



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL APPEAL NO. 62 OF 2018

KIMANZI MWANZIA.....APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal against the Judgment of the Principal Magistrate's Court at Hola by Hon. A. P. Ndege

(PM) delivered on 2nd October 2018 in PMCR Case No. 116 of 2018)

CORAM: Hon. Justice Reuben Nyakundi

The Appellant in person

Mr. Mwangi for the State

J U D G M E N T

What is before the Court is an appeal against the conviction for the offence of violence with robbery contrary to Section 296 (2) of the Penal Code and the sentence of death.

The appeal is based on the grounds that the appellant was not assigned an advocate to represent him and that he was not given an interpreter. He also faulted his identification by **(PW2)** at the scene of the crime. He submitted that there should have been an identification parade conducted to prove that **(PW2)** knew him.

The appellant contended that **(PW2's)** claim of having known him three (3) months to the crime was hearsay. Further, that he was not arrested with the alleged motorcycle or anything incriminating. He raised the issue of the manner of his arrest by members of the public as none of them brought in evidence to support the prosecution case.

He submitted that the imposition of the death sentence was unconstitutional and cited the case of **Francis Karioko Muruatetu & Another Pet. No. 15 & 16 of 2017** in support of his submission.

The appellant faulted the investigations carried out by **(PW13)**. The motorcycle that was stolen was KMDU 440Z Bajaj Model 150, red in colour. However, **(PW12) Cpl. Morris Koome** from Kiambere station while on duty on 22nd July 2017 was told by **Cpl. Kushiko** that there was a motor cycle stolen from Charindende, Tana River area. He interrogated one Kamututho who told him the motorcycle was in his house and the same was recovered. This contradicted the evidence by **(PW13)** that he received information on 27th July 2017 and the next day they acted in the information and recovered a motorbike at Ngiri Market, yellow in colour, Registration No. KMPU 440Z, a Bajaj boxer.

Further, that **(PW13)** claimed to have arrested him and recovered an ignition key but there is no inventory prepared to prove the same. He was not booked with the same in the OB or cell registry. The prosecution opposed the appeal and submitted that **(PW2)** was the last person to see the deceased and he narrated to the Court how the deceased left with two passengers and he was informed of this by a witness who knew the appellant well. There was no need for an identification parade as the identification was by recognition. **(PW8)** narrated to the trial Court how they went to Nguni on 27th July, 2017 on the deceased's motorbike being ridden by the appellant. They then took the motorbike to **(PW8's)** uncle's home, who testified as **(PW9)**. Both these witnesses identified the appellant before Court. **(PW13)** arrested the appellant after he was called by **(PW9)**. At the police station he searched him and found the keys to the motorcycle. The said motorcycle belonged to the deceased and several witnesses positively identified the appellant being in possession of the same. The prosecution asked that the death sentence be replaced with a life sentence.

Issues for determination

After a perusal of the submissions, pleadings and the record of appeal if have identified the following issues for determination;

1. *Whether the appellant was afforded a fair trial.*
2. *Whether the identification of the appellant was proper.*
3. *Robbery with violence relying on the doctrine of recent possession.*
4. *Whether the sentence was commensurate to the offence.*

The task of a first appellate Court on first appeal from a conviction was declared by the decision of the predecessor of this Court in **Pandya v R C {1957} E.A. 336 at page 337** where the matter was put as follows:

“On the first appeal from a conviction by a Judge or Magistrate sitting without a jury the appellate is entitled to have the appellate Court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the materials before the Judge or Magistrate with such other materials as it may have decided to admit. The appellate Court must then make up its mind not disregarding the Judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate Court must be guided by the impression made on the Judge or Magistrate who saw the witnesses, but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant the Court in differing from the Judge or Magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen . On second appeal it becomes a question of law as to whether the first appellate Court in approaching its tasks, applied or failed to apply such principles” (See also Shantilal M. Ruwala v R, {1957} E.A. 570).

(1). Whether the appellant was afforded a fair trial

Article 25 (c) of the Constitution provides:

Despite any other provision in this Constitution, the following rights and fundamentals freedoms shall not be limited –

(c) the right to a fair trial;

The Court of Appeal in the case of **Karisa Chengo & 2 others v R CR. Nos. 44, 45 & 76 of 2014**, stated:

“It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The Constitution is crystal clear that an accused person is entitled to legal representation at the State’s expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This Court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result” and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise.”

In Kenya the Constitution under Article 50 (2) (h) the accused person is entitled to legal representation at the expense of the state if substantial injustice will otherwise result. The class of people contemplated are those indigent persons facing serious offences which calls for a necessity to have counsel representation in those criminal proceedings. Though, the right is provided for under the Constitution it is not an absolute right for it is dependent upon an accused person demonstrating to the Court that substantial injustice will be occasioned if that right to counsel is not provided for by the state expense. In the **Karisa Chengo (supra)** the Supreme Court made an attempt to outline various factors within the scope for substantial injustice to result. That includes: seriousness of the offence, sentence severity, ability for accused person to pay for his own legal representation, age and literacy of an accused person and the complexity of the Judge. Arguably, it makes sense that the accused person to have access to justice and legal services. However, that legal aid, legal counsel is scarcely provided for because of financial limitation living quite a sizeable proportion of those accused with serious offences not able to be provided with counsel at the state expense. That access to legal representation, in our criminal justice system is generally unavailable and only sometimes available in the High Court more specifically for those facing murder contrary to Section 203 of the Penal Code. Notwithstanding, the rubric of factors characterizing what constitutes substantial injustice in the **Karisa Chengo** case the poor are priced out of the criminal justice system. The substantial evidence is that those charged with serious offences with the mandatory sentences of death or life imprisonment have their criminal processes resolved without access to legal representation. It is a fact advocates are few in number to significantly offer legal assistance to suspects upon arrest or during trials to assist in navigating the criminal justice system. Ramification of the right to counsel cannot be gain said for it to assist the accused person in overcoming routine and legal obstacles which may be encountered if he/she represents herself or himself before the Court in an adversarial system like Kenya.

Whether or not lack of legal counsel to the appellant occasioned a failure of justice in respect of that trial is not very clear from the record. In addition to define illegibility for legal counsel at the state expense one must pass the hurdle of substantial injustice. Despite the lengthy submissions by the appellant the extent to which he suffered prejudice or injustice for lack of legal counsel has not been sufficiently brought out in his appeal. In this case, in view of the line of inquiry in adjudication of the appeal on its merits typically I find the principle of substantial injustice would otherwise result not established on a balance to provide support for admitting that ground in favor of the appellant.

Similarly, the appellant complained of his violation under Article 50 (2) (m) to have the assistance of an interpreter without payment as he did not understand the language used at the trial. The Article guarantees the right to the free assistance of an interpreter for translation or interpretation of all documents or statements in the proceedings that are necessary for the accused person to understand and to benefit from fair trial rights in Article 50. As observed from the record, it is explicitly provided for that the accused person proceedings had the benefit of Court Assistants by the name **Buko** and **Kofa**. It is presumptive that the Court Assistants dealt with issues on access to the case file interpretation and translation in a language understood by the accused person in the course of the criminal proceedings. This was to ensure that the rights of the accused person are fully exercised and to safeguard the fairness of the trial. By the Court providing interpretation and translation of the proceedings into a specific language understood by the accused the whole process met the criteria under Article 50 of the Constitution. The ambit of the rights enshrined in Article 50 (2) (h) & (m) must be determined by having regard to the context in which it appears and the purpose of which it is intended. The purpose of Article 50 as a whole is to minimize the risk of wrong convictions, prejudice and consequent failure of justice to the accused persons. At this juncture, I find no detailed or extensive evidence to grant the appellant the remedy on infringement of his fair trial rights.

(2). Whether the identification of the appellant was proper

The accused was identified by way of recognition. The Court of Appeal in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret, Peter Okee Omukaga & Another v R (unreported)** had this to say on the evidence of recognition at night:-

“We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as ‘neighbours from the village’, that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non-recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants.”

The Court of Appeal in the case of **Wamunga v R {1989} KLR 426** stated as follows:

“It is trite law that 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 conviction.”

The purpose of identification of the accused in this instance was to confirm that he was in recent possession of the deceased’s motorbike. **(PW8)** identified the appellant as having possession of the motorbike as they rode to Nguni. **(PW9)** corroborated that the appellant came to his home with the bike together with **(PW8)**. There was no need for an identification parade as the appellant was positively identified by witnesses including **(PW2)**.

(3). Whether the doctrine of recent possession was applied correctly

The doctrine of recent possession was set out by the Court of Appeal in the case of **Isaac Nanga Kahiga alias Peter Nganga Kahiga v R, Criminal Appeal No. 272 of 2005 (unreported)**, in these terms:

“..... it is trite Law that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be proved. In other words, there must be positive proof first, that the property was found with the suspect, and secondly that, the property is positively identified the property of the complainant, thirdly that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to another. In order to prove possession, there must be acceptable evidence as to search of the suspect and recovery of the alleged stolen property, and in our view any discredited evidence on the same cannot suffice no matter how many witnesses”

There was positive proof that the property was found with the appellant, he could not explain how he came into possession of the ignition keys, the property was positively identified as the property of the deceased. The deceased’s body was recovered without the motorcycle so it is a rebuttable presumption of fact that he was robbed of the motorcycle. The appellant failed to rebut this presumption.

I find that the doctrine of recent possession was applied correctly.

(4). Whether the sentence was commensurate with the offence

The trial Court sentenced the appellant to death. However, the Supreme Court in the case of **Francis Karioko Muruatetu & Another v R SC Petition No. 16 of 2015 {2017} eKLR** held that:

“The mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional.”

Nevertheless, the prescriptive approach articulated in this case does not apply **Mutatis Mutandis** to the death penalty for robbery with violence contrary to Section 296 (2) of the Penal Code. More recently, the Court stressed that the guidelines and mandatory death sentence was only applicable with the provisions of Section 204 of the Penal Code. It is therefore unsurprising that the principles found in **Muruatetu II** are difficult to interpret in pursuit of the goals of sentencing. For purposes of clarity the words disparity and discrimination are frequently interlocked in the sentencing decisions by trial Courts following the dicta in **Muruatetu II**.

In reviewing the instant case on the nature of the sentence posed by trial Court what comes in mind is the statement by **Steffensmeier et al. {1998, 766-7}**, drew our attention to the offender’s culpability and degrees of injury:

“Sentencing research generally shows that seriousness of the offense – as measured in terms of the culpability of the defendant and the harm caused by the offense – is the most significant factor in sentencing. Moreover, relevant research applying schema theory to criminal punishment finds that crime wrongfulness and harmfulness (defined in various ways) are two global schema by which people in a wide variety of contexts assess the appropriateness of criminal sanctions (See Farrell and Holmes, 1991; Miller, 1994). Besides offense severity, the main factors influencing the judges’ and other criminal justice actors’ view of the blameworthiness of the offender are biographical factors, such as criminal history (which increases the perceptions of blameworthiness and risk) or prior victimization at the hands of others (which tends to mitigate perceived blameworthiness), and the offender’s role in the offense, such as whether the offender was a leader, organizer, or follower.”

These variables seem to be have been widely legally relevant in considering the legitimate criteria in sentencing the appellant to the prescribed mandatory death sentence. It will be appreciated the centrality of sentencing purely is anchored in the discretion of the trial Judge. The fundamental problem is out to identify and measure the discretion dimensions to provide meaningful sanction on mandatory custodial penalties. The sentence conceptualized here was that of pure prison followed by rehabilitation. However, what stood out is the quadrant of rebuke combined with detention. The death penalty rarely captures the quadrant of rehabilitation. In sum the offender is sentenced to prison and placed on death row. That is however the continuum of sanctions that encompasses all sentences motions as characterized by the Supreme Court in **Muruatetu** dicta. It was a profound case law policy with a goal of individualized sentencing fine-tuned to the circumstances of each offender. I am not sure whether the answer for the question raised by the appellant is generally to be found by employing the variables in **Muruatetu II** jurisprudence. In other words, there is a restricted choice set by parliament in the sentencing option under Section 296 (2) of the Penal Code, which **Muruatetu II** tended to promote its letter, but the spirit in **Muruatetu I** states otherwise.

This verdict requires the trial Court to impose a sentence of death with no opportunity to the appellant to present mitigation evidence to justify a less severe sentence. That evidence might have included the appellant’s age at the time of the crime, self-discipline, good judgment before the commission of the crime, his history of being a first offender and the potential for rehabilitation. On this grounds, there is an import of an unfair trial when the sentencing option is automatic upon conviction verdict of an offender. In my view, mandatory death sentence for robbery offenders without mitigation violates Article 25 of the Constitution on prohibition from torture and cruel, inhuman or degrading treatment or punishment. By making Courts impose that harshest mandatory death sentence, without mitigation poses two great a risk of disproportionate punishment. In this case, the Court must address part of the question left restricted in the sentencing of the appellant. I tend to think a conviction under our Constitutional law without the foundation of the whole proceedings on due process and sentencing herein is not merely erroneously but it is illegal.

As discussed in **Muruatetu** case the Court concluded that the same logic governs a challenge to a punishment that deprives judges/magistrates the authority to impose alternative sentence besides the minimum mandatory provided for in the statute. The **Muruatetu I** provides a substantive rule on sentencing in our criminal justice system. In my view, there is no grandfather clause that permits Courts to impose punishment the constitution of it by nature of mandatoriness. The foundation stone from **Muruatetu I** was the line of precedent setting that the mandatory death sentence is disproportionate without the central substantive guarantees under Article 50 on the right to a fair hearing. This consideration calls upon this Court to nonetheless take into account attendant characteristics of this offence whether indeed it deserves the rarest of the sentence within the definition of the crime. The recent trend in our Courts provides an increasing robust and enlightened role in the enforcement of upholding the bill of rights such as the right to life, humane treatment and dignity, a fair trial and due process rights and finally the rule of Law. It is clear from Section 296 (2) the contemplated clause seems to be more tandem with **Hammurabi’s** legal code. Whether or not that was the intention of the legislature is a moot question. In short, the incompatibility of the mandatory death penalty with fundamental rights was well established and settled by the Supreme Court in **Muruatetu** case. That quagmire was laid to rest. In principle the Court should in this case primarily in the same vein substitute the death penalty in such circumstances to provide for a lesser sentence for the benefit of the appellant. The text of the law under Section 296 (2) can be read in the light of the accompanying interpretive case law and the constitution as a whole to give way to imposition of a custodial sentence. In those circumstances, I set aside the mandatory death sentence by substituting it with the custodial sentence of twenty-five years imprisonment from the date of arrest with effect from 12th June 2017. The appeal is allowed to that extent. With regard to conviction I find no good grounds exists to disturb the findings by the trial Court.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 17TH DAY OF DECEMBER 2021

.....

R. NYAKUNDI

JUDGE

In the presence of

1. The appellant
2. Mr. Mwangi for the state