Mutisya alias Karish v Republic (Criminal Appeal 175 of 2016)
[2023] KECA 1013 (KLR) (28 July 2023) (Judgment)

Neutral citation: [2023] KECA 1013 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 175 OF 2016

MSA MAKHANDIA, AK MURGOR & PM GACHOKA, JJA

JULY 28, 2023

BETWEEN

BENSON MUSYOKA MUTISYA ALIAS KARISH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court at Machakos (B. Thuranira Jaden and L. Mutende, JJ.) delivered on 16th July 2014 in HCRA No 293 of 2010)

JUDGMENT

1. This is a second appeal arising from a judgment of the trial magistrates' court dated September 7, 2010, where the appellant, Benson Musyoka Mutisya alias Karish was charged with the offence of robbery with violence contrary to section 296 (2) of the *Penal Code*. The particulars of the offence were that on January 13, 2006 at about 1.00 a.m. at Soome village, Kavuta Sub- location, Itoleka Location in Kitui District of the former Eastern Province, jointly with others, while armed with dangerous weapons namely pangas and rungus robbed Issack Kimeu Syengo of cash Kshs. 1,100, 20 kilogrammes of maize, 10 kilogrammes of cooking oil, 2 jackets, one radio cassette make National, one pair of bed sheets all valued at Kshs. 11,750 and at or immediately after the time of such robbery, used actual violence against Issack Kimeu Syengo, PW1.

2. The appellant pleaded not guilty and at the hearing, the prosecution called 7 witnesses. After a full trial, the trial magistrate found the appellant guilty, convicted him of the offence and sentenced him to death.

3. Dissatisfied with the decision, the appellant appealed to the high court where in a judgement dated July 16, 2014, the court dismissed the appeal and upheld both the conviction and sentence.

4. Aggrieved by the high court's decision, the appellant filed this appeal on grounds set out in a supplementary memorandum of appeal that the learned judges failed to subject the entire evidence

tendered at the trial court to fresh and independent evaluation and further, failed to consider the grounds of appeal and submissions lodged by the appellant thereby arriving at the wrong conclusion; in failing to find that the appellant's conviction which was based on contradictory and uncorroborated evidence of visual identification of the appellant; in disregarding the appellant's defence and breaching his right to a fair hearing; and in upholding the appellant's conviction without disclosing their points for determination contrary to the provisions of sections 169 (1) and (2) of the *Criminal Procedure Code*.

5. Both the appellant and the respondent filed written submissions. When the appeal came up for hearing, learned counsel for the appellant, Ms J.A. Onyancha submitted that the conviction by the high court and the trial court was based on visual identification of the appellant as one of the perpetrators, yet none of the witnesses named the appellant, as one of their assailants; that rather they listed their assailants as Mutisya Ngulu, Musyoka (also known as Bernard), Kyalo, Bernard Mulwa, Musyoka Mutisya. Counsel submitted that the identification of the appellant by the witnesses was therefore not free from error which rendered the conviction unsafe.

6. Counsel further submitted that the judgment of the trial magistrate did not comply with section 169 (1) and (2) of the *Criminal Procedure Code* as it did not specify the grounds on which the appellant was convicted.

7. On the final issue regarding the sentence, counsel submitted that the mandatory death sentence as prescribed under section 296 (2) of the *Penal Code* was unconstitutional to the extent that it denied courts the ability to exercise their discretion in sentencing a convicted person by taking into account the nature of the offence and the accused's mitigation.

8. In response, learned prosecution counsel for the state, Mr Okachi submitted that the prosecution proved its case to the required standards, and that the trial court arrived at a proper decision which was upheld by the first appellate court after it properly analysed the evidence.

9. On identification, counsel submitted that the appellant was not a stranger to the witnesses who identified him; that the robbery took about one hour under bright moonlight and as a consequence, the appellant was properly identified.

10. With respect to the sentence, counsel submitted that the death sentence is still available in cases of robbery with violence, and that the appellant was properly sentenced in the circumstances.

11. This is a second appeal. The mandate of this court is specified in section 361(1) of the *Criminal Procedure Code* to the effect that in second appeals, this court's jurisdiction is limited to matters of law only. The court ought not to interfere with factual matters save for instances where the findings made are not supported by the evidence on record. See *Adan Muraguri Mungara v Republic* [2010] eKLR and *David Njoroge Macharia v Republic* [2011] eKLR.

