Muchoki v Republic (Criminal Appeal 165 of 2013)
[2024] KEHC 9606 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9606 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL 165 OF 2013

CW GITHUA, J

JULY 26, 2024

BETWEEN

SAMUEL NJARAMBA MUCHOKI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence of Hon. J Gathuku (R.M) dated the 20th of September, 2011, in the Senior Principal Magistrate's court at Murang'a Criminal Case No. 1774 of 2010)

JUDGMENT

1. The appellant, Samuel Njaramba Muchoki, jointly with another not before this court, was tried and convicted of the offence of preparation to commit a felony contrary to Section 308 (1) of the *Penal Code*.

2. It was alleged that on the night of 21st July 2010, at 0030 hrs at Matithi Village in Murang'a North district within Central province, the appellant and his co-accused was found armed with offensive weapons namely, an axe, a chain and three pangas in circumstances that indicated that they were so armed with intent to commit a felony, namely robbery.

3. Upon conviction, the appellant was sentenced to serve a term of seven years imprisonment. He was aggrieved with his conviction and sentence. He proffered an appeal to this court through a Petition of Appeal dated 27th September 2011 filed on his behalf by the firm of Ms. Kirubi, Mwangi Ben & Company Advocates.

4. In his petition of appeal, the appellant relied on seven grounds in which he principally complained that the learned trial magistrate erred in fact and in law by : convicting him on the basis of evidence which was marred with contradictions and which did not prove the offence charged to the required legal standard; failing to ensure that PW1 and PW2 were recalled for further cross examination as requested

hence denying him a fair hearing; failing to consider his defence thereby arriving at a wrong decision; and shifting the burden of proof from the prosecution to him.

5. A brief summary of the prosecution case in the lower court was that on 21st July 2010 at about 12.30 am, PW1, Snr. Sgt Peter Ndung'u was on patrol duties in Muthithi area together with PW2, APC Dismus Kimunyu and other police officers when they saw a group of about ten people. Since it was at night, they all had torches. On seeing them, the people in the group started running away in different directions despite being ordered to stop. They gave chase. According to PW1, he arrested the appellant who was armed with a panga and upon search, he recovered a chain on his waist.

6. PW2 and the other police officers arrested the appellant's co- accused who were also armed with two other pangas and an axe. They were all escorted to Muran'ga police Station where they were handed over to PW3, PC Isaac Teker. PW3 re- arrested them and took possession of the recovered weapons and subsequently charged them with the offence for which the appellant stands convicted.

7. When placed on his defence, the appellant chose to give an unsworn statement and did not call any witness. He denied having committed the offence as alleged and stated that on the day and time alleged, he was asleep when police officers for no reason broke into his house, handcuffed him and took him to a waiting police vehicle and then to a police station.

8. The appeal was prosecuted by way of written submissions. The appellants submissions were filed by his advocates on record on 4th July 2023 while those of the respondent were filed on the same date by learned prosecution counsel, Mr. Calvin Kariuki. Both learned counsel chose to rely entirely on their written submissions which I have read and duly considered.

9. This being a first appeal, it is an appeal on both law and facts. I am fully conscious of my duty as the first appellate court which is to thoroughly scrutinize and re-evaluate all the evidence tendered before the trial court and arrive at my own independent conclusions regarding whether the appellant was properly convicted and sentenced. In doing so, I should remember that unlike the trial court, I did not have the advantage of seeing and hearing the witnesses as they testified and give due allowance for that disadvantage: See: *Dickson Mwangi Munene & another v Republic* (2014) eKLR; *Okeno v Republic* (1972) EA 32.

10. Guided by the above principle, I have carefully considered the grounds of appeal, the rival written submissions filed by both parties and the authorities cited. I have also read and understood the evidence on record and the impugned judgement.

    Having done so, I find that the main issue arising for my determination is whether the evidence adduced by the prosecution was sufficient to prove the charge preferred against the appellant beyond any reasonable doubt and if the answer is in the affirmative, whether the appellant's sentence was lawful or ought to be set aside as prayed.

11. Before addressing the first issue, I would like to briefly deal with the complaint made by the appellant that the trial court denied him a fair hearing by failing to ensure the recalling of PW1 and PW2 for further cross examination.

12. The trial court's record reveals that on 24th May 2011, the appellant and his co-accused requested the court to recall PW1 and PW2 for further cross-examination which prayer the court granted. When the matter came up for hearing on 21st June 2011, the prosecution informed the court that it had been unable to trace the Prosecution witnesses that were to be recalled and requested for summons for both of them, which summons the court issued.

13. On 12th July 2011, the prosecution requested for adjournment on the basis of lack of exhibits and when the appellant and his co-accused complained of delay in the conclusion of their case, the prosecution was forced to close its case. The appellant did not at that point or at any other time before presenting his defence raise the issue of recalling of the two witnesses. The issue appears to have been forgotten by both the appellant and the trial court and though the trial court ought to have ensured that its order was complied with, failure to do so appears to have been an inadvertent omission.

14. Since the appellant had already cross-examined the witnesses, it is my view that the trial court's aforesaid omission did not violate the appellant's right to a fair hearing nor did it cause him prejudice that would amount to a failure of justice. It is thus my finding that the error was curable under Section 382 of the *Criminal Procedure Code* and cannot be a basis of vitiating the appellant's conviction.

15. Having found as I have above, I now turn to a consideration of the first issue. The appellant has complained that he was convicted on contradictory evidence which did not prove the essential ingredients of the offence of preparation to commit a felony beyond any reasonable doubt. A reading of Section 308 (1) of the *Penal Code* which creates the offence reveals that for the prosecution to sustain a conviction, it must prove beyond any reasonable doubt two essential elements of the offence which are;

    i. Possession of a dangerous or offensive weapon; and,

    ii. That the possession was in circumstances that indicated that the accused was so armed with intent to commit a felony.

16. The Court of Appeal in the case of *Nyadenga v Republic* (1989) eKLR re-iterated this position when it held as follows;

> "An accused person commits the offence of preparation to commit a felony contrary to section 308 (1) of the *Penal Code* if he is found "armed with any dangerous or offensive weapon in circumstance that indicate that he was so armed with intent to commit any felony. "Thus, an accused person must be found: 1. Armed with any dangerous or offensive weapon; and 2. In circumstances that indicate that he was so armed with intent to commit a felony."

17. In this case, the prosecution witnesses were all clear and consistent in their evidence that the appellant was arrested on the night of 21st July 2010 armed with a panga and a chain. The question that needs to be answered is whether a panga and a chain qualify to be dangerous or offensive weapons as contemplated in Section 308 (1) of the *Penal Code*.

18. The interpretation section of the *Penal Code* which is Section 4 does not define the term dangerous or offensive weapon nor does Section 308 which as stated earlier, creates the offence. The only provision in the *Penal code* which sheds some light on the meaning of the term 'offensive weapon' is Section 89 (4) which defines the term for purposes of the offence of being in possession of a firearm or other offensive weapon created under Section 89 (1) of the same code.

19. Section 89 (4) defines the term as;

> "any article made or adapted for use for causing injury to the person, or intended by the person having it in his possession or under his control for such use."
>
> The above meaning was applied by the High Court to the definition of the term "dangerous or offensive weapon" in reference to the offence of preparation to commit a felony in the

case of *Mwaura & Others v Republic* (1973) EA 373, which has been cited and relied on by both parties in this appeal.

20. Having the above definition in mind, although I agree with Mr. Kirubi's submission that having possession of a panga and a chain does not by itself create an offence, I am unable to agree with his submission that the same are just common farm tools and cannot be classified as dangerous or offensive weapons because in my view, the circumstances and the place of their possession matters. Although a chain is not an offensive weapon per se, it can be wielded in a way that can cause injury to a person. The same argument cannot apply to a panga because a panga is made in a way that makes it a dangerous weapon which can cause injury to a person although it can also be used for other non violent activities including farming.

21. It is also important to note that from the evidence on record, the appellant and his co-accused were found in possession of the said weapons at night, in fact past midnight and obviously, the panga and chain could not have been intended for use as farm tools or tools of trade at that hour. They must have been intended for use as weapons to cause injury to people and that's why the appellant and his co-accused were found on a public road and not in a farm. In the premises, I have no doubt in my mind that the appellant was found in possession of offensive weapons at the time alleged.

22. Given my finding above, the only question which now begs an answer is whether the appellant was found in possession of those weapons in circumstances that indicated that he was so armed with the intention of committing a felony.

    At the outset, I wish to agree with Mr. Kirubi's submission that the offence of preparation to commit a felony is not complete if there was no overt act showing that an offence was about or was intended to be committed. This was the holding of the Court of Appeal in the case of *Manuel Legasiani & 3 Others v Republic* (2000) eKLR which was also cited by both parties.

23. In this case, PW1 and PW2 were clear and consistent in their evidence that before his arrest, the appellant was in the company of a group of about ten people who ran away in different directions upon noticing them and continued running even after being ordered to stop. After giving chase, the appellant was arrested and upon search by PW1, he was found in possession of a panga which he was holding in his right hand and a chain on his waist. His co -accused who were also in the same group were found in possession of other weapons namely, an axe and two pangas.

24. The learned trial magistrate after considering the appellant's unsworn statement rejected it as a mere denial and believed the evidence of PW1 and PW2 regarding the circumstances of the appellant's arrest. I have on my part considered the content of the appellant's unsworn statement and I also find it difficult to believe. PW1 and members of his team could not have broken into his house and arrested him for no apparent reason. The appellant did not claim that he was known to the police officers before the material date and that they had a grudge or a reason to give false evidence against him.

25. From the evidence on record, am unable to fault the learned trial magistrate's finding on the credibility of PW1 and PW2 firstly because it is the trial court that had the advantage of seeing the witnesses as they testified and secondly, contrary to the claim by the appellant, their evidence was consistent and did not have any material contradictions. Further, their evidence was corroborated by the evidence of PW3 who received and re-arrested the appellant and his co-accused the same night when they were escorted to Murang'a Police Station together with the recovered weapons.

26. Flowing from the foregoing and after my own independent appraisal of the evidence on record, I have come to the same conclusion as the learned trial magistrate that the appellant and his accomplices were at the material time found in possession of offensive weapons in circumstances that indicated that they

were so armed with intent to commit a felony like robbery or any other felony whose commission requires the use of weapons. The circumstances were that he was in a group of other armed men on a public road well past midnight and they all fled upon seeing police officers.

27. It is my finding that the act of arming themselves late at night and walking as a group on a public road and running away on seeing police officers constituted overt acts that left no doubt that the appellant and his co-accused were armed with the intention of committing a felony. If they did not have a felonious intent, they had no reason to run away from law enforcement officers.

28. For the reasons stated above, I am satisfied that the prosecution proved its case against the appellant beyond any reasonable doubt. It is therefore my finding that the appellant was properly convicted. His appeal against conviction thus fails.

29. With regard to the appeal against sentence, the appellant only prayed that his sentence be set aside but did not state either in his grounds of appeal or in his submissions what error the trial court committed to warrant setting aside of his sentence.

30. The record shows that the appellant was sentenced to seven years imprisonment which is the minimum mandatory sentence prescribed by the law for the offence of preparation to commit a felony. It is noted that this sentence was handed down on 20th September 2011 long before the new jurisprudence on the constitutionality of minimum mandatory sentences emerged from our courts starting with the decision of the Supreme Court in *Francis Kariokor Muruatetu v Republic* (2017) eKLR which declared that the mandatory nature of the death penalty for persons convicted of the offence of murder, was unconstitutional.

31. Subsequent to the above decision, both the High Court and Court of Appeal has made several decisions declaring minimum mandatory sentences prescribed for sexual offences and for the offence of robbery with violence unconstitutional for fettering the court's discretion in sentencing- See: *Maingi & 5 Others V Director of Public Prosecutions & Another* (2022) KEHC13118 (KLR); *Edwin Wachira & 9 Others v Republic* Petition No. 97 of 2021 and *Mohamed Salim & Another v Republic* (2024) KECA153 (KLR)

32. In *Mohamed Salim & Another v Republic* (*Supra*) , the Court of Appeal when substituting the death penalty with 30 years imprisonment for an appellant who had been convicted of the offence of robbery with violence correctly observed as follows;

> " The current jurisprudence on the issue of mandatory sentences is that it is unconstitutional, as it deprives the court of its mandate to exercise its discretion in such a manner as to do justice in a way that imposes a sentence that is appropriate to the circumstances of the particular case which is at hand. Accordingly, it is now settled that sentences which are couched in mandatory terms shall be construed as the maximum penalty that can be handed down."

33. I fully associate myself with the above finding. And having noted from the record that the appellant was a first offender, I am persuaded to find that the sentence of seven years imprisonment imposed by the learned trial magistrate though lawful was harsh and manifestly excessive. Consequently, I hereby set aside the trial court's sentence and substitute it with a sentence of two years imprisonment.

34. As stated earlier, the appellant was convicted on 20th September 2011. The court record shows that he has been out on bond pending conclusion of this appeal for over ten years. For all this period, he has been attending this court for the hearing of his appeal and he has not absconded. In the circumstances,

I am of the considered view that no useful purpose will be served by ordering him to serve a custodial sentence.

Accordingly, I hereby exercise my discretion under Section 15 of the *Criminal Procedure Code* and suspend the appellant's sentence for the same period of two years. The appellant is hereby warned of the consequences of committing any offence during the operational period.

35. It is so ordered.

DATED, SIGNED AND DELIVERED AT MURAN'GA THIS 26TH DAY OF JULY 2024.

C. W. GITHUA

JUDGE

In the Presence of :

The appellant

Mr. Kirubi for the appellant

Ms. Muriu for the respondent

Ms. Susan Waiganjo, Court Assistant