Saidinga v Republic (Criminal Appeal 41 of 2016)
[2024] KECA 383 (KLR) (12 April 2024) (Judgment)

Neutral citation: [2024] KECA 383 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 41 OF 2016

F SICHALE, FA OCHIENG & WK KORIR, JJA

APRIL 12, 2024

BETWEEN

JOHN SAIDINGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the Judgment of the High Court of Kenya at Nakuru (M. Odero & A. Ndung'u, J.) dated 30th September 2016 in H.C.CR.A. No. 301 of 2010)

JUDGMENT

1. The appellant was charged with the offence of robbery with violence contrary to Section 296(2) of the *Penal Code*. The particulars of the offence were that; on 20th March 2009 at Oloporil in Nakuru District of the then Rift Valley Province, the appellant robbed Elizabeth Karia of Kshs. 15,000/-, one mobile phone make Nokia 1680c, and assorted clothes, all valued at Kshs. 23,000/-, and immediately before or immediately after the time of such robbery threatened to use actual violence to the said Elizabeth Kiaria while armed with a knife.

2. The appellant was also charged with the alternative charge of handling stolen goods contrary to Section 322(2) of the Penal Code.

3. The appellant denied the charges and soon thereafter, the trial commenced. After the trial, the appellant was convicted for the offence of robbery with violence and sentenced to death.

4. The prosecution case was as follows: The complainant told the court that on 20th March 2009, she and her children were asleep in her home in Narok. At about 3:00 am, her house was broken into by the appellant, whom she recognized as her herdsman. The appellant was carrying a Somali sword in his hand. The appellant demanded money, and she gave him Kshs. 15,000/-, which PW1 had left for her home use, and a mobile phone. The appellant also took clothes. She raised the alarm after the appellant had left, and also informed PW2. The matter was later reported to the police and the appellant was

arrested at Rumuruti market. The appellant was wearing clothes that she identified as the ones stolen from her house.

5. Put to his defence, the appellant in his sworn statement denied having robbed the complainant.

6. Aggrieved by the judgment, the appellant appealed to the High Court against the conviction and the sentence.

7. The learned Judges held that the complainant was able to recognize the appellant through his voice when he demanded money from her. The appellant was well known to her, being her herdsman. The appellant did not deny being the complainant's employee either. The appellant was with the complainant in an enclosed space where they spent ample time and she was able to hear his voice. The complainant was also able to see the appellant using the light from the torch he was carrying.

8. Citing the case of *Maitanyi v Republic* [1986] eKLR, the learned Judges warned themselves about the dangers of relying on the evidence of a single identifying witness but ultimately held that the complainant positively identified the appellant through voice and visual recognition, and there was no room for mistaken identity.

9. The appellant did not deny being found wearing the clothes and shoes belonging to PW1 that were identified by the complainant and PW1 as having been stolen on the material day. The appellant was also found in possession of the Nokia mobile phone which the complainant was able to identify by the mark of her name "Eliza". The learned Judges dismissed the appellant's defence that he was given the items by the complainant because they were having an affair, as being an afterthought given that the appellant did not raise this issue during his cross- examination of the complainant. The learned Judge held that:

> " The appellant was found in possession of property stolen from PW2 barely five (5) days after the robbery. The doctrine of 'recent possession' would squarely apply."

10. The learned Judges relied on the case of Isaac Nganga Kahiga alias Peter Nganga Kahiga v Republic, Criminal Appeal No. 272 of 2005 in holding that all the ingredients for the doctrine of recent possession had been satisfied.

11. The learned Judges found the evidence against the appellant to be overwhelming. They held that the case against the appellant had been proved beyond reasonable doubt.

12. Consequently, the learned Judges upheld the appellant's conviction and sentence.

13. Dissatisfied with the judgment on both conviction and sentence, the appellant lodged the appeal herein in which he relied on his supplementary grounds of appeal to wit that; the learned Judges erred in law in failing to observe that the appellant's right to a fair trial as enshrined in Article 50 was contravened thus prejudicing him, and that the sentence imposed on him was manifestly harsh and excessive.

14. When the appeal came up for hearing on 29th November 2023, Ms. Odhiambo, learned counsel appeared for the appellant whereas Ms. Kisoo, learned prosecution counsel holding brief for Ms. Korosi was present for the respondent. Counsel relied on their respective written submissions.

15. The appellant submitted that the appellant's rights under Articles 50(1) & (2) and 159(2) (d) of the *Constitution* as well as the provisions of Sections 323, 329 and 216 of the Criminal Procedure Code were violated as the appellant was never given a chance to mitigate before being sentenced. The appellant relied on the cases of *Henry Katap Kipkeu v Republic* [2009] eKLR, John Muoki Mbatha v

Republic, Criminal Appeal No. 72 of 2007, and *Muruatetu & Another v Republic* [2017] eKLR, to buttress this submission.

16. The appellant submitted further that the sentence imposed against him was manifestly harsh and excessive as the trial court did not consider all the circumstances of the case. The appellant was of the view that the amount that was stolen was so little to warrant a death sentence.

17. The appellant relied on the cases of *William Okungu Kittiny v Republic*, Criminal Appeal No. 56 of 2013, *George Onyango Kesera & Another v Republic* [2019] eKLR, *Simon Kanui Mwenda v Republic* [2020] eKLR, *Charo Ngumbao Gugudu v Republic*, Criminal Appeal No. 358 of 2008, and D*aniel Kyalo Muema v Republic*, Criminal Appeal No. 479 of 2007, in submitting that the death sentence is not mandatory, and that courts must be guided by mitigating circumstances of each case when imposing a sentence.

18. The appellant pointed out that he did not benefit from the mitigating circumstances. He further noted that the complainant never suffered any injuries. The appellant urged the court to consider the legality and the proportionality of the sentence imposed on him being a first offender.

19. Opposing the appeal, the respondent relied on the provisions of Section 296(2) of the *Penal Code* in submitting that the prosecution had proved beyond reasonable doubt that there was theft of some property which was found in possession of the appellant, the appellant was armed with a Somali sword during the robbery, and that the appellant was placed at the scene.

20. The respondent was of the view that the appellant's right to a fair trial was not infringed upon, as he has not demonstrated how his right to a fair trial was not adhered to.

21. The respondent submitted that the aggravating circumstances in this case outweighed the mitigating circumstances as the appellant attacked the complainant with a sharp and offensive weapon, (Somali sword), and the appellant used threats during the incident. The respondent urged the court to uphold the death sentence.

22. We have carefully considered the record of appeal, the submissions by counsel, the authorities cited, and the law. The issues for determination are whether or not the appellant was accorded a fair trial, and whether or not the sentence against the appellant was excessive and harsh.

23. This being a second appeal, we are legally constrained to consider only issues of law raised in the appeal and not to consider matters of fact that had been determined by the trial court and the appellate court on the first appeal. This is by dint of Section 361(1)(a) of the *Criminal Procedure Code*.

    This position was reiterated in the case of *M'Riungu v Republic* [1983] KLR 455 where the court stated thus:

> " Where the right of appeal is confined to the question of law, an appellate court has loyalty to accept the findings of fact of the lower courts and resist the temptation to treat findings of fact as holdings of fact and law and it should not interfere with the decision of the trial court or the 1st appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision was bad in law."

24. The appellant's grievance is that he was not accorded a fair trial as enshrined in Article 50 of the Constitution. This issue was not raised before the High Court sitting as a first appellate court.

Therefore, as a second appellate court, the issue cannot be raised before us for the first time. In the case of *John Kariuki Gikonyo v Republic* [2019] eKLR, the court held that:

> " Similarly from the grounds of appeal and the submissions by counsel for the appellant the question of whether the amended charge sheet was signed by a qualified person and whether the charge sheet was fatally defective for failure to describe the property was also not raised before the two courts below. Though the appellant was represented by counsel, no mention of this was made before the first appellate court nor has any explanation been given for such failure. We also find some of the contestations with regard to procedural irregularities such as whether the substance of the charge was explained to the appellant; whether the appellant ought to have been informed of his right to recall witnesses and/or of his right to counsel; and whether the trial court properly weighed the propriety of allowing the amendment of charge prior to allowing it; are all issues that only sprung up in the present appeal. The question that follows is how then can the learned first appellate Judge be faulted for having failed to address issues that were never placed before her" This Court when faced with a similar issue in *Alfayo Gombe Okello v Republic* [2010] eKLR Criminal Appeal No. 203 of 2009; held as follows: "....the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have." Page 11 of 20 [18] In line with that finding, we are disinclined to address matters where there is no opinion by the two courts below on new issues introduced for the first time on a second appeal."

25. We are of the considered opinion that this court sitting as a second appellate court can only entertain matters that were considered by the court being appealed from. An appeal can only lie where there has been a decision made by a lower court. If an issue was not brought up before the lower court, and therefore not determined, then any decision made by the appellate court would not be considered a judgment on an appeal.

26. In the case of *Peter Kihia Mwaniki v Republic* [2010] eKLR, the court stated thus:

> " Neither the appellant nor the prosecution raised any issue concerning the delay in bringing the appellant to court. Nor was the issue raised before the superior court on the first appeal. It was in either of those courts that the issue should have been raised so that an inquiry would be made regarding the issue, when both sides would possibly call evidence on the matter... By raising the issue at this late stage the appellant has, in a way denied the prosecution the Constitutional opportunity to explain the delay. This ground likewise has no merit."

27. In the result we find that the appellant did not advance any arguments regarding his conviction. We therefore find no reason to interfere with the findings of the two courts below on conviction.

28. The appellant was sentenced to death as provided for under Section 296(2) of the *Penal Code*. The said section stipulates as follows;

29. The Supreme Court in the case of *Francis Muruatetu & Another v Republic* [2017] eKLR held that:

> " Consequently, we find that Section 204 of the penal code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum penalty."

30. In the case of *William Okungu Kittiny v Republic* (*supra*), this court held that:

> "From the foregoing, we hold that the findings and holding of the Supreme Court, particularly in para. 69, applies Mutatis Mutandis to section 296 (2) and 297 (2) of the *Penal Code*. Thus, the sentence of death under section 296 (2) and 297(2) of the *Penal Code* is a discretionary maximum punishment."

31. In our considered view, what renders a sentence unconstitutional is the fact that the prescribed mandatory sentence completely precludes the court from exercising any discretion, regardless of whether or not the circumstances so require.

32. The current jurisprudence on the issue of mandatory sentences is that it is unconstitutional, as it deprives the court of the mandate to exercise its discretion in such a manner as to do justice in a way that imposes a sentence that is appropriate to the circumstances of the particular case before it.

33. In the light of the current jurisprudence on sentencing, and after giving due consideration to the circumstances in which the offence was committed, and the fact that the appellant was not given an opportunity to mitigate, we are persuaded that the appropriate sentence in the circumstances is 25 years' imprisonment.

34. In the result, the appellant's appeal on conviction is dismissed.

    However, we set aside the sentence of death and it is substituted with a sentence of 25 years' imprisonment.

35. The sentence herein shall run from the date when the appellant was first sentenced. We so order because the appellant had been granted bail pending trial.

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 12TH DAY OF APRIL, 2024.

F. SICHALE

.....

JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.