12. In observance of the above guidance, the following issues arise for determination:

    (i) whether the offence of robbery with violence was proved to the required standards;

    (ii) whether the appellant was properly identified;

    (iii) whether high court's judgment failed to adhere to sections 169(1) and (2) of the *Criminal Procedure Code*

    (iv) whether the high court properly evaluated the evidence; and

    (v) whether the mandatory death sentence for robbery with violence was unconstitutional.

13. Before determining the issues set out as above, a brief outline of the facts is necessary.

14. On the night of January 13 and 14, 2006 at about 1.00 a.m., PW1 was awoken by the sound of an object falling outside his house. He also heard a person calling his name loudly demanding that he open the door. There was also the sound of people walking outside his bedroom window. The people broke the window and flashed a torchlight on him. He screamed for help. They proceeded to hit the front door, and when it opened, he saw a person he identified as, Mutisya Ngulu, pick up a panga and enter the house, followed by 2 people. The assailants proceeded to attack him, cutting his left hand and his head. They then led him to the bedroom while demanding money from him.

15. PW1 pointed to a shirt with cash of Kshs. 1,100, but they continued to beat him whilst demanding more money; that they then went and pulled Judith Kimeu Syengo, PW2, his daughter from her bedroom. They took them outside to a thatch house where they searched for money. When they did not find any, they cut PW1's thighs, and hit him on the head with the flat side of a panga until he fell unconscious. He regained consciousness the following day at Kitui Hospital and was given the names of the attackers by Simon Muthengi, PW3 and PW2. After he was discharged, he recorded a statement with the police.

16. PW2 reiterated PW1's evidence. She added that though the robbery was at night, there was bright moonlight and the assailants had torches and she was able to see them; that one of the assailants hit her with a machete on her forehead and she could see the others beating her father and demanding for money. She was taken outside, where she identified the appellant who was wearing a white shirt; that though there were 4 attackers, she identified 2 of them as Kyalo and Mutisya, the appellant. She also saw them take away maize, cooking fat, Kshs. 1,500. They were thereafter locked in the house.

17. Simon Mutua, PW3, a neighbour corroborated PW1 and PW2's evidence. At about 1.00 a.m., he was coming from his farm of Ithumbu where he had gone to check on his charcoal kiln that he had left burning during the day. On the way, he heard a door in PW1's homestead being hit. He stood 15 m away behind a fence and saw the appellant standing outside the kitchen. He also saw one Bernard Mulwa standing beside a toilet; that he was able to see them clearly because there was a bright shiny moon. When they noticed him, he ran away and took cover under a tree. After sometime, he saw 2 people leave the house carrying a briefcase. They passed about 6m away from where he was hiding. He identified them as Kyalo, Bernard Mulwa, Musyoka Mutisya, the appellant and Mutisya Njeru.

18. He rushed home and woke up Kiema Kamwana PW4 who accompanied him to PW1's house which they found locked from the outside. When they opened the door, they saw PW1 and PW2 in the house. PW1 was bleeding from the head and his hand, and was taken to Kitui Hospital. PW4 stated that he came from the same village as the appellant whom he had known for 15 years.

19. PW4 and Cosmus Ngei, PW5, confirmed that they were woken up by PW3 who informed them of the attack.

20. PC Joseph Karanja, PW6, received the report of the robbery on January 19, 2006 from PW1. He stated that PW1 was admitted in the hospital with injuries sustained during the robbery. He also confirmed that a P3 form was filled by Mr Kamwea, a fellow clinical officer at Kitui Hospital who had since been transferred to Mbooni Hospital; that attempts to bond Mr Kamwea for the hearing were unsuccessful. He stated that he knew Mr Kamwea and had worked with him for two years and knew his handwriting and signature.

21. In his defence, the appellant denied committing the offence and stated that on the night in question, he was at home and had slept in his house with the rest of his family members.

