Angoga v Republic (Criminal Appeal 281 of 2018)
[2024] KECA 132 (KLR) (9 February 2024) (Judgment)

Neutral citation: [2024] KECA 132 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 281 OF 2018

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

FEBRUARY 9, 2024

BETWEEN

MAULID ANWAR ANGOGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kisii (R.N. Sitati, & E.M. Muriithi, JJ) Dated 9th May 2013 in Kisii HCCA No. 81 of 2011)

JUDGMENT

1. The appellant, Maulid Anwar Angoga, was charged in Migori SPM Court, with 4 counts of the offence of robbery with violence contrary to section 296 (2) of the *Penal Code*. It was alleged that on the night of 1st and 2nd October 2010, while armed with offensive weapons, namely pangas and rungus, the appellant in the company of others not before the court, robbed all the 4 complainants of their phones and money, and in the course of the robbery, wounded George Ochieng Olal, the complainant in count1.

2. A brief background to the incident discloses that three of the victims were inside the same house when a gang of men entered their house, roughed them up, blindfolded the complainant in count1, and robbed them. The attackers took off when the electricity lights went out, but as the appellant ran, he knocked himself against the corridor wall and fell down. The complainant in count1 had by this time removed the bed sheet that had been tied around his face, and saw an opportunity to get hold of the appellant who was trying to escape. He struggled with him until his mother Awuor and his aunt Atieno joined him, and eventually members of the public joined them; and helped to apprehend the appellant.

3. The appellant's sworn defence was that he was having his leisure time, drinking juice and water in a pub, and when he stepped outside, he was accosted by a group of men who claimed that he was in the

group of those who were fleeing; so he was apprehended and beaten senseless, before eventually being arraigned in court.

4. Upon considering the evidence that was presented, the learned trial magistrate held that:

> " I have no doubt that the accused person was properly identified. I find him guilty for offence of Robbery C/S 296(1) of the *Penal Code* and under section 179 (2) of the *Criminal Procedure Code* Cap 75 Laws of Kenya I convict him accordingly"

5. He was consequently sentenced to serve 15 years imprisonment on each count, which sentences were to run concurrently.

6. He appealed against the said decision to the High Court at Kisii (Sitati, and Mureithi, JJ) in HCCRA No. 81 of 2011, contending that the trial magistrate did not evaluate all the evidence and prevailing circumstances surrounding identification of the appellant, and failed to note that the evidence was unreliable; thus arriving at a wrong conclusion; and that the magistrate rejected his defence without reason.

7. The respondent in opposing the appeal, notified the appellant that it would be seeking enhancement of the sentence to a death penalty, saying there was no basis for reducing the charge to simple robbery from capital robbery, as the evidence sufficiently proved an offence punishable under section 296 (2) of the *Penal Code*.

8. In its judgment the High Court acquitted the appellant on counts II, III, IV; but was of the view that the decision of the lower court to reduce the charge of capital robbery to one of simple robbery was not well founded, as there was ample evidence that the appellant was in the company of other persons; and that during the attack; the attackers were armed with pangas; and the complainant was seriously wounded as was confirmed by the doctor. The High Court found that the charge of capital robbery on Count 1 was proved beyond reasonable doubt and reducing the charge to simple robbery was based on misapprehension of the law with no basis whatsoever. The learned judges accordingly set aside the conviction for simple robbery; and convicted the appellant with the offence of capital robbery under section 296(2) of the *Penal Code* on Count 1. As a consequence, the 15 years' sentence was set aside, and substituted with a sentence of life imprisonment.

9. Aggrieved by the turn of events, the appellant has challenged that outcome in an appeal before us on grounds that the learned Judge of the High Court erred: in law and principle by substituting the trial court's finding on the offence committed in count 1 from simple robbery to one of robbery with violence and sentencing him to the sentence of life imprisonment.

10. Drawing from the case of *S v Malgos* 2001 SACR 469 (SCA), the appellant herein protests against the sentence imposed by the High Court on points of law; faulting the decision of the learned Judge in substituting the charge, and subsequent interference with the sentence as unlawful.

    The appellant contends that the principles guiding interference in sentencing were set out as early as the 1950's in the case of the Court of Appeal case of *Ogolla s/o Owuor v Republic*(1954) EACA 270 that:

> " The court does not alter a sentence unless the trial court has acted upon wrong principles or overlooked some material factors."

We are also invited to consider the sentiments expressed in *Benard Kimani Gacheru v Republic* (2002) e KLR that:

> " It is now settled law, following several authorities by this Court and the High Court that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material, or took in account some wrong material, or acted on a wrong principle. Even if the court feels that the sentence is too heavy and the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless anyone of the matters already stated exists."

11. The appellant contends that the learned judges of the High Court erred in law by: failing to consider his mitigation; and more so that he was a first offender, was remorseful, and had been in custody for more than 2 years before sentence was passed, and therefore, imposing a sentence of life imprisonment that was harsh and capricious in the circumstances. The appellant thus prays that the appeal be allowed; the sentence be set aside and/or an order for his release do issue; or in the alternative, the sentence of life imprisonment be substituted with a lesser sentence of term served.

12. We have carefully considered the record of appeal, submissions by counsel, the authorities cited and the law. This being a second appeal, we are mindful of our duty as a 2nd appellate court that we must only be confined to points of law; and resist interference with the concurrent findings of the two courts below, unless based on no evidence. The test to be applied on a second appeal is whether there was any evidence on which the trial court could find as it did. See *Karingo & 2 others v Republic* [1982] eKLR.

13. The grounds of appeal all relate to sentencing yet it would be rather escapist to immediately immerse ourselves into the penalty meted without setting out the ingredients of the offence; and why the punishment under section 296 (1) of the *Penal Code*, is so significantly different from the punishment under section 296 (2).

14. The offence of robbery with violence is contained in sections 295 and 296(2). The elements of the crime of robbery with violence were set out by this Court (differently constituted) in the case of *Oluoch v Republic* [1985] KLR as follows:

> " Robbery with violence is committed in any of the following circumstances:
>
> The offender is armed with any dangerous and offensive weapon or instrument; or
>
> The offender is in company with one or more person or persons; or
>
> At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person ..."

15. Also in the case of *Dima Denge Dima & others v Republic* Criminal Appeal No. 300 of 2007 the Court stated:

> " The elements of the offence under section 296(2) are three and they are to not be read conjunctively, but disjunctively. On element is sufficient to find an offence of robbery with violence."

16. Looking at the testimony of the complainants, PW1, PW2, and PW3, we are in agreement with the findings of the judge that the appellant was indeed identified as the attacker on the material date in questions and that the evidence is credible, that the appellant was the attacker. We say so because from the evidence on record, the complainants were able to properly identify the appellant as, in the midst of the appellant trying to escape, they managed to scuffle with and detain him until help arrived from the members of the public. Furthermore, the appellant was dragged to the nearby Gilly's hotel where he was placed under the brightness of the hotel light. We therefore agree with the learned High Court judges that there was no case of mistaken identity.

17. PW6 the doctor produced the P3 form as EX1 which classified the injuries on PW1 as harm, while PW5 produced the panga as EX 3, thus satisfying the ingredients necessary for the offence of robbery with violence.

18. Since the single issue of this appeal only focuses with sentencing, then the relevant section is section 296(2) which provides for the sentence as death in the following terms:

> " If the offender is armed with any dangerous or offensive weapon or instrument, or is in the company of one or more person (s) at or immediately before or immediately after the time of stealing it he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death"

19. On the issue of sentence having found that the elements of robbery with violence had been met, the *Penal Code* prescribes a death sentence for the offence of robbery with violence. The High Court overturned the lower court's sentence of 15 years imprisonment and substituted the same with life imprisonment.

20. The appellant argues that the life sentence was harsh in the circumstances; and that the High Court was wrong in substituting the sentence to life imprisonment. The respondent on the other hand gives notice to the appellant that it will be pushing for the death sentence instead of life imprisonment.

21. On the issue of life sentence being harsh, illegal and/or inappropriate, looking at section 296(2) of the *Penal Code*, the prescribed sentence by law for the offence of robbery of violence is death. The appellant in citing *Karioko Muruatetu & Another v Republic* Petition No. 15 of 2015 (Muruatetu 1), laments that the mitigating factors were not taken into account during his sentencing. It is the appellant's contention that in the instant case, although the court did not call for a social inquiry report or a pre sentence report, it was on record that the appellant was a first offender as he had no previous record of being charged and/or conviction in a court of law, nor was evidence of bad character adduced during the trial; further, that he was remorseful, had pleaded for leniency in addition to being the sole breadwinner and caretaker of his elderly mother; and had been in custody for more than 2 years before the case was heard, determined and sentence was imposed.

22. The appellant lamented that the learned judge failed to take into account the mitigating factors he put forth and concentrated solely on the provisions of the *Penal Code* to impose a harsh sentence. Holes are poked at what is termed as an error in sentencing by the fact that no pre-sentence report was availed in court to guide; that it is a well-established principle that sentencing is discretion of the court and the same should be exercised judiciously; that the substitution of the sentence of 15 years with a life sentence was unwarranted, disproportionate and inconsistent with the globally accepted principles and guidelines of sentencing in criminal cases, and resulted in imposition of an excessive and arbitrary sentence.

23. In the premise, the appellant prays that the appeal be allowed as prayed and particularly in line with the Judiciary Guidelines, that the appellant be released for the time served as he has met the threshold for release having been in custody for more than ten years.

24. The respondent in reply points out that the decision in *Muruatetu 1* only applies in relation to sentences of murder under sections 203 and 204 of the Penal Code, courtesy of the Supreme Court advisory in *Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 Others (Amicus Curiae)* [2021] eKLR (Muruatetu 2). It is thus the respondent's argument that the death sentence holds legitimacy upon conviction for the offence of robbery with violence and that the High Court erred in substituting the lower court's sentence with life imprisonment.

25. Our reading of the Supreme Court's Advisory in *Muruatetu 2* at paragraph 4 (a) clearly communicates to us the Supreme Court's direction that the mandatory nature of the death sentence as provided for under section 204 of the *Penal Code* was declared unconstitutional, but that the declaration did not disturb the validity of the death sentence under article 26(3) of the *Constitution*. We agree with the respondent's position that the jurisprudence created by *Muruatetu1*, which was initially adopted by courts as a 'one size fits all' for all offences attracting mandatory sentences has been overtaken by events following the directions given by the Supreme Court on 6th July 2021 in the case of *Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 others* (supra). For purposes of clarity, the learned judges stated thus:

> " It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the *Constitution*. It bears restating that it was a decision involving the two Petitioners who approached the Court for specific reliefs. The ultimate determination was confined to the issues presented by the Petitioners, and as framed by the Court"

26. 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.

27. The question left for this Court to now answer is whether there is any lawful reason to interfere with the sentencing of the High Court. In this case all the ingredients of robbery with violence have been met. The appellant robbed the complainant, and in the course of the robbery, the appellant not only used force but was armed with a dangerous weapon which he used to cut PW1 causing bodily injury, which injuries were assessed as harm. Indeed, the trial magistrate made an error which the 1st appellate court duly corrected. The *Penal Code* prescribes the death sentence for the offence of robbery with violence and that sentence is still legal; and the Supreme Court of Kenya has clarified the position. Consequently, we dismiss the appellant's appeal against conviction and sentence. Ultimately, being cognizant of the position from the apex court, it behoves us to disturb the life imprisonment sentence that was imposed by the High Court, by setting it aside, and substituting it with the proper sentence provided under section 296(2) of the *Penal code* which is that the appellant is sentenced to death so as to align the penalty meted with the law.

28. It is so ordered.

DELIVERED AND DATED AT KISII THIS 9TH DAY OF FEBRUARY, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.