



REPUBLIC OF KENYA



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**Omukanga v Republic (Criminal Appeal 260 of 2019)
[2023] KECA 430 (KLR) (14 April 2023) (Judgment)**

Neutral citation: [2023] KECA 430 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CRIMINAL APPEAL 260 OF 2019
F SICHALE, LA ACHODE & WK KORIR, JJA
APRIL 14, 2023**

BETWEEN

OPRODI PETER OMUKANGA APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Bungoma (A. Aroni, J.) delivered and dated 30th May 2012) In HC CR Appeal No. 2 of 2012)

JUDGMENT

1. The appellant, Oprodi Peter Omukanga, was alongside two others charged with three counts of robbery with violence contrary to Section 296(2) of the *Penal Code*. He was found guilty on all the three counts and was sentenced to death in the first count while the sentencing for the second and third counts was held in abeyance.
2. The case against the appellant was constructed by the evidence of seven witnesses whose testimony was to the effect that between 4th November 2010 and 17th December 2010, the appellant committed three counts of robbery with violence. The prosecution's case was that the appellant accosted his victims while in the company of others who included his co-accused. During the incidents, they were armed with firearms and made away with several motorcycles, money, and mobile phones while also threatening to use violence against their victims. Vincent Omuwrukul Omoding (PW2) testified that during the robbery, he managed to identify one of the appellant's co-accused using the motorbike's headlight while Mathew Onyait (PW4) testified that during his encounter with the assailants, he identified the appellant as the moon was up and bright on the material night. The prosecution's evidence was that on 27th December 2010, motorcycle riders arrested the appellant upon his identification by PW4. The appellant then named his co-accused as the persons he was with during the robberies. The appellant later led Gerald Erick Mutanda (PW1), PW2, Paul Egoro Emuswuti (PW3), and PW4 to Uganda, where the stolen motorcycles were recovered with the help of



the Ugandan police. The appellant and his co-accused were then handed over to the Kenyan police by their Ugandan counterparts and later charged.

3. In his defence, the appellant alluded to bad blood between him and PW4 emanating from an occasion when he had ferried PW4's wife to the chagrin of the witness. At the conclusion of the trial, the court found the appellant and his two co-accused guilty and as already stated, sentenced each one of them to suffer death.
4. Aggrieved by the conviction and sentence, the appellant lodged an appeal before the High Court. His appeal was subsequently dismissed and the conviction and sentence by the trial court confirmed. He is dissatisfied with the judgment of the first appellate court and appeals to this Court on the grounds that the evidence of identification was flawed due to lack of an identification parade form; that identification by a single witness was not free from error; that key or essential witnesses were not called to prove the element of recovery or recent possession; that the charge sheet was defective; that the evidence on record was marred with material discrepancies and contradictions; and, that the sentence of death which was later commuted to life imprisonment was harsh and excessive in the circumstances.
5. When this matter came up for hearing on 7th December 2022, Ms Ochieng appeared for the appellant while Ms Kipyego represented the respondent. Each counsel had filed written submissions and sought to rely on them. We have noted two sets of submissions for the appellant, one by Ms Ochieng and the other by the appellant himself.

We have considered the two sets and summarize the appellant's submissions as follows. On the issue of identification, it was submitted that there was no evidence that PW4 while making his first report informed the police or the chief or even PW3 that he recognized the appellant through the use of moonlight as he later testified in court. In support of the claim that the appellant was not identified at the scene of crime by PW4, it was submitted had the appellant been identified it would not have taken PW4 ten days to arrest him.

6. The appellant further challenged the evidence of identification stating that the incident took place at night and PW4 could have been in shock and fear hence unable to identify the appellant. He also argued that had the court considered these factors, it could have found that evidence of identification by the single witness was unreliable and susceptible to error or mistake. In this regard, the Court was referred to the case of *Terekali & another v Republic* [1952] EACA, 182-186 to underscore the importance of the evidence of the first report in testing the truth and accuracy of subsequent statements made by a witness. The appellant also referred to the case of *Cleophas Otieno Wamunga v Republic* [1989] eKLR to stress the need to test with utmost care the evidence of a single witness where the evidence of identification is the only implicating factor against the accused.
7. The appellant submitted that there was failure on the part of the respondent to call crucial witnesses to prove the elements of recovery and recent possession with regard to the motorcycles. He argued that this offended the provisions of Section 147 of the *Evidence Act*. He was of the view that the evidence of one Mr. Mwizaka and Mr. Rashid was essential in linking him to the recovered goods and in the absence of those witnesses, the evidence linking him to the goods is insufficient. Reliance was placed on the case of *Bukenya v Uganda* [1972] E.A. 549 in support of the submission that failure to call the two witnesses was fatal to the prosecution case.
8. On the claim that the charge sheet was defective, it was submitted that the element of violence under Section 296(2) of the *Penal Code* ought to have been continuous from the beginning to the end of the robbery and that the charge sheet only indicated that violence was meted on the victims immediately after the robbery. The appellant was of the view that this made the charge sheet defective as it did not capture the exact elements of the offence as was required. To buttress this point, he relied on



