Ngangara alias Muthengi v Republic (Criminal Appeal 16 of 2018) [2024] KECA 803 (KLR) (5 July 2024) (Judgment)

Neutral citation: [2024] KECA 803 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 16 OF 2018

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

JULY 5, 2024

BETWEEN

JOSEPH MWANGI NGANGARA ALIAS MUTHENGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence of the High Court of Kenya at Chuka (R.K. Limo, J.) dated 23rd October 2017 in Criminal Appeal No. 8 of 2016)

JUDGMENT

1. On 23rd October 2014 at about 9.00 pm along Makutano – Kinoru Road in Meru Township of the Meru County, Lawrence Mwiti Murugu (PW 1) was on his motorcycle registration number KMDK 892V make Tiger TG-150, when he was attacked by two strange men one of whom had a panga that he used to slap him with. They took the motorcycle and his Safaricom wallet that had Kshs.1,000 and Afya Sacco ATM Card. He ran home and next day he reported the matter to Meru Police Station. He did not identify his attackers.

2. Five months earlier, on 11th May 2014 at about 23.30 hours along Nkubu-Kariene road Alex Munene Mwiti (PW 2) was robbed by two men of his motorcycle registration KMDG 900G make Captain. One of the men cut him on the nose before they disappeared with the motorcycle. He reported the incident at Nkubu Police Station and was treated at Consolata Hospital at Nkubu. He testified that he identified one of the attackers. He was a stranger. He did not see him again until he testified in court. The man (Martin Muthoni Mwikamba) had been charged jointly with the appellant, Joseph Mwangi Ngangara Alias Muthengi, with two counts of robbery with violence contrary to sections 295 and 296(2) of the Penal Code in connection with the two incidents. The appellant faced an alternative charge of handling stolen property contrary to section 322(2) of the Penal Code on each charge. In the alternative charge to Count 1, the appellant was alleged to have undertaken the disposal of motorcycle chassis number LSRPCKLIIEA700225 and engine number 161FMJI4088500 make Tiger knowing or having reasons

to believe it to be stolen or unlawfully obtained. This was PW 1's motorcycle. The offence was allegedly committed on 26th April 2014 at Miomponi Market in Tharaka South Sub- county in Tharaka Nithi County.

3. In the alternative charge to Count 2, it was alleged that on 10th November 2014 at Miomponi in Tharaka South Sub-County in Tharaka Nithi County, the appellant undertook the disposal of the motorcycle number plate registration KMDC 900G knowing or having reason to believe it to be stolen or unlawfully obtained. This was the number plate of PW 1's motorcycle.

4. On 4th June 2015 a traffic officer PC Charles Kimonge (PW 5) was on duty along Marimanti – Gaciongoni Road when he stopped a motorcycle (Exhibit 10) that had a registration number KMDJ 773H. The cyclist was Francis Mugambi Kithure (PW 4). PW 5 suspected the motorcycle because the registration had an overwritten number plate. He checked and found that beneath the showing number plate was another number plate KMDC 900G. The engine number was 161FMJ14088500 and chassis number was LSRPCKL11EA700225. The make was Tiger green in colour. This is the same motorcycle that had been robbed from PW 1, but PW 5 was not aware of this. He arrested PW 4 and took the motorcycle to his DCIO to investigate.

5. According to PW 4, he bought this motorcycle for Kshs.65,000 on 26th October 2014 from the appellant. They had written an agreement. The assistant chief Patrick Nyaga Muchege (PW 8) and PW 10 (Marigo Geoffrey Mwiti) were witnesses to the transaction. They knew the two well. It meant that the appellant had this motorcycle three days after it had been robbed from PW 1 by two unknown men.

6. When Corporal Casper Ratemo (PW 12) of DCI Office Tharaka was handed over the motorcycle and the agreement between PW 4 and the appellant, he begun to investigate. He went to KRA office Meru and requested for particulars of motorcycle KMDJ 733H. He found that KMDJ 733H was motorcycle make Skygo. It operated in Kayole and had not been stolen. He checked the particulars of motorcycle KMDC 900G which the number beneath KMDJ 733H on the recovered motorcycle. He found that this was a Captain motorcycle that belonged to Simon Kinoti (PW 3) who had given it to PW 2 from whom it had been robbed on 11th May 2014. The Tiger motorcycle (Exhibit 10) had been sold to PW 1 as KMDK 892V through receipt (Exhibit 3(b)). It meant that from the time PW'2 motorcycle (Exhibit 10) was stolen, the registration number had been changed to KMDJ 733H and underneath was number plate number KMDC 900G.

7. Based on this evidence, the Senior Resident Magistrate at Marimanti placed the appellant on his defence. He made a sworn statement and did not call witnesses. He denied that he had participated in the two robberies or that he had been found with any stolen or unlawfully obtained property. He denied to have sold the motorcycle to PW 4. He admitted that he entered into the agreement but said that it was for the hire of a motorcycle at the rate of Kshs.300 per day for 30 days. He is a motorcycle mechanic, he testified.

8. The trial court considered the prosecution and the defence evidence and came to the conclusion that the guilt of the appellant had been proved beyond doubt on Count 1 of robing PW 1 with violence contrary to section 296(2) of the Penal Code and on the alternative charge to Count 2 of handling stolen property contrary to section 322(2) of the Penal Code. He was convicted on each, and sentenced to death on Count 1. The sentence on the alternative charge to Count 2 was left in abeyance.

9. The appellant was aggrieved by the conviction and sentence and appealed to the High Court. The learned R.K. Limo, J. re- evaluated the evidence and found no merit in the appeal. It was dismissed on both conviction and sentence.

10. The appellant has come before us on second appeal. The grounds of appeal were that the learned Judge had not properly and adequately analysed and evaluated the evidence; he had erred by confirming the conviction that was based on weak, contradictory and completely unsafe evidence; that he had misdirected himself by shifting the burden of proving innocence on the appellant, thereby prejudicing him; and that the learned Judge had erred by confirming a sentence that was neither constitutional nor legal.

11. Learned counsel Mr. Mugambi represented the appellant during the hearing of this appeal. It was common ground that PW 1 did not identify the two people who attacked him and robbed him of the motorcycle, among other items. The prosecution relied on the doctrine of recent possession to have the appellant found guilty and convicted. It was the submission by the learned counsel that the appellant was not found with the motorcycle; that the written agreement that the prosecution witnesses were relying on agreed with his defence that it was for lending money and not for sale of the motorcycle. Regarding the sentence, learned counsel submitted that, the sentence that was meted out was not constitutional.

12. Learned counsel Ms. Nandwa represented the State. She urged us to uphold both the conviction and sentence, submitting that the appellant had been convicted on sufficient evidence. This was because it had been proved that the appellant had been found in possession of the motorcycle which had been recently robbed from PW 1. She submitted that the impugned sentence was legal.

13. We are aware of our mandate under section 361 of the Criminal Procedure Code that confines us to the consideration of matters of law only. In Karingo -vs- R. [1982]eKLR, this Court reiterated that –

14. We note that both the trial court and the 1st appellate court reached the conclusion that there was sufficient evidence proving that the appellant had been found in possession of PW 1's motorcycle three days after it was robbed in circumstances that showed that he was one of the robbers. We can only interfere with these concurrent findings if it has been demonstrated to us that the findings were based on no evidence. Otherwise we are bound by those findings on which the courts agreed on.

15. According to the evidence, PW 5 found PW 4 with this motorcycle in Tharaka County three days after it was robbed from PW 1 in the neighbouring Meru County. PW 4 testified that he had bought it for Kshs.65,000 from the appellant, and that he had got PW 8 and PW 10 to witness the transaction that had been reduced into writing. According to the appellant, the money he received from PW 4 related to his renting a motorcycle for 30 days at the rate of Ksh.300 a day. He did not have the motorcycle and neither did he sell it to PW 4. Both courts below noted that the written agreement related to the appellant lending money. The explanation by PW 4, PW 8 and PW 10 was that because the appellant did not have the documents of ownership of the motorcycle, this was the tentative agreement until he had produced the documents. He had promised to produce the documents. The trial court that had the benefit of seeing and hearing the evidence accepted the prosecution version and discounted the appellant's defence. It accepted that the appellant had the motorcycle which he had sold to PW 4 as stated. The learned Judge received and re-evaluated the evidence and agreed with the finding.

16. We have considered the matter quite carefully. In Erick Otieno Arum -vs- Republic [2006]eKLR, this Court reiterated that in a conviction based on recent possession, there must be positive proof that the property was found with the accused; the property must be proved to belong to the complainant, and the one recently stolen from him in the incident in question; and the circumstances are such that the accused was the thief. Such proof is done before the trial court, and it is up to the 1st appellate court to re-evaluate the evidence tendered before the trial court to satisfy itself that the conviction based on the findings on these questions was safe.

17. After the 1st appellate court re-evaluated the evidence before the trial court, and after bearing in mind the decision of this Court in Matu -vs- Republic [2004] IKLR 510, this is what it stated:

> " In view of my finding above in respect to the time the appellant was found in possession of the stolen motorcycle which was on 26th October 2014, barely three days after it was violently robbed from PW1, this court finds that the trial magistrate made correct inference that the appellant was one of the gangsters that accosted the complainant. The principle of recent possession was correctly applied because again as I have observed above, the appellant's explanation of how he came into possession of a stolen motorcycle was wanting. His attempt to change the reading of the number plate (P. Exh 10) was an attempt to cover up the crime and were it not for the diligence of a police officer (PW5) perhaps the discovery could not have been made given the location the motorcycle was recovered."

18. We also note that the 1st appellate court was alive to the fact that, once it had been proved that the appellant had been found in possession with the motorcycle that had been recently robbed from PW 1, it was up to him to explain how he had come by the same. Indeed in Athuman Salim Athuman -vs- Republic [2016]eKLR, this Court observed as follows:-

> "The essence of the doctrine is that when an accused is found in possession of recently stolen property and is unable to offer any reasonable explanation how he came to be in possession of that property, a presumption of fact that arises that he is either the thief or receiver."

19. So, the claim by the appellant that when he was required to explain how he had come by the motorcycle that had been recently robbed from PW 1, he was being prejudiced, cannot be true. Indeed, the burden was being shifted on him to make a reasonable explanation regarding how he had come by the motorcycle. The burden to prove his guilt beyond all reasonable doubt still remained on the prosecution.

20. In conclusion, we find that the 1st appellate court was alive to its responsibility to reconsider the evidence that had been tendered before the trial court, and that it carried out its responsibility correctly before confirming the conviction.

21. Regarding the death sentence that the 1st appellate court confirmed, we consider that sentence is a matter that rests with the discretion of the trial court as it depends on the facts and circumstances of the case. This court cannot interfere unless it is shown that the sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. (See Bernard Kimani Gacheru -vs- R. [2002]eKLR).

22. The learned Judge dealt with the complaint by the appellant that the death penalty deprived him of his right to life, and observed that such a right was not absolute as stated by Article 26(3) of *the Constitution*. It was found that the sentence was constitutional; and that as long as the penalty was still in the Penal Code for robbery with violence under section 296(2) the court's hands were tied.

23. It does appear that the trial court took the position, which the learned Judge appeared to adopt, that because the sentence was mandatory, there was no need to mitigate. The appellant did not mitigate. The prosecution was not even asked if he was a 1st offender or had previous antecedents.

24. We consider that where a statute provides a mandatory penalty that denies the accused the opportunity to mitigate and takes away the court's discretion to consider a penalty that takes into account such mitigation, then the notion of a fair trial under Article 50 of *the Constitution* and equal protection

and equal benefit of the law under Article 27(1) of *the Constitution* are compromised. We find that the death sentence under section 296(2) of the Penal Code to be a discretionary maximum penalty; that depending on the particular circumstances of the case, and the accused's mitigation, the death sentence may be found to be manifestly excessive and the appellate court may interfere with it (See William Okungu Kittiny -vs- Republic [2018]eKLR).

25. In this case, when it is considered that the appellant was not allowed to mitigate, the complainant did not receive serious injury, and the motorcycle was recovered, we find that the death penalty was manifestly excessive in the circumstances. We set it aside, and in its place the appellant shall serve 20 years in jail calculated from the date of plea.

26. To that limited extent, the appeal is allowed.

DATED AND DELIVERED AT NYERI THIS 5TH DAY OF JULY 2024

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR