Alice v Republic (Criminal Appeal E048 of 2023)
[2025] KECA 726 (KLR) (2 May 2025) (Judgment)

Neutral citation: [2025] KECA 726 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL E048 OF 2023

PO KIAGE, WK KORIR & JM NGUGI, JJA

MAY 2, 2025

BETWEEN

SAMUEL NJUGUNA ALICE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the Judgment of the High Court at Nairobi (Ojwang & Omondi, JJ.) dated 5th May, 2009 in HCCRA No. 498 of 2006)

JUDGMENT

1. Kibe Mbana (Kibe) was violently robbed on 21st September, 2005 at around 2:00pm. He was in a building within a farm where he worked as a supervisor waiting for workers who had been picking tea to bring their haul for the day for weighing. Three people came into the building and accosted him. One pointed at him; another pointed a pistol at him. The one who had the pistol demanded that he gives them money "and everything" he had. When he told them that he had no money, they became enraged and started cutting him with a panga (or knife) and tearing his clothes. In the process, Kibe's wrist watch worth Ksh. 1,500 was stolen. He was hurt on his head and upper limbs; and his clothes were torn.

2. Kibe immediately recognized one of his assailants as the appellant. He said that this was a person he had known since 1963; and that his father had worked in the farm but had been let go earlier. Kibe testified as much during the trial of the appellant in which he was PW1.

3. Kibe screamed. The screams attracted people who responded to the distress call. The assailants ran away. The people who had responded gave chase. They apprehended one of them in a nearby plantation.

4. One of the people who responded to Kibe's distress screams was Nyutu Munga (Nyutu) – a worker in the farm. He was among a group of workers who were in the same farm building as Kibe on the fateful

day. They were busy working a few metres from where Kibe was when they heard Kibe's screams. Nyutu testified as PW2 at the trial. He told the court that when he lifted his head after hearing the screams, he saw three people accosting Kibe. He immediately recognized two of the assailants – the appellant, whom he called Njuguna, and one Ndung'u, who was never arrested.

5. Nyutu and his co-workers started running towards the scene but one of the assailants pointed a pistol at them. Some of his co- workers ran away at the sight of the pistol while some obeyed the instructions of the assailants and lay on the ground. However, Nyutu said he soon realized that the pistol was not functional and he led his co-workers in charging towards the assailants. Sensing danger, the assailants fled. Nyutu and his colleagues gave chase. The assailants ran into a coffee plantation. The crowd followed them there. Nyutu went back to the scene to help Kibe.

6. Nyutu testified that after a while some members of the crowd came back having arrested the appellant in the plantation. The other two members of the gang had managed to escape. One of the co-workers who was with Nyutu was Samuel Biyayo. He testified as PW4 and, for the most part, corroborated Nyutu's testimony. However, he did not identify or recognize any of the assailants.

7. Ndichu Kimani owns a farm near where the incident took place. At around 2:00pm on 21st September, 2006, he heard screams coming from the farm where Kibe worked. He ran out to find out what was happening. On getting there, he found Kibe injured on the head and hands. Shortly thereafter, a crowd that had chased the assailants brought the appellant having arrested him. The Police came immediately after and re-arrested the appellant.

8. PC Mutisya was, at the time, attached to Tigoni Police Station. While on patrol duties on that day with his colleague, PC Njoroge, they got a call that a robbery was afoot in the Kawaida area. They rushed there and tried to locate the scene of the robbery. It was then that they met members of the public having arrested one of the suspects. That suspect was the appellant. They re-arrested him and went to the scene where they found Kibe. Kibe was bleeding on the head and face and had an injury on his left hand. He identified the appellant as one of the robbers. PC Mutisya and his colleague escorted the appellant to Tigoni Police Station where he was eventually charged with the offence of robbery with violence.

9. After the incident, Kibe went for examination and treatment at Tigoni Hospital. At the hospital, he was examined by Dr. Githuka. The doctor testified as PW6. He testified that upon examination, he found that Kibe had a fracture on the left forearm near the wrist and had lacerations on the neck. He was stitched and a plaster put on his injured hand. Dr. Githuka filled the P3 form which he produced as an exhibit during the trial.

10. Upon arrest, the appellant was presented before the Limuru Senior Resident Magistrate's Court and was charged with the offence of robbery with violence contrary to section 296(2) of the *Penal Code*. The particulars of the offence as per the charge sheet read that: "On the 21st day of September, 2005 at Kawaida village in Kiambu District of the Central Province jointly with others not before court being armed with offensive weapons namely a pistol and a knife robbed Kibe Mbana one wrist watch make Seiko valued at Ksh. 1,500 and at or immediately before or immediately after the time of such robbery wounded the said Kibe Mbana."

11. At the trial, six witnesses whose testimony we have rehashed above testified. The learned trial magistrate ruled that a prima facie had been established and put the appellant on his defence. He elected to give an unsworn statement in which he claimed that on that day he had gone to Kiambu using Githiga road. On his way back, a pickup vehicle stopped near him and the occupants asked him if he had seen three people running. When he responded in the negative, he was arrested and told that he had been involved in a robbery; one he knew nothing about.

12. At the end of the trial, the learned magistrate was persuaded that all the elements of the offence of robbery with violence had been established and convicted the appellant of the offence. In doing so, the learned magistrate considered and dismissed the appellant's defence as incredulous. He sentenced him to death as the law stipulates.

13. Aggrieved by the conviction and sentence, the appellant appealed to the High Court. He raised four grounds of appeal: that the identification evidence was not foolproof; that the evidence was insufficient to convict; that he was not found with any of the stolen items; and that his defence was not properly considered.

14. In a judgment dated and delivered on 5th May, 2009, the High Court (J. B. Ojwang', J. and H. A. Omondi, J. (as they then were), dismissed the appeal in its entirety and affirmed both the conviction and sentence.

15. Still dissatisfied, the appellant is before us on a second appeal. It is unclear why the appellant took so long to file his appeal. In any event, in his Amended Grounds of Appeal, the appellant faults the decision of the High Court on three points:

    a. That the learned Judges erred by not re-evaluating and coming to their own independent conclusions regarding the evidence of identification or otherwise insufficiently or erroneously analyzed it;

    b. That the learned judges erred by failing to properly analyze the alibi defence advanced by the appellant; and

    c. That the learned Judges erred in affirming the mandatory death penalty imposed on the appellant because that sentence impermissibly breached the sentencing court's discretion; denied the appellant an opportunity to mitigate, and for his mitigation to be considered; and denied the appellant "the right to rehabilitation and reintegration" into the society after incarceration.

16. The appeal before us was argued by way of written submissions by both parties. During the virtual hearing, learned counsel, Mr. Gesumwa Mayieka appeared for the appellant while learned prosecution counsel, Ms. Vitsengwa appeared for the respondent. Both parties relied on their submissions and orally highlighted them.

17. Regarding the first point on identification evidence, the appellant argued that had the learned Judges properly re-evaluated the evidence as they were obligated to do, they would have concluded that the evidence was not sufficient to sustain a conviction. This is because, the appellant argued, there was no evidence of who actually identified him to the members of the public so that they could apprehend him. He argued that the evidence showed that members of the public ran after the assailants, and then the appellant was brought to where PW1 and PW2 were so that they could identify him. However, the fact that there was no evidence of who pointed the appellant to the members of the public is a crucial missing link in the identification evidence. The appellant further argued that the fact that there was no description of the appellant further weakens the identification evidence. Finally, on this question, the appellant faults the learned Judges for failing to make inquiries as the nature of the available light at the time of the attack. In this regard, the appellant cites Paul Etole & Another v Republic [2001] KECA 285 (KLR). In that case, this Court held as follows:

> " All these matters go to the quality of the identification evidence. When the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened: but the poorer the quality, the greater the danger. In the present case, neither of the

> two Courts below demonstrated any caution. This is a serious nondirection on their part. Nor did they examine the circumstances in which the identification was made. There was no inquiry as to the nature of the alleged moonlight or its brightness or otherwise or whether it was a full moon or not or its intensity. It was essential that there should have been an inquiry as to the nature of the light available which assisted the witnesses in making recognition. What sort of light, its size, and its position vis a vis the accused would be relevant. In the absence of any inquiry, evidence of recognition may not be held to be free from error."

18. On its part, the respondent argues that the recognition evidence in this case was iron-clad: it was recognition evidence which is better than mere identification; the incident happened during the day; and the appellant was apprehended immediately. The respondent points out that the trial court had a chance to look at and observe the witnesses and had no reason to believe that the witnesses were lying – and that there were concurrent findings of the two courts below on the identity of the appellant as one of the assailants.

19. The appellant next complained that his alibi defence was not dislodged. Citing several High Court cases, the appellant argues that it was the obligation of the prosecution to dislodge his alibi which, he says, did not happen. He points out that the prosecution did not utilize the procedure afforded by section 309 of the *Criminal Procedure Code* to call further witnesses to dislodge his alibi defence. He also says that the witnesses did not describe the clothes the assailants wore on the day of the attack so it cannot be truly said that their evidence dislodged his alibi.

20. On this point, the respondent argues that the trial court considered and dismissed the appellant's defence. Contrary to the appellant's assertions, the respondent argues, the alibi defence was "invented" and raised for the first time in this appeal. His defence at the trial was a "mere denial" and not an alibi as he basically claimed mistaken identity and not alibi defence.

21. Finally, the appellant complains that the sentence imposed on him is harsh and inhumane. He cites the famous decision of the Supreme Court in Francis Karioko Muruatetu & Another v Republic [2017] eKLR (Muruatetu 1) for the proposition that courts have the constitutional authority to consider the mitigation of convicted offenders so that they can individualize sentences. This authority of the courts is taken away in cases such as here where the statute imposes a mandatory sentence. The appellant further argues that, in the circumstances of this case, the mandatory sentence is excessively harsh and inhumane and ought to be set aside as a matter of justice.

22. On sentence, the respondent argues that the death sentence which was imposed by the trial court and confirmed by the High Court was commuted to life imprisonment by the President. The respondent argues that this removes the jurisdiction of this court to interfere with the life sentence the appellant is currently serving.

23. This is a second appeal. As already stated by the respondent, our jurisdiction is limited to a consideration of matters of law only by dint of section 361(1) of the *Criminal Procedure Code*. It is only on rare occasions that we interfere with concurrent findings of fact by the two courts below. In Samuel Warui Karimi v Republic [2016] eKLR, it was held as follows:

> " This is a second appeal and this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See Chemangong -vs- R, [1984] KLR 611."

24. We have carefully considered the appeal, the rival submissions of the parties and the authorities cited in support of the opposing positions. We confirm that the three issues raised by the appellant are matters of law which, therefore, properly invoke the jurisdiction of this Court as a second appellate court. We will address them in seriatim.

25. It is true, as the appellant argues that, in our jurisprudence, the courts have consistently emphasized the need for caution when dealing with identification evidence, particularly where the identification was made under difficult conditions, such as poor lighting, stress, or a brief encounter. Fortunately, several landmark cases have enunciated clear principles which guide courts when assessing identification and recognition evidence. These cases include this Court's decisions in Paul Etole Case (supra); Wamunga v. Republic [1989] KLR 424; and Anjononi & Others v Republic [1980] eKLR.

26. Key among these principles are that: courts must warn themselves of the dangers of relying on the evidence of a single identifying witness; conditions of observation (like lighting, distance, and duration) must be carefully considered; and recognition evidence is more reliable than the identification of a stranger.

27. In the present case, the incident happened at 2:00pm during the day. The identifying evidence was one of recognition as both PW1 and PW2 had known the appellant for a long time before the incident. There was, also, more than one identifying witness. Moreover, the apprehension of the appellant occurred immediately after the incident: a crowd gave chase and arrested the appellant in the coffee plantation where the assailants were seen fleeing into a few minutes earlier. In the circumstances of this case, we have no hesitation in affirming the two courts below that they correctly applied the principles of identification evidence in concluding that the appellant was, in fact, one of the assailants who had attacked Kibe. Even with the application of the most cautious approach advocated by our caselaw, the recognition evidence in this case was, therefore, ironclad and free from any possible errors.

28. We will now turn to the complaint that the appellant's alibi evidence was not properly considered. First, we note, like the respondent, that the appellant did not raise an alibi defence strictly speaking. Additionally, he never raised this as a ground of appeal at the High Court, and so this Court is divested of jurisdiction to hear it.

29. In any event, we note that the appellant did not, in fact, claim that he was at a different place when the attack took place, he only claimed that he had just arrived from Githiga when the crowd pounced on him and claimed he was one of the assailants who had just attacked Kibe. He was, therefore, at the scene of the crime at the time of the arrest. However, if we stretch the appellant's argument to be that he had just alighted from a matatu and that, therefore, he had obliquely raised an alibi defence that immediately before the attack he was not at the scene, the trial court would still have been correct in rejecting that defence in light of the strong evidence of recognition by two witnesses. The recognition evidence in this case completely dislodged the appellant's alibi if it is deemed one.

30. The upshot is that the appellant's appeal against conviction fails.

31. Turning to the appellant's challenge on sentence, we accept that the appeal is properly before us because the appellant has attacked the sentence imposed by the trial court and affirmed by the High Court on what would be considered legal points. He has challenged the constitutionality of the sentence itself, its mandatory nature and its disproportionate effect in this particular case. We find the respondent's position that this Court becomes divested of jurisdiction to consider a challenge on sentence imposed on a convict once the President acts under the authority granted to him under power of mercy (presently stipulated in Article 133 of *the Constitution*) to be misleading. We simply assert that the President's actions under the power of mercy do not at all erase an appellant's rights to appeal

against a sentence imposed by a court of law, and neither do they effete this Court's jurisdiction to consider such an appeal properly before it.

32. However, having considered the appeal on sentence, the appellant's 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 v Mwangi (supra), such an issue must be raised and fully argued in the High Court, before it can be escalated to this Court.

33. The second reason the appeal against sentence must fail is that the Supreme Court has also given categorical guidance in Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR (Muruatetu 2) that the holding in 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
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> 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)

34. In our decision in Cyrus Kavai Onzere v 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.

35. 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 v 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. 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."

36. In this case, the robbery, while violent, was not atavistically so; there was no evidence that it was carefully planned; the weapon used was a knife; and the value of what was stolen was relatively minor; and, finally, the appellant was a first offender. While a serious offence, it is doubtful that upon consideration of mitigation the trial court would have imposed the death sentence but for the mandatory sentence prescribed by statute. We say no more.

37. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF MAY, 2025.

P. O. KIAGE

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JUDGE OF APPEAL

W. KORIR

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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.

Signed

DEPUTY REGISTRAR.