Case Number:	Criminal Appeal 98 of 2015
Date Delivered:	23 Jul 2021
Case Class:	Criminal
Court:	Court of Appeal at Nyeri
Case Action:	Judgment
Judge:	Daniel Kiio Musinga, William Ouko, Jamila Mohammed
Citation:	Joshua Bundi Nganatha v Republic [2021] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Nyeri
Docket Number:	-
History Docket Number:	Criminal Appeal 70 of 2014
Case Outcome:	Appeal partly allowed.
History County:	Nyeri
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 98 OF 2015

BETWEEN

JOSHUA BUNDI NGANATHA..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nyeri, (Ong'udi & Ngaah, JJ.) dated 15th December, 2015

in

HCCR.A. NO. 70 OF 2014)

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JUDGMENT OF THE COURT

Background

[1] This is a second appeal by the appellant, **Joshua Bundi Nganatha**, against conviction for the offence of robbery with violence contrary to ***Section 296 (2) of the Penal Code*** and death sentence by the Chief Magistrates' Court at Nanyuki. This follows an unsuccessful first appeal to the High Court of Kenya at Nyeri (**Ong'udi & Ngaah, JJ.**).

[2] The particulars of the offence were that on 12th September, 2013, at Kenya Wildlife headquarters junction in Laikipia County within the Republic of Kenya jointly with others not before court, while armed with a dangerous weapon, namely, a *panga*, the appellant and his co-accused robbed **Freddy Van Hulst** of cell phones, Samsung make E1200 GSM valued at Kshs 1,490/=, Nokia make 1661 valued at Kshs 3,750/= a camera make Panasonic Lumix DMC FZ-38 valued at Kshs 35,200/=, motorcycle registration number KMDC 285T make ranger valued at Kshs 82,000/= a wallet containing Kshs 5,000/= a driving licence, a student identification card and ATM cards, all valued at Kshs. 127,430/= and immediately before such robbery, they used personal violence to the said **Freddy Van Hulst**.

[3] The circumstances leading to the appellant's conviction were that at about 10.30 am on 12th September, 2013, **Fredrick Johnness Van Hulst** *alias* **Freddy Van Hulst (Freddy)** was riding a motor cycle on Nanyuki-Mount Kenya Safari Club road with his wife, **Maaika Yohanna Elizabeth (Elizabeth);** they stopped briefly at Kenya Wildlife Headquarters junction in Laikipia County to take pictures before getting back on their motorbike to continue with their journey to Mt. Kenya; that they noticed three strangers on a motorbike across the road and as **Freddy** ignited the motorbike, the three strangers confronted them from behind; and that one of the strangers switched off the motor cycle engine and took the key, while another one hit **Freddy** and **Elizabeth** with a machete.

[4] Thereafter, the assailants took **Elizabeth's** bag which contained **Freddy's** camera. The assailants also took the couple's cell phones, student identity cards, ATM cards and driving licences from **Freddy's** pockets and rode off on the two motor-bikes.

[5] On 20th September, 2013 the appellant was arrested as one of the suspects. According to **PC Boniface Kithinji (PC Kithinji),** upon interrogation, the appellant admitted having been involved in the robbery and led the police officers to a shop in Nanyuki town where he had taken the camera. The owner of the shop, **Henry Ngari Ndungu (Henry),** removed the camera from a drawer in the shop and gave it to the police officers whereupon he was arrested and taken to the police station together with the appellant.

[6] Subsequently, **Freddy** was called to Nanyuki Police Station where he identified the camera, a Panasonic DMC-F238, and the camera bag as his property. In court, **Freddy** testified that whenever the bag was shaken, it made a particular noise. He also provided receipts for the purchase of the camera and cell phones.

[7] In defence, the 1st appellant gave sworn testimony that he was arrested in the course of his business on 20th September, 2013. He denied having committed the offence with which he was charged.

[8] Upon evaluation of the evidence, satisfied that the prosecution had established its case against the appellant, the trial court convicted the appellant and sentenced him to death. The trial court found that the ingredients of the offence of robbery with violence were proved: that the appellant was positively identified as one of the assailants; and that there was circumstantial evidence that linked the appellant to the offence. The appellant's co-accused was acquitted. On the appellant's first appeal, the trial court upheld the appellant's conviction and sentence. Aggrieved, the appellant challenged the High Court decision to this Court in: failing to consider the inconsistencies in the evidence of **Freddy** and **PC Kithinji** regarding the make of the exhibit camera; relying on a scanned copy of the receipt for the camera; failing to consider that **Freddy** did not identify the appellant despite the four identification parades that were conducted; failing to consider that there was violation of ***Section 85 (1), (2) and (3) of the Criminal Procedure Code (CPC)*** in that **PC Agutu** was below the rank of a qualified prosecutor; and failing to consider that the appellant was not issued with witness statements contrary to **Article 25 (c)** and **50 (j)** of the **Constitution**.

[9] This appeal was heard virtually through an online platform due to the risks associated with the novel COVID -19 pandemic as per the Practice Directions issued by the Chief Justice on 20th March 2020 in ***Gazette Notice No. 3137***.

Submissions

[10] Ms. Loise Miriti held brief for **Mr Nderi**, learned counsel for the appellant, while **Mr. Duncan Ondimu**, learned Principal Prosecution Counsel (PPC) represented the respondent. **Ms. Miriti** stated that the appellant had instructed his advocate to withdraw the appeal to enable him to pursue re-sentencing.

[11] On the other hand, learned PPC conceded the appeal on grounds that **PC Agutu**, a Police Constable, who partly prosecuted the case and led the evidence of **PC Kithinji** and **Henry** that was relied on in convicting the appellant based on the doctrine of recent possession, was not qualified to conduct the prosecution. It was his submission that before the amendment in 2012, ***Section 85 (2) of the CPC*** provided that:-

"The Attorney General, by writing under his hand may appoint any advocate of the High Court or any person employed in the

public service, not being a police officer below the rank of Assistant Inspector of Police to be a public prosecutor for the purpose of any case." *(Emphasis supplied).*

[12] The learned PPC also relied on ***Roy Richard Elirema & another v Republic [2003] Criminal Appeal No. 67 of 2002 (Roy Richard case)*** where this Court found that the trial of the appellants was a nullity as it was conducted by two police officers who were not qualified to act as prosecutors. The PPC also cited the case of ***Laban Kimondo Karanja & 2 Others v Republic [2006] eKLR*** where the High Court found that a police officer of the rank of Sergeant was not qualified to be appointed as a public prosecutor under ***Section 85 of the Criminal Procedure Code***.

[13] Further, relying on the ***Roy Richard case (supra),*** the learned PPC submitted that a re-trial would not serve the interests of justice in this case as the offence was committed seven years ago and the victims were foreign nationals who were in the Country for a limited period of time.

Determination

[14] We have considered the appeal, the submissions by the parties, the authorities cited and the law. Our duty as the second appellate court in the matter is limited to consideration of matters of law only. In this respect, ***Section 361 of the Criminal Procedure Code*** provides that:-

"361. (1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section –

(a) on a matter of fact, and severity of sentence is a matter of fact; or

(b) against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence."

[15] In this regard, this Court held in ***Karingo v. Republic [1982] KLR 213*** as follows*:*

"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karori S/O Karanja versus Republic [1956 17 EALA 146]."

[16] This appeal has been conceded by the State. However, the concession is not binding on the Court as this Court's duty is to determine the appeal on its merits and consider whether the evidence adduced supported the appellant's conviction. See ***Norman Ambich Miero & another v Republic [2012] eKLR, Criminal Appeal No. 279 OF 2005*** and ***Nelson Ambani Mbakaya v Republic [2016] eKLR, Mombasa Criminal Appeal No. 1 of 2016.***

[17] The main issue arising for our determination is whether the appellant's trial was conducted by an unqualified prosecutor and if so, whether that trial was a nullity. Following the ***Roy Richard case (supra)*** and the nullification of trials on the basis that they were conducted by police officers below the rank of Assistant Inspectors, Parliament amended ***Section 85(2) of the Criminal Procedure Code*** through ***Act No. 7 of 2007***. The words "***not being a police officer below the rank of Assistant Inspector of Police,"*** were removed. Thus, "any person employed in the public service" was capable of being appointed a public prosecutor. See ***Joseph Kamau Gichuki v Republic [2013] eKLR*** and **Criminal Appeal No. 523 of 2010**, ***Peter Sabem Leitu v Republic [2013] eKLR*,** **Criminal Appeal No. 482 of 2007**.

[18] Subsequent to the promulgation of the Constitution of Kenya in August, 2010, Parliament further amended **Sections 2 and 85(2) of the CPC** through ***Act No. 12 of 2012***, replacing the Director of Public Prosecutions with the Attorney General. ***Section 85 (2) of the CPC*** now reads:-

"(2) The Director of Public Prosecutions, by writing under his hand, may appoint any advocate of the High Court or person employed in the public service, to be a public prosecutor for the purposes of any case."

Section 2 of the CPC now defines "Public Prosecutor" as:-

"...the Director of Public Prosecutions, a state counsel, a person appointed under section 85 or a person acting under the direction of the Director of Public Prosecutions."

[19] In ***Isaac Mutuma Irikia v Republic [2017] eKLR, Criminal Appeal No. 6 of 2015,*** this Court, interpreting the above provisions, found that after the amendment of ***Section 85(2) of the CPC*** in 2007, a Police Constable had the authority to prosecute.

[20] In the instant appeal, the prosecution commenced on 26th September, 2013 and judgment was issued by the trial court on 19th August, 2014. It is therefore evident that the prosecution of the case was lawful since it was conducted after the amendments of ***Section 85(2)*** of the **Criminal Procedure Code** in the years 2007 and 2012. We therefore find that there is no merit in the ground advanced by the learned PPC to concede the appeal as **PC Agutu** was duly authorized by law to prosecute the matter at the time.

[21] In view of the above, we find that the testimonies of **PC Kithinji** and **Henry** were lawfully led by **PC Agutu**. We are therefore satisfied that the learned Judges of the High Court did not err in upholding the appellant's conviction on the basis of the doctrine of recent possession.

[22] As regards sentence, in meting out the sentence of death, the trial court stated that, ***"I have considered the accused mitigation and accused is sentenced to the mandatory sentence as by law prescribed."*** It is clear that in sentencing the trial court did not exercise his discretion since it was at the time under a mistaken belief that death sentence was mandatory.

[23] Upon our own consideration of the circumstances under which the offence was committed, the mitigating factors and conscious that death is not mandatory, it is our considered view that both the trial court and the High Court erred in their belief that there was only one sentence upon conviction.

[24] We therefore take into consideration that in mitigation, the appellant sought leniency and stated that he was a family man. It is also not lost on us that though the offence with which the appellant was charged was serious, one of the complainants having sustained a laceration on the frontal region from a *panga* cut, we note that a camera which was stolen in the course of the robbery was recovered. We therefore find that a sentence of 30 years imprisonment would serve the course of justice.

[25] Accordingly, the appeal against conviction is dismissed while the appeal against sentence is allowed. We set aside the death sentence imposed by the trial court and upheld by the 1st appellate court and substitute it with a sentence of 30 years imprisonment with effect from 19th August 2014, when the appellant was convicted and sentenced.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JULY, 2021.

W. OUKO

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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

DEPUTY REGISTRAR