Ireri alias Mapengo & another v Republic (Criminal Appeal 15 of 2015) [2025] KECA 1356 (KLR) (18 July 2025) (Judgment)

Neutral citation: [2025] KECA 1356 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 15 OF 2015

S OLE KANTAI, JW LESSIT & AO MUCHELULE, JJA

JULY 18, 2025

BETWEEN

DICKSON MBOGO IRERI ALIAS MAPENGO ..... 1ST APPELLANT

ALI JUMA MUSALI ALIAS "J" ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Embu (F. Muchemi, J.) delivered on 16{{^th}} December, 2014 in H.C. Criminal Appeal No. 74 of 2013.) Consolidated with H.C. Criminal Appeal No. 75 of 2013.)

JUDGMENT

1. When this appeal came up for hearing before us on 26th March, 2025 we were informed that the 1st appellant Dickson Mbogo Ireri had died in prison while serving sentence. Learned counsel for the appellants applied, and we ordered, that the appeal against that appellant had abated. This appeal is therefore by the 2nd appellant Ali Juma Musali alias "J".

2. We shall not go into much detail on the facts of the case because of the position we have taken after observing the way that the High Court of Kenya at Embu (Muchemi, J.) dealt with the first appeal.

3. The two appellants had been charged before the Chief Magistrates Court at Embu with various offences - Count 1 was robbery with violence contrary to section 296(2) of the *Penal Code* particulars being that on the night of 26th and 27th September, 2012 at Marriot Travellers Inn, Embu, jointly with others not before the court while armed with crude weapons like iron bars, axes and hammers they had robbed Loter Nakwawi of various items listed in the charge sheet and that immediately before or immediately after the time of such robbery they had killed the said Nakwawi.

4. The appellant here (Ali Juma Musali alias 'J') was charged on Count 2 with being in possession of narcotic drugs contrary to section 3(1) as read with section 2(1)(a) of the *Narcotic Drugs & Psychotropic Substances Control Act* No. 4 of 1994 particulars being that on 27th September, 2012 at Embu old stadium he was found in possession of 12 rolls of 50 grams of cannabis with a street value of Kshs.1540 in contravention of the said *Act*. He was charged in Count 3 of being in possession of public stores contrary to section 324(3) of the *Penal Code* it being alleged that on the said 27th September, 2012 at Embu old stadium he was found keeping in his house public stores namely a green military sleeping bag the property of a disciplined force namely the Kenya Army such property being reasonably suspected of having been stolen or unlawfully obtained.

5. The appellant was charged in the alternative to Count 1 of handling stolen property contrary to section 322(1) as read with section 322(2) of the said *Code* it being alleged that on 29th September, 2012 at Mwambao estate in Kirinyaga County, otherwise than in the course of stealing, he dishonestly undertook the retention of various items listed in the charge sheet for his own benefit, knowing or having reason to believe them to be stolen.

6. The trial magistrate heard testimony by 12 prosecution witnesses who testified how Marriot Travellers Inn, Embu had been broken into in the night of 26th and 27th September, 2012, the night watchman Loter Nakwawi was viciously attacked as a result of which he died and various items including brands of alcohol, gas cylinder and regulator, cigarettes, speakers and other items had been stolen. A government analyst examined the narcotic drug recovered from the appellant and found that it was "-bhangi which falls under the 1st schedule of *Psychotropic Substance Control Act*."

7. The magistrate also considered the unsworn defences by the appellants and in her judgment held:

> "... I find that the evidence to prove the offence of robbery with violence doesn't meet the standard required i.e. degree of prove (*sic*) which is beyond reasonable doubt. The production has failed to discharge its burden. I find each accused not guilty of count 1 and acquit each of them under section 215 of the *CPC*."

8. The magistrate convicted the two accused persons before her on the alternative charge to Count 1 and sentenced them to 10 years' imprisonment; on Count 2 the appellant was sentenced to serve 5 years' imprisonment and on Count 3 he was sentenced to serve 1 year imprisonment, the sentences ordered to run concurrently. Those orders were given on 22nd November, 2013.

9. There were appeals to the High Court of Kenya at Embu where the then two appellants raised various issues including that the appellants had been convicted by the magistrate based on inconsistent uncorroborated evidence and that the defences had not been considered. The appeals were consolidated and when they came for hearing before Muchemi, J. on 20th November, 2014 the appellants relied on written submissions and the State prosecution made submissions in opposition to the appeal.

10. The Judge analysed the record and in the end made the following findings which we find disturbing:

> "I make the following orders: -
>
> 1. That the convictions and sentences against both appellants in the separate alternative charges of handling stolen goods contrary to Section 322(1) of the *Penal Code* are hereby set aside and substitute with a conviction in the joint charge of robbery with violence contrary to Section 296(2) of the *Penal Code* in respect of the appellants.

2. That the appellants are sentenced to suffer death in the manner authorized by the law in Count I;

3. That the conviction and sentences in counts II and III in respect of the 2nd appellant are hereby upheld;

4. That the appeal stands dismissed for lack of merit."

11. We find the findings disturbing because the Judge in the result enhanced the sentence imposed by the trial court where the respondent had not cross-appealed and no warning was given to the appellant that the sentence may be enhanced if the High Court, on appeal, found that the trial magistrate had made a wrong determination of the case.

12. The High Court has power under section 354 of the *Criminal Procedure Code* to enhance sentence in specified circumstances and the power to do so has been the subject of judicial consideration and pronouncement by this Court. In *J. J. W. v Republic* [2013] eKLR this Court pronounced itself as follows on that power of the High Court to enhance sentence:

> " However, what we do not appreciate is the manner in which the learned judge enhanced the sentence. It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 354 (3) (ii) and (iii) of the *Criminal Procedure Code*. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Oftentimes this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal."

13. This Court also held in *M. K. v Republic* [2015] eKLR on considerations for altering a sentence:

> " We recognized in the case of *Robert Wafula v Republic* [2016] eKLR that although the law allows an appellate court to enhance sentence, that can only be done when an appellant has been warned of the consequences of proceeding with an appeal when sentence may be altered to his disadvantage. In *Josiah Kibet Koech v Republic* [2009] eKLR which was an appeal regarding sentence which had been enhanced by the High Court on first appeal, it was observed that because the State had not given any notice of enhancement of sentence to the appellant, such enhancement was without jurisdiction."

14. In the appeal before the High Court the appellant had been sentenced to 10 years' imprisonment on the alternative charge of handling stolen goods. The Judge enhanced this sentence to a death sentence. The respondent had not cross-appealed; the appellant was not given any notice that the sentence may be enhanced and he was not given any opportunity to prepare for that eventuality. The Judge acted on her own to find that the appellant was guilty of the main charge of robbery with violence and sentenced him to death where the magistrate had found that the prosecution had not proved that charge at all.

Without a cross – appeal and/or notice being served on the appellant we find that the Judge acted in error to enhance the sentence from 10 years' imprisonment to that of a death sentence. That being our finding we set aside the judgment of the High Court in its entirety.

15. On the findings by the magistrate we have considered the record. The prosecution alleged that various alcoholic drinks and other items were stolen during the robbery and some of them recovered from the appellant and from the appellant whose appeal abated. No attempt was made by the prosecution to prove that the items recovered belonged to the complainant at all. No receipt was produced to prove that items stolen matched those recovered; prosecution witnesses did not give any direct evidence on how they identified any of the recovered items as those stolen during the robbery at Marriot Travellers Inn, Embu. The finding that the appellant was found in possession of recently stolen items was without any basis and that conviction was unsafe and is set aside.

16. The appellant was convicted for being in possession of a narcotic drug. There was evidence by Sergeant Bernard Ndungu (PW8) of how, upon information by an informer he and his colleagues had raided the appellant's house; that they found him seated outside his house on a mattress and they recovered a narcotic drug which upon analysis by the Government Analyst Geoffrey Nyaga (PW12) was found to be a narcotic drug as defined in the Narcotic Drugs and Psychotropic Substances Act. The appellant did not address his possession of that narcotic drug in the whole case or in his defence at all and his conviction in that regard was well founded. He was sentenced to 5 years' imprisonment for that offence.

17. In the end we set aside the judgment of the High Court of Kenya at Embu in HCCA No. 74 of 2013 as consolidated with HCCA No. 75 of 2013 in its entirety. The conviction of the appellant by the trial court on various counts is quashed save conviction on the offence of possession of narcotic drug contrary to the *Narcotic Drugs and Psychotropic Substances Act* which conviction we uphold. The sentence of 5 years' imprisonment is upheld. Considering that the sentence was awarded over 5 years ago the sentence has already been served. The appellant shall be set free forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT NYERI THIS 18TH DAY OF JULY, 2025.

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

signed

DEPUTY REGISTRAR