- the decision in [Daniel Morara Mose v Republic](#) [2000] eKLR where the Court allowed an appeal on account of failure to include the word “actual” in a charge sheet. He also submitted that the evidence on record did not support the particulars of the charge in respect to the identity of the motorcycles alleged to have been stolen in counts one and two.
9. On the assertion that the prosecution case was marred with material contradictions and discrepancies, it was submitted that the evidence of PW1 and PW2 was contradictory in respect to the order of the arrests of the appellant and his co-accused. The appellant pointed out that while PW1 stated that the appellant was the first suspect to be arrested, PW2 testified that one of the appellant’s co-accused was the first suspect to be arrested. He also argued that the evidence of PW1, PW2 and PW4 was contradictory regarding the chain of events. It was his contention that such discrepancies coupled with the gaps in the prosecution case were material and fatal to the case. He relied on the decision in [John Mutua Munyoki v Republic](#) [2017] eKLR to buttress the submissions along this line.
 10. Turning to another ground of appeal, the appellant submitted that his right to legal representation was violated. According to the appellant, he ought to have been accorded legal representation by the State since the charge against him was a capital offence. It was argued that the denial of the right to legal representation under article 50(2)(h) of the [Constitution](#) was prejudicial to the appellant.
To reiterate this point, counsel referred the Court to the decision in [Douglas Kinyua Njeru v Republic](#) [2015] eKLR as cited in [Simon Ndungu Kinuthia v Republic](#) [2016] eKLR.
 11. Finally, it was submitted that the sentence of death passed, and later commuted to life sentence, denied the appellant an opportunity to mitigate and was therefore harsh in the circumstances. The appellant urged the Court to interfere with the sentence, consider his mitigation and pass a sentence commensurate to the circumstances of the case. To buttress this argument, he referred us to the cases of [Gedion Kenga Maita v Republic](#) [1997] eKLR and [Bernard Seneyo Letikirich v Republic](#) [2006] eKLR. The Court was also urged to consider the Judiciary Sentencing Policy Guidelines as well as the sentencing principles set by the Supreme Court in [Francis Karioko Muruatetu & another v Republic](#) [2017] eKLR.
 12. Ms Kipyego commenced the respondent’s submissions by acknowledging that the onus of discharging the burden of proof was with the prosecution. In rebutting the appellant’s submission that key witnesses were not called, counsel relied on the case of [Bukonya \(supra\)](#) to submit that the appellant was required to demonstrate that the alleged failure to call key witnesses was informed by ill motive on the part of the respondent. Counsel argued that it was within the powers of the respondent to decide on the witnesses that were necessary to establish their case against the appellant and that the burden of proof was fully discharged in this case.
 13. On the right to legal representation, counsel relied on the case of [John Bosco Ndwigwa & 2 others v Republic](#) [2017] eKLR to submit that the right was not absolute and that the appellant did not establish that he suffered any prejudice.
 14. On sentence, counsel, while citing Article 26(3) of the [Constitution](#), submitted that the death penalty was still constitutional in Kenya. She submitted that in warranting situations, courts were allowed to pass the death sentence against an accused person.
 15. This is a second appeal and by dint of Section 361(1)(a) and (b) of the [Criminal Procedure Code](#), our mandate is confined to matters of law. At this level of the appellate hierarchy, what is expected of us is to pay homage to the concurrent findings of fact as have been determined by the two courts. This is the norm unless the findings of fact are not supported by the evidence or that the findings so made are bad



in law. Our view in this regard concur with the decision of this Court in *Adan Muraguri Mungara v Republic* [2010] eKLR where it was stated that:

“Adan is now before us on his second and final appeal which may only be urged on issues of law (section 361 *Criminal Procedure Code*). As this Court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere.”

16. Upon giving due consideration to the record of appeal, memorandum of appeal and submissions of the parties, we identify the following issues for determination; whether the evidence of identification was properly considered by the courts below; whether there was failure to call key witnesses to prove the element of recovery and recent possession; and, whether the death sentence was merited in the circumstances.
17. The first issue we address is whether the evidence of identification was properly considered by the courts below. The appellant challenges the finding that he was properly identified on four grounds. First, that PW4 while making his first report did not inform the police or the chief or even PW3 that he recognized the appellant during the incident. Second, that the incident took place at night and the witness could have been in shock and fear hence not being able to identify the appellant. Third, that it took the respondent ten days to finally effect the arrest of the appellant and that in the circumstances, his identity could not have been known from the scene. Fourth, that the evidence of his identification was that of a single witness and should have been subjected to critical analysis.
18. The first appellate Court addressed the issue of identification of the appellant in paragraphs 7 and 8 of its judgment and arrived at the conclusion that the appellant was properly identified and linked to the motorcycles as he led the witnesses to their recovery. From the evidence on record, it was PW4 who identified the appellant at the scene of crime with the help of moonlight. It was also PW4 who led to the arrest of the appellant. The appellant faults the evidence of PW4 for reasons that, first, he did not name him in the initial report, and second, that the evidence being that of a single witness was not subjected to critical analysis.
19. To appreciate the context within which the evidence of PW4 should be considered, the case of *Abdallah Bin Wendo v R* (1953) 20 EACA 166 as cited in *Cleophas Otieno Wamunga v Republic* [1989] eKLR serves as a guide. In that case, the Court stated:

“Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”

20. The evidence of PW4 remained unchallenged even on cross-examination. The witness was firm that with the help of light from the moon, he was able to identify the appellant who he said was his neighbour. In our view, this evidence leads to a further conclusion that in as far as PW4 was concerned, he was not just able to identify an assailant, he in fact recognized a person who was well-known to him



prior to the incident. Further, in his defence, the appellant conceded to having known PW4 prior to the incident but instead alluded to a disagreement between him and the witness for carrying the wife of the witness for gain on his boda boda. We, however, note that this defence was never raised during the cross-examination of PW4 and was only brought up during the appellant's testimony. In view of the evidence that was placed before the trial court by both sides, the two courts below did not err in dismissing the appellant's defence.

21. As held in *Abdallah Bin Wendo (supra)*, notwithstanding the fact that the only evidence of identification is that of a single witness, the existence of circumstantial or direct evidence pointing to the guilt of an accused from which a court can reasonably conclude that the evidence of identification is free from the possibility of error serves to cement the element of identification. From the facts as concurrently established by the two courts below, and which courts had the benefit of analyzing the evidence and arriving at the same conclusion, the appellant was arrested by members of the public upon being identified by PW4. He then led his apprehenders to the homes of his co-accused. It is also the appellant who informed those who arrested him that the three motorcycles were in Malaba, Uganda. With the help of the Ugandan police, the appellant led the witnesses to his Ugandan contact and three motorcycles were recovered.
22. From the above summarized chain of evidence, the appellant played a key role in the recovery of the stolen motorcycles. His role intricately links him to the robberies. This is the additional evidence that serves to support the evidence of PW4 which placed the appellant at the scene of crime. This evidence also links the appellant to the robberies in relation to PW1 and PW2 as their motorcycles were also recovered from the shop to which the appellant had sold the stolen motorbikes. All the witnesses testified that it is the appellant who led them to the shop from which the recovery was made. From the foregoing deliberation, we fail to find in favour of the appellant as there was no error on the part of either the trial court or the first appellate court with regard to his identification.
23. The next frontier of our determination is the appellant's contention that the prosecution failed to call key witnesses to prove the elements of recovery and recent possession against him. He submits that the evidence of Mr. Mwizaka and Mr. Rashid was essential in linking him to the stolen goods and failure to call them to testify rendered the evidence linking him to the motorbikes insufficient. The starting point is Section 143 of the *Evidence Act* which provides that no particular number of witnesses shall, in the absence of any provision of the law to the contrary, be required for the proof of any fact. That the prosecution is vested with the discretion to determine the persons it should call as its witnesses is a matter that this Court has always restated. In that regard this Court in *Julius Kalewa Mutunga v Republic* [2006] eKLR stated as follows:

“As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.”
24. It then follows that the prosecution has discretion to assess the importance that the testimony of a witness would play, or would likely play in relation to every element of the offence charged. Oblique motive may be inferred, or adverse inference can be drawn by the court if the evidence tendered by the prosecution is not sufficient or is barely adequate. However, if the evidence is adequate or sufficient to prove the particular matter in issue or the entire case, adverse inference will not be drawn by the court. We further point out that a party desirous that adverse inference be made owing to the failure to call certain witnesses should, as a matter of good practice, identify the various aspects of the case that, in the view of that complaining party, the uncalled witnesses would have shed more light on. It is also



important for the party to establish a link between the uncalled witnesses and the set of evidence. In our view, anything short of this, would amount to mere speculation not actionable by the courts. The alleged oblique motive should be visible from the record or the evidence by itself.

25. The appellant herein argued that the evidence of Mr. Mwizaka and Mr. Rashid was essential in linking him to the recovered motorcycles. It is not in dispute that Mr. Mwizaka, a police officer from Uganda, escorted the witnesses to the shop of Mr. Rashid where the motorcycles were recovered from. That evidence is found in the testimonies of PW1, PW2, PW4 and Erneo Omojong (PW5) who all accompanied the appellant to Malaba in Uganda. They were all eyewitnesses to the recovery of the motorcycles in a location beyond our borders and which place they were led to by the appellant. Police Constable Joseph Kirimi (PW6) of Malaba Police Station in Kenya on the other hand re-arrested the appellant from Ugandan police officers at Malaba Police Station in Uganda. The appellant did not lead evidence to explain how he found himself at a police station in Uganda. Instead, he only rendered evidence surrounding his arrest from his home and detention at Malaba Police Station in Kenya. In our view, the evidence on record was sufficient to prove that the appellant led to the recovery of the motorbikes that had recently been violently stolen from the complainants.
26. Based on our analysis above, we find that the first appellate court and the trial court properly appreciated the law and evidence in arriving at the correct conclusion in relation to the appellant's conviction. The appeal against conviction is therefore without merit and is hereby dismissed.
27. The next issue is with regard to the death sentence passed against the appellant. The appellant was sentenced to death in Count 1 while he was not sentenced in respect to other counts. It is however the appellant's contention that the sentence of death, later commuted to life sentence, denied him an opportunity to mitigate and was therefore harsh in the circumstances.
28. The provisions of Section 361(1) of the *Criminal Procedure Code* limit an appeal against sentence only to instances where the first appellate court enhanced the sentence or where the subordinate court had no power to pass such a sentence. The trial court while sentencing the appellant to death noted that "the sentence provided by the law is one and it is death sentence...." The first appellate court on its part while confirming the sentence noted that the sentence was lawful. We cannot fault the two courts below in passing and confirming the sentence of death because this was the law then.
29. However, the recent judicial development from the High Court, this Court and the Supreme Court has changed the tides in as far as mandatory statutory sentences are concerned. In *Dismas Wafula Kilwake v Republic* [2019] eKLR, this Court stated that:

"...the imposition of mandatory sentences by the Legislature conflicts with the principle of separation of powers, in view of the fact that the legislature cannot arrogate itself the power to determine what constitutes appropriate sentences for specific cases yet it does not adjudicate particular cases hence cannot appreciate the intricacies faced by judges in their mandate to dispense justice. Circumstances and facts of cases are as diverse as the various cases and merely charging them under a particular provision of laws does not homogenize them and justify a general sentence.

This being a judicial function, it is impermissible for the Legislature to eliminate judicial discretion and seek to compel judges to mete out sentences that in some instances may be grossly disproportionate to what would otherwise be an appropriate sentence..."
30. We agree with the views in the cited decision. Even so, we appreciate that 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) limited its decision in *Francis Karioko*



Muruatetu & another v Republic [2017] eKLR to Section 204 of the *Penal Code* which provided a mandatory death sentence for murder convicts. However, in our view, the application of the doctrine of stare decisis requires that where a court has previously ruled on an issue similar to or closely related to an issue in question in a current case, the court is required to make its decision in alignment with the previous decision. This must, however, be construed in tandem with the rule that every case must be decided on its own merits. Combining the two rules of jurisprudence, the only aspect of a decision that a court is free to import into its own decision is the rationale applied by the previous court and not the outcome itself. If that is the case, the rationale of the Supreme Court in the *Francis Karioko Muruatetu* (*supra*) would be applicable where a court is faced with a situation in which the mandatory nature of a sentence is concerned. In *Francis Karioko Muruatetu* (*supra*) the Supreme Court observed that a mandatory death sentence violates various constitutional rights. This is what the Court said:

“(45) To our minds, what Section 204 the *Penal Code* is essentially saying to a convict is that he or she cannot be heard on why, in all the circumstances of his or her case, the death sentence should not be imposed on him or her, or that even if he or she is heard, it is only for the purposes of the record as at that time of mitigation because the court has to impose the death sentence nonetheless, as illustrated by the foregoing Court of Appeal decisions. Try as we might, we cannot decipher the possible rationale for this provision. We think that a person facing the death sentence is most deserving to be heard in mitigation because of the finality of the sentence.

...

(48) Section 204 of the *Penal Code* deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under articles 25 of the *Constitution*; an absolute right.

...

51. The dignity of the person is ignored if the death sentence, which is final and irrevocable is imposed without the individual having any chance to mitigate. We say so because we cannot shut our eyes to the distinct possibility of the differing culpability of different murderers. Such differential culpability can be addressed in Kenya by allowing judicial discretion when considering whether or not to impose a death sentence. To our minds a formal equal penalty for unequally wicked crimes and criminals is not in keeping with the tenets of fair trial.

52. ... It is during mitigation, after conviction and before sentencing, that the offender’s version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness....

56. We are therefore, in agreement with the petitioners and amici curiae that Section 204 violates article 50 (2) (q) of the *Constitution* as convicts under



it are denied the right to have their sentence reviewed by a higher Court – their appeal is in essence limited to conviction only. There is no opportunity for a reviewing higher court to consider whether the death sentence was an appropriate punishment in the circumstances of the particular offense or offender...

57. The scope of access to justice as enshrined in article 48 is very wide. Courts are enjoined to administer justice in accordance with the principles laid down under article 159 of the Constitution. Thus, with regards to access to justice and fair hearing, the State through the courts, ensures that all persons are able to ventilate their disputes. Access to justice includes the right to a fair trial. If a trial is unfair, one cannot be said to have accessed justice. In this respect, when a murder convict’s sentence cannot be reviewed by a higher court he is denied access to justice which cannot be justified in light of article 48 of the Constitution.
56. To our minds, any law or procedure which when executed culminates in termination of life, ought to be just, fair and reasonable. As a result, due process is made possible by a procedure which allows the Court to assess the appropriateness of the death penalty in relation to the circumstances of the offender and the offence. We are of the view that the mandatory nature of this penalty runs counter to constitutional guarantees enshrining respect for the rule of law.”
31. Even though in its 2021 directions in Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions), the Supreme Court limited the applicability of its decision in Francis Karioko Muruatetu & another (supra) to the death sentence under section 204 of the Penal Code; we have no doubt that the deficits identified by the Court in the above excerpt applies to all mandatory death sentences. For instance, the rights to fair trial and dignity as discussed by the Supreme Court above are inherent and applicable to all accused persons. In appreciating and ensuring the rights of all accused persons are preserved, a court within our jurisdiction would, of necessity, refer to the decision of the Supreme Court in a bid to protect and preserve these rights. Similarly, we adopt the opinion of the Supreme Court expressed above in dealing with the death sentence passed by the trial court and confirmed by the first appellate court in this matter, even though it was in respect of a robbery with violence case.
32. The trial court, going by the provisions of Section 296(2) of the Criminal Procedure Code, proceeded on the basis that it lacked discretion to render a different sentence other than the death sentence. It is on this basis that we accept the invitation by the appellant to intervene on the sentence. The provision to Section 333(2) of the Criminal Procedure Code requires the court when passing sentence to take into account the period already spent in custody by the accused. The Sentencing Policy Guidelines issued by the Kenyan Judiciary in 2016 at paragraph 23.9 provides for how to conduct a balancing act between the aggravating and mitigating circumstances during sentencing. The appellant disclosed that his sentence has been commuted to life imprisonment. Paragraph 23.10 of the guidelines provide that even in instances calling for life sentence, courts should still endeavor to impose a sentence in keeping with the spirit of these guidelines, which includes the promotion of consistency and certainty in the sentencing process hence enhancing delivery of justice and promoting confidence in the judicial process.
33. In this matter, the aggravating factors were that the appellant had a rifle. He tied up his victims and left them in middle of the road in the dead of the night. We also note that the theft of motorcycles,



the common means of transport and income in most parts of this country, is rampant and should be discouraged through imposition of stiff sentences. However, the mitigating circumstances are that the level of violence involved was not extreme and the stolen motorcycles were subsequently recovered with the aid of the appellant. He was also a first offender. In the circumstances, cognizant that the statutory sentence is a death sentence, and in consideration of the mitigating and aggravating factors, a 30 years jail term is a reasonable sentence.

34. The upshot of the foregoing is that the appeal against conviction has no merit and is hereby dismissed. The appeal against sentence has merit and is hereby allowed; the death sentence (already commuted to life imprisonment) is hereby set aside. The appellant is instead sentenced to 30 years imprisonment. From the record, the appellant was held in custody throughout the trial. In line with the proviso to Section 333(2) of the *Criminal Procedure Code*, we direct that the sentence shall run from January 7, 2011 being the date the appellant made his first court appearance.

DATED AND DELIVERED AT ELDORET THIS 14TH DAY OF APRIL, 2023.

F. SICHALE

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