22. Regarding the arising issues, we begin with whether or not the prosecution proved its case beyond reasonable doubt.

23. The elements of robbery with violence are enumerated in section 296(2) of the *Penal Code*. The ingredients for the offence were set out in the case of *Johanna Ndung'u v Republic* [1996] eKLR as follows:

> "... Therefore, the existence of the afore described ingredients constituting robbery are presupposed in the three sets of circumstances prescribed in section 296 (2) which we give below and any one of which if proved will constitute the offence under the subsection:
>
> (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."

24. As held in *Oluoch v Republic* [1985] KLR 549, proof of any one of the above stated ingredients is sufficient to sustain a conviction.

25. The record is clear that the appellant together with others whilst armed with dangerous or offensive weapons, to wit, pangas robbed PW1. According to PW2 and PW3, they saw four assailants that carried out the robbery. The robbers violently cut and hit PW1 and PW2, with the pangas, and robbed PW1 of cash Kshs. 1,100, 20 kilogrammes of maize, 10 kilogrammes of cooking oil, 2 jackets, one radio cassette make National, one pair of bed sheets all valued at Kshs. 11,750. Based on this evidence, there can be no doubt that PW1 and PW2 were violently robbed on the night in question.

26. On identification, the appellant's complaint is that he was not properly identified as all the prosecution witnesses did not, refer to him by his correct name of Benson Musyoka Mutisya, but by different names, which were not his.

27. In this regard, the high court had this to say;

> "Both PW2 and PW3 mentioned the name of the Appellant to the complainant. The complainants evidence confirms that PW2 and PW3 gave the names of the attackers. PW5 Cosmus Ngei, a brother to the complainant also gave appellant...We are satisfied that the witnesses from the scene (PW1, PW2 and PW3) were able to see and identify some of the assailants including the Appellant without any possibility of error."

28. PW1 identified the appellant as one of his assailants. PW2 testified that since the moonlight was bright and with the help of the assailants' torch lights, she saw and recognised the appellant who was wearing a white shirt on the material night. She stated that he was well known to her as their neighbour, Musyoka.

29. PW3 also identified the appellant as Musyoka Mutisya. He confirmed that he had known him for close to 15 years; that with the aid of a bright moonlight, he clearly saw him. He was wearing a white shirt on the night in question.

30. In the case of *Anjononi v Republic* [1980] KLR 59, the court rendered itself thus;

> " Recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another"

31. The evidence is clear that, the appellant was well known to PW2 and PW3. They both stated that the moon was bright and in view of the close proximity to him, they both saw that he was wearing a white shirt, and they recognised him. In his defence, the appellant confirmed that PW2 and PW3 have known him since childhood. This was therefore a case of recognition by the witnesses as opposed to identification of a stranger. As such, the appellant was properly identified by the prosecution witnesses.

32. Regarding the issue that though the person charged with the offence was, Benson Musyoki Mutisya, yet none of the witnesses testified against him, we have carefully considered the evidence, and are satisfied that, the witnesses referred to him as Musyoki which is his name, and also placed him at the *locus in quo* on the night in question. This ground is therefore without merit.

33. Having so found as we have above, as did the trial court and the high court, we too have come to the conclusion that the offence was proved to the required standard; and that the conviction was sound.

34. Concerning the contention that the high court's judgment did not set out the issues for determination and reasons contrary to the requirements of sections 169(1) and (2) of the *Criminal Procedure Code*, the provisions stipulate that;

> " Every such judgment shall except as otherwise expressly provided by this court, be written by or under the direction of the presiding officer of the court, in the language of the court and shall contain the point or points for determination, the decision thereon and the reason for the decisions and shall be adopted and signed by the presiding officer in the open court at the trial of pronouncing it."

35. This Court in the case of *Hawaga Joseph Ansanga Ondiasa v Republic*, Criminal Appeal No 84 of 2001 held that;

> " It is true that the trial magistrate may be criticized for the perfunctory way in which he expressed himself in his judgment. However, even if we were to hold that he did not prepare his judgment strictly in accordance with section 169 of the *Criminal Procedure*, this would not, of itself mean that the conviction of the appellant was wrong or is to be invalidated."

36. Having made the above observation, a review of the first appellate court's judgment shows that the learned judges set out the offences the appellant faced, the evidence tendered by both the prosecution and the defence, the appellant's grounds of appeal which were that, the trial magistrate convicted the appellant on uncorroborated evidence; that the appellant was not properly identified; that the offence was not proved to the required standard, his *alibi* evidence was not considered, and finally that the mode of his arrest was questionable. Our consideration of the judgment discloses that the high court addressed each and every issue raised to the extent that we are satisfied that the requirements of section 169(1) of the *Criminal Procedure Code* were duly complied with. This ground is therefore lacking in merit.

37. Turning to the allegation that the high court failed to properly evaluate the evidence, and to reach its own independent conclusion, upon our re- analysis of the evidence, it cannot be controverted that the learned judges considered the prosecution evidence, and after weighing it against the appellant's *alibi*

defence, that he was at home with his family on the night in question, came to the conclusion that it did not in any way discredit the evidence of PW2 and PW3 that the appellant was among the assailants that attacked and robbed PW1 that night. In our view, the high court satisfactorily examined the evidence and rightly came to the conclusion that the appellant committed the offence of robbery with violence for which he was charged and convicted. This ground is without merit and is so dismissed.

38. With respect to the sentence, the appellant asserted that the sentence imposed on him was unconstitutional for the reason that the supreme court's decision in the case of *Francis Karioko Muruatetu v Republic* [2017] eKLR (Muruatetu 1) determined that the mandatory death sentence for the offence of murder was unconstitutional, similarly rendered the mandatory sentence of death for the offence of robbery with violence unconstitutional.

39. In this case, after affording the appellant a chance to mitigate, the trial court sentenced the appellant thus;

> " The accused is a first offender and appears to be remorseful. However, the penalty for this type of offence is one. The court will not hesitate to deliver it. The accused is hereby sentenced to death."

40. In imposing the sentence, the trial court relied on section 296(2) of the *Penal Code*, that stipulates;

> " 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."

41. As rightly observed by the appellant, the supreme court in *Muruatetu 1* held that the mandatory death sentence for the offence of murder was unconstitutional. But subsequently thereto, on July 6, 2021 the supreme court in *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* (2021) eKLR ("Muruatetu 2") issued guidelines stating that;

> " 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."

42. Furthermore, the court was equivocal that the *Muruatetu 1* decision only applied to sentences pertaining to section 203 as read with section 204 of the *Penal Code*, and that it did not in any way render mandatory sentences or minimum sentences under the *Penal Code*, the *Sexual Offences Act* or any other statute invalid. In effect, this would mean that, the supreme court was categorical that *Muruatetu 1* and *Muruatetu 2* cannot be applied to cases of robbery with violence, such as the instant case.

43. In considering the issue of the constitutionality of the death sentence for the offence of robbery with violence under section 296 (2) of the *Penal Code*, in the case of *Onzere v Republic*(Criminal Appeal 166 of 2016) [2023] KECA 643 (KLR), after considering *Muruatetu 1*, this Court observed that;

> " 32. Though we have gone into this jurisprudential terrain to clarify what we believe is the correct jurisprudential posture and impact of *Muruatetu 1* and *Muruatetu 2*, we must, without relish, find that the appeal in the present case does not come within our remit in order to determine if *Muruatetu 1* can analogously apply to it. This is because the appellant did not raise the constitutional issue in the high court in order to preserve it for determination before us. We are, therefore, precluded from latching on to this constitutional issue on second appeal. To do otherwise will be to assume jurisdiction we do not have. In an appropriate case where the constitutional issue is preserved and appropriately raised, this court would be entitled to analogously apply *Muruatetu 1* to the facts of the case."

44. And in the recent case of *Katana & another v Republic* (Criminal Appeal 8 of 2019) [2022] KECA 1160 (KLR) this court differently constituted similarly held that the appellant having failed to raise the issue in the high court, it could not be addressed by this court on appeal.

45. For our part, given the supreme court's decision in *Muruatetu 1* and the *Muruatetu 2* guidelines strictly limiting its application to the offence of murder, and for the reason that, since the appellant did not raise the issue of the constitutionality of the mandatory death sentence in respect of robbery with violence under section 296 (2) of the *Penal Code* in his appeal to the high court, we are precluded from addressing that issue in this appeal. Consequently, the appeal on sentence also has no merit and is dismissed.

46. In sum, the appeal on both conviction and sentence is not merited and is dismissed.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY 2023.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR