KENYA LAW
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# Imo v Republic (Criminal Appeal 16 of 2020) [2022] KEHC 11970 (KLR) (26 April 2022) (Judgment)

Neutral citation: [2022] KEHC 11970 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT BUNGOMA**

**CRIMINAL APPEAL 16 OF 2020**

**JM BWONWONG'A, J**

**APRIL 26, 2022**

**BETWEEN**

**NICKSON CHELE IMO ........................................................................ APPELLANT**

**AND**

**REPUBLIC ........................................................................................ RESPONDENT**

***((Being an appeal from the judgement of Hon. C.M. Wattimah, SRM, dated 28/01/2020 in the Principal Magistrate's Court at Sirisia in Criminal Case No. 1171 of 2018 Republic v Nickson Chele Imo))***

## JUDGMENT

1. The appellant has appealed against his conviction and sentence of 40 years imprisonment in respect of the offence of robbery with violence contrary to section 296 (2) of the *Penal Code* (Cap 63) Laws of Kenya in count 1.

   He was acquitted in count 2.

2. In his petition of appeal to this court the appellant has raised nine grounds.

3. In grounds 1 and 2 the appellant has faulted the trial court for convicting him on the prosecution evidence that did not prove the offence of robbery and that the sentence of 40 years imprisonment was not warranted. The issue of sentence will be dealt with below in this judgement. In respect of conviction, the evidence of Rashid Wekesa Barasa (Pw 1), who is the complainant, was that on February 23, 2018 at 3.00 am he had voices of people at his door step. They asked him to open his door. They forced open his door by firing at it using a gun. Pw 1 kept quiet. These people had very bright torches. Pw 1 got through the roof and escaped to the road. Those people got hold of him. One of them wanted to shoot him but another said that they should not shoot him until he gave them money. He identified the appellant amongst those people. One of those people had a torch which spot lighted at the appellant. Pw 1 knew the appellant before as the person who had gone to see him before, where

he was ploughing with his tractor. Pw 1 recognized the voice of the appellant when the appellant said: 'you are the one who has been disturbing us in this area.' Pw 1 recognized his voice since he had talked him previously. Upon demand, Pw 1 gave them Kshs 105,000/-. They told him that the money was not enough.

4. The robbers told Pw 1 to stand and surrender but he was unable to stand. Pw 1 heard gun shots and he heard that the robbers were knocking somewhere.

5. Furthermore, Pw 1 testified that on November 19, 2018 he attended a police identification parade, where he identified the appellant as the person who was on his tractor and he had seen him during that fateful night. He also identified him by voice. Pw 1 testified that during that fateful night the appellant was wearing a green jumper with a hood but the hood was not in is head. Pw 1 also testified that the appellant was armed with a long metal bar during that night.

6. In addition to Pw 1, the appellant was identified by Pravin Namitati (Pw 2). Pw 2 testified that during the night of $24^{th}$ and $25^{th}$, while at his home, he heard people talk loudly in the house of the complainant. Pw 2 opened his window and peeped. He saw many people among them was the appellant. Pw 2 looked at them for thirty minutes. Pw 2 had seen the appellant in the home of Pw 1; before the appellant went to their home. Pw 2 testified that the robbers had very bright spotlights which assisted him to identify the appellant. The appellant was the one who was directing the other robbers in respect of their movements. The appellant was armed with a metal bar.

7. No 233932 CI Lilian Otieno (Pw 4) conducted a police identification parade at the request of Sgt Mohamed Aden (Pw 5), who was the investigating officer. The parade was conducted at the general DCI office at Bungoma West. In that parade Pw 1 identified the appellant who was standing between the $7^{th}$ and $8^{th}$ member in the parade. After being identified, Pw 5 asked the appellant whether he was satisfied with the parade. In response the appellant said in Kiswahili: 'nimeradhika.' (I am satisfied). Pw 4 then produced the parade as exhibit Pexh. 2.

9. Upon being put on his defence, the appellant gave sworn evidence and did not call any witnesses in his defence; although he had indicated he was going to call three defence witnesses. He testified that he was arrested on November 17, 2018 at a hotel where he was working as a cook. He then asked as to why he was arrested. He was told he would know later. He was taken to office of DCIO Sirisia and that is where he was told that he was a suspect in a robbery case. From there he was taken to court and charged.

10. This is a first appeal. As a first appeal court, I have independently re-evaluated the entire evidence of prosecution and the defence. I have also considered the submissions of the parties. I find on the evidence that the appellant was positively identified by Rashid Wekesa Barasa (Pw 1), who is the complainant. Pw 1 had known the appellant before this incident. Pw 1 had also known the voice of the appellant before this incident and he therefore easily recognized it when the appellant said that: '*you are the one who has been disturbing us in this area*.'

11. Furthermore, the appellant was identified by Pravin Namitati (Pw 2), who was a neighbor of the complainant. Pw 2 woke up when the appellant and his accomplices were robbing Pw 1. He opened his window and watched the appellant and his accomplices for 30 minutes. He was able to identify the appellant as did Pw 1 as the person who was armed with a metal bar. I find as credible the evidence of Pw 2 that the robbers had very bright spotlights which assisted him to identify the appellant. I further find as credible the evidence of Pw 2 that the appellant was the one who was directing the other robbers in respect of their movements at the scene of crime.

12. In view of the ample evidence of recognition of the appellant at the scene of crime, I find that his evidence that he did not know why he was being arrested as incredible. I therefore reject it.

13. I therefore find that the offence of robbery was proved beyond reasonable doubt.

14. I find that the contention of the appellant in grounds 1 and 2 that the offence was not proved lacks merit and is hereby dismissed.

15. In ground 3 the appellant has faulted the trial court that the 24-hour rule, which requires suspects to be taken to court within the 24 hours was breached. He further submits that the prosecution has not offered any explanation for the said breach. He has submitted that he was arrested on November 17, 2018 and taken to court on November 23, 2018. This is he says is in breach of his constitutional rights as enshrined in articles 49 (1) (f) and 50 of the 2010 Constitution of Kenya. The proper forum to raise this issue is in a court exercising civil jurisdiction. The concern of this court is whether to offence of robbery was proved or not. I therefore dismiss this ground and submission for lacking in merit.

16. In ground 4 the appellant has faulted the trial court in failing to find that the exhibits produced in court did not link the him with the offence. The evidence of Pw 1, Pw 2 and Pw 3 is that there were many robbers and that these robbers fired rounds of ammunition in the course of committing the robbery. There is credible evidence that the appellant was armed with a long metal bar. By virtue of the doctrine of common intention as embodied in section 21 of Penal Code (Cap 63) Laws of Kenya, the appellant and his co-accomplices are each deemed to have been armed. The action of one was the action of all of them; since they shared a common purpose in prosecuting the robbery. It is immaterial the appellant was not actually armed with a gun. See *Solomon Mungai & others v R (1965) EA 782.*

17. It therefore follows these exhibits, that is, the spent cartridges which were recovered from the scene of crime by Sgt Mohamed Aden (Pw 5), linked the appellant to the offence of robbery with violence. Furthermore, I find as credible the evidence of Pw 5 that the spent cartridges were fired from an AK 47 SN: UG094XXXXX which had two magazines; which were produced as exhibit Pexh. 6 a-c. Pw 5 recovered the AK 47 and the two magazines from a gang following a tip off they received from an informer that the said gang was planning to raid Chesamisi in Kimilili. Pw 5 laid an ambush on August 10, 2018 and a shoot-out occurred in which three gangsters were gunned down, but the two riders managed to escape with their motor cycles.

18. Furthermore, I find as credible the evidence of No 23XXX SSP Lawrence Nthiwa (Pw 6), who was the firearms examiner that he examined the AK 47 and found that the spent cartridges were fired from it. Pw 6 produced his report as exhibit Pexh 5.

19. I therefore reject the submission of the appellant for lacking in merit that the spent cartridges and the AK 47 did not link him to the robbery. I further find that the AK 47 was used to commit many robberies in the area according to the credible evidence of Pw 5.

20. I further find that it was not necessary to dust the gun and lift it for finger prints because it was not in the appellant's possession at the time of commission of the offence. I therefore find no merit in ground 7 of the appellant that dusting and lifting of finger prints from the gun should have been done.

21. In ground 5 the appellant has submitted that Pw 1 and Pw 2 testified that he was arrested on March 24, 2018 while the investigating officer arrested the appellant on November 17, 2018. On the evidence I find that the appellant was arrested on November 17, 2018 and that Pw 1 and Pw 2 were mistaken in that regard. I find that this error did not occasion a failure of justice. I therefore dismiss it for lacking in merit.

21. In ground 6 the appellant has faulted the trial court in failing to find that the police parade was not properly conducted. The appellant has also faulted the trial court for failing to find that the real criminal was one Nickson Kamwana Chele and not himself. I find as credible the evidence of

No 2XXXXX CI Lilian Otieno (Pw 4) who conducted the police identification parade that at the conclusion of the parade the appellant said in Kiswahili that: 'nimeradhika.' (I am satisfied). I therefore find that this ground is after thought and therefore dismiss it for lacking in merit.

22. I further find as credible the evidence of Pw 1 that he knew the appellant as Nick Kamwana Chele. And the fact that the appellant is also described as Nickson Chele Imo does not mean that these are two different persons. These names refer to the appellant and not to another person. I find this to be a curable error.

23. In ground 8 the appellant has faulted the trial court in failing to find that an inventory diary and the OB were not produced to substantiate the prosecution evidence. I find that this was not necessary in view of the ample evidence produced by the prosecution.

24. In his submissions the appellant submitted that there were tenants in those premises where Pw 1 and Pw 2 rented. I find that there is no evidence that there were tenants in those premises. It therefore follows that the issue of the tenants being called does not arise. However, there is evidence that Pw 3 called the assistant chief. The assistant chief should have been called as a witness. I find that even in the absence of the potential evidence of the said assistant chief there is ample evidence that proved the offence of robbery with violence.

25. The appellant also submitted that all the elements of the offence of robbery were not proved. The respondent submitted based on the decision of this court (Odero, Muya, JJ) *Mohamed Ali v Republic Mombasa High Court Criminal Appeal No 2 of 2010*, which in turn cited the Court of Appeal decision in *Oluoch v Republic (1985) KLR*, that the offence of robbery with violence was not proved. In the foregoing decision the court held that the offence of robbery is proved in the following circumstances:

> 1. 'If the offender is armed with any dangerous and offensive weapon or instrument, or
>
> 2. If the offender is in company with one person or more persons,
>
> 3. Or, if, at or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes, or uses other personal violence to any person,'

26. I find that in the instant appeal, the appellant was in the company of many people one of them was armed with a gun (an AK 47) and another was armed with a metal bar. They used these weapons to commit personal violence against their victims and stole from them Kshs 105,000/- and Kshs 50,000/=. I therefore find that all the elements of the offence of robbery were proved.

27. I find no merit in this submission which I hereby dismiss with the result that the appeal against the conviction is hereby dismissed.

28. The appellant has faulted the trial court for imposing upon him an excessive sentence.

29. The issue of sentence is problematic due to the decision of the Supreme Court in the second Muruatetu case namely *Francis Karioko Muruatetu & Another v R; Katiba Institute & 5 others (Amicus Curiae) [2021] e-KLR*, in which the court clarified its decision in the first Muruatetu case namely *Francis Karioko Muruatetu & another v R [2017] e-KLR.* The apex court made it clear in its second Muruatetu decision that its judgment in the first Muruatetu case was only in relation to the offence of murder. In that regard, the court pronounced itself as follows:

> 'We therefore reiterate that, this court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute.'

30. The trial court imposed the sentence of 40 years according to the applicable law as it was then, that is, before the Supreme Court clarified its decision in the first Muruatetu case. Before the Supreme Court clarified its earlier decision the law in respect of the imposition of prescribed mandatory minimum sentence was as set out by the Court of Appeal (Musinga, M'inoti & Murgor, JJ A) in *Dismas Wafula Kilwake v Republic, Criminal Appeal No 129 of 2014 [2019] e-KLR* where the court made a determination on the constitutionality of the mandatory sentences imposed under the *Sexual Offences Act* and stated that:

> Here at home in a judgment rendered on December 14, 2017 in Francis Karioko Muruatetu & Another v Republic, SC Pet No 16 of 2015, the Supreme Court concluded that the mandatory death sentence prescribed for the offence of murder by section 204 of the Penal Code is unconstitutional. While appreciate that the decision had nothing to do with the *Sexual Offences Act*, we cite it because of the pertinent observations that the apex court made regarding mandatory sentences. The court expressed itself thus:
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> > 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.' (Emphasis added)

31. In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court, which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the *Sexual Offences Act*, which do exactly the same thing.

32. Being so persuaded, we hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.

33. The sentencing policy guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful.'

34. The lower court then imposed the sentence of imprisonment based on the foregoing decision of the Court of Appeal.

35. Consequently, the court imposed the lesser severe sentence of 40 years imprisonment instead of imposing the death penalty. In doing so the court acted in accordance with the provisions of article 50 (2) (p) of the 2010 Constitution of Kenya. It follows that the sentence imposed was lawful. The change of the law as clarified by the Supreme Court thereafter cannot operate retroactively in respect of this case.

36. It therefore follows that I do not have discretion to revise the sentence that was imposed. I find that the sentence imposed was lawful and was justified in the circumstances of this appeal.

37. In the premises, the appellant's appeal against both conviction and sentence fails with the result that it is hereby dismissed in its entirety.

**JUDGEMENT SIGNED, DATED AND DELIVERED AT NAIROBI THROUGH VIDEO CONFERENCE IN OPEN COURT THIS 26TH DAY OF APRIL 2022.**

**J M BWONWONG'A**

**JUDGE**

**In the presence of:-**

Kinyua: Court Assistant

The appellant – present in person

Mr Oyiembo for the respondent