Sabaya v Republic (Criminal Appeal 106 of 2022) [2023] KECA 483 (KLR) (12 May 2023) (Judgment) (with dissent - SG Kairu, JA)

Neutral citation: [2023] KECA 483 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL 106 OF 2022

SG KAIRU, JW LESSIT & GV ODUNGA, JJA

MAY 12, 2023

BETWEEN

CHRISTOPHER BILAL SABAYA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal from the judgement of the High Court of Kenya at Mombasa (Ong'injo J) dated 10th January 2022 in HCCRA No. 130 of 2019) (Original Shanzu SPM CR.C NO. 575 of 2015)

JUDGMENT

1. The Appellant herein, Christopher Bilal Sabaya, was charged before the Senior Principal Magistrate's Court at Shanzu in Criminal Case No 575 of 2015 with one count of Robbery with Violence Contrary to Section 295 as read with 296(2) of the *Penal Code*. The particulars were that on the April 7, 2015 at Borabora Area, in Kisauni Sub-county, within Mombasa County, while armed with a dangerous weapon namely a gun robbed David Kyalo Kinyingi of cash Kshs 290,000.00 and immediately before the time of such robbery, used actual violence on the said David Kyalo Kinyingi.
2. Upon his arraignment before the Magistrate's Court, he pleaded not guilty. After hearing the evidence from 6 prosecution witnesses and the Appellant, the Learned Trial Magistrate in his amended judgement dated October 30, 2020, found the Appellant guilty and proceeded to sentence him to death pursuant to Section 296(2) of the Penal Code.
3. Upon his appeal to the High Court in Mombasa High Court Criminal Appeal No 130 of 2019, the Court (A Ong'injo, J) dismissed the appeal in its entirety.
4. Before us the Appellant raised the following grounds of appeal:

1. That the learned judge erred in law in upholding the convicting of the appellant while relying on weak, tenuous, incoherent, unbelievable and discredited dock identification evidence allegedly connecting the appellant to the alleged offence of robbery with violence.

2. That the learned judge erred in law in upholding the convicting of the appellant while basing it on speculative, contradictory, inconsistent, uncorroborated, weak, tenuous, incoherent, unbelievable and discredited circumstantial evidence allegedly connecting the appellant to the alleged offence of robbery with violence.

3. That the learned judge erred in law in upholding the convicting of the appellant while Mensrea & Actus Reus was never established to the required standards of beyond reasonable doubt, for no recoveries were made to link the Appellant to the alleged offence of robbery with violence.

4. That the learned judge erred in law in upholding the conviction of the appellant while ignoring his defence of Alibi and failure by the prosecution to link the arrest of the appellant with the alleged offence of robbery with violence.

5. That the learned judge erred in law in upholding the sentence of death, in the absence of any aggravating circumstances and agreeing to be held hostage by legislation by failure to exercise discretion for the fact that the Appellant remained to be a first time offender.

5. The appeal was heard on virtual platform on November 15, 2022 during which the Appellant, was represented by Learned Counsel, Mr Chacha Mwita while Ms Vallerie Ongeti held brief for Ms Ngina for the Respondent.

6. Learned Counsel relied on their written submission in which he relied on *Oluoch vs Republic 1985 KLR 549* as cited in the case of *David Karongo Gathui vs Republic [2006] eKLR* and submitted that the learned trial Magistrate misdirected herself as to what ingredients constitute the charge of Robbery with Violence contrary to Section 296(2) of Penal Code; that the prosecution failed to prove that an offence of robbery with violence did ever took place on the April 7, 2015 and that PW1 was a victim in the said robbery with violence and that the Appellant was the assailant & that he was armed. It was further submitted that the primary prosecution witnesses to the alleged robbery (PW1, PW2, PW3 & PW4) did present serious contradictory, inconsistencies and uncorroborated evidence going to the root of the case and that the ensuing serious doubts ought to have been considered in favour or to the advantage/benefit of the Appellant. It was further submitted that all the primary prosecution witnesses did not attempt to describe the alleged assailant in their first report to the police and considering that the police did implant the image of the Appellant in the minds of the primary prosecution witnesses long before they had recorded their respective statements, any claims to any subsequent identification was suspect.

