Wambua v Republic (Criminal Revision 32 of 2019)
[2022] KEHC 14674 (KLR) (27 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14674 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL REVISION 32 OF 2019

MW MUIGAI, J

OCTOBER 27, 2022

BETWEEN

NZIOKA WAMBUA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

Background

1. The Applicant was charged with the offence of Robbery with violence contrary to Section 295 as read with Section 296 (2) of the *Penal Code*.

2. The particulars of the offence are that on the 24th day of June 2014 at Slota in Athi river within Machakos County while armed with a dangerous weapon namely bottle robbed Ann Atieno of her mobile phone make Samsung valued at Kshs 1,800/=and at the time of such robbery threatened to use actual violence to the said Ann Atieno

3. He was found guilty and sentenced to death on July 21, 2015.

Notice of Motion

4. The Notice of Motion Application filed on October 9, 2019, the Applicant sought to have the sentence against him reviewed.

5. The Application is supported by the affidavit of Nzioka Wambua filed on an even date in which he deposed that he was charged with the offence of robbery with violence contrary to section 295 (1) as read together with section 296(2) of the *Penal Code* and was sentence to what he termed "Cond" sentence.

6. He contended that the court is empowered to handle the application under Article 165(3) of the *Constitution*. He deposed that he had not exhausted all appeals and that the life sentence was too harsh and excessive in nature thus sought an appropriate sentence. He opined that he was not given a fair trial contrary to the provisions of Article 50 (2) (q) of the *Constitution*.

7. The Application was not opposed by the Respondent who filed submissions dated December 14, 2021 in support of the application.

8. The Application was canvassed by way of written submissions.

Applicant Submissions

9. The Applicant filed submissions dated July 13, 2022 in which he highlighted four issues.

10. The first issue was whether the Trial Court erred in law and fact for failing to observe the sentence imposed was contrary to the legal standard requirement provided under Article 26 (1) ,159 and 160 of the *Constitution* and the sentencing policy guidelines. The Applicant submitted that section 296 (2) of the *Penal Code* is in conflict with the norms required under Article 26 (1) of the *Constitution of Kenya*. The Applicant faulted the Trial Court for failing to observe the provisions of the Constitution which is the supreme law of the land and opined that it ought to have given him an alternative sentence that is in line with the law. Reliance was placed on the case of *Patrick Cholmondeley vs Republic* (2008) eKLR.

11. The Applicant contends that the sentence was purely out of the international norms. The Applicant submitted that the affliction of punishment is a matter of discretion of the Trial Court and the mandatory sentence reduces the court normal sentencing functions to the level of a mere rubberstamp which is repugnant. Further, that the imposition of mandatory sentences by the legislature has always been considered an intrusion upon the sentencing functions of the court.

12. The second issue he raised was that the trial court erred in sentencing him to death without observing that as per the evidence presented he was to be robbery and not robbery with violence. The Applicant submitted that the evidence of the complainant proves that he did not use any force to rob her and she did not sustain any injuries.

13. The Applicant contended that the ingredients for Robbery with Violence under section 296 (2) of the *Penal Code* were not met from the evidence presented. He also opines that Section 295 and 296 (2) of the *Penal Code* create two distinct circumstances for the same matter and also gives an allowance for courts to interpret both provisions.

14. The Applicant submitted that he only threatened the Complainant but did not use violence against her and therefore the offence should be reduced to a lesser charge. The court was asked to find that the applicant is entitled to protection of the law under Article 27 (1) (2) of the *Constitution* which he says includes the full and enjoyment of all rights and fundamental freedoms.

15. Thirdly, he submitted that the trial court erred in law by convicting and sentencing him without observing that Section 296 (2) of the *Penal Code* is in contravention of Article 2 (1) (4) of the *Constitution*. The Applicant opines that the *Constitution* has declared itself superior to the supremacy thus outweigh all other laws inferior for their inconsistence with the constitution.

16. The Applicant relies on Article 2 (4) of the *Constitution* that provides that any law, including customary law that is inconsistent with the constitution is void to the extent of its inconsistency and any act or omission in contravention of this constitution is invalid. He submits that section 296 (2) offends Article 2(5), 25 (a) , 29(f) (6) and 50 (1) (2). The Applicant further contends that the Trial court failed

to exercise the doctrine of separation of powers articulated in chapter 9 and 10 of the *Constitution* and the authority and independence of the judiciary under Article 159 and 160 of the *Constitution.*

17. It was submitted that in order to exercise in a rational and non-arbitrary manner, the sentencing discretion should be guided by territories that constitutionally belong to the judiciary prescribed principles and standards and should be subject to effective judicial review, all with a view to ensuring that the death penalty is imposed in only the most exceptional and appropriate cases, there should a requirement for individualized sentencing in implementing the death penalty. It was submitted the sentence imposed robs him of the opportunity of what he called an individualized sentence that would take into consideration factors relating to the offender, prohibiting mitigation thus denying him the right to fair trial. It was submitted that the Trial court did not explain Section 216 and 329 of the *Criminal Procedure Code* to him rendering the trial unfair. To buttress this point, he relied on the Indian cases of *Mithu vs State of Punjab* , Criminal Appeal No 745 of 1980, *Bachan Singh vs the State of Punjab*, Criminal Appeal no 273 of 1979 AIR (1980) SC 898.

18. Lastly, he submitted that section 296 (2) of the *Penal Code* is not in line up with Article 19 and 28 of the *Constitution* from the death aspect which is contrary to Article 29 as with life imprisonment, he will not be able to his common good and that of his community. He submitted that sentencing him would be in line with the reasoning in *Godfrey Mutiso Ngotho* Case and he would benefit from lesser punishment based on the evidence presented.

19. It was submitted that the sentencing process is a legal issue that forms part of the basic principles of a fair trial and required judicial determination in the course of a trial for it needs judicial minds. It was submitted that the law which civilized societies must live under must evolve as human society is evolving. It was submitted that courts should make fine decisions and orders to reflect the protection of human dignity. The court was asked to take into account any judgement, decision, declarations, the *Constitution* and from other jurisdiction as Kenya on the issues of human rights protection. Further, that the court should make strides to promote the protection and observance of human rights in court and all spheres of life to secure appropriateness and proportionality on sentencing of an offender.

20. It was submitted that the Appellants should be given a remedy that conforms with the provisions of Article 19, 28 and 29 of the *Constitution*, Article 2 and 3 of the Human Rights Act of 1997. The Applicant asked for a remedy without capital punishment.

Respondent Submissions

21. The Respondent filed submissions in support of the application and submitted that the death sentence provided for under Section 204 of the *Penal Code* has been declared unconstitutional by the Supreme Court of Kenya in *Francis Karioko Muruatetu & Another vs Republic*- Petition No 15 of 2015 consolidated with Petition no 16 of 2016, *William Okungu Kittiny vs Republic* (2018) eklr and *Godfrey Ngotho Mutiso vs Republic*, Criminal Appeal Number 17 of 2008.

22. Counsel submitted that the offence of robbery with violence under section 296 (2) and 297(2) of the *Penal Code* provide that an offender shall be sentenced to death. Counsel placed reliance on Article 27 (1) of the *Constitution*, that every person has *inter alia* the right to equal protection and equal benefit of the law and submitted that although the *Muruatetu*'s case specifically dealt with the death sentence of murder, the decision broadly considered the constitutionality of the death sentence in general.

Determination

23. The Court considered pleadings, the Trial Court record and written submissions filed by parties.

24. The Appellant filed Notice of Motion filed on October 9, 2019 and sought hearing of the application for re-hearing sentence review imposed against him

25. The appellant also on July 13, 2022 filed amended Grounds of appeal and written submissions.

26. The Appellant/Applicant seemed to seek review of sentence and/or appeal on added issues. However, this Court distilled issues for determination of the appeal as;

    a. The sentence of death penalty was unconstitutional by virtue of Articles 26 (1) of *CoK 2010* and relied on Article 50 (2) (p) *CoK 2010*

    b. The charge(s)/Information were/are in consistent with the evidence on record and ought to have been charged with robbery with violence contrary to Section 296(1) *Penal Code* a lesser offence from Section 296(2) of the *Penal Code*.

    c. The Appellant/Applicant was not granted Fair Hearing under Article 50 of *CoK 2010*

27. The application on review of re-sentencing was/is not opposed by the State/ODPP as outlined in the detailed written submissions on the death penalty being unconstitutional.

28. This Court adopts the position in the recent decision by Hon J Mativo J & Hon Stephen Githinji J High Court *Petitions 97 of 2021, Petition 88 of 2021 90 of 2021 & 57 of 2021* Constitutional & Judicial Review Mombasa High Court where the Court considered at length the constitutionality of mandatory and /or minimum sentences in sexual offences.

29. Following the reasoning by Supreme Court in *Muruatetu 1 & 2* with regard to mandatory death penalty with regard to the offence of murder, The Court found that sentencing is an integral part a fair trial prescribed by Article 50 *CoK*.

30. The binding precedent of the Apex Court; Supreme Court in *Francis Karioko Muruatetu & Another vs Republic* [2017]eKLR (hereinafter referred to Muruatetu 1); relying on the Privy Council case of *Spence vs The Queen* where Byron CJ held;

> " In order to be exercised in a rational and non-arbitrary manner, the sentencing discretion should be guided by legislative or judicially prescribed principles and standards, and should be subject to effective judicial review ,all with a view to ensuring that the death penalty is imposed in only the most exceptional and appropriate circumstances. There should be a requirement for individualized sentencing in implementing death penalty."

The Supreme Court declared death penalty unconstitutional.

In *Francis Karioko Muruatetu vs Republic; Katiba Institute & 5 Others (amicus Curiae)* [2021] e KLR (hereinafter Muruatetu 2) The Supreme Court clarified;

> "The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under Section 203 & 204 of the Penal Code....."

31. This Court is persuaded by the case of *Simon Njiru Kiura v Director of Public Prosecutions* [2018] eKLR in declaring the mandatory death sentence imposed on the petitioner under Section 296(2) of the *Penal Code* is unconstitutional, the court stated as follows;

> "The right to a fair trial is provided for under Article 50(2) of the Constitution. The Supreme Court in the Muruatetu case specifically dealt with death sentence in murder cases.

However, the issue of constitutionality of death sentence was addressed as a whole in the court's decision in its holding that:-

The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional.

46. I am of the view that the finding of the Supreme Court is equally applicable to death sentence in offences of robbery with violence.

47. I wish to rely on a recent Court of Appeal decision sitting at Kisumu of William Okungu Kittiny Vs Republic[2019] eKLR where it was held:-

From the foregoing, we hold that the findings and holding of the Supreme Court particularly in paragraph 69 applies mutatis mutandis to Section 296(2) and 297(2) of the Penal Code. Thus, the sentence of death under Section 296(2) and 297(2) of the Penal Code is a discretionary maximum punishment. To the extent that Section 296(2) and 297(2) of the Penal Code provides for mandatory death sentence the Sections are inconsistent with Constitution.

48. I reach a conclusion that death sentence under Section 296(2) is "a discretionary maximum punishment".

32. The High Court considered Sections 216 & 329 of the *Criminal Procedure Act* make mitigation a part of the trial process and therefore minimum and /or mandatory sentences deprive the Courts of judicial discretion in sentencing and such law is harsh unjust and unfair. If a Court does not have discretion to take into consideration mitigating circumstances if possible and it may make the sentence wholly disproportionate.

33. This Court confirms from the Trial Court record that by virtue of the Judgment delivered on July 27, 2015, it was before the emerging jurisprudence of Muruatetu 1 & 2 on the constitutionality of the mandatory sentence of the death penalty. Until then, 2 years later from delivery of the Trial Court's judgment, the legal position and practice was imposition of mandatory sentence. Therefore, the Trial Court was on point as to sentencing at the time. However, with the advent of recent binding case-law as outlined above, the review of resentencing is granted and to that extent the Appellant's appeal and/or review is upheld.

On the question of whether the charge(s)/Information were/are in consistent with the evidence on record and ought to have been charged with robbery with violence contrary to Section 296(1) *Penal Code* a lesser offence from Section 296(2) of the *Penal Code*.

34. This court has jurisdiction to review the sentence in light of the charges drawn/preferred. Article 165(6) of the *Constitution* empowers the High Court to exercise supervisory jurisdiction over subordinate courts.

35. Section 362 of the *Criminal Procedure Code*(CPC) is clear on the scope of revision in criminal trial as follows:-

> " The High Court may call for and examine the record of any Criminal proceedings before any Subordinate Court for the purposes of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate Court."

36. Section 367 *Criminal Procedure Code* provides that;

> " when a case is revised by the High Court it shall certify its decision or order to the court by which the sentence or order so revised was recorded or passed and the court to which the decision of order is so certified shall thereupon make such orders as are conformable to the decision so certified, and, if necessary, the record shall be amended in accordance therewith".

37. As was stated by the High Court of Malaysia in *Public Prosecutor vs Muhari bin Mohd Jani and Another* [1996] 4 LRC 728 at 734, 735:

> " The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of "paternal or supervisory jurisdiction" in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion...This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammeled and free, so as to be fairly exercised according to the exigencies of each case"

38. The Supreme Court in the case of *Sriraja Lakshmi Dyeing Works v Pangaswamy Chettair* [1980] 4SCC 259 said as follows:

> " The conference of revisional jurisdiction is generally for the purpose of keeping tribunal subordinate to the revising tribunal within the bounds of their authority to make them act according to law, according to the procedure established by law and according to well defined principles of justice. Revisional jurisdiction as ordinarily understood with reference to our statues is always included in appellate jurisdiction but not vice versa. The question of the extent of appellant or revisional jurisdiction has to be considered in each case with reference to the language employed by the statute. The dominal ideal conveyed by the incorporation of the words to satisfy itself under section 25 read as which has similar provisions with our section 362 of the Criminal Procedure Code (Cap 75 of the Laws of Kenya) emphasis mine is essential a power of superintendence. The scope of the revisional powers of the High court where the High court is required to be satisfied that the decision is according to law as to the legality and propriety of the order under revision, which is quite obviously as much wider jurisdiction. That jurisdiction enables the court of revision, in appropriate cases, to examine the correctness of the findings of facts also, though the revisional court is not a second court of appeal"

39. The conditions under which the court will exercise revisionary orders were espoused in the case of *Reuben Mwangi Nguri v Republic* [2021] eKLR where the

(a) Where the decision is grossly erroneous

(b) Where there is no compliance with the provisions of the law.

(c) Where the finding of fact affecting the decision as not based on the evidence or it is result of mis-reading or non-reading of evidence on record

(d) Where the material evidence on the parties is not considered.

(e) Where the judicial discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence.

40. The offence that the Applicant was charged with, the evidence on record and the sentence meted out. The accused was charged under Section 295 as read with Section 296 (2) of the *Penal Code* that provides as follows;

41. Section 295 of *Penal Code* prescribes the definition of offence of robbery as follows;

> Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

Section 296(2) *Penal Code* prescribes the punishment for robbery in 296(1) & 296(2) as follows;

(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before 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.

42. The Applicant contends that Section 295 and 296 (2) of the *Penal Code* create two distinct circumstances for the same matter and also allows discretion for Courts to interpret both provisions.

43. Section 137 (a) of the *Criminal Procedure Code* is a proviso on the framing of charges and information. It provides that;

> "The following provisions shall apply to all charges and information, and, notwithstanding any rule of law or practice, a charge or information shall, subject to this Code, not be open to objection in respect of its form or contents if it is framed in accordance with this Code—
>
> (a)
>
> (i) Mode in which offences are to be charged.—a count of a charge or information shall commence with a statement of the offence charged, called the statement of offence;
>
> (ii) the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence;
>
> (iii) after the statement of the offence, particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary: Provided that where any rule of law or any Act limits the particulars of an offence which are required to be given in a charge or information, nothing in this paragraph shall require more particulars to be given than those so required;
>
> (iv) the forms set out in the Second Schedule or forms conforming thereto as nearly as may be shall be used in cases to which they are applicable; and in other cases forms to the same effect or conforming thereto as nearly as may be shall be used, the statement of offence and the particulars of offence being varied according to the circumstances of each case;

(v) where a charge or information contains more than one count, the counts shall be numbered consecutively;"

44. It follows that a charge should contain the section that creates the offence and the one that contains the sentence so as to meet the threshold of providing sufficient information that is to be given to an accused person.

45. This is also a fundamental right provided for under Article 50(2) (b) of the *Constitution*. The Article provides that an accused person has the right "to be informed of the charge, with sufficient detail to answer it."

46. The contention by the Applicant that section 295 and 296 (2) present different circumstances and disclose different offences cannot stand together. There are different types of robbery and the law provides punishment for each, as such, it is important for the section under which one is being charged under to be clear.

47. In this case the statement of the charge or offence is robbery with violence contrary to 295 as read with Section 296(2) of the *Penal Code*. The Appellant/Applicant took the view that he ought to have been charged under Section 296(1) of the *Penal Code* whose sentence is 14 years.

48. The next issue is to look at the nature of this offence. The ingredients of robbery with violence were clearly set out by the Court of Appeal in the case of *Oluoch –VS – Republic* [1985] KLR where it was held:

> " Robbery with violence is committed in any of the following circumstances:
>
> a. The offender is armed with any dangerous and offensive weapon or instrument; or
>
> b. The offender is in company with one or more person or persons; or
>
> c. 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 .....

49. This Court finds that the use of the word or in this definition means that proof of any one of the above ingredients is sufficient to establish an offence under section 296(2) of the *Penal Code*. From the record, the Applicant was armed with a bottle that was recovered, identified in Court by PW1 and PW2 who recovered the weapon and was produced by PW3. PW1 evidence on record is that PW1 was accosted from behind and the Appellant/Applicant used the bottle on PW1's head and pulled her bag and snatched the phone. The appellant/Applicant told Pw1 that he wanted to rape her and she lured him away allegedly to her house and on the way she was rescued by PW2 and the Applicant was caught at the scene and the phone was recovered.

50. The evidence on record by PW1 confirms that the Appellant accosted PW1 with the bottle on her head which was dangerous and offensive to PW1's safety and security and in the process grabbed her bag and took her phone The Applicant used personal violence to PW1 with the bottle at and during the process snatched her bag and intended to rape her as he was pulling her to the bush. There is also evidence that he stole a mobile phone, make Samsung that was also recovered and produced in court

51. These circumstances disclose and confirm the ingredients of robbery with violence, the Applicant/ Appellant threatened and/or used personal violence at and during obtaining her bag and took out the

phone. These circumstances disclose and confirm proof of robbery with violence in Section 295 as read with Section 296(2) of the *Penal Code*.

52. The second ingredient that the Applicant/Appellant was in the company of one or more other persons was not satisfied as the Applicant was alone when committing the offence. The third ingredient on the other hand of using personal violence was satisfied as he threatened the Complainant. He also admits to threatening the Complainant in his submissions before this court and contends that he did not use actual violence on the complainant. The fact that it was a threat to violence in the course of the robbery does not reduce the offence to simple robbery or a lesser offence as the Applicant contends.

53. The Court finds no non-joinder or mis-joinder of the offence the Applicant/Appellant was properly charged and convicted as per the evidence on record. The Trial Magistrate was correct in imposing a conviction under Section 296(2) *Penal Code*.

d. The Appellant/Applicant was not granted Fair Hearing under Article 50 of *CoK 2010*

54. Article 50(2) of the *Constitution, 2010* provides as follows:-

> (2) Every accused person has the right to a fair trial, which includes the right—
>
> (b) to be informed of the charge, with sufficient detail to answer it;
>
> (g) to choose, and be represented by, an advocate, and to be informed of this right promptly;
>
> (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
>
> (i) to remain silent, and not to testify during the proceedings;
>
> (k) to adduce and challenge evidence;
>
> (l) to refuse to give self-incriminating evidence.....

55. The Appellant /Applicant failed to particularize with specificity the breach of Constitutional guarantees during the Court proceedings conviction and sentence. The Court record confirms, plea-taking was legally conducted, bond was granted, Statements were provided, adjournments were granted when he was sick with malaria, he cross examined witnesses. After close of Prosecution case he sought recalling of the witnesses the Prosecution opposed the application and the application was denied, grounds for retrial were not advanced for the Court to consider as per the Court record.

56. The Applicant/Appellant opted to remain silent in his defense.

57. From the above summary of conduct of proceedings as per the Trial Court record, this Court finds no breach of Article 50 *CoK 2010*.

Disposition

1. For the foregoing reasons, the upshot of this court's decision that the Applicant's application for review and/or amended grounds of appeal are dismissed except this Court upholds the review of resentencing to allow the trial court discretion in granting appropriate sentence after considering mitigation.

2. The Matter is remitted to Principal's Magistrate's Court Mavoko through Deputy Registrar Machakos High Court for mitigation and resentencing

3. It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 27th DAY OF OCTOBER 2022 (VIRTUAL/PHYSICAL CONFERENCE).

M.W MUIGAI

JUDGE

IN THE PRESENCE OF:

NZIOKA WAMBUA - THE APPLICANT

MWONGERA - FOR THE RESPONDENT

GEOFFREY/PATRICK - COURT ASSISTANT(S)