Ashibabi v Republic (Criminal Appeal 251 of 2019) [2025] KECA 611 (KLR) (28 March 2025) (Judgment)

Neutral citation: [2025] KECA 611 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 251 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

MARCH 28, 2025

BETWEEN

SAMUEL ASHIBABI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kakamega (Majanja, J.) dated 13th October, 2017 in HCCRA No. 78 of 2016)

JUDGMENT

1. The appellant, Samuel Ashibabi, jointly with another were the accused persons in the trial before the Chief's Magistrate's Court at Kakamega in Criminal Case No. 2172 of 2015. They were charged with the offence of robbery with violence contrary to section 295 as read with section 296(2) of the *Penal Code*. They were also charged with three other counts of robbery contrary to section 295 as read with section 296(1) of the *Penal Code*.

2. The particulars of count 1 were that on the 22nd day of July, 2015, at HQ Bar and Restaurant in Kakamega Township in Kakamega Central District within Kakamega County, the appellant jointly with another not before court, while armed with dangerous weapons, namely iron bars robbed Jeremiah Ateru one phone make Itel worth Kshs. 1500/= and cash of Kshs. 300/= all valued at Kshs. 1800/= and immediately before the time of such robbery used actual violence on the said Jeremiah Ateru.

3. The particulars of count 2 were that on the 22nd day of July, 2015, at HQ Bar and Restaurant in Kakamega Township Kakamega Central District within Kakamega County, jointly with another, while armed with dangerous weapons namely iron bars, robbed Dorcas Amwayi one phone make Nokia 310 worth Kshs. 3000/=, one solar lamp worth Kshs. 1000/= and cash of Kshs. 25,000/= all

valued at Kshs. 29,000/= and immediately before the time of such robbery threatened to use actual violence on the said Dorcas Amwayi.

4. The particulars of count 3 were that on the 22nd day of July, 2015, at HQ Bar and Restaurant in Kakamega Township Kakamega Central District within Kakamega County, jointly with another, while armed with dangerous weapons namely iron bars robbed, Ignatius Luchi one music system (mixer and amplifier) worth Kshs. 365,000/=, one laptop worth Kshs. 85,000/= and cash Kshs. 1100/= all valued at Kshs. 451,110/= and immediately before the time of such robbery threatened to use actual violence on the said Ignatius Luchi.

5. The particulars of count 4 were that on 22nd day of July, 2015, at HQ Bar and Restaurant in Kakamega Township Kakamega Central District within Kakamega County jointly with another, while armed with dangerous weapons namely iron bars, robbed Fredrick Wanga one mobile phone make E-xtel 20 worth Kshs. 2000/=, national identity card, Equity Bank ATM card and Kshs. 3500/= all valued at Kshs. 5500/= and immediately before the time of such robbery threatened to use actual violence on the said Fredrick Wanga.

6. The appellant and his co-accused pleaded not guilty to all the charges and the case proceeded to full hearing. However, the court record shows that when they were placed on their defence, the appellant's co-accused escaped lawful custody, which prompted the prosecution to withdraw its case against the escaped accused. Thereafter, the appellant proceeded to proffer his defence.

7. At the conclusion of the trial, the learned trial magistrate found the appellant guilty in count 1 and count 3. The complainants in count 2 and count 4 were not availed before the trial court and therefore the court did not have an opportunity to hear their evidence. For this reason, the appellant was acquitted for counts 2 and 4. The learned trial magistrate then convicted the appellant and sentenced him to death in count 1 and imprisonment for five (5) years in count 3. The imprisonment term was held in abeyance in view of the death sentence.

8. The appellant was aggrieved by the decision of the lower court and filed an appeal against the sentence before the High Court.

9. The High Court (D.S. Majanja, J.) dismissed the appeal and upheld the conviction and sentence in a judgment dated 13th October, 2017.

10. The appellant was again dissatisfied with the decision of the High Court and has lodged the present appeal. He raised three (3) grounds in his Memorandum of Appeal, all of which impugned his sentence. They were that:

    a. The learned judge of the High Court failed to take into account the mitigation tendered by the appellant when dismissing the appeal on sentence.

    b. The sentence imposed upon the appellant is manifestly harsh and excessive taking into account the mitigation on record as well as the circumstances of the case.

    c. The learned judge of the High Court erred in law in sentencing the appellant to death by failing to find that the mandatory nature of death sentence as set out in section 296(2) of the *Penal Code* is unconstitutional to the extent that it only provides for one sentence.

11. The appeal was argued by way of written submissions by both parties. During the virtual hearing, learned counsel Mr. Mbeka appeared for the appellant, whereas learned senior prosecution counsel, Ms. Busienei, appeared for the respondent. Both parties relied on their submissions.

12. The appeal is against sentence only in Count 1. The sentence imposed in that count was the death penalty. To that extent, the facts of the case are unnecessary. Suffice it to say that both the courts below found sufficient factual proof to warrant the conviction on Count 1 which led to the imposition of the death penalty, the only sentence prescribed under section 296(2) of the *Penal Code*.

13. While considering it, we are mindful of our remit as a second appeal court. Our jurisdiction is limited by dint of Section 361(a) of the *Criminal Procedure Code* to deal with matters of law only and not to delve into matters of fact that have been dealt with by the trial court and re-evaluated by the first appellate court. For purposes of this section, severity of sentence is defined as a matter of fact. See Samuel Warui Karimi vs. Republic [2016] eKLR.

14. The appellant attacked his death sentence for being unconstitutional arguing that it violates the appellant's right to be free from cruel, inhuman, and degrading treatment under Articles 29(f) and 24(a) of *the Constitution* as well as his inherent dignity under Article 28; and to life as enshrined under Article 25 (c) of *the Constitution*. He also argued that section 296(2) of the *Penal Code* is unconstitutional to the extent that it prescribes a single penalty of death without affording an accused person an opportunity to be heard in mitigation. The mandatory nature of the death sentence in section 296(2) of the *Penal Code*, the appellant argued, is unconstitutional because it breaches judicial discretion to determine the appropriate sentence to impose on a convicted person while taking into consideration the circumstances of the offence, offender and the victim of the crime.

15. Finally, the appellant argued that the death penalty was disproportionate, harsh and manifestly excessive in the circumstances of this case. He prayed that the Court sets aside the death penalty in Count 1 and impose an appropriate determinate sentence. The appellant relied on a number of our cases including Joseph Kaberia Kahinga & Others vs. The Attorney General [2016] eKLR; Francis Karioko Muruatetu & Another vs. Republic (supra); Henry Katap Kipkeu vs. Republic, Criminal Appeal No. 295 of 2008 and Dorcas Jebet Ketter & Another vs. Republic, Criminal Appeal No. 10 of 2012.

16. Ms. Busienei opposed the appeal on sentence and relied on the reasoning in the case of Nillson vs. Republic [1970] E.A. 599 and Ogalo s/o Owuora vs. Republic [1954] 21 EACA, wherein it was stated that an appellate court will not ordinarily interfere with the discretion exercised by a trial judge unless it is evident that the trial judge acted on some wrong principle or overlooked some material factor, or it is shown that the sentence is manifestly excessive in view of the circumstances of the case.

17. Counsel submitted that the sentence by the trial court was proper and lawful as per the directions of the Supreme Court in Muruatetu & Another vs. Republic; Katiba Institute & 4 Others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6th July 2021) (Directions)("Muruatetu 2"). She further submitted that the trial court having had the opportunity to hear the appellant's mitigation, applied its discretion and was convinced that the death penalty was the most appropriate sentence under the circumstances.

18. We have considered the appeal, the grounds argued in support thereof, the rival submissions and the authorities cited by both parties.

19. We accept that the appeal is properly before us because the appellant has attacked the sentence on what would be considered legal points. He has challenged the constitutionality of the sentence itself, its mandatory natureand its disproportionate effect in this particular case.

20. Unfortunately for the appellant, his appeal must fail for two reasons. First, while he has challenged the constitutionality of his sentence, this ground is being raised for the first time on second appeal before us. It was not raised in the High Court in the first instance. As the Supreme Court re-confirmed

recently in Republic v Joshua Gichuki Mwangi (Petition E018 of 2023) [2024] KESC 34 (KLR), this Court is deprived of jurisdiction to consider a matter which was not first raised at the High Court. The appellant cannot now raise this issue before us for the first time. As stated by the Supreme Court in Republic - vs- Mwangi (supra), such an issue must be raised and fully argued in the High Court, before it can be escalated to this Court.

21. The second reason the appeal must fail is that the Supreme Court has also given categorical guidance in Francis Karioko Muruatetu & Another vs. Republic; Katiba Institute & 5 others (Amicus Curiae) (2021) eKLR (Muruatetu 2) that the holding in Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR (Muruatetu 1) is inapplicable to the offence of robbery with violence. In Muruatetu 2, the Supreme Court directed that the application of the judgment was limited to murder cases falling within its scope and stated as follows:

> " 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." (emphasis ours)

22. In our decision in Cyrus Kavai Onzere vs. Republic (Criminal Appeal 166 of 2016) [2023] KECA 643 (KLR) (9 June 2023) (Judgment) this Court explained the narrow circumstances under which an appellant may be able to challenge their death sentence in our jurisprudential milieu. Such an appellant must, first, raise the constitutional argument before the High Court so as to preserve the issue for determination before this Court. That did not happen in this case. We are, thus, precluded from considering the issue on jurisdictional grounds.

23. The upshot is that the appeal fails and must be dismissed. In dismissing it, we echo the remarks of this Court (differently constituted) in Katana *& Another vs. Republic, Criminal Appeal No. 8 of 2019*, where S.G. Kairu, Nyamweya & Lessit, JJ.As stated:

> " 32. .....We are also mindful of the limits of the exercise of our appellate jurisdiction under Article 164(3) of *the Constitution* and section 3(1) of the *Appellate Jurisdiction Act*. It is thus our view that the remedy for the Appellants with regards to the issue they raise and arguments they have put forward on the legality and constitutionality of the mandatory death sentence imposed on them, does not lie with this Court, for the reasons we have given.
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> 33. Based on the foregoing, we have no option but to dismiss this appeal in the circumstances.
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> We find it necessary to add that we find this outcome, predicated as it is upon Muruatetu II, to be unfair and disproportionate, in light of the rationale by the Supreme Court of Kenya for declaring the mandatory death sentence unconstitutional in Muruatetu I. There is need for urgent intervention in this regard by way of the necessary legal reforms, or determination by the Supreme Court of Kenya regarding constitutional validity of the mandatory death penalty in such cases as this."

24. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF MARCH, 2025.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR