbery with violence. It was his contention that the circumstances arose out of a disagreement over an unpaid debt. The necessary elements of the offence of robbery with violence have been elaborated by this Court in **Juma Mohamed Ganzi & 2 other vs. Republic [2005] eKLR, Johana Ndungu vs. Republic [1996] eKLR** and **Oluoch v Republic [1985] KRL 549** as follows: -

"1. If the offender is armed with any dangerous or offensive weapon or instrument, or

2. If he is in the company with one or more other person or persons, or

3. If at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person."

[18] It is clear that the two courts below were not convinced that the incident was as a result of a disagreement over an unpaid debt. Giving reasons for dismissing the appellant's version of events, the learned Judges reiterated a statement made by PW1 before the trial court as follows: -

"…at the time of the robbery he was armed with a metal rod which in my assessment is an offensive weapon. There is also evidence that the accused assaulted PW1 just before robbing him. PW1 sustained injuries which PW4 confirmed in the P3 form. Therefore I find that the prosecution have proved all the ingredients of the charge against the accused beyond reasonable doubt as required."

We find the foregoing analysis sound and legal and therefore we have no justification for faulting the two courts below in the conclusions made regarding conviction of the appellant.

[19] However on the death sentence, we are persuaded that the appellant should benefit from the *ratio decidendi* in the ***Muruatetu's case*** (supra). The appellants in the said case were sentenced to death for the offence of murder contrary to ***Section 203*** as read with ***Section 204*** of the Penal Code. ***Section 204*** of the Penal Code provides:

"Any person convicted for murder shall be sentenced to death."

After their appeals were dismissed by the Court of Appeal, they appealed to the Supreme Court challenging the constitutionality of the death sentence as the only sentence. The main issue canvassed in the appeal was whether or not the mandatory death penalty is unconstitutional. The Supreme Court said at paragraph 48 that: -

"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"

At **paragraph 52**, the Supreme Court again said: -

"We are in agreement and affirm the Court of Appeal decision in Mutiso that whilst the Constitution recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed."

In our view the substance of that judgment was summarized at **paragraph 69** where the Supreme Court stated: -

"Consequently, we find that Section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that

it provides the mandatory death sentence for murder. For avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment."

[20] By parity of reasoning, even the death penalty as the only sentence prescribed under **Section 296 (2)** of the **Penal Code,** would meet the same fate. We will therefore consider the sentencing of the appellant within the aforesaid principles. It is apparent to us that mitigation was rancorously done before the trial court, although this is understandable bearing in mind that death sentence was at that time the only one mandatorily prescribed by law. All the appellant stated was that he was unwell and was suffering from malaria, while the prosecution stated that he was a first offender. We have taken into account these two factors, which we have weighed against the proportionality of the offence that was committed. Following the above guidelines and considering the circumstances of the matter, we ask ourselves whether death sentence was the appropriate sentence in this case.

[21] It is common ground that the appellant did not sustain serious injuries, even after he was hit, he still managed to run to the police station, he also took himself to the hospital and the P3 form shows he had a tenderness on the shoulder. Also, the property that was stolen was valued Ksh. 2400 which may not have benefited the appellant much and in any event, he has been incarcerated for more than 10 years which we think is sufficient and proportionate punishment for the offence he committed.

[22] In the circumstances we are of the view that death sentence in this case was manifestly excessive and the two courts below would not have imposed it if they had a choice. Although we dismiss the appeal on conviction, the appeal partially succeeds on sentence. We set aside the death sentence and substitute therefor an order commuting the death sentence to the period served. Accordingly, and unless the appellant is otherwise lawfully held, he is set at liberty forthwith.

Dated and delivered at Nairobi this 24th day of April, 2020.

M. K. KOOME

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

Signed

DEPTY REGISTRAR