Mugini & another v Republic (Criminal Appeal 277 of 2018)
[2025] KECA 480 (KLR) (7 March 2025) (Judgment)

Neutral citation: [2025] KECA 480 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 277 OF 2018

MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA

MARCH 7, 2025

BETWEEN

SAMWEL MWERA MUGINI ..... 1ST APPELLANT

JOHN MOI MATIKO ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kisii (Sitati & Muriithi, JJ.) dated 30th May 2013 in HCCRA No. 240 of 2011)

JUDGMENT

1. The appellants, Samwel Mwera Mugini and John Moi Matiko, lodged this second and perhaps last appeal contesting the decision of the High Court of Kenya at Kisii (Sitati & Muriithi, JJ.), which dismissed their first appeal against their conviction and sentence by the Senior Resident Magistrate's Court at Kehancha ("the trial court").

2. In the trial court, the appellants had been charged with the offence of robbery with violence, contrary to section 296 (2) of the *Penal Code*. The particulars being that on 2nd April 2010, at Nyairema village in Kuria East District within the then Nyanza Province, the appellants, with others not before court, while armed with dangerous weapons, namely rifles, pangas, and other crude weapons, robbed Francis Nyamagige Boke, Marenge Rioba, Protus Mwita, and Jackson Mwita Kibondari of 16 heads of cattle, one long blue trouser, and one Kitenge, all valued at Kshs. 220,000 and at or immediately before or immediately after the time of such robbery, the appellant and his accomplices shot dead Marenge Rioba and Jackson Mwita Kibondari.

3. The appellants denied the offence and soon thereafter their trial ensued. To prove its case against the appellants, the prosecution called a total of nine witnesses. Their testimony in brief was that PW1, Francis Nyamagige Boke, heard gunshots in the dead of night, rushed out of his house and hid in the

bush. He saw heavily armed cattle rustlers break down the gate to his cattle boma, and le with his two heads of cattle. He also heard, other rustlers rob his neighbours as they headed towards Tanzanian border. He telephoned the area District Officer (D.O.) for assistance who in turn mobilized police officers who came and started tracking and or pursuing the cattle rustlers towards the direction they had taken. He soon thereafter heard exchange of gunfire. The following day, he was summoned to the police station and was able to identify his two heads of cattle that had been recovered during the gunfire exchange between the cattle rustlers and the Tanzanian police officers.

4. Meanwhile, PW2, IP Julius Mashumbuzi, PW3, Cpl, Lucian John together with other Tanzanian police officers from Utegi Police Station in Tanzania, were on their routine border patrol along the Tanzanian-Kenya border when they saw the cattle rustlers come towards their direction with several heads of cattle in tow. They laid an ambush and in the ensuing gun battle lasting 30 minutes, one robber was killed, and an AK47 rifle recovered. Other rustlers escaped with injuries. Eleven heads of cattle were recovered and later returned to their owners.

5. The following morning, while at Ntimaru Police Station where he was the then Officer Commanding Police Station (OCS), PW7, CIP Evans Omuga received a telephone call from an informer. Acting on information that two suspects were hiding and receiving treatment from gunshot wounds from the home of one, Mokiri Nyaitomo, with other police officers, raided the house and found the appellants, one of whom was hiding under the bed. When arrested, all of them were found bleeding from gunshots wounds on various parts of their bodies. They were escorted to their homes and a blood stained Somali sword, sword sheath and mobile phone were recovered. According to PW7, the distance from the scene of the shootout to the home where he arrested the appellants was about 1km. All these circumstances led this witness to conclude that the suspects were part of the cattle rustlers.

6. Though the appellants claimed that they sustained the wounds when they were attacked by thugs with arrows as they returned from a wedding party in Nyasincha area of Tanzania, upon investigations, PW9, Sgt Winston Kadzombo established that there had been no such wedding on the material day, prompting him to conclude as well, that the appellants were part of the cattle rustlers. PW5, Maruti Lawrence a clinical officer at Ntimaru Sub-District Hospital, confirmed upon examination of the appellants, that the wounds they were nursing were from gunshots.

7. PW8, Edwin Nyalera testified on behalf of Dr. Okello who conducted the post mortem on the bodies of the two victims of the cattle rustlers. He had concluded that their cause of death was cardio pulmonary arrest secondary to hypotensive shock due to gunshot injury.

8. After the trial magistrate determined that a prima facie case had been established against the appellants, he placed them on their defence. In a sworn testimony and without calling any witnesses, the appellants stated that on 2nd April 2010, they left a wedding ceremony at 5:30am when suddenly robbers shot at them with bows and arrows. Upon regaining consciousness, they proceeded to a nearby home where they stayed until 9:30 am. When the owners of the home returned, they sent one of them to go to their homes and come with relatives to take them to the hospital, but instead, that person returned with police officers.

9. After a detailed consideration of the evidence presented, the trial court was satisfied that although none of the witnesses positively identified the cattle rustlers, there was sufficient circumstantial evidence to implicate the appellants as some of cattle rustlers. Consequently, the appellants were found guilty as charged and sentenced to death.

10. Dissatisfied with the judgment of the trial court, the appellants filed an appeal in the High Court, challenging both the conviction and sentence. The grounds for their appeal included the prosecution's

failure to establish a prima facie case against them, evidence of their identification wanting, absence of any offensive weapon(s) found in their possession, and the trial court's failure to consider their defences.

11. Upon re-evaluating the evidence, the learned Judges of the High Court dismissed the appeal and upheld both the conviction and sentence in a judgment delivered on 30th May 2013. It is that judgment that has galvanized this appeal. The appellants have challenged the High Court's findings on grounds: that both the trial and High Courts erred in law by convicting the appellant on circumstantial evidence that did not meet the legal threshold; failure to sufficiently consider the alibi defences put forth by the appellants; failure to call crucial witnesses and finally sentencing the appellant to death which was unconstitutional.

12. However, on 4th October 2023, the 1st appellant withdrew his appeal pursuant to rule 70 (1) of this Court's Rules. Though the 2nd appellant had also initially indicated his desire to do so, he later changed his mind and elected to pursue the appeal. Accordingly, this appeal is in respect of the 2nd appellant only.

13. When the appeal was heard on 22nd October 2024, Mr. Menezes, learned counsel appeared for the 2nd appellant, whereas Ms. Kitoto,learned Prosecution Counsel appeared for the respondent. Counsel for the appellant submitted that all the limbs of circumstantial evidence were not proved. Counsel submitted that it was settled law that when a case rests entirely on circumstantial evidence as was the case here, such evidence must satisfy three tests to wit; the circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established; those circumstances should be of definite tendency unerringly pointing towards the guilt of the accused; the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and no one else.

14. For these propositions, counsel relied on the cases of Tepper v Republic [l952] ALL ER 480; Musoke v Republic [I958] EA 715; That there were several loopholes or lacuna in the prosecution case that suggested that the appellant may not after all, have been at the scene of crime and that the facts did not therefore unerringly point towards his participation in the offence. This was in the light of the alibi defence advanced by the appellant which was not displaced at all and after every witness called testified, that they did not identify the appellant among the robbers. Counsel maintained that there was need to re-examine and redefine the concept of circumstantial evidence in the light of recent developments in technology. He argued that the doctrine should not be used to convict an accused without considering advancements in technology such as DNA, gun powder testing and digital evidence. That in this case the appellant and his cohorts were alleged to have used weapons in their raids. It would have been expected that there would be gun residue on their hands and therefore gun powder residue testing should have come in handy. That no such investigations were undertaken. That there was also no scientific DNA testing.

15. It was counsel's further submissions that crucial witnesses such as the owner of the house from which the appellant was arrested as well the informer were not called to testify. Counsel submitted that failure to call these crucial witnesses meant that the prosecution case was not proved to the required standard. That in the alternative the two courts below ought to have drawn adverse inference by that failure. Counsel relied on the cases of Suleiman Otieno Aziz v Republic [2014] eKLR; Bukenya and others v Uganda [1972] EA. 549, for the propositions.

16. It was submitted by counsel that the appellant advanced an alibi defence that he was not at the scene of crime; that the injuries he sustained were not as a result of exchange of fire but were as a result of being shot at by bows and arrows as he returned from a wedding party; that this explanation was not disapproved at all as it was not investigated. Reliance was placed on the authority of Victor Mwendwa Mulinge v Republic [2014] eKLR, for the proposition.

17. Lastly, it was submitted that the death sentence imposed on the appellant was manifestly harsh, excessive and unconstitutional. That the Supreme Court of Kenya had in Francis Karioko Muruatetu and Another v Republic [2017] eKLR, ("Muruatetu1"), declared the mandatory nature of the death sentence unconstitutional. That though the declaration was in respect of the offence of murder, however, by parity of reasoning, it equally applied to all other capital offences. See Benjamin Keruboi Kipkone v R. [2018] KLR; Wycliffe Wangugi Mafura v R [2018] eKLR; Benson Ochieng & Another v R [2018] eKLR; Cyprian lngira Ikobwa v R [2019] eKLR.

18. In response, Ms. Kitoto, opposed the appeal in its entirety. In support of her submissions on the jurisdiction of this Court on second appeal, which is limited to consideration of issues of law only, counsel relied on the cases of Karingo v Republic [1982] KLR 213; Mneni Ngumbao Mangi v Republic [2005] eKLR. Counsel submitted most of the issues raised by the appellant were matters of fact, which the court is barred from considering. Counsel argued that although the prosecution's evidence was circumstantial, it was sufficient to link the appellant to the offence. She contended that the appellant's alibi, claiming that he was at a wedding function lacked particulars and was not corroborated by any other evidence. That PW9 had confirmed after investigations, that there was no wedding on the material day in the vicinity. Additionally, the claim that his injuries were from bows and arrows was debunked by PW5, the clinical officer, who confirmed that the injuries were from gunshots, which was consistent with the exchange of fire between police and assailants. On crucial witness not being called, Ms. Kitoto noted that there was no need to call a multiplicity of witnesses to prove a fact. That the circumstantial evidence marshalled by the prosecution was sufficient to link the appellant to the offence. That, in any event, PW9 found no one else in the house that the appellant was arrested from and therefore, his or her evidence would have been superfluous. The same went for the informer. Counsel placed reliance of Bukenya & Others v Uganda [1972] EA 549; and Keter v Republic [2007] 1 EA 135 for the submission.

19. On the constitutionality of the death sentence, counsel submitted that the issue was not raised in the first appeal in the High Court and cannot therefore be raised in this appeal for the first time. That in any event, the Supreme Court of Kenya had in Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 Others (Amicus Curie) [2021] eKLR, ("Muruatetu 2"), clarified that Muruatetu 1 was only applicable to offence of murder and not to all capital offences. The dictum was therefore not applicable in this case as the appellant was convicted and sentenced for the offence of robbery with violence. In the ultimate, we were urged to dismiss the appeal in its entirety.

20. As already stated, this is a second appeal and our jurisdiction is limited to addressing matters of law only as commanded by section 361 of the *Criminal Procedure Code*. Furthermore, this Court will only interfere with the concurrent findings of fact by the two lower courts if those findings are not supported by the evidence, or if they are based on misdirection or errors of law. See Omolo & 2 Others v Republic [1991] KLR 328 and Karingo v Republic (supra).

21. Having considered the record, the grounds of appeal, the submissions and authorities cited by counsel, the issues that we discern for our consideration are whether: circumstantial evidence was sufficient to sustain the charges against the appellant; the defence of alibi advanced by the appellant was sufficient to dislodge the prosecution evidence; failure to call crucial witnesses undermined the appellants case; and lastly, whether the death sentence imposed on the appellant was manifestly harsh, excessive and unconstitutional.

22. On the first issue, the appellant contends that the conviction was based solely on circumstantial evidence, which was insufficient to meet the legal threshold. Reliance on circumstantial evidence requires that the evidence must point unerringly to the guilt of the accused and exclude any other

reasonable hypothesis. This was so stated in the case of Musoke v Republic (supra). The court emphasized that the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt of the accused. See also Nyakundi v Republic [2003] JELR 93857 (CA).

23. The Supreme Court in the case of Republic v Mohammed & Another [2019] KESC 48 (KLR), emphasized the importance of a complete chain of circumstantial evidence. The court held that any break in the chain of evidence could lead to a reasonable doubt about the guilt of the accused. The five golden principles of circumstantial evidence set out in Sharad Birdhichand Sarda v State of Maharashtra (1984) 4 SCC 116, serve as a comprehensive guide for courts in assessing circumstantial evidence. They are:

    1. The circumstances from which the conclusion of guilt is to be drawn should be fully established.

    2. The facts so established should be consistent only with the hypothesis of the guilt of the accused.

    3. The circumstances should be of a conclusive nature and tendency.

    4. They should exclude every possible hypothesis except the one to be proved.

    5. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused.

24. In the present case, the threads of circumstantial evidence were that cattle rustlers armed to teeth with all manner of crude weapons including firearms, in the dead of that night, descended on Nyairema village in Kuria East District and robbed the villagers of their several heads of cattle. They then headed for the Tanzania-Kenya border with the stolen cattle. They were soon thereafter confronted by the Tanzania police officers and an exchange of fire ensued leaving two of the rustlers dead. It is also important to underscore that an AK47 rifle was recovered. Those who were lucky managed to escape but with gunshot wounds. Eleven of the stolen cattle were recovered, among them the two that had been stolen from PW1 which he positively identified the following day when called to the police station.

25. Meanwhile, PW7 aware of the incident, received information of suspects who were hiding in a house, 1km way from the scene of confrontation. In the company of other police officers, they raided the home and found the appellant in the company of his initial co- appellant in the house, one of whom was hiding under the bed. All of them had fresh gunshot wounds. Their explanation that they had suffered the wounds as a result of being shot at by bows and arrows by robbers was immediately debunked by PW5, who confirmed upon examination of the appellants, that the injuries were as a result of gunshot. Further investigations by PW9 regarding the alleged wedding ceremony the appellant had said he attended before he was allegedly accosted by the robbers on his way home, was found to be a mirage. It was also noted that despite the alleged attack, nothing was forcefully taken from him. Finally, it was also noted that, the appellant never reported the robbery incident to any authorities for appropriate intervention nor openly sought treatment in any medical facility.

26. We are satisfied just like the two courts below that all the foregoing threads considered as a whole render the circumstantial evidence presented by the prosecution sufficient to establish the appellant's guilt beyond reasonable doubt. The evidence pointed unerringly to the appellant’s involvement in the robbery and excluded any other reasonable hypothesis. The trial court and the High Court therefore correctly relied on this evidence to convict the appellant, in our view.

27. On the call for review of the doctrine of circumstantial evidence by Mr. Menezes, we are satisfied that it is belated. First, because the call was not made in the first appellate court in the first instance as required. We therefore, have no basis to entertain it. Secondly, and more importantly, counsel did not indicate in which manner we should refashion the doctrine. To our mind, the doctrine of circumstantial evidence as currently obtains and espoused, is still good law and easily amenable and elastic enough to align itself with the changing times and advances in technology.

28. Regarding the defence of alibi, we start from the premise that the term "alibi" is derived from the Latin word "alibi" meaning "elsewhere". It is a claim that the accused is falsely accused because he was in a different location when the crime occurred. Alibis can be supported by various forms of evidence such as eyewitness accounts, video surveillance, digital footprints, documents and so forth. The burden of disapproving an alibi lies with the prosecution once it is raised by the defence. The prosecution must investigate and rebut the alibi in order to establish the guilt of the accused beyond reasonable doubt. In the case of Kamau v Republic [2024] KECA 314 (KLR), The court emphasized that the burden of proof lies with the prosecution to disprove the alibi. In the recent case of Victor Mwendwa Mulinge v R. (supra), this Court rendered itself thus on the issue:

> " It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see Karanja v R, [1983] KLR 501 ... this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought."

29. In the present appeal, did the alibi defence raise a reasonable doubt in the prosecution case? From the record, we note that the defence was raised too late in the day, at the time the appellant was giving his sworn statement of defence. Thus, the prosecution was not accorded sufficient time to investigate it. That notwithstanding, it appears to us that the prosecution made a strong and watertight case against the appellant, that displaced the alibi. The evidence of the prosecution witnesses corroborated each other and formed a clear and logical sequence of events establishing the appellant's presence at the scene of crime and not otherwise.

30. PW9, the investigating officer, testified that there was no evidence of a wedding on the material day, as claimed by the appellant. Additionally, the appellant and his co-accused were found with gunshot wounds, which were consistent with the exchange of fire between the police and the cattle rustlers alluded to earlier. The clinical officer, PW5, confirmed that the wounds were from gunshots, not arrows as the appellant had claimed. It is also common ground that the appellant was arrested in the vicinity of the crime scene. On the whole, we are satisfied just like the two courts below that the evidence marshalled by the prosecution, successfully disapproved and displaced the appellant's alibi defence.

31. On the third issue about the prosecution's failure to call crucial witnesses, the legal framework governing the calling of witnesses is primarily found in section 134 of the *Evidence Act* which in the main provides that no particular number of witnesses are required to prove any fact. This means that the prosecution is not obligated to call every possible witness, so long as the evidence presented is sufficient to establish the case beyond reasonable doubt. For this proposition, see the cases of Bukenya & Others v Uganda (supra) and Edward Maruti Simiyu v Republic [2013] KECA 399 (KLR). However, failure to call crucial witnesses who could have provided material evidence may weaken the prosecution's case and invite adverse inference from the court in favour of an accused.

32. In the present case, the appellant argued that the prosecution's failure to call certain crucial witnesses undermined the prosecution case. Specifically, the appellant contended that the owner of the house from whence the appellant was arrested and the informer, should have been called to testify. We do not think this evidence was crucial and absolutely necessary given that it was common ground that the appellant was arrested in the house, in the absence of the owner(s). Similarly, we are not able to discern how the informer's evidence would have assisted the prosecution or defence case. We are therefore satisfied just like the two courts below that the prosecution's failure to call the said witnesses did not materially affect its case.

33. On the constitutionality of the death sentence imposed on the appellant, Article 26 (1) guarantees the right to life. However, Article 26 (3) provides an exception where a person has been lawfully sentenced to death by a court of law for committing a criminal offence such as treason, murder, or robbery with violence. While section 204 of the *Penal Code* prescribes the death penalty for the offence of murder, section 296 (2) prescribes the death penalty for the offence of robbery with violence. The Supreme Court of Kenya held that the mandatory death sentence as provided for under section 204 of the *Penal Code* was unconstitutional because it deprived the courts of the discretion to consider mitigating circumstances before sentencing. However, the court clarified that this decision did not outlaw the death penalty itself, which remains applicable by the courts in certain cases. Clearly, this dictum was limited to the offence of murder as subsequently clarified by the Supreme Court in "Muruatetu 2". Indeed, the court directed that 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*, a challenge on the constitutional validity of the mandatory death penalty in such cases be mounted and fully argued before the High Court and escalated to this Court, if necessary, at which a similar outcome as that in that case, could be reached. Muruatetu 1 as it stood, could not directly be applicable to those cases.

34. In the present case, the appellant was sentenced to death for the offence of robbery with violence under section 296 (2) of the Penal Code. It is then obvious that this sentence is precluded from the Muruatetu 1 dictum. The appellant did not challenge the constitutionality of the death sentence imposed upon him in his appeal in the High Court. He has only done so in this Court for the first time. In terms aforesaid, we are precluded from addressing that issue in this appeal.

35. In the ultimate, we agree with the judgments of the trial and the High Courts with the result that the appeal is dismissed in its entirety.

Dated and Delivered at Kisumu this 7th day of March 2025.

ASIKE-MAKHANDIA

JUDGE OF APPEAL

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H. A. OMONDI

JUDGE OF APPEAL

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L. KIMARU

JUDGE OF APPEAL

I certify that this is a True copy of the original

DEPUTY REGISTRAR