Muchesia v Republic (Criminal Appeal 10 of 2020)
[2024] KEHC 11343 (KLR) (27 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11343 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL 10 OF 2020

AC BETT, J

SEPTEMBER 27, 2024

BETWEEN

ALFRED MUTUKHA MUCHESIA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence of Hon E. Malesi (SRM) passed on 16th January 2020 and 30th January 2020 in Kakamega CMC Criminal Case No 2391 of 2018)

JUDGMENT

1. The appellant Alfred Mutukha Muchesia was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code.The particulars of the offence were that on the night of 19th October 2017 and 20th October 2017,jointly with his co-accused Paul Muchesia Mwole, at Namanja Secondary School in Matioli sub-location,Butali location in Kakamega North sub-county within Kakamega County, while armed with dangerous weapons namely; slasher, two metal bars and a wheel spanner ,robbed David Makokha Muchiti of one LG TV 49LH548, one Sony DVD player SR760,one HP Volt Power guard, one electronic calculator, two computers HP Compaq tower and HP Compaq desktop ,four mobile phones, two CPU machines and cash Kshs 23,625/= all valued at Kshs 297,817/= and at immediately before or immediately after the time of such robbery caused the death of David Makokha Muchiti.

2. The appellant and his co-accused pleaded not guilty, and the matter proceeded to hearing whereupon the appellant and his co-accused were convicted and each sentenced to 30 years imprisonment.

3. The appellant was aggrieved by the conviction and sentence of the trial court and promptly filed a petition of appeal in which he faulted the trial court for its decision. His contention was that the charge of robbery with violence was not conclusively proved and that he was convicted on mistaken identity. He further faulted the trial court for finding that the doctrine of recent possession was applicable to his

case and denied being in possession of the recovered items. The appellant also contended that the trial magistrate failed to consider his defence. It was the appellant's further contention that he was denied his constitutional right to a fair trial.

4. The prosecution's case was based on circumstantial evidence because the sole eyewitness to the robbery was killed at the time of the crime. The prosecution adduced evidence on how they recovered the stolen items from the appellant and his two accomplices while they were ferrying them in a public service vehicle. According to PW3, a corporal from Butali Administration Police Camp, on the morning of 20th October 2017, one of the administration police officers received a call from a conductor who informed him that he had seen some suspicious people carrying bags on their backs waiting to board a vehicle towards Kakamega direction. Acting on the tipoff, the witness and his colleague headed out and on seeing a vehicle heading to Kakamega from Webuye direction, they flagged it to a stop. In the vehicle, they found two people seated behind the driver's seat. The two carried a box on their laps and bags on their backs.PW3 asked the two to step out of the vehicle, handcuffed them, and took them to Butali AP Camp where, upon opening the box, they found a T.V set. The two bags had computer gadgets. According to PW3, the two suspects were unable to explain where and how they came into possession of the T.V. set and on further interrogation, the appellant decided to lead them to the place where they got the T.V. set which turned out to be Namanja Secondary School.PW3 stated that as they approached the school, they found people wailing that their son had been murdered. So, they returned the appellant to the AP Camp where they picked up the other suspect and took them to Kabras police station. They then proceeded to Namanja Secondary School where they found that there had been a robbery incident in which the school watchman had been killed and various items belonging to the school stolen.

5. PW3's evidence was corroborated by his colleague, PW5 and the other prosecution witnesses. The items that were found with the appellant were positively identified by PW4 who was the principal,Namanja Secondary School at the time of the robbery.

6. The appeal was disposed of by way of written submissions.

7. The appellant submitted that since the he and his co-accused were arrested on a tip off by a person who was not called to testify, and the arrest was at an unknown distance away from the scene, then there was a possibility that the appellant was a victim of mistaken identity. The appellant contended that the failure to call the informer to testify meant that the prosecution did not establish a link between the appellant and the offence.

8. Secondly, the appellant submitted that the prosecution failed to prove that the appellant was in possession of the stolen items and in absence of such proof, the doctrine of recent possession could not apply.

9. The appellant further submitted that his right to a fair trial as guaranteed under Article 25(c) and Article 50 of *the Constitution* was violated, as he was not promptly informed of his right to legal representation. The appellant also submitted that since he was facing a capital offence, he ought to have been assisted with legal representation by the state and failure to do so occasioned him substantial injustice.

10. The appellant also submitted that the trial court failed to consider his defence which created doubt in the mind of the court as to whether or not the appellant was guilty of the offence. The appellant urged this court to quash the conviction and set aside the sentence.

11. The respondent opposed the appeal and submitted that the conviction and sentence was well founded. The respondent submitted that there was sufficient evidence that a robbery had occurred at the school

on the material date and a watchman had been killed. According to the respondent there was cogent evidence that several items were stolen from the school at the time of the robbery and the appellant, and his co-accused were found with the stolen items the morning after the robbery. The respondent submitted that the circumstances under which the stolen items were recovered from the appellant and his co-accused rendered the doctrine of recent possession applicable to the case. Reliance was placed on the case of William Oongo Arunga V Republic [2022] KECA 23(KLR) where the court stated as follows:-

> " The essence of the doctrine is that when an accused person is found in possession of recently stolen property and is unable to offer any reasonable explanation how he came to being in possession of that property a presumption of fact arises that he is either the thief or the receiver."

12. It was the respondent's submissions that the sentence imposed on the appellant was lenient in the circumstances since the robbery resulted in the untimely death of one David Makokha Muchiti and considering the fact that the penalty for robbery with violence under Section 296(2) of the Penal Code is death.

13. It is well settled that the duty of the court in a first appeal is to re-evaluate the evidence and make its own independent conclusion bearing in mind the fact that it did not get to hear and see the witnesses testify. In the case of Okeno V Republic [1972] EA 32, the court stated as follows; -

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya v. R,[1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.(Shantilal M. Ruwala v, R[1957] E.A.570.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[E.A.424."

14. The court must subject the evidence to fresh scrutiny to determine whether the prosecution discharged its burden of proof. The charges facing the appellant were robbery with violence. In order to prove that the appellant had committed the offence, the prosecution needed to prove any of the ingredients of the offence of robbery with violence as set out in the case of Oluoch V. Republic [1985] KLR where the court stated thus:-

> " Robbery with violence is committed in any of the following circumstances:
>
> The offender is armed with any dangerous and offensive weapon or instrument; or
>
> The offender is in company with one or more person or persons; or
>
> At or immediately before or after the time of the robbery the offender wounds, beats, strikes, or uses other personal violence to any person....."

15. I have carefully gone through the evidence adduced by the prosecution. It was established that property belonging to Namanja Secondary School were stolen on the material day and that in the cause of the robbery, the school watchman was fatally wounded and lost his life. The evidence was that there were breakages to several offices in the school, books and papers were found scattered all over, and several

items belonging to the school were missing. The evidence was sufficient to point to robbery with violence, and the trial court was right in making a finding that the offence of robbery with violence had been proven.

16. Since there was no eyewitness to the robbery, the prosecution needed to adduce evidence linking the appellant and his co-accused to the offence. The evidence adduced was that when the appellant and his co-accused were apprehended while carrying with them the suspected stolen property the morning after the robbery, the appellant first said that he had taken the T.V. set from Mayonje .The administration police did not find any case of reported theft at Mayonje and after further interrogation, the appellant led the police to the place where they got the T.V. set, which happened to be Namanja Secondary School. The appellant and his co-accused were found with the stolen items less than 12 hours after the robbery. PW6, who was the matatu conductor that tipped off the police testified that at around 4 am on 20th October 2017, he was near Butali stage when he saw the appellant and another person carrying luggage which they told him they were taking to Kisumu. As the two were not in a designated stage, PW6 became suspicious, especially when he shone his torch at the duo's luggage and saw it was a large T.V. set, two computers and two small bags. His suspicion prompted him to call the local administration police officer after the suspects had boarded the motor vehicle. According to the said witness, he pointed out the two suspects to the police when the matatu was flagged down by the said police officers. The items found with the appellant were later positively identified by the principal, Namanja School, as the stolen property of the school. The prosecution's evidence was well collaborated, cogent and consistent. There was no doubt at the close of the case that the items recovered from the appellant and his co-accused in the early morning of 20th October 2017 were the items stolen from Namanja Secondary School. In the circumstances there was no case of mistaken identity since the appellant was caught re-handed, while ferrying the stolen items.

17. The appellant contended that the doctrine of recent possession was not applicable in his case. According to him, the stolen items were found in the vehicle in which they were travelling, and he was not the one in possession of the items. His submissions are that in absence of the evidence of the driver of the said motor vehicle, there is no evidence connecting him with the said property. He relies on the case of Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga V Republic [2006]eKLR.

18. On its part, the respondent submitted that the totality of the evidence before the trial court meets the requirements of the doctrine of recent possession. The appellant and his co-accused were arrested by PW3 and his colleague after a tip-off. They were found carrying a TV and each had a bag. They did not proffer a satisfactory explanation as to how they came into possession of the property and upon further interrogation, the appellant led the police to the place where they had stolen the property.

19. The prosecution's evidence was well corroborated by the evidence of PW6 who, contrary to the appellant's contention, was the informer as well as the matatu conductor and who pointed the stolen items as belonging to the appellant and his co-accused. The prosecution witnesses' evidence was clear and was not shaken on cross-examination. The appellant did not challenge their testimony .He did not put it to the witnesses that the property was not in his possession and could have been in possession of other parties not before court. The assertion that possession was not proved is therefore an afterthought. In the Ng'ang'a Kahiga (supra) case the Court of Appeal stated:-

> " It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case the possession must be positively proved. In other words, there must be positive proof first that the property was found on the suspects, secondly that the property is positively the property of the complainant, thirdly that the property was stolen from the complainant and fourthly that the property was recently stolen from the

complainant. The prove as to time has been stated over and over again will depend on the easiness with which the stolen property can move from one to another."

20. Relying on the aforementioned case, which was cited by both parties in support of their submissions, it is clear that the four ingredients of the doctrine of recent possession were proved by the prosecution.

21. In respect of the contention that his right to a fair trial under Article 25(c) and 50 of *the Constitution* were violated, the appellant submitted that the trial court failed to observe that he was not conversant with the law and did not inform him of his right to legal representation. According to him, the state ought to have provided him with legal aid. He relied on the following cases; JOseph Kiema Philip Vs. Republic [2019] Eklr, Advocate Sans Frontiers (on Behalf Of Bwampanye) Vs. Burundi,african Commission On Human Rights,coom. No 213 /99(2000), Gideon Vs. Wainwright 471 Us 335{1963),pett Vs. Greyhound Racing Association (1968) 2 All Er 545, And Karisa Chengo & 2 Others Vs. Republic CR.APP NOS 44,45,AND 47 OF 2024.

22. . Article 50 of *the Constitution* states as follows:-

> "(1) Every person has a right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or if appropriate another independent and impartial tribunal or body.
>
> (2) Every accused person has the right to a fair trial, which includes the right-
>
> (g) to choose and be represented by and advocate, and to be informed of this right promptly;
>
> (h) to have an advocate assigned to the accused by the state and at state expense if substantial injustice would otherwise result and to be informed of this right promptly."

23. It is clear that the state is under an obligation to provide an accused person with legal assistance especially if the person is faced with a capital offence.However,the state has so far been unable to discharge the said obligation to date. Although the respondent did not submit on this issue, I am of the opinion that the test is whether substantial injustice was occasioned to the appellant by reason of this failure. A perusal of the primary records confirms that the appellant fully took part in the proceedings using the Kiswahili language which he said he was conversant with. He pleaded not guilty to the amended charge on 22nd November 2018 and informed the court that he was ready to proceed with the trial and he had all the witness statements and the amended charge sheet. He actively engaged the prosecution witnesses in cross-examination and asked relevant questions as is discernable from the answers. He gave a sworn statement in his defence. He also filed written submissions in which he cited relevant case law. In the Karisa Chengo (supra) case, the Court of Appeal had this to say:-

> "Nor did the appellant point out that substantial injustice was caused to them by such failure. The respective records show that they were never inhibited at all in the prosecution of their cases during the trial. They actively participated in their trials and subjected to intense cross-examination the witnesses availed by the prosecution. We therefore discern no substantial injustice occasioned to the appellants by the State's failure to accord them legal representation. This ground must necessarily therefore fail."

24. In the same vein, I find that the appellant has not demonstrated that he suffered substantial injustice by reason of failure of the state to accord him legal representation .

25. The appellant's further submissions were that the trial court failed to consider his defence. A careful consideration of the judgement shows that the trial court weighed the prosecution's case vis-a -vis the defence case and upon careful consideration reached the conclusion that the appellant was guilty of the offence. The appellant and his co-accused were apprehended while in possession of property recently stolen from Namanja School in a robbery incident. The appellant did not explain how he came into possession of the stolen goods. In his defence, he attempted to say that he was framed as on the material day, he was on his way to his place of work at Malava forest.His defence was not plausible in light of the evidence adduced by the prosecution. The prosecution case was watertight.

26. In respect of the appeal against the sentence, the appellant stated that the trial court did not consider his mitigation and imposed a harsh sentence. The appellant was sentenced to 30 years imprisonment for an offence whose maximum penalty is death.

27. The respondent is not in support of the sentence on account of the fact that the robbery resulted in the death of the school's night watchman. They relied on the case of William Oongo Arunda Vs, Republic [2022] KECA 23 (KLR) where the Court of Appeal stated as follows in regard to the death penalty imposed in a robbery case:-

> " As regards the sentence and as already noted on the 6th July 2021 the supreme court in Francis Karioko Muruatetu and Another vs Republic directed that the judgement of the court in that case cannot be the basis for stating that all provisions of the law prescribing mandatory or minimum sentences are unlawful.The implication therefore is that upon conviction courts must pass the mandatory sentences that are prescribed.We are therefore unable to interfere with the sentence meted out by the trial court and upheld by the high court in this matter."

28. Section 296(2) of the Penal Code stipulates:-

> " If the offender is armed with a dangerous or offensive weapon or instrument or is in company of one or more persons or if at the time or immediately after the time of the robbery, he wounds, beats, strikes, or uses any other personal violence to any person he shall be sentenced to death."

29. Before the current Constitution, the mandatory death sentence was an imperative under Section 296(2) of the Penal Code. However, our Constitution has led to a paradigm shift in how the penalty for an offence under the said section is determined.

30. Section 27(1) of *the Constitution* provides that every person has a right to equal protection and equal benefit of the law. In the same vein, Article 51(1) guarantees every person the retention of all rights and fundamental freedoms except to the extent that the right or fundamental freedom is incompatible with the fact that the person. More significant to this appeal is Article 51(3) which states as follows:-

> " Parliament shall enact legislation that –
>
> a. Provides for the humane treatment of persons detained, held in custody or imprisoned; and
>
> b. Takes into account the relevant international human rights instruments."

31. Although *the Constitution* recognizes the death sentence as a lawful sentence, it is the mandatory nature of the sentence that has been impugned albeit with respect to murder charges. In the case of Francis

Karioko Muruatetu & Another Vs. Republic & 5 Others [2021] KESC 31(KLR), the Supreme Court observed as follows:-

> " 69. Consequently, we find that section 204 of the Penal Code is inconsistent with *the Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable and a discretionary maximum punishment."

32. The principle behind the Supreme Court's holding in the Francis Karioko Muruatetu case (Supra) is that the mandatory nature of the death sentence denies the accused person his constitutional right to equal treatment of the law in that it robs the court of the judicial discretion on sentence. The Supreme Court stated as follows:-

> " 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. That the mandatory nature deprives the court of their legitimate jurisdiction to exercise discretion not to impose a set 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 trials that accrue to accused persons under Article 23 of *the Constitution*, an absolute right."

33. Despite the respondent arguing that the court should set aside the sentence of thirty (30) years meted upon the appellant and substitute thereof a sentence of death as is mandatory, the court is mindful of the holding in the Muruatetu Case (Supra) which holding should apply by extension, mutatis mutandis to the mandatory death sentence under Section 296 (2).

34. A pre-determined sentence is unconstitutional to the extent that fetters the judicial officer and denies him the exercise of his judicial discretion even in the face of compelling mitigating circumstances.

35. In mitigation, the appellant said that he was young. He pleaded for leniency. Although the trial court called for a pre-sentence report, it appears it was not filed and the court did not refer to it. The court sentenced the appellant and his co-accused to 30 years imprisonment noting that the offence resulted in a death and called for a stiff sentence.

36. The appellant claims that the trial court did not consider his mitigation. However, this court is of the view that the failure by the trial court to expressly mention that it had considered the appellant's mitigation does not mean it did not consider the mitigating factors.

37. The objectives of punishment under the Sentencing Policy Guidelines are; retribution, deterrence, rehabilitation, restorative justice, community protection, denunciation, reconciliation and reintegration. The appellant committed a serious offence. He needed to be subjected to a sentence that would not only help in deterring other would-be offenders and himself from committing a similar offence in future, but as an act of denunciation of his heinous conduct for which he must bear responsibility. The community also needs to be protected from the offender by separating the offender from the society.

38. Both parties have urged the court to interfere with the sentence. The appellant by implication, seeks a downward review. The respondent seeks the death sentence terming it mandatory. On the respondent's submissions, I am constrained to adopt the approach taken by the other courts of equal status with regard to the issue whether the death sentence should be held mandatory in robbery with violence cases.

39. It is well settled that the power to interfere with a sentence meted out by a trial court is limited. In the case of Bernard Kimani Gacheru Vs. Republic [2002] eKLR, the Court of Appeal held:-

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with the sentence unless, the sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

40. In determining whether there is need to interfere with the trial court's sentence, the court needs to be satisfied that there is a lawful reason in view of the Court of Appeal's decision in the Bernard Kimani Gacheru case (Supra).

41. It is trite law that a sentence should be contingent and in proportion to the offence. The trial court had an unfettered discretion in imposing its sentence. It only needed to exercise the same in accordance with the law.

42. In the case of Patrick Kirimi Jacobu Kanuu Vs. Republic (Criminal Appeal No. E065 of 2022) [2024] KEHC 6586 (KLR), L.W. Gitari J set aside the death sentence and substituted it with an imprisonment of a term of 30 years where the victim suffered grievous harm. In the case of Paul Njoroge Ndungu Vs. Republic [2021] eKLR, E. M. Gikonyo J. imposed a sentence of 35 years to an appellant whose act of violence had only caused bodily harm to the victim.

43. For an offence that called for a death sentence, the court imposed a 30 year sentence on the appellant. This was quite lenient in view of the entire circumstances of the case where a defenceless night watchman of an institution was bludgeoned to death.

44. Relying on the two persuasive precedents cited above, the court finds that the trial court exercised its discretion properly. The conviction and sentence were therefore proper.

45. The upshot is that the appeal on conviction and sentence fails and is therefore dismissed.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 27TH DAY OF SEPTEMBER, 2024.

A. C. BETT

JUDGE

In the presence of:

Ms. Chala for State

Appellant in person

Court Assistant: Polycap

Fourteen (14) days' right of appeal.