



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 93 OF 2019

MKALA DZILA MWERO.....APPELLANT

-V/S-

REPUBLIC.....RESPONDENT

(Being an appeal from the decision of the Hon. D. NYAMBU (CM)

on 10th May 2019 in Kwale Criminal Case No. 380 of 2016).

JUDGMENT

Background

1. The Appellant, MKALA DZILLA MWERO alias MOHAMED DZILA and MRINA KOMBO MRINA alias HUSSEIN MRINA KOMBO, were jointly charged with five counts of robbery with violence contrary to Section 296 (2) of the Penal Code.
2. The first count was particularized that on the 2nd day of February 2016 at about 09.00pm at Kambingu Centre within Ndavaya location, Kinango sub-county of Kwale county within coast region jointly with others not before court and while armed with dangerous weapon namely AK47 riffle robbed KOMBANIA ALI RAMADHAN off money and two Kwale County Miscellaneous receipt books and two pairs of uniform, the property of Kwale County Government and at the time of such robbery shot dead the said KOMBANIA ALI RAMADHAN.
3. The second count was particularized that on the 2nd day of February 2016 at about 09.00pm at Kambingu Centre within Ndavaya location in Kinango sub-county in Kwale county, jointly with others not before court and while armed with dangerous weapon namely AK47 riffle, robbed ANNE WANJIKU of Kshs. 50,000, the property of the said ANNE WANJIKU, and at the time of such robbery threatened to use actual violence to the said ANNE WANJIKU.
4. The third count was particularized that on the 2nd day of February 2016 at about 09.00pm at Kambingu Centre within Ndavaya location in Kinango sub-county in Kwale county, jointly with others not before court and while armed with dangerous weapon namely AK47 riffles, robbed CHRISTINE WANJIRU JOSEPH of Kshs. 150,000 the property of the said CHRISTINE WANJIRU JOSEPH, and at the time of such robbery threatened to use actual violence to the said CHRISTINE WANJIRU JOSEPH.
5. The fourth count was particularized that on the 2nd day of February 2016 at about 09.00pm at Kambingu Centre within Ndavaya location in Kinango sub-county of Kwale county, jointly with others not before court and while armed with dangerous weapon namely AK47 riffle, robbed MWINGO CHIRIMA off a wallet valued at Kshs. 200 and Kshs. 3800 all amounting to Kshs. 4000 property of the said MWINGO CHIRIMA, and at the time of such robbery threatened to use actual violence to the said MWINGO CHIRIMA.
6. The fifth count was particularized that on the 2nd day of February 2016 at about 09.00pm at Kambingu Centre within Ndavaya location in Kinango sub-county in Kwale county, jointly with others not before court and while armed with dangerous weapon namely AK47 riffle, robbed RAMA KARISA off a miscellaneous receipt book, a calculator and a pair of uniform all valued at Kshs. 2,650 the property of Kwale County Government, and at the time of such robbery threatened to use actual violence to the said RAMA KARISA.
7. The Appellant pleaded not guilty. The trial magistrate considered the sworn evidence of ten prosecution witnesses, the sworn evidence of DW1 and the unsworn evidence of DW2. The trial magistrate then convicted the appellant who was sentenced to death in count 1 while the sentence in the 2nd, 3rd, 4th and 5th counts are held in abeyance in account of the sentence in count 1.
8. The Appellant was aggrieved by the conviction and sentence and he preferred an appeal herein on the following amended grounds of

appeal which were filed with written submissions:-

- a) That the learned trial magistrate erred in law and in fact by convicting and sentencing the Appellant to suffer death without considering that it was unlawful because the Supreme Court declared the same as unconstitutional.
- b) That the learned trial magistrate erred in law and fact by convicting the Appellant without considering that the circumstances that prevailed at the alleged scene of crime were not conducive for proper identification.
- c) That the learned trial magistrate erred in law and fact by convicting the Appellant without considering that the alleged parade conducted was unlawful because Chapter 46 of the Force Standing Orders was violated.
- d) That the learned trial magistrate erred in law and fact by convicting the Appellant without considering that the confession statement was unlawfully conducted.
- e) That the learned trial magistrate erred in law and fact by convicting the Appellant without considering reasonable defence.

Prosecution Case

9. PW1, Chondo Kumbiro Chondo, was headed to Kitali in Lunga Lunga from Mbita to collect revenue on 2.02.2016. He was with the deceased, Ali Kombani the driver, in Count 1 when they were attacked by armed robbers. He was also with Rama Karisa the revenue clerk. Their vehicle was KCD 922G Toyota Double Cabin. He did not identify the attackers who ordered them to lie down and shot at Kombani. He said the lights at the shop were dim.

10. PW2, Mbodzi Jawa Koro, knew Mrina Kombo, the 1st Accused. The 1st Accused's mother asked her to guarantee her using her ID card since she did not have hers and that the 1st Accused's mother used PW2's identity card to receive her dues from 'Nguvu ni Kazi' group. That she also accompanied the 1st Accused to Ukunda who used her ID to register for an Mpesa line. She said the 1st Accused withdrew Kshs. 10,000 from Ukunda. That later, the police summoned PW2 to know how her number was registered. She said that Abdullahi Mundungu was arrested before she was interrogated.

11. PW3, Dr. Gathundu Edwin a medical officer at Kinango Sub-County Hospital performed a post-mortem on Kombania Ali Ramadhan, the deceased in Count I at 10.30 am. The body had two bullet entry wounds, one on the right and the other on the left shoulder of significance, the exit of one of the bullet wounds was on the right of the 5th inter-coastal space and on the exit wound there were multiple rib fractures, physical lung injuries and accumulation of blood in the right lung cavity. PW3 formed the opinion of death as penetrative thoracic injury with primary and secondary lung injury and haemothorax. He prepared the post-mortem report.

12. PW4, No. 235253 Inspector Reuben Kiptum Bett a firearm examiner attached at DCI produced a Ballistic Report on behalf of his colleague Chirchir who examined three cartridge cases and one fired bullet which were received from Inspector Joseph Murigi on 7.04.2016. Mr. Chirchir established that the three cartridges were formerly a component of a 7.62 round of ammunition and that A1 was fired from one gun while A2 and A3 were fired from another gun and that they were fired from the same rifle used in other shooting incidents.

13. PW5, Rama Karisa, the Revenue Clerk with County Government of Kwale was with PW1 and the deceased when they were attacked by 4 gangsters 2 of whom were armed with firearms, the other had a panga and the 4th had a rungu. He said they had gone to look for food at Kabinga Trading Centre where a tin lamp was being used and he was not able to identify the gangsters. He said they were ordered to lie down and he was hit on the thigh. He said when the deceased told the robbers they were also officers, one ordered he should be finished, he heard a gunshot and Ali did not speak again. He said he flee to the nearby thicket when robbers turned attention to the people who were seated on a bench nearby. He called and informed his boss what had happened. He remained in the bush until 8.00am the next day. He said that when he came out to meet his supervisor, he found the vehicle had been driven away and there was blood where Ali had been spotted.

14. PW6, CIP Barissa Mwakio, No. 232750 the OCS Vingunguni Police Station received a call on 2.02.16 at around 9.30 pm that a man had been killed at Kambingu market. They were told that a gang of six (6) people had been terrorizing people and they were armed. PW6 said that on 20.3.2016, DCIO Kinango called him to go and record statements of suspects who had been arrested and he complied. He produced statements recorded by Mkala Dzilla- ExP6 and Mrina Kombo-ExP7. He said he did not investigate the case and that relatives of the 1st Accused were present when confession was recorded. He said the 2nd Accused recorded confessions voluntarily without threats. He said the 2nd Accused's brother was present and he signed the confession.

15. PW7, Christine Wanjiru Joseph said that her and her sister were robbed by the same robbers who attacked the County Government Revenue Collectors on 2.2.2016 within Kambingu Shopping Centre. They were robbed of Kshs. 200,000 and her sister Anne Wanjiku was taken by robbers to look for a place with network to transfer money. However, it was not successful as she had reached the limit. PW7 said that she was in the house with one Chondo, the County Government Revenue Officer when they were attacked. PW7 did not recognise or identify the robbers as it was dark and they put a gun on her head.

16. PW8, Anne Wanjiku Wamboi, a resident of Kambingu shopping center. On 2.02.2016 at 9.00pm, she left her sister's house to take a bath when she saw people armed with guns in jungle green uniforms. That she heard them command people to lie down and when she did not, she was slapped. She was asked for money and she said that there was money in the house. She was taken to the house where she called PW7 to open. While in the house, PW7's cash was taken and robbers also asked for her phone when she said their colleague had taken her phone, the robbers decided to go with her so that she could give them her Mpesa PIN. That she was taken to a place with network and she was made to sit down and they left with her Nokia phone and cash from PW7's house. She said the robbers were unable to withdraw from Mpesa. PW8 remained at the neighbour's house until the next morning when she heard one person had been killed. She said she did not identify the robbers as it was dark.

17. PW9, No. 216373 C. I. Julius Kurgat stationed at Kinango Police station at the time, took part in the investigation of robbery with violence at Vigurungani which led to the arrest of the 1st Accused from his house in Vigurungani where a Samsung phone, SIM card and battery were recovered.

18. PW10, No. 233161 Chief Inspector Joseph Murithi previously at Kinango Police Station as D.C.I.O. took part in the investigation of robbery with violence at Kambingu area. He established that PW8's phone was used in an attempt to transfer money to Sophia Omar and Mbodze Kolo's phone. He said that the 1st Accused's presence at the scene was confirmed from the phone records. He said that the 1st Accused's arrest led to arrest of the 2nd Accused.

Defence Case

19. DW1, Mrina Kombo Mrina, stated that he was arrested in his house at 5.00am by police officers where he was taken to Kinango Police Station and booked on OB 4/21/3/2016 at around 6.40 am. He underwent an identification parade and stated that he did not need anyone present for him. All the complainants positively identified him.

20. DW2, Mkalla Dzilla Mwero, stated that he was arrested at around 1.00am and told the police that he knew Mrina Kombo but only as the husband to his niece. He underwent an identification parade with eight people and he was identified by being touched by two people and the other one failed to identify him. When they were being taken to court, the 1st Appellant who was handcuffed with him tried to escape from a moving vehicle at Marereni Bridge. DW2 was injured in the process and taken to Kwale hospital.

Appellant's Submissions

21. The Appellant submits that he was prejudiced for lack of legal representation. Under Article 50(2) (g) & (h) of the Constitution of Kenya 2010, the trial court was under a mandatory and constitutional duty to have informed the Appellant and promptly so of their right to legal representation by an advocate of their choice or to apply to be assigned an advocate at the state's expense.

22. The Appellant submits by humbly requesting the court to call for a pre-sentencing report so as to determine the appropriate sentence in the unlikely event that the appeal on conviction fails.

23. The Appellant submits that despite failure by the alleged victims to identify the alleged robbers, there was no evidence tendered to demonstrate that the item which are subject of counts 1, 4 and 5 ever existed. Worst still, there was no witness called from the Kwale County Government to confirm that Mr. Kombania Ali Ramadhan had possession or was ever issued with an unknown amount of money, two Kwale county Miscellaneous receipt books and two pairs of uniforms alleged to be the property of Kwale County Government. Further the Appellant submits that if Mwingo Chirima & Chondo Kumbiro Chondo are not one and the same person, then count 4 stands to be dismissed for lack of evidence and prosecution.

24. The Appellant submits that the finding herein is the only game changer in this case for there was no other evidence in support of the charges in implicating the Appellant and neither was there any corroborative evidence even if the said confession was to be admitted in evidence. The prosecution case was purely circumstantial and the evidence tendered has failed to meet the threshold as set out in the Court of Appeal case of *Musili Tulo v Republic* [2014] eKLR.

25. The Appellant submits that during the evidence of PW8 and despite having introduced herself as Anne Wanjiku Wambui, she never reconciled why the line was registered in the name of Margaret Njeri Wambui. Additionally, the Appellant submits that it is very strange that it was the investigating officer who introduced the call data records and Mpesa statements without laying a basis on how he was able to retrieve the same while he was not an employee of Safaricom or a liaison officer.

Respondent's Submissions

26. The Prosecution submits that the critical ingredients forming the offence of robbery with violence were stated in Criminal Appeal No. 163 of 2016, *Kurera Chilo Kuto v Republic* where the court stated that theft is a central element in robbery with violence that must be proved by the prosecution. The Prosecution further submits that the other elements of robbery with violence were elaborated by the Court of Appeal in *Ganzi & 2 Others v Republic* [2005] 1 KLR and in *Johanna Ndungu v Republic*, Cr. App. No. 116 of 2005 (unreported) as:

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

27. The Prosecution submits that in Criminal Appeal No. 87 of 2016, *Caroline Wanjiku Wanjiru & Another v Republic*, the court outlined the law regarding confessions as hereunder:-

The basis of the law on confession can be found in the following:-

- i. *Article 49 (1) (b), (d) and 50 (2) (a) and (4) of the Constitution*
- ii. *Section 25 to 32 of the Evidence Act*

iii. *The Evidence (Out of Court Confession) Rules, 2009, and*

iv. *The case law*

28. The Prosecution submits that under the Evidence Out of Court Confession Rules, Rule 4 states:-

4. (1) *where an accused person intimates to the police that he wishes to make a confession, the recording officer shall take charge of the accused person and shall ensure that the accused person :*

a. *Has stated his preferred language of communication;*

b. *Is provided with an interpreter free of charge where he does not speak either Kiswahili or English;*

c. *Is not subjected to any form of coercion, duress, threat, torture or any other form of cruel...*

29. The Prosecution submits that the Appellant did not object to production of the confession as evidence, he also from his cross examination did not put it to the witness that he did not record a confession only that the same was not voluntarily made. Even if the court were to treat the appellant's confession as a retracted confession, there is no rule of law or practice that requires corroboration of a retracted confession before it can be acted upon. This was the position adopted by the Court of Appeal in *Kanini Muli v Republic* [2014] eKLR. In the instant case, the Appellant did not present any evidence to court to support their claim of being coerced into making a confession. The trial court in its judgment found that the confessions were properly made.

30. The Prosecution submits that its evidence and the events as narrated by the Appellants tally. It is Mrina Kombo Mrina who led the police to Mkalla Dzilla because they were accomplices in the robbery. None of the prosecution witnesses saw the robbers. Therefore, there is no issue of mistaken identity or malicious prosecution. The evidence of the failed Mpesa transactions and that of PW2 place Mrina Kombo at the scene that night who was in the company of Mkala Dzilla.

31. The prosecution further submits that it is trite law that the appellate court will not interfere with sentencing unless it is evident that the trial court acted upon a wrong principle of the law.

Analysis and Determination

32. This being the first appellate court, I am guided by the principles in **David Njuguna Wairimu v Republic** [2010] eKLR where the court of appeal held:-

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

33. After considering the grounds of appeal, records of the trial court, submissions and circumstances of the case, issues for determination are as follows:-

- i) Whether the conviction of a death sentence was lawful.
- ii) Whether the Appellant was convicted on account of having been identified at the robbery.
- iii) Whether confession by the Appellant was lawfully conducted.
- iv) Whether the Appellant was prejudiced for lack of legal representation.
- v) Whether Count No. 6 was applicable to the Appellant.

Whether the conviction of a death sentence was lawful

34. The Appellants stated in their first ground of appeal that the learned trial magistrate erred in law and in fact by convicting and sentencing the Appellants to suffer death without considering that it was unlawful because the Supreme Court declared the same as unconstitutional. However, this is a misinterpretation of the decision of the Supreme Court in **Francis Karioko Muruatetu & another v Republic** [2017] eKLR. What the Court held was that the mandatory nature of the death sentence is unconstitutional and that the court has the discretion to impose a sentence other than death. However, the death sentence remains in the Penal Code as the sentence for robbery with violence and murder and has not been repealed. On 6.7.2021, the Supreme Court gave guidelines clarifying that the holding in **Muruatetu** was applicable only to death sentence in murder cases. The Appellant cannot therefore benefit in that holding.

Whether the Appellant was convicted on account of having been identified at the scene of the robbery

35. PW1, PW5, PW7, and PW8 testified that they were not able to identify the robbers for reasons that it was dark and that the attackers were armed with guns and ordered them to lie down. They also testified that the deceased in Count I was shot dead when he challenged the robbers to identify themselves when they claimed they were officers. The Appellant was arrested when the 1st Accused led PW10 and other officers to him. That on arrest of the Appellant, he was interrogated and made a confession to PW6, Chief Inspector Mwakio. The ground raised by the Appellant that he was not properly identified cannot be sustained as he was not convicted on account of having been identified at the scene of the robbery.

36. Contrary to the Appellant's claim that he was convicted based on evidence of identification, the prosecution's evidence was that it his co-accused Mrina Kombo Mrina who led to his arrest after it was established that M-Pesa transactions made during the robbery from PW8's phone were being transferred to PW2 and upon arrest of PW2 and her son, they led to the arrest of Mrina Kombo Mrina. PW2, Mbodzi Jawa Koro testified and stated that she knew the 1st Accused who had used her Identity Card number to register for an Mpesa line. PW10, stated that when the 1st Accused was arrested, he led police officers to the 2nd Accused's home, the Appellant herein.

Whether confession by the Appellant was lawfully conducted.

37. **Section 25** of the **Evidence Act** defines what amounts to confession as follows:

“A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.”

Section 25 of the **Evidence Act** was amended by Act No. 5 of 2003 and Act No. 7 of 2007 by inserting into the Act, **Section 25A** which provides for the manner of taking an accused persons confession to make it eligible for admission as follows:

‘25A (1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.’

38. PW6, No.232750 CIP Barisa Mwakio in his testimony said that he took part in the initial investigations by visiting the scene of the robbery at Kambingu market and removed the body of the deceased to Kinango Hospital Mortuary. He was therefore in possession of some facts of the case by the time he was taking the confession of the Appellant. There is a high likelihood that the facts in possession of PW6 were recorded and the Appellant herein made to sign them as his confession. In his testimony, he did not give particulars of the procedure of confession which he followed. The trial magistrate acknowledged that the Appellant and his co-accused denied having made a confession. In the circumstances, this court finds that there is doubt raised as to the manner the alleged confession was taken.

Whether the Appellant was prejudiced for lack of legal representation

39. The Appellant raised the issue of legal representation under Article 50 (2)(g) & (h) of the Constitution of Kenya 2010 in their submissions but the same had not been raised in the Grounds of Appeal.

Whether Count No. 6 was applicable to the Appellant

40. The Appellant's Advocate, Mr. Chacha, made submissions in respect to Count No. 6 for the offence of having been found with suspected or stolen property, but the said count was not in respect to Mkala Dzila Mweru the Appellant in CRA No. 93 of 2019 but it relates to Mrina Kombo Mrina the Appellant in Criminal Appeal No. 94 of 2019 who was the co-accused to the Appellant herein.

41. Although the Appellant was convicted for the offence in the 4th count, the complainant therein, Mwingo Chirima did not testify and there was therefore no basis upon which the trial magistrate found the Appellant's guilty in the absence of the complainant's evidence.

42. In conclusion, the finding in paragraph 36 as to the manner and the officer who took the Appellant's confession makes this court find that the ground of Appeal No. 4 as to admission of confession allegedly made by the Appellant has merit and the Appeal as to conviction and sentence is allowed. The conviction is quashed and sentence set aside. The Appellant shall be released forthwith unless lawfully detained.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 14TH DAY OF OCTOBER 2021**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ogwel- Court Assistant

Ms. Karanja for Respondent

Mr. Chacha for Appellant

HON. LADY JUSTICE A. ONG'INJO

JUDGE