Hinga v Republic (Criminal Appeal E047 of 2023)
[2025] KEHC 1429 (KLR) (17 January 2025) (Judgment)

Neutral citation: [2025] KEHC 1429 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL E047 OF 2023

SM MOHOCHI, J

JANUARY 17, 2025

BETWEEN

KEVIN HINGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the Nakuru Chief Magistrate's Court Criminal Case No.1452 of 2022 dated and delivered by Hon. R. Kefa – Principal Magistrate 13th July, 2023)

JUDGMENT

1. The Appellant Kevin Hinga was charged before the Chief Magistrate Nakuru Law Courts in Criminal Case.1452 Of 2022 in an offence of robbery with violence contrary to Section 295 as read with Section 296 of the Penal code.

2. After a trial the Appellant was sentenced upon conviction on the main count of robbery with violence and sentenced to suffer death.

3. By a memorandum of Appeal filed on 20th November 2023 and a further unilateral amendment introducing the last two grounds filed on 3rd July 2024, the Appellant contends;

    a. That, the learned trial magistrate erred in law and in facts by failing to consider the evidence adduced before Court in regards to identification at the scene was mistaken identity since I was nowhere close to that scene.

    b. That, the learned trial magistrate erred in law and in facts by failing to appreciate the investigation conducted by the investigating officer was poorly done and the same would not have supported the conviction meted to I the Appellant.

c. That, the learned trial magistrate erred in law and in facts failing to appreciate that during the time of arrest I was not found to be in possession of any of the items robbed from the complainant. There was nothing found in my possession to link me with the said offence.

d. That, the learned trial magistrate erred in law and in facts, by failing to appreciate the evidence adduced before Court by the prosecution witnesses was inconsistent.

e. That, the learned trial magistrate erred in law and in facts, when she rejected my defence without giving cogent reason why it was unacceptable.

f. That, the learned trial magistrate erred in law and in facts, by convicting the Appellant on the strength of the prosecution case which was evidently full of glaring gaps.

g. That, the learned trial magistrate erred in law and facts which he relied on the evidence of identification to convict the Appellant yet failed to note that circumstances were not conductive for positive identification and recognition to the fact that there were no parade done.

h. That, the learned trial magistrate erred in law and in fact when imposing a mandatory sentence of death but failed to note that the death sentence imposed was declared unconstitutional.

4. The Appellant framed two major issues for determination.

   As to whether the Identification and recognition of the Appellate was not proved from possibilities of errors?

5. That, the Appellant's conviction and sentence were primarily based on identification and recognition by PW1 and PW2. However, the learned trial magistrate did not consider that, all the prosecution witnesses were not at the scene of crime thus identify witnesses on difficult circumstances.

6. Reliance is placed on the case of Kamau Vs Republic (1975) EA 139, the Court held that:

   > " The most honest witnesses can be mistaken when it comes to identification in Roria- vs R (1967) EA 563, the predecessor of this Court, stated as per sir clement de lester Vp) Inter alia, as follows.
   >
   > "A convicting resting entirely on identity invariably causes a degree of uneasiness and as lord Gardner said recently in the house of lords. In the course of a debate on section 4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to divide the power of the Courts to interfere with verdict. There may be a case in which Identity is in question and if any innocent people are convicted today, I should think that in nine cases out of ten if there are as many as ten it is in question of identity."

7. Given that nine out of ten persons convicted on the basis of identification and recognition could be innocent, the Court needs to examine evidence of identification of an accused person with greatest care to avoid a situation where an innocent person is convicted merely because of witnesses who may be honest but are nonetheless mistaken on their identification of the accused person or persons. (See Kamau vs Republic. (supra).

8. The Appellant implores this Court to observe the evidence of the prosecution witnesses on identification. PW1 was the star witness, she told the Court that, “she was coming from her fathers' place heading to her place, on arrival at Ponda Mali market a person appeared in front of me and greeted me. Another person appeared behind me. The one who greeted me grabbed my handbag. The bag

contained KSHS. 5,000. The one appeared behind me removed a panga from his jacket. Then she saw the one who was armed with a panga.

9. The Appellant submits that, a close scrutiny of the evidence tendered shows that PW1 did not identify the Appellant as the assailant. That on the cross-examination she describes the Appellant on the clothing the assailant had, however there is no any record tendered to the Court, the matter was reported to the police station, the Appellant was not arrested by the police, the Appellant as arrested by members of the public this shows that there is no report given to the police station before the arrest of the Appellant.

10. The Appellant contends that, this matter did not receive further attention by the Court while analyzing the evidence of the witnesses, citing the case of Terekaly s/o Kirongozi and 4 others versus the Republic (1952) EACA 259: where the Court held:

> " We have had reason before to comment on the fact particularly in cases tied in Tanganyika, that the evidence of the first complainant made to a person in authority has not been adduced such statement are admissible under Section 157 of the Indian *Evidence Act* which applies in Territory. Their importance can scarcely be exaggerated for they often provide a good test by which the truth or accuracy of the latter statement can be judged, thus providing a safeguard against later embellishment or the deliberately made up case. Truth will often come out in the first statement take from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others."

11. That, the learned trial magistrate fell into error when he accepted that, the evidence of PW1 was evidence of recognition rather than identification.

12. Reliance is placed on the case of Onfononi Vs Republic (1980) KLR.59 the Court held that:

> " ...recognition of an assailant is more satisfactory, more assuring and more reliable that identification of a stranger because it depends upon personal knowledge of the assailant in some form or another."

13. The Appellant further submits that, the evidence tendered by PW1 was not fully analyzed against the authorities given. It cannot fully be argued that, the Appellant was identified by PW1 owing to the gaps left by the prosecution. PW1 was told by PW1 about the incidence this can the Court to use the evidence of PW2 as the key witeness. That, the evidence of PW2 was hearsay, the evidence which cannot support positive identification or recognition. See R.Y. Glays vs Republic and Soleman Juma alias Tom vs Republic Criminal Appeal No.181 of 2002 (Mombasa)

As to whether the sentence imposed is unconstitutional?

14. The Appellant asserts that, the right to a fair trial is a fundamental right, Article 50 of *the constitution* grants every citizen that right under Article 10 of the Universal Declaration of Human Rights makes it one of the inalienable rights. Article 25 (c) of *the constitution* elevates it to a non-derogable rights which cannot be limited or taken away. That a fair trial is therefore one of the cornerstones of a just and democratic society without which the rule of law and public faith in the justice system would inevitably collapse.

15. That Article 20 (3) (4) of *the constitution* demands that, when Courts are applying a provision of the Bill of Rights, to develop the law to the extent that it does not give effect to a right or fundamental freedom and to adopt the interpretation that most favors the enforcement of a right or fundamental freedom and further, In Interpreting the Bill of Rights, a Court tribunal or other authority shall promote the

values that underlay an open and democratic society based on human dignity equality, equity and freedom and the spirit, purport and objects of the Bill of Rights.

16. The Appellant submits that, a trial magistrate who convicts and meet a death sentence does not abide to the above values, thus my sentence is unlawful.

17. That, Article 19 (3) (a) of *the constitution* provides that:

> " The right and fundamental freedom in the Bill of rights, belong to each individual and not granted by the state, Article (20) and 2 of *the constitution* provides that the Bill of Rights applies to all law and binds all state organs and all persons, that everyone shall enjoy the rights and fundamental freedom in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom."

18. That, Article 28 of *the constitution* provides that every person has inherent dignity and the right to have that dignity protected while under Article 48 mandates the state to ensure justice for all persons.

19. That, a sentence of death does not support the above constitutional rights, under Section 332 (3) of the *Criminal Procedure Code* mandates the president to issue a death warrant or an order for the sentence of death to be commuted, or pardon under his hand and the public seal of Kenya which according to him is in contravention with Article 131 (1) which stipulates that:

> " the president ensures the protection of human rights and fundamental freedoms and the Rule of law".

20. That it also contravenes Sentencing Guideline 2016 which stipulates that sentencing is a judicial function, only to be exercised by judicial officers. Thus, his death sentence as for now is at the mercy of the president not the Court, which to the Appellant is a bad law, thus the need for this Court to order that this is unconstitutional.

21. That in Kenya the issue of death sentence, violates *the constitution*. In its permeable under sub heading committed to nurturing and protecting the wellbeing of the individual, the family, communities and the nation.

22. That the death sentence destroys the Individual, the family, community and the nation equating the sentence to the Amorabi Laws, the law on an eye for an eye is not good law which the death sentence seems to embrace.

23. That we all might not be Christians, that the BIBLE and the QURAN are widely read holy books, which according to the Appellant do not support killing a person because of his misdeeds but supports forgiveness and one to be given another chance. That he was denied forgiveness when he was sentenced to suffer death.

24. That Article 27 (1) every person is equal before law and has to equal protection and equal benefit of the law (2) Equality includes the full and equal enjoyment of all fundamental freedoms.

25. That the imposition of death sentence is unconstitutional as it disregards the offenders' personal circumstances thus robbing him/her his personal dignity therefore inhuman and degrading.

26. That this Court has jurisdiction in particular to hear and determine whether his rights and fundamental freedoms which cannot be limited as provided under Article 25 (a) and (c) have been violated. Thus, this Court has jurisdiction to order that the sentence imposed is unconstitutional. To

decide on a definite sentence thus quashing the conviction and sentence of death meted upon the Appellant and he be set at liberty.

Respondents Case

27. That the Appellant filed an Amended Petition of Appeal and submissions thereto raising two grounds of appeal. Which the Respondent opposes the Appeal and has crafted two issues for determination as;

    a. Whether the Appellant was positively identified

    b. Whether the sentence imposed against the Appellant was unconstitutional.

As to whether the Appellant was positively identified?

28. The state posits that, on the material date of the robbery, PWI was attacked by the Appellant and his accomplice at around 6:00am while on her way home. She testified that a person appeared before her and greeted her then another person appeared behind her. The one who appeared in front of her grabbed her handbag which contained Kshs. 5,000/- and the one who was behind her brandished a panga from his jacket.

29. She identified the one who attacked her from behind as the Appellant when she turned to see him. She knew this Appellant since she used to see him around Ponda Mali area. She even knew him by name as Kevin. As she was running away, Kevin spoke to her asking her to go for her handbag. She met them again near a church and the one who had attacked her from the front threatened to stab her and slit her stomach open.

30. From PWI's evidence it is clear that she saw the Appellant and recognized him as a person she knew before. During the robbery and after the robbery there was sufficient interaction between the Appellant and PWI and they were in close proximity during and after the robbery. She had the opportunity to identify him.

31. The Respondent submits that, the Appellant's identification was by recognition by PWI and whose testimony was cogent and consistent. Her evidence on identification was not shaken by the Appellant during cross examination.

32. The trial magistrate in her judgment, found that the conditions for identification were favourable and noted it is that of recognition and I pray that you so find.

    As to whether the sentence imposed against the Appellant was unconstitutional?

33. The Appellant contends that, the death sentence meted upon him was violated the tenets of *the Constitution* of Kenya 2010 by taking away his rights as established under Article 25 of the said Constitution.

34. The Appellant was sentenced in accordance with the provisions of Section 296 (2) of the *Penal Code* provides for the death penalty as;

> "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, the offender wounds, beats, strikes or uses other personal violence to any person, he shall be sentenced to death."

35. Article 26 (1) of *the Constitution* provides that every person has the right to life, this right is however not absolute and has limitations in certain circumstances. The state can only limit this right in accordance

with written law. Article 26 (3) of *the Constitution* provides that a person may be deprived of the right to life to 'the extent authorized by this constitution or other written law. The law in this case is the *Penal Code* which has provided for the death penalty in the aforementioned section.

36. The only rights that are guaranteed, absolute and non-derogable are those found under Article 25 of *the Constitution* and the right to life is not among them.

37. That, the death penalty in robbery with violence cases remains to be a lawful sentence in our statutes.

38. This Court should also consider the aggravating circumstances of the case. That, the complainant stated during the robbery, the Appellant was armed with a panga and his accomplice, who is yet to be apprehended, threatened to cut her stomach open. There was threat of use of violence by stabbing. The weapon was not recovered.

39. The Court should also consider the serious nature of the offence, it is a capital offence to which a deterrent sentence is encouraged to keep the Appellant away from the community and a message to like offenders.

40. Throughout the trial, the Appellant did not display any form of remorse for committing the offence nor the loss occasioned by the robbery.

41. The State therefore submits that, the death sentence is a sound and proper sentence fitting the circumstances of this particular case.

42. Given the nature of the case and the evidence adduced at trial, the prosecution proved its case to the required standard. The prosecution proved that PWI was robbed of her handbag which contained Kshs. 5,100/-. She was robbed by the Appellant who was armed with a panga and was in the company of another and immediately before as well as after the robbery, threatened to use actual violence upon PW1.

43. That, the Appellant was therefore rightfully convicted and sentenced. The state urges this Court to find that the appeal herein is devoid of merit, dismiss the same in its entirety and find that the conviction and sentence herein was safe.

The Trial

44. The Appellant was charged on 19th April, 2022 at the Chief Magistrate's Court in Nakuru, *vide Criminal Case No. 1452 of 2022*. In Count I he was charged with the offence of robbery with Violence contrary to Section 295 as read with Section 296 (2) of the *Penal Code* Count II he was charged with escape from lawful custody contrary to Section 123 as read with 36 of the *Penal Code*.

45. The particulars of Count I were that on 10th March, 2022 at Rhonda Estate in Nakuru West Sub-County within Nakuru County, the Appellant jointly with another not before Court, while armed with a panga, robbed Emmaculate Atieno of her handbag and cash Kshs. 5,100/- and at the time of such robbery, threatened to use actual violence to the said Emmanuel Atieno.

46. The particulars in Count II were that on 12th march, 2022 at Rhonda Estate, Nakuru West sub-County within Nakuru County, the Appellant, being in lawful custody at Rhonda Police Station cell, escaped from the said cell.

47. On 12th May, 2022, the Appellant pleaded guilty to Count II, he was convicted on his own plea of guilty and was sentenced to a fine of Kshs. 20,000/- in default 6 months imprisonment.

48. At trial, three prosecution witnesses tendered their evidence against the Appellant for Count I and at the close of the prosecution case the trial Court ruled that a prima facie case had been established and

the Appellant was subsequently placed on his defence. Directions under Section 211 of the *Criminal Procedure Code* were complied with and the Appellant elected to keep silent and await the judgment of the Court.

49. On 13th July, 2023, the trial magistrate found the Appellant guilty on the charge of robbery with violence, convicted him and on 13th July, 2023 sentenced him death.

50. Dissatisfied with the Trial Court's judgment, he has now appealed against his conviction and sentence.

Duty of the Court as a first Appellate Court

51. In accordance with the provisions of Section 347 (1) and 347 (2) of the *Criminal Procedure Code*, this Court is vested with the jurisdiction to address matters of law as well as matters of fact raised in the appeal.

52. This being first appeal, the duty of this Court is to re-evaluate, re-analyse and reconsider the evidence of the Trial Court and draw its own independent conclusion. However, the Court must bear in mind that it did not see the witnesses testifying and therefore give due allowance for that. In the case of Gitobu Imanyara & 2 others v Attorney General (2016) eKLR, the Court stated;

> " This being a first appeal... this Court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."

Analysis and Determination

53. All amendments of memorandum of appeals must be upon leave of the Court but in this instance the Appellant contravened the rules which this Court overlooked in consideration of the entire Appeal in the interest of justice.

54. I find the appeal to be lacking in merit, the constitutionality of the death penalty cannot be a ground of appeal and unless the Appellant brings forth a constitutional review application. This Court is of the view that where an Appellant wants to mount constitutional question in a Criminal Appeal then he should seek leave of the Court such that the Court may in granting such leave issue directions in tandem with appropriate variations in law of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 otherwise known as the Mutunga Rules.

55. The Death Penalty remains constitutional, a valid sentence, whose legality is unimpeached until our legislature deems it otherwise and repeal the same. I disagree with the assertion that the death penalty is unconstitutional.

56. The Appellant elected not to offer any evidence in defence and as such cannot introduce an alibi at this juncture or seek to introduce evidence on appeal which evidence was never presented.

57. The Appellant cannot now claim his defence evidence was disregarded wherein he offered none.

58. In my re-evaluation of the trial before the Lower Court, I do find that the conviction was sound and the sentence as imposed was troubling in that, the trial magistrate acknowledged the Appellant as a 1st offender deserving leniency but indicated that the sentence is mandatory.

59. To this Court the statement aforesaid explicitly indicate that the judicial discretion was inapplicable or curtailed in this sentencing, owing to the mandatory nature it was imposed, which aspect has since been held to be unconstitutional.

60. This Court thus finds that the trial magistrate failed to afford the Appellant fruits of mitigation in contravention his constitutional right under Article 50.

61. I further find by imposing the sentence in mandatory terms deprived the Appellant his right to be heard and whatever mitigation the Appellant made was only for academic purpose and could not influence the sentence.

62. I am thus inclined to disturb the sentence of death as imposed, set-it aside and substitute the same with an imprisonment sentence.

63. The alleged robbery the Appellant is accused of committing is of low-value of a sum not exceeding Kenya shillings 6,000/- together with his age at the time of commission of the offence and the fact that he was remorseful which should equally inform the sentence to impose.

64. I accordingly sentence the Appellant to an imprisonment for a term of ten (10) years to run from 19th April, 2022.

It is so ordered.

DATED SIGNED AND DELIVERED ON THIS 17TH DAY OF JANUARY 2025

MOHOCHI S.M

JUDGE