Ngui v Republic (Criminal Appeal E043 of 2022)
[2023] KEHC 23550 (KLR) (21 July 2023) (Judgment)

Neutral citation: [2023] KEHC 23550 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E043 OF 2022

JN ONYIEGO, J

JULY 21, 2023

BETWEEN

DAVID WAMBUA NGUI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the sentence and conviction by Hon. Tanchu in CM's Court in Garissa Criminal Case No.810 of 2017 delivered on 31.01.2022)

JUDGMENT

1. The appellant herein filed an undated petition of appeal on 27.07.2022 wherein he challenged his conviction and sentence by the trial court in respect of the offence of robbery with violence contrary to section 296 (2) of the Penal Code.

2. The particulars of the offence were that on 10.09.2017, at Raya Area within Garissa Township of Garissa county, jointly with another not before court being armed with a dangerous weapon namely a panga, robbed Joseph Mutemi off his motor cycle registration number KMDY xxxM valued at Kes. 100,000,00 and immediately before the time of such robbery wounded the said Joseph Mutemi. The appellant having denied the charge, was tried and thereafter convicted of the offence and sentenced to death.

3. It is that conviction and sentence that necessitated the instant appeal wherein the appellant raised the amended grounds of appeal as hereunder:

    i. The learned magistrate erred in both points of law and facts when the prosecution failed to disclose the evidence it intended to rely on.

    ii. The learned magistrate erred in both points of law and facts by convicting the appellant and yet the case was not proven to the required standard.

iii. The learned magistrate erred in both points of law and facts by failing to prove the offence of handling stolen property as prescribed under section 322(1)(2) of the Penal Code.

iv. The learned magistrate erred both in points of law and facts by failing to note that essential witnesses were not called to testify in the prosecution's case whose doubts ought to be resolved in favour of the appellant.

v. That the trial magistrate erred in law and fact by relying on the prosecution's evidence which was riddled with contradictions and discrepancies to convict the appellant.

vi. That the learned trial magistrate erred both in law and in fact by totally disregarding and dismissing the appellant's defence.

vii. That the trial magistrate erred in law and fact by relying on the prosecution's evidence which was riddled with contradictions and discrepancies to convict the appellant.

viii. That the learned erred in law and fact by imposing harsh, unfair and excessive punishment to the appellant.

4. At the hearing of the appeal, the court directed that parties file their written submissions and both parties complied with the said directions.

5. The appellant submitted in relation to ground 1 that there is no where on the record where it was recorded that the appellant was armed with adangerous weapon. Further, the appellant contended that there was no other person who was arrested in regard to the matter herein and the same applied to the proceedings before court that the appellant was in company of one or more persons.

6. The appellant also contended that even after the complainant allegedly fell unconscious after being cut with a panga, there was no information in relation to whether he reported the same to the police hence the basis of the charges is not ascertained. Further, that the said initial information was not provided to the appellant during the hearing of the case herein. To buttress the essence of a first report, reliance was placed on the case of Terikali v Republic [1952] EACA.

7. In reference to ground 2 and 3, the appellant submitted that the prosecution did not prove its case to the required standard as there was no basis laid on the same. The court was referred to the case of Wamai v Republic (2003) EA 2003 KLR 279 to reiterate the fact that the elements of the offence herein were not proved beyond any reasonable doubt. That the prosecution did not tender evidence to prove that the appellant received the alleged stolen motor cycle as there was no proof to show that the alleged house was rented by the appellant herein. The appellant relied on the case of Bakari and Another v Republic (1987) KLR 173 where Gachuhi, Platt and Apaloo held that it was necessary for the prosecution to prove its case to the required standards. It was further contended that there were no photos produced to show that indeed the motor cycle was recovered in the house allegedly occupied by the appellant nor was there an inventory form filed to prove that the said motor cycle was found in the said house hence the alternative charge was not proved.

8. On the ground that the prosecution failed to call the essential witnesses, the appellant submitted that the 'young man' who allegedly told the police officers that he saw a motor cycle hidden in the house within Adhele village was an essential witness whom the prosecution ought to have availed to testify. Reliance was placed on the case of Bukenya & Others v Uganda EACA to express the position that

the evidence would have been adverse to the prosecution's case. The appellant further contended that, even the arresting officer failed to testify to give evidence on the reasons that led to the arrest of the appellant. In conclusion, the appellant stated that such a failure ought to be resolved in his favour.

9. On the ground that there were alleged contradictions and inconsistencies, it was submitted that the same tainted the prosecution's case in that the prosecution witnesses depicted that they were not credible. It was pointed out that, whereas PW1 alleged that he was hit by a panga thus being unconscious and thereafter rushed to the hospital by PW2, the same was in contradiction with the evidence of PW5 who testified that when PW1 went to the hospital, he was talking and was alone.

10. In the same breadth, it was submitted that PW6 who claimed that he was among the police officers who arrested the appellant from Kyuso, later denied thus stating that he found the appellant at Kyuso Police Station and that he did not know the person who arrested him. The appellant thus placed reliance on the case of Kimani Ndungu v Republic (1971) 1 KLR wherein it was stated that the witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straight forward person.

11. On ground 6, the appellant argued that he gave a clear defence which as per the provisions of the law, ought to have been considered by the trial court but to the contrary, the same was left out.

12. On sentence, the appellant decried that the sentence meted out by the trial court was greatly uncalled for as his conviction was not proved and further, that the death sentence be set aside and a lenient one meted out instead.

13. The respondent on the other hand through Mr. Kihara prosecution counel submitted that PW1 demonstrated that the appellant was armed with a panga and while in the company of an unknown male attacked and injured him; that at the same time, the stolen motorcycle was later found in the house of the appellant. The respondent relied on the case of Oluoch v Republic [1985] eKLR to support his proposition that the ingredients of the offence herein were met and therefore conviction should be upheld. In the same breadth, the respondent submitted that conviction having been proper, the appeal herein lacks merit and the sentence which is legal should equally be upheld.

14. I am alive to the fact that as the 1st appellate court, I am duty bound to re-evaluate, re-analyze and re-assess afresh the evidence tendered before the trial court and arrive at an independent determination and or decision bearing in mind that the trial court had the benefit of seeing and listening to the witnesses so as to be able to assess their general demeanour. See Okeno v Republic [1972] E.A. 32

15. Briefly, PW1 Joseph Mutemi testified that on 10.09.2017, he went to Heller where he met one Benjamin Musinyi whom he told that he needed work as aboda boda rider. That the said Benjamin informed him that he would give him a motorcycle and the same turned to be of Skygo make with a registration number KMDY xxxM. He proceeded that he thereafter went to Mororo stage where he met the appellant, a person well known to him and equally a regular customer. That the appellant asked him to take him to Raya where upon he dropped him to an isolated house. He stated that having reached the destination, he stood at the door and upon appellant knocking, someone else came out of the said house as the appellant herein entered. He continued that he carried the duo on the motor cycle as pillion passengers. That after a short distance, one of the pillion passengers seated at the middle tapped his shoulder and informed him that his phone had fallen down. It was his case that upon stopping, the appellant cut him on the face with a panga. He identified the appellant herein as the person who assaulted him.

16. PW2, APC Aden Mohammed testified that on 10.09.2017, while he was on duty, he was informed by a watchman that his colleague APC Kemboi had responded to a case wherein some had been viciously

attacked. That he decided to visit the scene too whereupon he met APC Kemboi, two juveniles and another man. It was his evidence that together with APC Kemboi, they took the injured man to the Provincial General Hospital Garissa and thereafter reported the matter to Garissa Police Station.

17. PW3, Dubow Gedi Kadiye testified that on 10.09.2017, he rented a house he was managing for somebody to the appellant. That after the appellant rented the said house he assumed possession. That after sometime, police officers approached him enquiring on the identity of the person who occupied the said house. He stated that he referred the police officers to the appellant but due to the fact that the appellant was the one in possession of the key to the said house, the police instead broke the door to the house and recovered the said motor cycle. He identified the appellant as the person who had rented the house.

18. PW4, Sgt Adan Abdi testified that on 13.09.2017 at 1 p.m., while at the patrol base, three members of the public led by one Kimanzi informed him that they were looking for a stolen motor cycle of Skygo make and registration number KMDY xxxM which had been stolen within Adhele sub location of Raya. That it was stolen on 10.09.2017 and the owner had been injured in the process. He stated that the trio requested that the motor cycle be searched for in case it passes the road blocks.

19. He stated that at 1500 hrs, a young man reported that he had seen the said motor cycle in a house belonging to the appellant within Adhele village. That together with other police officers namely Phillip Muthoka and Rajab Mwongela, they boarded the station land rover and headed to the area where the said house stood. It was his evidence that upon asking the children whom they found playing within the place, they were informed that the said house belonged to the appellant; thus they further enquired from PW2, Dubow Gedi Kadiye who confirmed that he had rented the said house to the appellant herein. The witness produced the photos of the motor cycle as MFI – 2 (a), 2 (b) and 2 (c).

20. PW5, Moses Koech clinical officer testified that he saw PW1 at the Provincial General Hospital at Garissa on 22.11.2017 and that PW1 had injuries on the head, neck and on the left eye. He produced P3 Form as Pex 1.

21. PW6, P.C Harun Tuva testified that he took over the case as the previous investigating officer was transferred. He reiterated that the previous investigating officer investigated the matter herein and thereafter recorded statements of the witnesses. He produced a copy of the logbook as Pex 3. On cross examination, the witness stated that the said motor cycle was found in the house of the appellant herein

22. At the close of the Prosecution's case, the Court considered the evidence tendered by the prosecution and placed the accused person on his defence.

23. DW1, David Wambua Ngui the appellant herein testified that on 10.09.2017 he was at his home doing farming but thereafter, left to go check on his cows because there was no herder. That while there, he found a neighbor in the bush having been killed and therefore, he returned to the village to inform the chief and the other villagers. It was his evidence that on 17.10.2017 while at home, one Omar Musembi in company of Mwendwa Musembi and Muema Musembi arrived and informed him that he was a suspect in the murder case involving their brother and therefore, he was required at the police station. He blamed his predicament on his wife and the police officers.

24. Having considered the submissions of the appellant and further analyzed the evidence before the trial court, I find that the issue for determination is whether the appellant has made a case for this court to interfere with the conviction and sentence imposed by the trial court.

25. It is trite law that in criminal proceedings, the burden of proof always lies with the prosecution and that the same does not shift. Under Section 107(1) of the *Evidence Act*, the burden of proof is placed on the prosecution to establish every element in a criminal charge beyond reasonable doubt. This position was

well buttressed in the case of Woolmington v DPP (1935) AC 462 and Miller v Minister of Pensions (1947) 2 ALL 372-273.

26. The offence of robbery with violence is contained in Sections 295 and 296(2) of the Penal Code as follows:

> " 295. 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.
>
> 296(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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

27. The question which needs to be answered is whether any of the above elements was proved to the required standards?. In Jeremiah Oloo Odira v Republic [2018] eKLR the Learned Judge encapsulated the aforementioned sections and elaborated on the offence of robbery with violence as follows:

> " Robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto. Two things must therefore be proved for the offence of robbery to be established: Theft and the use of or threat to use actual violence.
>
> On the other hand, the offence of robbery with violence is committed when robbery is proved and further if any one of the following three ingredients are established: -
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> i. The offender is armed with any dangerous or offensive weapon or instrument, or
>
> ii. The offender is in the company of one or more other person or persons, or
>
> iii. The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person"
>
> [Also See Olouch v Republic (1985) KLR].

28. Based on the evidence of PW1 who distinctly gave a recollection of what unfolded on the material day, it is clear that PW1 was attacked leading to grievous injury and in the process robbed of his Skygo motor cycle of registration number KMDY xxxM. He testified that the appellant while in the company of another person cut him on the face and thereafter made away with the said motor cycle.

29. He narrated that the appellant, a person well known to him and a regular customer of his had contracted his services to take him to Raya; that he proceeded up to the said place and as he stood by the door, someone else came out of the said house as the appellant entered. He continued that he carried the duo on the motor cycle as pillion passengers but after a short distance, one of the pillion passengers

tapped his shoulder informing him that his phone had fallen down. It was his case that upon stopping, the appellant cut him on the face with a panga.

30. PW5, Moses Koech also testified that he saw PW1 at the Provincial General Hospital at Garissa on 22.11.2017 and that PW1 had injuries on the head, neck and on the left eye. He produced P3 Form as Pex 1. From the evidence of pw1 and the medical evidence, the complainant was injured and or wounded on the material day. According to pw1, the assailant had used a panga to attack him. Taking into account the evidence as a whole and the nature of the injuries, the same were obviously not self-inflicted. To that extent force was applied against the complainant and in the process got wounded.

31. As regards theft of the motor cycle, the complainant was categorical that he was robbed the motorcycle after his attack. He reported the incident and a search commenced leading to recovery of the same from the house alleged to have been rented out by the Appellant. Pw2 a caretaker to the house where the motorcycle was found confirmed that he had rented out the said house to the appellant. I have no reason to imagine that pw2 was fabricating a case against the appellant. Am convinced that the complainant was robbed off the subject motor cycle on the material day and that it was recovered from a house occupied by the appellant.

32. The next question is, who attacked the complainant on the material day. Was there positive identification. According to the complainant, he was attacked during the day by the appellant a person he physically knew very well before as a regular customer. That the appellant was in company of another man. Further, the stolen motor cycle was recovered from a house rented by the appellant. This was confirmed by pw2 the caretaker of the said house.

33. In Hassan Abdallah Mohammed v Republic [2017] eKLR, it was stated that:

> " Visual identification in criminal cases can cause miscarriage of justice and should be carefully tested. The court in Wamunga v Republic (1989) KLR 424 at 426 had this to say:
>
> > "Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it the basis of a conviction."

34. It is clear from the graphic evidence of the complainant, he could not have mistaken him for somebody else. There was no bad blood alleged between the two to infer a frame up or fabrication. It is trite law that a court can convict based on the evidence of a single witness. See Roria v Republic (1967) e EA and Ogeto v Republic (2004) KLR where the court held that;

> " it is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the court has to bear in mind it is possible for a witness to be honest but to be mistaken".

35. Besides, the recovery of the stolen motor cycle from the house rented by the appellant circumstantially does lend credence to the evidence of the complainant.

36. It is my reasoned view that the appellant in his defense tried to mislead the court by stating that he was not involved in the attack and robbing of the complainant and blamed his misfortunes on his wife and the police officers. Of importance to note is the fact that the respondent's case considered along that of the appellant, it is clear that the respondent proved its case against the appellant as the prosecution witness seemed credible as they were all consistent in their testimonies and the same tallied

on the sequence of the events of the day. In my view, the appellant was positively identified and that the conditions for identification were conducive and free from any possibility of error.

37. Concerning ground 3 on the offence of handling stolen property as prescribed under section 322(1)(2) of the Penal Code, the appellant submitted that the same was not proved to the required standards. Indeed, when an accused person is charged with both the main count and an alternative, and the court finds him guilty or he pleads guilty to the main count, the alternative count becomes irrelevant. The court can only turn to the alternative count if it dismissed the main count. The trial magistrate was therefore not in error when he found the appellant guilty of the main count and proceeded to convict and sentence him on the same. [See Moses Alusa Imbitsa v Republic [2016] eKLR].

38. On the ground that the prosecution failed to call essential witness, the appellant submitted that the 'young man' who allegedly told the police officers that he saw a motor cycle hidden in the house within Adhele village was an essential witness whom the prosecution ought to have availed to testify. In my view, the argument herein brings into focus section 143 of the *Evidence Act* which provides: -

> "No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact."

39. The Court of Appeal in Julius Kalewa Mutunga v Republic Criminal Appeal No. 31 of 2005 stated: -

> "...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

40. Also see the case of Bukenya & Others v Uganda [1972] E.A. 549 where the court held that:

    i. The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.

    ii. The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.

    iii. Where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.

41. The court in the above case was categorical that the prosecution is not expected to call a superfluity of witnesses. The adverse inference will only be made by the court if the evidence by the prosecution is not or is barely adequate. Accordingly, it will not be inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case. In order for the adverse inference to be made, the evidence of the missing witness must be such as would have elucidated a matter. The appropriate inference to draw is a question of fact to be answered by reference to all the circumstances of the case.

42. Upon evaluating the evidence herein, I find that this is not a proper case for the court to make an adverse inference on account of the failure to call the alleged witness as argued by the appellant; In fact, the respondent managed to prove its case to the required standards by the witnesses that testified.

43. On the ground that the prosecution's evidence was marred with contradictions and discrepancies, it was the appellant's submission that the testimony of PW1 was to the effect that he was hit with a panga thus became unconscious and thereafter rushed to the hospital by PW2 was in contradiction with the

evidence of PW5 who testified that when PW1 went to the hospital, he was talking and was alone. Pw5's evidence was not referring to the events that occurred on the day of the robbery but pw1's visit after one month and 10 days when he saw the complainant for purposes of filing the p3 form thus the issue of pw1 being unconscious does not arise hence no contradiction.

44. In the same breadth, it was submitted that PW6 who claimed that he was among the police officers who arrested the appellant from Kyuso was far from the truth as he later denied that he found the appellant at Kyuso Police Station and that he did not know the person who arrested him. A perusal of the testimony of pw6 does not show anywhere he said that he arrested the appellant hence no contradiction.

45. The law as regards the issues of contradictions and discrepancies is crystal clear. It is trite law that inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected. [See Uganda v Rutaro {1976} HCB; Uganda vs George W. Yiga {1979} HCB 217].

46. I'm also guided by the Court of Appeal decision in Erick Onyango Odeng' v Republic [2014] eKLR citing with approval the Uganda Court of Appeal case of Twehangane Alfred v Uganda Criminal Appeal No. 139 of 2001, [2003] UGCA, 6 in which it was held as follows:

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case."
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> [Also See Philip Nzaka Watu v Republic (2016) CR APP 29 OF 2015].

47. On the ground that his defence was not considered, it is clear that the trial court considered the evidence before him cumulatively before reaching the determination being appealed against. It was his view that the prosecution had proved its case against the appellant. In a nutshell, I do not find any merit on the appeal against conviction.

48. On sentence, the Penal Code prescribes a death sentence for the offence of robbery with violence. The trial court imposed the sentence as provided in law. I have perused the decision by the trial court and it is apparent that the death penalty was imposed because it was the only sentence prescribed in law at the time or that he did not use his discretion to sentence otherwise.

49. It was argued by the appellant that the death sentence was uncalled for and therefore urged this court to set the same aside. In recognition of the same, I am guided by the directions given on 6th July 2021 by the Supreme Court in the case of Francis Karioko Muruatetu & Another v Republic inter alia; that the said decisional law is not an authority to declare all mandatory or minimum sentences unconstitutional. Its application was limited to murder cases falling within its scope. Therefore, this being a case for robbery with violence, this court is therefore endowed with the jurisdiction to look into the facts herein if the same warrants so.

50. Am aware that since Muruatetu one and later muruatetu two, there has been a series of high court and court of appeal decisions declaring mandatory sentences as interfering with court's discretion in dispensing with justice. Recently the court declared life sentence as unconstitutional. The court went ahead to find that Muruatetu 'one' is analogously applicable to robbery with violence that death penalty is not mandatory. See Julius Kitsao Manyeso vs Republic criminal appeal No.12 of 2021Malindi held analogously along the principles espoused under muruatetu 1 that imposition of

life imprisonment is unconstitutional as it violates Article 28 of *the constitution* on the right to dignity as the sentence is indeterminate.

51. In expressing its position, the court had this to say;

> " We note that the decisions of this Court relied on by the Appellant, namely Evans Wanjala Wanyonyi vs Rep [2019] eKLR and Jared Koita Injiri vs Republic Kisumu Crim.App No 93 of 2014 were decided before the Supreme Court clarified the application of its decision in Francis Karioko Muruatetu & another v Republic [2021] eKLR and limited its finding of unconstitutionality of mandatory sentences to mandatory death sentences imposed on murder convicts pursuant to section 204 of the Penal Code. This fact notwithstanding, we are of the view that the reasoning in Francis Karioko Muruatetu & Another v Republic [2017] eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under Article 27 of *the Constitution*. In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under Article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in Vinter and others vs The United Kingdom (Application nos. 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved"

52. The question is whether there is any lawful reason to interfere with the discretion of the trial court in passing sentence.

53. In James Kariuki Wagana v Republic [2018] eKLR, Prof. Ngugi J (as he then was) observed that while the penalty of death is the maximum penalty for both murder and robbery with violence, the court has the discretion to impose any other penalty that it deems fit and just in the circumstances. He further observed that the death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder. He noted that while force had been used in the case before him, it could not be said that the appellant used excessive force, nor did he "unnecessarily injure the Complainant during the robbery" and was not armed during the robbery. He therefore reduced the appellant's sentence of death to imprisonment to fifteen years. The same shall run from the date of conviction.

54. In the case before me, all the ingredients of robbery with violence have been met. The appellant, who was in the company of another, robbed the complainant, and in the course of the robbery, the appellant not only used force, but was armed with a dangerous weapon with which he used to cut the complainant causing bodily injuries. PW5 assessed and verified the same.

55. The level of violence unleashed on the complainant is sufficiently serious to warrant long term imprisonment but of importance to note, the violence did not cause death.

56. In the circumstances, I will reduce the death penalty to a term of imprisonment for 20 years from the date of first arraignment in court.

ROA 14 days

DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 21ST DAY OF JULY 2023

J.N.ONYIEGO

JUDGE