7. Based on *Francis Kariuki Njiru & 7 others v Republic [2001] eKLR* and *Donald Atiema Sipendi v R (2019) eKLR* it was submitted that the identification evidence did not irresistibly point at the Appellant herein; that all that the prosecution relied on so as to link the Appellant to the alleged offence was dock identification, being the most unreliable form of identification as echoed in *John Mwaura Muchiri vs Republic (2007) eKLR*, *Maitanyi vs Republic (1986) KLR 198* and *John Mwangi Kamau vs Republic (2014) eKLR* respectively.

8. It was further submitted that in light of the Appellant's evidence that he was not at the scene, the Learned Trial Magistrate shifted the burden of proof in cases where an alibi defence is raised, to the Appellant; that failure to prove any of the ingredients of the offence of Robbery with violent and further failure to link the Appellant to the alleged robbery, left the alibi defence unshaken & unrebutted and diluted the claims of a possible positive identification of the alleged assailant.

9. Mr Mwita, in his oral address submitted that the Appellant was charged with the offence under Sections 295 and 296(2) of the *Penal Code* hence the charge sheet offended the rule against duplicity. It was submitted that the issue was not raised before the trial court due to the fact that the appellant was unrepresented and did not appreciate that point. It was further submitted that the credibility of witnesses was wanting particularly as regards the evidence of the withdrawal of the sum in question. According to learned counsel, the money could not have been stolen if it was merely withdrawn.

10. It was further submitted that from the evidence of PW6, there were two different firearms at the scene but only one cartridge was found. However, according to PW1, whereas there were two firearms, involved only one was presented before the Court. According to learned counsel, whereas the law requires that the witness describes the assailant in the first instance, in this case, there was no attempt to describe the assailants.

11. On sentence, learned counsel submitted that whereas judicial officers have discretion in sentencing, in this case instead of exercising that discretion, the learned trial magistrate advised the appellant to seek revision from the High Court. It was submitted that the learned Judge erred in failing to point out any aggravating circumstances that would justifying upholding the death sentence by the learned trial magistrate.

12. On her part, Ms Ongeti relied on her written submissions in which this Court was urged not to delve into matters of fact where there are concurrent findings of fact by both the trial Court and the first appellate court unless it is demonstrated that there is an error apparent on the face of the record, or that the Learned Judge of the first appellate Court misdirected her/himself in material particulars on the evidence and the law. According to learned counsel, sentence is not a matter of law but of fact hence the second appellate court cannot be moved to overturn sentence unless the sentence is illegal as opposed to being excessive which is a matter of fact. This submission was based on Adan Muraguri Mungara v Republic, Cr No 347 of 2017 (Nyeri), that this court 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.

13. It was submitted that from the testimony of PW1, PW2 and PW3 the evidence of identification was cogent and corroborated and that the Appellant was properly identified.

14. As regards circumstantial evidence, it was submitted that the evidence presented before the trial Court was direct evidence and that both the trial Court and the first appellate Court, upon evaluation of the evidence arrived at a finding that the evidence adduced by the witnesses was direct, corroborated and cogent.

    Therefore, there was no need for the two Courts below to warn themselves of the conditions for the application of circumstantial evidence as laid down in various decisions.

15. Before us, it was urged that as long as the evidence in toto clearly demonstrates that the Appellant possessed the requisite guilty mind, guilty knowledge and wilfulness to prove mens rea combined with the fact of commission of the offence, he was criminally liable; that the Appellant did not give an account of the event of the material date and that in any case the Appellant raised the defence of alibi at the defence stage but the same did not dislodge or controvert the evidence against him to raise any reasonable doubt in the minds of the two Courts below; that the defence was a mere denial of knowledge of the facts as proved by the watertight evidence against him and his evidence did not

controvert or dislodge the prosecution's evidence in any way or at all hence this defence was rightfully dismissed as being an afterthought based on *Erick Otieno Meda v Republic [2019] eKLR*.

16. On the sentence, it was submitted that the statutory penal provision for the offence of Robbery with Violence is death and that aggravating factors of the offence were brought to the attention of the trial Court regarding the Appellant's previous conviction in similar circumstances to the offence he was convicted of. It was noted that the Appellant was not remorseful at all in his mitigation. Notwithstanding the decision of the Supreme Court in *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR* we were urged to uphold the sentence meted out to the Appellant and dismiss the appeal.

Analysis And Determination

17. This being a second appeal our mandate is limited by Section 361(1) (a) to consider issues of law only but not matters of fact that have been tried by the first court and re-evaluated on first appeal. In *Njoroge v Republic [1982] KLR 388* it was held by this Court on the said mandate on a second appeal:

> ' On a second appeal, we are only concerned with points of law and consider ourselves bound by the concurrent findings of fact arrived at in the courts below, unless shown to be based on no evidence.'

18. As to what constitutes 'matters of law' in relation to this Court's jurisdiction as the second appellate court, the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji and 3 others [2014] eKLR* characterised the three elements of the phrase 'matters of law' thus:

    (a) The technical element: involving the interpretation of a constitutional or statutory provision;

    b. The practical element: involving the application of the *Constitution* and the law to a set of facts or evidence on record; and

    c. The evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record.'

19. This Court however held in *Jonas Akuno O'kubasu v Republic [2000] eKLR* that:

> ' It is correct that on first appeal the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the material before the judge or magistrate with such other material as it may decide to admit. The appellate court must make up its own mind not disregarding the judgement appealed from but carefully weighing and considering it. On second appeal, it becomes a question of law as to whether the first appellate court on approaching its task, applied or failed to apply such principles.'

20. It was similarly held in *Karani vs R [2010] 1 KLR 73* that:-

> ' This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.'

21. We are also guided by the decision in Adan Muraguri Mungara v R CA Cr App No 347 of 2007 where it was held thus:

> ' As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by 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.'

22. The determination of this appeal must therefore be based on the above principles. We shall briefly visit the facts of the case purely to satisfy ourselves whether the two Courts below carried out their mandate as required in law.

23. The prosecution evidence was that on April 7, 2015, PW1 had withdrawn some money from the Bank out of which he had with him Kshs 290,000.00 which they intended to place in a safe in the shop. Upon reaching his shop, he was approached by the appellant who inquired whether he was selling airtime cards and was directed by PW1 to purchase the same from a nearby shop. However, as PW1 was in the process of opening his shop, the appellant pulled out a pistol from a bag and ordered PW1 to enter the shop and hand over the money to him which PW1 did and the appellant left.

24. In the meantime, PW2 on seeing the appellant removing the gun, ran raised an alarm and when the public started shouting, the appellant shot in the air and carjacked a vehicle and drove away. According to him, that was the first time he saw the appellant. PW3 was one of the members of the public who witnessed the incident. The driver whose vehicle was carjacked was being driven by PW4 who was ordered by the Appellant to drive off. After driving off, the Appellant ordered him to get off the car and drove off alone.

25. PW5, the Investigating officer, received information that the Appellant had been arrested at Voi in connection with another offence and he sought for a production order from Manyani Prison after which the Appellant was transferred to Shimo La Tewa Prison. After which he was remanded at Bamburi Police Station for the purposes of conducting an Identification Parade which the Appellant declined to attend on the ground that his photographs had been circulated in the media. It was his evidence that two spent cartridges were recovered from the scene. The same were examined by PW6 who formed the opinion that they were fired by different guns.

26. In his evidence, the Appellant stated that he knew nothing about the incident. According to him, on May 3, 2015, while he was heading to Taveta, he was arrested at Voi together with 4 other people with whom he was in the same vehicle but who were released. Upon being taken to Voi Police Station, he was interrogated by Anti-Terrorism Police Unit about his alleged trips to Somali. The following day he was arraigned before the court and charged with the offence. He denied any knowledge of the offence in question.

27. The two courts below having arrived at a concurrent finding of fact that the Appellant was properly identified by PW1, PW2, and PW3, we can only interfere with that finding if satisfied that the finding was 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. In this case PW1, PW2 and PW3 all testified that though they did not know the Appellant prior to that day, they could identify him. While PW1 and PW2 may not have had sufficient time with the Appellant, the Appellant hijacked PW3's vehicle and commandeered it before ordering PW3 out and took over the vehicle. It is true that the evidence of PW1, PW2 and PW3 as regards the identification was dock

identification but this was occasioned by the refusal by the Appellant to participate in the identification parade. In *Muiruri & 2 Others v Republic [2002] 1 KLR 274*, this Court expressed itself as hereunder:-

> ' We do not think it can be said that all dock identification is worthless. If that were to be the case then decisions like Abdulla bin Wendo v Rep (1953) 20 EACA 166, Roria v Republic [1967] EA 583, and Charles Maitanyi v Republic (1986) 2 KAR 76, among others, which over the years have been accepted as correctly stating the law concerning the testimony of a single witness on identification will have no place in our jurisprudence. In those cases courts have emphasized the need to test with the greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to found a conviction. We do not think that evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification.'

28. The two courts below were satisfied that that on the facts and circumstances of the case the evidence was true and we have no reason to disagree with them.

29. As regards the issue whether it was proper to convict the Appellant on the evidence adduced, based on the law and the authorities, we are unable to interfere with the concurrent evidence of the courts below, since whether or not the evidence was believable is a factual issue and we are not satisfied that the conditions under which we are entitled to interfere with such findings of fact exist in this appeal. We also find that the Appellant was convicted based on the direct evidence of PW1, PW2 and PW3 hence the law relating to conviction based on circumstantial evidence was not applicable.

30. As regards the establishment mens rea and actus reus, Section 296 of the Penal Code provides as follows:

    1. Any person who commits the felony of robbery is liable to imprisonment for fourteen years.
    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 before 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.

31. The definition of robbery however appears in section 295 thereof as follows:

> '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.'

32. In this case, the evidence was that the Appellant was armed with a pistol. In *Masaku vs Republic [2008] KLR 604*, the Court reiterated that:

> ' It is now well settled that any one of the following need be proved to establish the offence:
>
> 1. If the offender is armed with any dangerous or offensive weapon or instrument or
> 2. If the offender is in the company of one or more offenders or

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

'It should be remembered that a single ingredient is sufficient.'

33. Although the weapon was not recovered and there was no evidence connecting the Appellant with the cartridge that was produced in Court, the Appellant was not charged with being in possession of a firearm. In our view in light of the evidence of PW1, Pw2 and PW3 as regards the identification of the Appellant which evidence was to the effect that he was armed, the failure to recover the weapon was not fatal to the conviction since the offence was not that of being in possession of a firearm.

34. Before us, it was argued by Mr Chacha Mwita that the charge sheet was incurably defective because it was framed as 'contrary to section 295 as read together with section 296 (2) of the Penal Code'. This Court in *Paul Katana Njuguna v Republic [2016] eKLR* faced with a similar issue while appreciating that there is no offence known as robbery with violence under section 295 or 296, held that:

> ' Thus, Section 296 of the Penal Code has two provisions. This is subsection (1) that is a penal provision providing the sentence for the felony of robbery; and subsection (2)that creates the offence of aggravated robbery and provides a stiffer penalty of capital punishment. Neither Section 295 nor Section 296 refers to an offence of 'robbery with violence'. Indeed, the felony termed robbery as described under Section 295 of the *Penal Code* may involve use of actual violence or threat to use violence, while the aggravated offence of robbery as described under Section 296 (2) of the *Penal Code* may be complete with use of violence or no use of violence as long as there has been a theft and the offenders are either armed with offensive weapons or offenders are more than one.'
>
> We appreciate that Section 296 (2) of the *Penal Code* creates the offence of robbery with violence or aggravated robbery. In our view, the offence of robbery must first be demonstrated before proceeding to demonstrate the ingredients provided in Section 296 (2) of the *Penal Code*. As a corollary to this proposition, an accused person facing those charges would in defence seek to demonstrate that no offence of robbery was committed and that the ingredients alleged under Section 296 (2)were absent or were not demonstrated by the prosecution.'

35. The court however, held that such a defect is not fatally defective and summarized the purpose of the rule against duplicity as follows:

> ' As we have already noted the rule against duplicity is to enable an accused know the case has to meet. We accept as the correct position in law that uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed. If there is no risk of confusion in the mind of the accused as to the charge framed and evidence presented, a charge which may be duplex will not be found to be fatally defective.'

36. Therefore, the issue which a court has to consider is whether the alleged duplicity prejudiced the Appellant in any way. From the record, it is clear that the Appellant, though unrepresented, fully participated in the trial and cross-examined the witnesses. A perusal of the cross–examination reveals that the same was conducted in a manner that showed the Appellant understood the charge facing him. He did not allege during trial that he was unable to understand the charges because they were imprecise as submitted. This ground of appeal fails.

37. On alibi defence, it is important to understand what that defence entails. In *Patrick Muriuki Kinyua & Another vs Republic Nyeri Criminal Appeal No 11 of 2013 (UR)* this Court held that:

> ' An alibi is a plea by an accused person that he was not there (was not present) at the place where the crime was committed at the time of the alleged commission of the offence for which he is charged.'

38. In our view, where, as in this case, the Appellant's evidence explains the evidence surrounding his arrest which took place on a different date and at a different place from the date and the time when the offence was alleged to have been committed, that evidence does not amount to an alibi defence. Further, as this Court held in Erick Otieno Meda v Republic [2019] eKLR an alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view. Accordingly, we find that this ground of appeal similarly fails.

39. It was contended that the learned judge erred in law in upholding the sentence of death, in the absence of any aggravating circumstances and agreeing to be held hostage by legislation by failure to exercise discretion for the fact that the Appellant remained to be a first time offender. From the record, it is clear that the learned trial magistrate imposed the death sentence on the Appellant simply because, in her view, that was the mandatory sentence. The learned judge was swayed in upholding the said sentence by her interpretation of the decision of the Supreme Court in Francis Karioko Muruatetu & Another vs Republic: Katiba Institute & 5 Others (Amicus Curiae) [2021] eKLR. Our understanding of that case is that it was only dealing with the offence of murder and not any other offence. Therefore, as regards the sentences in respect of other offences in which mandatory sentences are prescribed, we understand the position of the Supreme Court to be that the court did not determine whether or not the principles laid down in that matter were applicable to other cases with mandatory sentences.

40. On our part, we do not see why the principles in that case regarding the prescribed death sentence in murder cases cannot apply with similar force to offence such as robbery with violence where a similar sentence is prescribed. Accordingly, it is our view and we hold that nothing bars this Court from finding that mandatory sentences, if imposed merely because the law prescribes the same without considering the circumstances of the case, is contrary to the letter and spirit of the *Constitution* as such sentences, prima facie, do not permit the Court to consider the peculiar circumstances of the case such as the circumstances under which they are committed. We find that even without the application of the ratio in the Muruatetu Case, whereas the death sentence prescribed is not unconstitutional by the mere fact of such prescription and the trial courts are at liberty to impose it, the imposition of the same, as the mandatory sentences, does not meet the constitutional threshold particularly Article 28 of the *Constitution*.

41. In our view the learned Judge erred in her application of the Muruatetu Case in upholding the sentence. In this case, the Appellant was not a first offender as contended. It was disclosed that he was serving another sentence for 25 years. However, in this case, no one was harmed. This Court in *Charo Ngumbao Gugudu vs Republic [2011] eKLR*, held that:

> ' It has long been a principle of sentencing that a maximum sentence should only be meted out to the worst offender under the particular section that the offender is charged.'

42. In our view, death sentence in these circumstances was not warranted. It is unfortunate that though the Appellant was given an opportunity to mitigate, he declined the offer to do so. In these circumstances, this Court is at liberty, based on the record, to impose an appropriate sentence. In our view, the circumstances are different from where no opportunity is afforded at all for mitigation, in which event

the proper thing to do is to remit the matter back to the trial Court to take mitigation and impose an appropriate sentence. We, in the circumstances, set aside the sentence of death imposed on the Appellant and substitute therefor a sentence of 30 years in prison to run from the date of his conviction.

43. It is so ordered.

44 This judgement is delivered pursuant to rule 34(3) of the *Court of Appeal Rules, 2022* as Gatembu, JA declined to sign.

Dated and delivered at Mombasa this 12th day of May,2023.

J. LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR