Oloo & another v Republic (Criminal Appeal 167 of 2018)
[2025] KECA 18 (KLR) (10 January 2025) (Judgment)

Neutral citation: [2025] KECA 18 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 167 OF 2018

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

JANUARY 10, 2025

BETWEEN

BENSON OCHIEN'G OLOO ..... 1ST APPELLANT

EVANS ODUOR OCHIEN'G ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Busia (W. Korir, J.) dated 10th December 2015) in HCCRA NO. 55 of 2015)

JUDGMENT

1. Benson Ochien'g Oloo, the 1st appellant, and Evans Oduor Ochien'g, the 2nd appellant, are two of the five accused persons who were charged in the Chief Magistrate's court at Busia with the offense of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were that on 9th July 2014 at Burumba Estate in Busia township within Busia County, the appellants with others not before court, while armed with dangerous weapons robbed Chrispinus Ouma of a motorcycle registration number KMDG 513V make Bajaj Boxer and a mobile phone make Tecno 1343 all valued at Kshs. 106,700/= and during the said robbery killed Chrispinus Ouma (the deceased).

2. The trial court, after carefully considering the evidence before it, was satisfied that the prosecution had proved its case beyond reasonable doubt,found the appellants guilty as charged and sentenced them to death.

3. Aggrieved by both the conviction and sentence, the appellants then appealed to the High Court. In a judgment dated and rendered on 12th July, 2017, the High Court dismissed the appeal for lack of merit, hence upholding the appellants' conviction and sentence.

4. The evidence as presented at the trial, and later subjected to re- evaluation and re-analysis at the High Court, was that, on 3rd June 2014, Zubeia Atieno Musa, PW2, bought a motorcycle registration number KMDG 513V make Bajaj Boxer for Kshs. 105, 000/-. She handed over the motorcycle to the deceased upon reaching an agreement that he would conduct business with it; and give her Kshs.350/-, daily. On 9th July 2014 she learnt about the deceased who had been seriously attacked, robbed of the motorcycle, and hospitalised.

5. Scolastica Obonyo Simanyula, PW3, the wife of the deceased, testified that on 9th July 2014 she received information that her husband had been seriously injured; was in hospital; and succumbed to his injuries.

6. PW4, Linet Atieno Oluoch testified that on 9th July 2014 at around 6am two men whom she identified as the 3rd accused (Phillip Odinga) and the 4th accused (Chrispinus Victor Otieno), went to her house in Sofia Uganda and asked her if she wanted to purchase a phone, but she told them she was not interested. She was able to identify Accused 3 and Accused 4.

7. Eric Egesa Makokha, PW7, the chairman of the boda boda association in Busia testified that on the morning of 9th July 2014 at 8.00am he was informed that the deceased had been attacked and robbed in Burumba area and taken to hospital. He went to the scene with other boda boda riders and Sergeant Charles Ouma Aduel, PW12. They found a broken helmet, a stick with a nail on it and a shoe. He stated they were informed that neighbours had heard the two motorcycles being ridden to a certain home. They went to the house and found a lady washing clothes but she denied there were people inside the house. They stormed into the house and found the 1st appellant sleeping on the bed and the 2nd appellant sleeping on the chair. Upon searching the house, they recovered two sticks that resembled the one at the scene, four jackets which had dust, and two were stained, a T-shirt, jungle green and blue jeans which were freshly washed.

8. PC Godfrey Ouma, PW5 confirmed that on the material date, he was instructed by the OCS Bungoma to accompany some boda boda riders to the residence of persons suspected to have committed a robbery; that out of the recovered 4 jackets, two which were bloodstained, were taken to the Government Chemist for examination and analysis; they also recovered a chest guard, jungle green t-shirt and blue jeans which were freshly washed. From the house of the 2nd appellant, 100m away, they recovered two blood stained bedsheets which were also taken for analysis. The 1st and 2nd appellants were arrested.

9. PW6 Dr. Walter Nalianya of Moi Teaching and Referral Hospital produced a post mortem report showing the deceased had multiple fractures on the frontal skull which extended to the base on both sides; and concluding that the deceased died as a result of severe head injury due to blunt trauma.

10. Margaret Oginga, PW8 was initially charged as the 5th accused, but testified for the prosecution after charges against her were dropped. Her evidence was that on 9th July 2014 at 7.15 am she was woken up by Phillip Oginga (Phillip), and Chrispin Victor Otieno (Chrispin), the 3rd and 4th accused at the trial. Phillip was acquitted by the trial court; they offered her a phone for sale saying Chrispin had a patient in hospital, and needed Kshs.1,000/=. She negotiated for Kshs.700/= which was agreed and she paid, and they left her with the phone. Shortly after, the police called her and told her to go to the police station with the phone. She then explained how she got the phone and identified Phillip and Chrispin to the police.

11. Meanwhile, PW1 inspector Mumo Shamala who was attached to Safaricom Law Enforcement Liaison Office, testified that on 16th July 2014 he received a request from the DCIO Busia for information on

the use of phone IMEI number 861275023295087. He found that the SIM card used in the handset from 5th July 2014 to 8th July 2014 was No. 0724xxxxxx belonging to Chrispinus Ouma. From 10th July 2014 at 1.24pm to 13th July at 7.50pm the SIM card used was number 0710xxxxxx registered in the name of Anastacia Kiragu.

12. Sella Wanjala, PW9, the village elder of Burumba D, was present when the appellants were arrested; she knew them before their arrest; and testified that some items were recovered during the arrest.

13. The 1st appellant's testimony was that as a boda boda rider, he was at Busia stage on 8th July 2014, when Sergeant Ouma arrested him on the basis that the motorcycle he had was stolen. He was then taken to the police station and investigation revealed that it was not stolen and was returned to the owner; the officer asked for money. The 1st appellant did not make reference to the events of the material date of the incident nor the charges brought against him.

14. The 2nd appellant testified that he was arrested from his rental house, and denied knowing the 1st appellant, or even knowing a place called Burumba D.

15. The High Court, having reconsidered and evaluated the evidence on record, upheld the conviction of the 1st and 2nd appellant, as the court was satisfied that violence was used resulting in the death of the deceased, and a motorcycle and phone stolen from the deceased during the robbery. The injuries sustained were fatal as evidenced by the post-mortem report, and the fact that the deceased died as a result of the injuries, was sufficient evidence that dangerous and offensive weapons were used to inflict the injuries. The High Court dismissed the appeal both on conviction and sentence as against the 1st and 2nd appellant, but the appeal by Chrispin succeeded.

16. Undeterred, the appellants challenged the findings of the High Court via this appeal on amended grounds that:

    i. The learned Judge and magistrate erred in law in making a finding that circumstantial evidence had been established as against the appellants in committal of the offence.

    ii. The learned Judge and magistrate erred in law in shifting the burden of proof to the appellants herein.

    iii. The learned Judge and Magistrate erred in law in failing to take mitigation into consideration in the sentencing.

    iv. The learned Judge and Magistrate erred in law in failing to make a finding that there was a contravention of Article 50(1) of *the Constitution*.

    The appellants thus pray that the appeal be allowed and the conviction and sentence be set aside; and they be acquitted and/or in the alternative there be an order for their retrial.

17. In support of the appeal, the appellants, through their counsel Bagada Mabale, submit that the only evidence used in their conviction was in relation to the piece of stick found in the 1st appellant's house, which the prosecution alleged matched the one found at the scene together with some bloodstained clothes, that it was never established that the blood found on the stick and/or clothes belonged to the deceased; that despite sending the said exhibits to the Government Chemist, no report was ever produced in court; and the stick in question was never proved to be the murder weapon. It is further contended that nothing was found on the 2nd appellant as the alleged items were recovered from the 1st appellant's house, and the only reason for his arrest was that he was found in the house of the 1st appellant.

18. The appellants lament that despite them facing serious charges, they were never informed of their right to have a legal representation neither were they accorded one to help in their defence; and that this led to miscarriage of justice.

19. In opposing the appeal, Ms. Busienei on behalf of the State, pokes holes at the appellants' submissions and contends that the ingredients of robbery with violence were set out by the Court of Appeal in the case of Johana Ndungu vs. Republic [1996] as follows:

    i. being armed with any dangerous weapon or instrument;

    or

    ii. being in the company of one or more other person or persons,

    or;

    iii. if at or immediately after the time of the robbery, he wounds, beats, strikes or uses violence to any person.

20. She maintains that these ingredients were met, on the night of 9th July, 2014, when the deceased was attacked and robbed off the motorcycle he was riding and his phone; and that it was established that the violence used resulted in the death of the deceased. She invites us to consider the evidence of PW6, the doctor who did the post mortem, and analyzed the injuries, and formed the opinion that the deceased died as a result of severe head injury due to blunt trauma.; against the backdrop that the victim died as a result of the injuries sustained in the robbery, to find that this was sufficient evidence that the dangerous weapons were used to inflict the injuries. In addition, our attention is drawn to the evidence of PW7, PW5 and PW12 who confirmed that the blood stained sticks were recovered at the scene of crime and 1st appellant's house; and weigh this with the contents of the charge sheet which indicated the weapons used as a stick and a rungu; that either way, the evidence placed the two appellants at the scene; and they were the ones who caused the said injuries to the deceased irrespective of what weapon was used; and that prosecution only needed to prove one ingredient of the elements of the offence.

21. To fortify this position, the respondent points out that the distance from the scene to the house they were found was not far, and this coupled with the bloodstained clothes that they had; and the stick that matched the sticks found at the scene, proved the case beyond reasonable doubt and the appeal should be dismissed.

22. The respondent also argues that the circumstantial evidence was so overwhelming as to confirm that the appellants participated in the offence; that the circumstances of the incident show common intention of the appellants, as they were both arrested in the same house which was near the scene of crime and there was recovery of items including a piece of stick that was evidently broken off from the stick with the nail which was recovered at the scene. Further there were several clothes that were blood stained in the said house which the appellants could not give an explanation to; that the sticks which were used to attack the deceased linked the appellants to the robbery.

23. With regard to sentence, the respondent points out that the circumstances where an appellate court can interfere with the sentence of the trial court were well cited in Nillson vs. Republic [1970] E.A 599 following the reasoning of the court in Ogalo s/o Owuora vs. Republic [1954] 21EACA 270 as follows:

> " The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a

somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James vs. Rex (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor! To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R vs. Shershewsity (1912) C.CA 28 T.LR 364."

24. In support of the penalty meted out by the trial court, the respondent is categorical that section 296(2) of the Penal Code prescribes the death penalty as the sentence for the offence of robbery with violence, which remains lawful; and is still applicable as a discretionary maximum punishment, as per the directions by the Supreme Court in Muruatetu & Another vs. Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021).

25. We have carefully considered the record of appeal, submissions by counsel, the authorities cited and the law. Being mindful that a second appeal must only be confined to points of law; and this Court will not interfere with concurrent findings of the two courts below unless based on no evidence; we acknowledge that test as applied in Karingo & 2 Others vs. Republic [1982] eKLR.

26. The elements of the crime of robbery with violence were set out by the court of appeal in the Case of Oluoch vs. Republic [1958] KLR. The case of Dima Denge Dima & Others vs. Republic Criminal Appeal No. 300 of 2007 stated:

> "The elements of the offence under section 296(2) are three and they are to not be read conjunctively, but disjunctively. One element is sufficient to find an offence of robbery with violence."

27. The evidence presented so easily demonstrated a violent attack (as confirmed by the post mortem examination), executed by more than one person, in which the deceased was assaulted using crude weapons some of which were found at the scene, and the motorcycle and a mobile phone were stolen from him during the robbery. We have no doubt that the ingredients of the offence of robbery with violence were met in this case.

28. When the police went to the 1st appellant's house, they found his wife who upon inquiry, denied that her husband was in the house. Nonetheless upon entering the house, lo and behold, the 1st appellant was asleep on the bed while the 2nd appellant slept on the chair, a search conducted led to the recovery of some items, blood-stained clothes including clothes belonging to the 1st appellant, which his wife was trying to wash so as to get rid of the blood. Also recovered were two sticks, including a piece of stick which fitted as a part broken off from the one found at the scene, two bloodstained jackets, a chest guard.

29. PW7, the boda boda chairman told the court that when he went to the scene, they recovered a helmet, and a big stick with a nail and the said stick had blood on it. The said stick was similar to that found in the 1st appellant's house. The 1st appellant was also found in possession of the subject motorcycle.

30. From the 2nd appellant's house about 100m away, according to PW7 who accompanied the police in the search, nothing was recovered. This was confirmed by PW2, the village elder who was present at the 2nd appellants house during the arrest and search. However, according to PW5 two bloodstained bedsheets were recovered and taken for analysis. It is on record that the blood-stained exhibits which were taken to the government chemist, the results therefrom were never produced in court.

31. What we must determine is whether the circumstantial evidence presented was so overwhelming as to link the 1st appellant to the crime; and that the 1st appellant could not explain the same away.

32. In Sawe vs. Republic [2003] KLR 364 this Court reiterated that:

> "in order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstance weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shifts to the accused."

33. Having regard to the principles, did the prosecution evidence meet the threshold? It is not in dispute that none of the prosecution witnesses identified the 1st appellant during the robbery. However, as discussed earlier, in the 1st appellant's abode was found bloodstained sticks, which he had no plausible explanation for. No one witnessed the attack, but the two courts below used the spurts of circumstances, beginning with the nature of the injuries the deceased sustained, which suggested a violent attack, the broken and crushed helmet, the missing motorcycle, the stolen phone which was quickly disposed of for a song, and recovered on the same day from the purchaser, the distance between the scene and the place the appellant were found shortly after the attack, the recovery of sticks from the scene and other blood stained pieces from the very house the appellants were in, the blood stained clothes, some of which were quickly washed to wipe out the traces of blood. In our view, the circumstantial evidence presented by the prosecution in this case was like silky strands that so aptly fitted into a complete well woven web and each strand met the threshold enunciated in the Supreme Court's decision in Republic vs. Ahmad Abdolfadhi Mohammed & Anor 2019 eKLR. Indeed, the facts and circumstances were so closely interwoven and connected that the finger of guilt pointed, and remains pointing unerringly at the 1st appellant and the 1st appellant alone.

34. With regard to the 2nd appellant, there is evidence from PW2 and PW7 that nothing linking the 2nd appellant to the incident was found in his house. In contrast, despite the evidence by the police officer, PW5 that two bloodstained sheets were found in the 2nd appellant's house; and taken to the lab for examination, the exhibits were never produced as evidence nor was there a report from the government chemist to show that the blood belonged to the deceased. We are keenly alive to the evidence that the 2nd appellant was found sleeping on a sit inside the 1st appellant's house, in the company of the 1st appellant, and this after the 1st appellant's wife had lied that there was no one inside the house. Would this make him an accomplice? Or was he just a guest who had been given a place to rest? There is great suspicion that he must have been acting in cahoots with the 1st appellant and others who attacked the deceased. Unfortunately, suspicion no matter how much strong is not enough to sustain a conviction, the gap left by the failure to submit the recovered bed sheets for forensic examination and present a report to the court, gives the 2nd appellant a life line, in what would otherwise have been strong circumstantial evidence against him. Consequently, we are of the view that the evidence was not adequate to prove the charge against the 2nd appellant.

35. On the issue of sentence, it is contended that both the High Court and the trial court erred in law in failing to take their mitigation into consideration in the sentencing. Relying on the Supreme Court decision in Francis Karioko Muruatetu & Others vs. Republic, [2017] eKLR the appellants argue that the death sentence was harsh in the circumstances, and unconstitutional.

36. Having found that the elements of robbery with violence had been met, the Penal Code prescribes a death sentence for the offence of robbery with violence, which is what was imposed. We acknowledge that both the trial court and the High Court did not consider the exercise of discretion, but imposed the

mandatory minimum sentence provided under section 296(2) of the Penal Code. Generally, sentencing is recognised as an exercise of discretion by the trial court, as was noted in Bernard Kimani Gacheru vs. Republic [2002] eKLR; and Shadrack Kipkoech Kogo vs. R. Eldoret Criminal Appeal No.253 of 2003. This position was reiterated by the Supreme Court in Francis Karioko & Another vs. Republic Petition No 15 & 16 of 2015 (Consolidated)[2017] eKLR (Muruatetu 1), when the Court declared the mandatory nature of the death sentence under section 203 of the Penal Code unconstitutional. This development led to a flurry of decisions by the courts who interpreted this to mean the position applied to all offences carrying a minimum mandatory sentence, hence the position adopted by the appellants. However, the Supreme Court of Kenya advisory in Francis Karioko Muruatetu & Another vs. Republic; Katiba Institute & 5 Others (Amicus Curiae) [2021] eKLR (popularly referred to as Muruatetu 2), dispelled this newfound enthusiasm, and clarified in Francis Karioko Muruatetu & Another vs. Republic; Katiba Institute & 5 Others (Amicus Curiae) [2021] eKLR (Muruatetu 2) that:

> " To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under Section 40 (3), robbery with violence under Section 296 (2), and attempted robbery with violence under Section 297(2) of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases."

37. As matters stand currently, neither this Court nor the Supreme Court has had the opportunity to consider a constitutional petition properly escalated to it, on the constitutional validity of the mandatory death sentence for the offence of robbery with violence under section 296(2) of the Penal Code. What this means is that the mandatory death penalty under section 296(2) of the Penal Code remains the only lawful sentence for that offence. To that end this Court finds that the appeal by the 1st appellant lacks merit and upholds the judgment of the High Court on conviction and affirms the death sentence. The appeal by the 2nd appellant is allowed and he should be set at liberty unless otherwise lawfully held.

DATED AND DELIVERED AT KISUMU THIS 10TH DAY OF JANUARY., 2025.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR