Akungwi v Republic (Criminal Appeal 81 of 2019) [2024] KECA 222 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KECA 222 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 81 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

FEBRUARY 29, 2024

BETWEEN

RASHID SHIKEU AKUNGWI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the judgment and decree of the High Court at Kakamega (J. Chitembwe & G.Dulu JJ) Dated 28th September 2015 in Criminal Appeal No. 16 of 2012)

JUDGMENT

1. This is a second appeal arising from the decision of the High Court of Kenya at Kakamega (Chitembwe, and Dulu, JJ) delivered on 28th September 2015, in Kakamega High Court Criminal Appeal no 16 of 2012 dismissing the appeal filed by Rashid Shikeu Akungwi, the appellant against conviction and sentence.

2. The genesis of this appeal is that the appellant, was charged in Mumias SRM Cr. Case no 830 of 2009 for the offence of robbery with violence contrary to section 296(2) of the *Penal Code*, which took place on the night of 2nd August 2009 at Lubinu within Mumias District, when the appellant, jointly with others not before the court, while armed with a dangerous weapons namely a panga, rungu, and a knife robbed James Wesonga Ndiri of one mobile dorado, one leather wallet, ATM card, one identity card and cash ksh 1,800/-, all valued at ksh 15,000/- and that at time of the robbery he used actual violence on the said person.

3. He denied the charge, and after trial, the learned trial magistrate found that the ingredients of the offence were proved; the evidence on identification was based on recognition; and under favourable conditions as there was moonlight, his alibi defence was rejected; and he was thus convicted and sentenced to death upon finding that the offence had been proved to the required standard.

4. Being dissatisfied with the outcome, the appellant filed Kakamega CRA. no 16 of 2012 to the High Court), on grounds inter alia that the evidence of identification was flawed; the prosecution failed to avail the first report made to test the credibility of identifying witnesses, the incident being brief and sudden; the trial magistrate erred on weak evidence to convict the appellant placing the burden of proof on the appellant; entertaining a trial that was based on a defective charge sheet since the date of the robbery did not correspond on the date of arrest as indicated on the charge sheet.

5. The appellant also blamed the trial court for failing to notice that the evidence on record was not corroborative, was inconsistent, discredited, fabricated and lacked probative value; rejecting his alibi defence; and that his right to a fair trial had been violated. The appeal was opposed on grounds that there was positive identification of the appellant and that the trial was conducted in a fair and impartial manner.

6. Upon considering submissions by counsel for the State and the appellant, the learned judges dismissed the appeal, holding that the prosecution had proved its case beyond reasonable doubt; consequently, confirming the conviction and the sentence.

7. The appellant was once again aggrieved by the decision and is now before us with this second appeal. He faults the learned Judges in dismissing his appeal on 14 grounds which he has subsequently abandoned, saying in his amended written submissions, that he is no longer contesting the conviction, but retains one ground that, the learned judge erred in law by sentencing him to a mandatory sentence contrary to emerging trends. He urges that the matter be remitted to the lower court for sentencing, as the sentence meted out on him was harsh in the circumstances.

8. At the plenary, Mr. Ariho who was on record sought, and was allowed to withdraw from the conduct of the case, after it became apparent that there was a total disconnect between what he was pursuing, and what the appellant wanted.

9. Drawing from the Supreme Court decision in *Francis Karioki Muruatetu and another v Republic and 5 others* (2016] eKLR (now referred to as Muruatetu1), the appellant argues that the apex court had declared the mandatory nature of the death sentence unconstitutional; and that had necessitated re•sentencing of all persons previously sentenced to the mandatory death sentenced. He also urges us to adopt the approach *Mutatis Mutandis* to the provisions of section 296[2] of the *Penal Code* to hold that the mandatory death penalty for the offence of Robbery with violence is a discretional maximum sentence.

10. In support of the foregoing position, we have been urged to find that mitigation is part of a fair trial in our criminal justice system, but is impeded by the mandatory nature of the sentence under section 296(2) of the *Penal Code* which also makes it conflict with section 329 of the *Criminal Procedure Code*. In support of this proposition, we are referred to the decision in *Joseph Kahinga & 11 others v Republic* (2016) eKLR, counsel urged that the courts do not need to pass a death sentence against persons charged with capital offences.

11. In response to the appeal, Mr. Chacha for the State, citing the case of *Njoroge v Republic* [1982] KLR 388 and *Chamegong v Republic* [1984] KLR 611, points out in the written submissions that, being a second appeal, we should only consider matters of law unless it is demonstrated that the impugned decision was based on a misapprehension of the evidence or that the two courts acted on wrong principles. In the written submissions, counsel for the State pointed out that in considering the place of a mandatory sentence, we ought to bear in mind that:

    a. Severity of sentence is a question of fact not law hence outside the province of this court.

b. At the time the sentence was passed, it was the only lawful sentence therefore the court did not err in law, however, in view of the decision of the Supreme Court in the case of *Muruatetu* the court may exercise its discretion.

d) The property robbed from the complainant was worth ksh 15,000/-; and the injuries were assessed as harm.

In view of the foregoing, the respondent's counsel suggested a sentence of at least 15 years imprisonment.

12. We have carefully considered the grounds, the parties' submissions, the record, and the applicable law. Indeed, this being a second appeal and as provided by section 361(1)(a) of the *Criminal Procedure Code*, we can only address points of law as urged by the prosecution counsel. In the case of *Karingo v Republic* (1982) KLR 213, this Court stated:

> "a second appeal must be confined to points of law and this court will not interfere with concurrent findings of fact arrived at in the two courts below based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. See also *Reuben Karari s/o Karanja v Republic* (1956) 17 EACA 146"

13. The singular issue for our determination is whether the death sentence meted on the appellant was harsh in the circumstances. The appellant was sentenced to death having been found guilty of the offence of robbery with violence. Upon the Supreme Court holding that the death sentence in Section 204 of the *Penal Code* was unconstitutional in *Muruatetu* 1, courts countrywide embraced the decision with gusto; and zealously applied the principle to all matters that had a minimum mandatory or exclusive mandatory sentence.

14. However, in an advisory that followed, the apex Court in *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 Others* (*Muruatetu* 2), where the Supreme Court clarified that *Muruatetu* 1 only applies for the offence of murder and not robbery with violence. Unfortunately, the appellants cannot find refuge in the Supreme Court decision of *Francis Karioko Muruatetu & another v Republic* (*Muruatetu* 1), as the newfound jurisprudence fizzled out with the clarification that the decision only addressed mandatory death sentence in regard to the offence of murder contrary to Section 203 and 204 of the *Penal Code*, and does not apply to the mandatory death sentence provided under section 296(2) of the *Penal Code*.

The upshot is that the appeal fails and is dismissed

DELIVERED AND DATED AT KAKAMEGA THIS 29TH DAY OF FEBRUARY, 2024

HANNAH OKWENGU

....

JUDGE OF APPEAL

H.A. OMONDI

....

JUDGE OF APPEAL

JOEL NGUGI

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR