Nyaranga & 5 others v Republic (Criminal Appeal 181 of 2017)
[2024] KECA 786 (KLR) (5 July 2024) (Judgment)

Neutral citation: [2024] KECA 786 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 181 OF 2017

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

JULY 5, 2024

BETWEEN

SAMUEL WAFULA NYARANGA ..... 1ST APPELLANT

PATRICK WAFULA KULULU ..... 2ND APPELLANT

CONSTANT MAKHANU SIFUNA ..... 3RD APPELLANT

DAVID MIX MASINDE ..... 4TH APPELLANT

JOHN WAFULA MASINDANI ..... 5TH APPELLANT

CALISTUS WAFULA SIMIYU ..... 6TH APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgement of the High Court of Kenya at Bungoma by (A. Ali Aroni, J) dated the 23rd October 2017 in HCRA No. 47,48, 51 & 52 of 2014)

JUDGMENT

1. The 1st appellant Samuel Wafula Nyaranga (Samuel), the 2nd appellant Constant Makhanu Sifuna (Constant), the 3rd appellant Patrick Wafula Kululu (Patrick), the 4th appellant David Mix Masinde (David), the 5th appellant John Wafula Masindani (John), and the 6thappellant Calistus Wafula Simiyu (Calistus), were tried together with one Kennedy Juma Makhoka (Kennedy), before the Principal Magistrate's Court at Bungoma of the offence of robbery with violence contrary to Section 296(2) of the Penal Code.

2. The particulars of the charge were that during the nights of 7th and 8th of April, 2013, within Bungoma County, jointly with others not before the court, while armed with offensive weapons namely pangas and rungus, the appellants robbed RNA (R), of cash Kshs. 5,700/=, 1 mobile phone make G-tide,

DVD player, solar panel, 5 bags of fertilizer, 1 jacket, 1 kikoi and a purse, all valued at Kshsh. 50,000/ = and at that time of such robbery used actual violence on the said Rukia.

3. During the trial, 6 witnesses testified including three eye witnesses who were the complainant R, her niece MW (M), and a neighbour MW (Merceline), who, on the material night was sleeping in the same house as M. Their evidence was that Rukia was asleep in her house when she was woken up at around midnight by the sound of the door to her bedroom breaking open. She woke up, took a torch, switched it on and saw intruders entering her bedroom. She identified the intruders as Kennedy, who was armed with a panga; Constant, who was armed with a rungu; Calistus, armed with a small axe; Partick, also armed with a panga; David, who was armed with a metal bar; and Samuel, who was also armed with a panga. The intruders demanded money from Rukia who was, apparently, employed by Bungoma Country Council as a Revenue Clerk. She pleaded that she did not have any money but Kennedy, threatening her with the panga insisted, and R gave him Ksh. 800/- which she had. The assailants demanded R's mobile phone and M-pesa PIN number which she gave and Samuel transferred Kshs. 5000/- which R had on her phone, to his phone. In addition to R's phone and money, the robbers also took various other items from the house. Before they left, they ordered R to take them to the house where M and Mercline were sleeping, as they thought M was keeping more money. When M opened the door, she only had Kshs.100/-. Samuel threatened to rape M but the other robbers told her to leave M and "finish" R. Samuel then ordered R to lie down and he cut her on the neck with a panga, he tried to cut her on the neck a second time but instead cut her left finger. R became unconscious, and the robbers left. M and Mercline screamed for help, and neighbours who responded took R to hospital. Two days later, R saw Constant who was operating as a boda boda rider and identified him as one of the persons who had robbed her and Constant was arrested and taken to the police station. R gave the names of the other robbers and they were all subsequently arrested. An identification parade was held, during which, R, M and M were able to identify the appellants except Kennedy, and Samuel who apparently did not participate in the parade.

4. Each of the appellants gave unsworn evidence in their defence and called no witnesses. They each denied having committed the offence. Kennedy, Patrick, David and John all claimed they were arrested from their respective houses where they were asleep. Constant claimed he was arrested after dropping some passengers at the Bungoma Hospital, he denied knowing R or committing the offence, Samuel claimed he was attacked when he was weeding in his farm and he was taken to his house which was searched, but nothing was recovered. He was subsequently charged with an offence which he did not commit.

5. The trial Magistrate, upon considering the evidence for the prosecution and the appellants' defences, found all the appellants including Kennedy (who jumped bail before the court delivered its judgment), guilty of the charge and sentenced each of the appellants to death. The appellants, who were dissatisfied, lodged an appeal in the High Court in which they contended inter alia that the evidence relied on by the prosecution was incredible and insufficient to sustain a conviction, and that the identification evidence was not safe to rely on.

6. The learned Judge, upon hearing the appeal, found that Rukia knew the appellants and identified them by recognition; and that the identification by M and Merceline at the parade fortified and corroborated Rukia's evidence on identification. In addition, the robbers took time during the robbery and engaged the witnesses while their faces were uncovered. This created an opportunity for the eye witnesses to observe the robbers and subsequently identify them. The learned Judge also found that although M and M were under the majority age of 18 years, they were not children of tender years, and their evidence did not require voire dire examination. Consequently, the learned Judge upheld

the appellant's conviction and sentence, finding that they were properly identified and their defences properly rejected.

7. The appellants, who were aggrieved by the judgment of the learned Judge, lodged an appeal in which they filed a joint memorandum of appeal through their counsel Byron Menezes. They raised five grounds in which they challenged their conviction and sentence, contending that the sentence meted out against them was excessive and unconstitutional; that the trial Judge erred in law and in fact in sentencing them to death as the mandatory nature of death sentence is unconstitutional as per the law; and that the learned Judge erred in failing to find that the prosecution infringed their right to a fair hearing, by failing to provide them with all the evidence they intended to rely on during the trial. Furthermore, that the trial court and the High Court erred in convicting and sentencing the appellants to death. On conviction, the appellants criticized the learned judge in failing to find that the offence of robbery with violence was not sufficiently proved; and in convicting the appellants on evidence that did not meet the minimum threshold of proof beyond reasonable doubt as required by law.

8. The appellants filed written submissions through their advocate in which they identified the main issues for determination as two, first, that the mitigation and sentencing was discriminatory against them, and secondly, that the principles of fair hearing were never adhered to by the trial court.

9. On the issue of sentence, the appellants relied on the Supreme Court decision in Francis Karioko Muruatetu & Another -vs- Republic, Petition No. 15 of 2015 [2017] eKLR, wherein the mandatory death sentence with respect to section 204 of the Penal Code was declared unconstitutional. The appellants argued that the death sentence imposed against them was unfair, as it took away their dignity contrary to Article 28 of *the Constitution*; and that the fact that they had to wait painfully for death was a cruel and inhuman punishment contrary to Article 29 of *the Constitution*. They argued that in light of the progressive Constitution of Kenya, and the fact that Kenya has ratified a number of international treaties that preserve key human rights, the sentence should not be upheld as it was degrading and inhuman.

10. In addition, the appellants argued that the mandatory death sentence takes away their right to fair trial as it denies them the right to offer mitigation as provided under Sections 323, 329, 216 and 215 of the Criminal Procedure Code, which was discriminatory against them contrary to Article 27 of *the Constitution*. The appellants relied on this Court's decisions in Dismus Wafula Kilwake -vs- R, [2018] eKLR; Jared Koita Injiri -vs- Republic [2019] eKLR; and Julius Mulanda Wanje -vs- Republic [2021] eKLR where mandatory minimum sentences under Section 8 of the *Sexual Offences Act* were held to be unconstitutional as they denied the court discretion in sentencing.

11. On fair hearing, the appellants argued that it was a right which is a norm of international human rights law designed to protect individuals from unlawful and arbitrary curtailment, or deprivation of basic rights and freedom, the most prominent of which are the right to life and liberty of the person. The appellants submitted that they were never furnished with witnesses' statements that the prosecution relied on, nor were they furnished with the charge sheet and other documents. They drew the attention of the Court to the proceedings of 17th July, 2013, when one of them requested to be supplied with witness statements and the trial court indicated that the same would be supplied upon payment of the necessary charges. They argued that this was contrary to Article 50(2(c) that gives an accused person the right to have adequate time and facilities to prepare for his defence. The appellants referred to Thomas Patrick Gilbert Cholmondeley - vs- Republic [2008] eKLR and Joseph Ndungu Kagiri -vs- Republic [2016] eKLR, for the proposition that failure to provide an accused person with documents in advance violated his constitutional right to fair trial and vitiated the entire trial. The Court was thus urged to acquit the appellants.

12. The appellants added that they were never provided with legal representation which violated their rights under Article 50(2)(h), and substantial injustice occurred when the appellants who were facing the death penalty failed to obtain legal representation and documents that the prosecution relied on in the trial. Consequently, the appellants were not able to represent themselves effectively. They, therefore, urged the Court to allow the appeal, quash or vary the conviction against each of them, or order a rehearing of their sentencing by the High Court.

13. Learned Senior Principal Prosecution Counsel, Ms. Busienei, filed written submissions on behalf of the Director of Public Prosecution (DPP) who was for the respondent. In opposing the appeal, Ms Busienei identified three issues for considerations. These were: whether the death sentence was unconstitutional, whether the principle for fair hearing was adhered to; and whether the prosecution case was proved beyond reasonable doubt. On the issue of sentence, counsel relied on Nillson -vs- Republic [1970] EA 599, in which Ogallo s/o Owuora -vs- Republic [1954] 21EACA 270, was cited, and wherein it was stated inter alia that the court will not ordinarily interfere with the discretion exercised by the trial Judge, unless the Judge acted on some wrong principle, or overlooked some material factor, or the sentence is manifestly excessive in view of the circumstance of the case.

14. Ms. Busienei submitted that Section 296(2) of the Penal Code prescribes the death penalty for the offence of robbery with violence, and that although there were conflicting decisions on whether a court could depart from the mandatory sentence, the Supreme Court had given directions in Francis Karioko Muruatetu & Another -vs- Republic, Petition No. 15 & 16 (Consolidated) of 2015, commonly referred to as Muruatetu 2, wherein the Supreme Court asserted that the decision in Muruatetu 1 was not intended to apply to all cadre of cases of mandatory minimum or maximum sentences. Counsel submitted that the sentence of death imposed upon the appellants was in accordance with the law, and was neither excessive nor illegal. She maintained that the trial court had the opportunity to hear the mitigation of the appellants and that it applied its discretion in imposing the sentence.

15. On the issue of fair hearing, Ms. Busienei submitted that only one of the accused persons applied for statements; that an indication was given that the statement would be supplied; that when the matter next came up, none of the appellants complained as the statements had been supplied; that the appellants indicated they were ready for hearing; and that the issue was not raised again during the trial even though the appellants were represented by counsel. It was pointed out that the *Legal Aid Act* came into force on 10th May, 2016 two years after the hearing of the appellants' case had been concluded.

16. On the conviction of the appellants, Ms. Busienei, relying on Johana Ndungu -vs- Republic [1996] eKLR, submitted that all the ingredients of the offence of robbery with violence were met; that Rukia was able to identify all the robbers by recognition; and that Margaret and Merceline also identified some of the robbers during the identification parade. She urged the Court to dismiss the appeal.

17. This being a second appeal, by dint of Section 361(1)(a) of the Criminal Procedure Code, this Court's jurisdiction is limited to consideration of matters of law only. Matters of fact may be treated as matters of law meriting the intervention of this Court where it is demonstrated that the two courts below considered matters that ought not to have been considered, or failed to consider matters that should have been considered; or that looking at the evidence as a whole, the decision of the court was plainly wrong.

18. We have carefully considered the record of appeal, the submissions by the respective parties and the law. The issues that we discern are, first, whether the appellants' right to a fair trial were violated during the trial; secondly, whether the offence against the appellants were proved to the required standard; and thirdly, whether the sentence imposed on the appellants was illegal and or unconstitutional. All these are issues of law which we have an obligation to determine.

19. Regarding the first issue on the violation of the appellants right to a fair trial, in *Jumaan v Republic (Criminal Appeal 119 of 2022)* [2023] KECA 1070 (KLR) (22 September 2023) (Judgment), this Court, differently constituted, held that this Court is not entitled to interfere with the findings of the High Court, unless the issue raised was taken up before the first appellate court. The Court stated as follows:

> " However, it must also be appreciated that this Court is not entitled to interfere with the findings of the High Court unless the issue raised was taken up before the first appellate court. This Court in Alfayo Gombe Okello v. Republic [2010] eKLR had this to say about the issue:
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> > "....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.""

20. We have perused the memorandum of appeal which was filed in the High Court, and find no issue raised regarding the infringement of the appellants' rights to a fair trial. Similarly, neither the record of the proceedings in the High Court nor the record of proceedings in the trial court reveal any such complaint. We, therefore, find that this issue is not open to us for consideration as we do not have the benefit of the High Court's opinion.

21. The offence of robbery with violence is provided for under sections 295 and 296(2) of the Penal Code as follows:

> " 295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.
>
> 296 (2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately after the time of the robbery, he wounds,beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

22. In Johana Ndungu -vs- Republic [1996] eKLR this Court explained the offence of robbery with violence as follows:

> "In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with s.295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s.296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:
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> 1. If the offender is armed with any dangerous or offensive weapon or instrument, or

2. If he is in company with one or more other person or persons, or

3. If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person."

23. The concurrent findings by the two lower courts were that, Rukia was in her house sleeping when her house was broken into by assailants who were armed with pangas, a rungu, an axe and a metal bar. The robbers took Kshs 800 in cash from her, withdrew kshs5000 from her mobile phone, and also took various items from the house.

Rukia identified Kennedy as the one who took the cash and Samuel as the one who withdrew the money from her mpesa account and transferred it to his account. Both Rukia and Margaret identified Samuel as the assailant who attempted to defile M, and also the one who cut Rukia with a panga. R, M and M were able to clearly see the assailants as there was sufficient light from torches, and a lantern and the robbers had not concealed their faces.

24. The eye witnesses described what weapon each of the appellants was carrying. R recognized the assailants as persons well known to her. She saw Constant two days after the incident and caused him to be arrested. She also gave the names of the other assailants. Upon an identification parade being conducted, R positively identified Patrick, David and John while M identified Constant during the parade and Marceline identified Patrick, Calistus, David and John. Although Samuel does not appear to have participated in the parade it is evident that the eye witnesses knew him well as "Sammy" and identified him by recognition as the person who threatened to rape M and also meted actual violence on R by cutting her with a panga.

25. We are satisfied that the appellants were all properly identified as having been among the gang of robbers. More than one of the ingredients of the offence of robbery with violence was established, as the appellants were more than one person, were all armed with dangerous weapons, used violence and wounded Rukiya during the robbery. The appellants' conviction was therefore safe and the appeal against conviction fails.

26. On sentence, the appellants challenged the death sentence on the ground that the sentence was illegal and unconstitutional, and that the trial magistrate did not exercise his direction in sentencing. We appreciate that this was one of the considerations by the Supreme Court in declaring in Francis Kariako Muruatetu & others v Republic [2017] eKLR [Muruatetu1], unconstitutional, the mandatory nature of the death sentence for the offence of murder under section 204 of the Penal Code. However, the appellant cannot find refuge under Muruatetu 1 because the sentence of death imposed upon them is prescribed under section 296(2) of the Penal Code, for the offence of Robbery with violence, and not the offence of murder in regard to which sentence is prescribed under section 204 of the Penal Code.

27. The Supreme Court in *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015)* [2021] KESC 31 (KLR) (6 July 2021) (Directions) (Muruatetu 2), has given clear directions that its decision in Muruatetu 1 only applied to the mandatory death sentence for the offence of murder under sections 203 as read with section 204 of the Penal Code. The Supreme stated categorically:

> "We therefore reiterate that, this Court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute."

28. At paragraph *15* in Muruatetu 2, the Supreme Court directed:

> " 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."

29. As the issue of the constitutionality of the mandatory death sentence under Section 296 (2) of the Penal Code is yet to be addressed as recommended by the Supreme Court, the death sentence under section 296(2) of the Penal Code is not unconstitutional as it remains valid under the law. The trial magistrate properly imposed the death sentence upon the appellants and the learned Judge was right in upholding the sentence.

Consequently, the appellants appeal fails in its entirety and is dismissed.

DATED AND DELIVERED AT KISUMU THIS 5TH DAY OF JULY, 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