Momanyi v Republic (Criminal Appeal 276 of 2018)
[2023] KECA 1565 (KLR) (19 December 2023) (Judgment)

Neutral citation: [2023] KECA 1565 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 276 OF 2018

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

DECEMBER 19, 2023

BETWEEN

JOHN OYUGI MOMANYI ..... APPELLANT

AND

REPUBLIC ..... REPUBLIC

(An appeal from the Judgment of the High Court at Kisii (J.R. Karanja, J.) dated 24th February 2016 in HCCRA NO. 221 of 2012)

JUDGMENT

1. This is a 2nd appeal arising from the judgment in Kisii HCCR No 221 of 2012 (JR. Karanja, J) dated 24th February 2016 dismissing the appellant's appeal. The appeal stems from the trial in the Magistrate's Court in Kisii CMCRC No 1623 of 2010, where the appellant, with three (3) others were jointly charged with two (2) counts of robbery with violence contrary to section 296(2) of the *Penal Code*. The particulars of the offence in the first count were that on the night of 19th September, 2010 at Ikuruma Sub-location, Ngenyi Location, within Kisii County, jointly with others not before court, being armed with AK47 Rifles, robbed Michael Nyakundi Onchonga of one Nokia Mobile Phone1800 valued at Kshs 4,500/= and an unknown amount of money and immediately after such robbery shot dead the said Michael Nyakundi Onchonga (deceased).

2. The appellant faced an alternative charge of handling stolen goods contrary to section 322(2) of the *Penal Code*, the particulars being that on 28th September, 2010 at Kapker Kericho County, otherwise than in the cause of stealing he (John Oyugi Momanyi) dishonestly handled one Nokia mobile Phone 1800 knowing or having reason to believe the same to be stolen goods.

3. The particulars in the second Count were that on the night of 19th September, 2010 at the same place, being armed with AK47 Rifles, robbed Sarah Motuka of one Nokia mobile phone 1100 valued at Kshs 2,500/- and immediately before such robbery used actual violence to the said Sarah Motuka Nyakundi;

in the alternative, the appellant's co-accused Susan Kerubo Ondieki was charged with handling stolen goods contrary to section 322(2) of the *Penal Code*. The particulars were that on 8th September, 2010 at Bomondo village, Nyamira County, otherwise than in the cause of stealing she dishonestly handled one Nokia mobile Phone 1100 knowing or having reason to believe the same to be stolen.

4. The appellant and his co-accused all pleaded not guilty to the charges; a total of nineteen (19) witnesses testified on behalf of the prosecution; all those charged gave sworn testimony in their respective defences; and called no witness.

5. The evidence before the trial court was that Sarah Motuka Nyakundi, PW1, was at home with her husband, Michael Nyakundi Onchonga (the deceased), when they were attacked by a group of armed people whose weapons included firearms. They were robbed of their mobile phones and money and, in the process, assaulted and injured then.

6. Josephat Omoi Mose, PW2 described how he saw the attacker, as he opened his door to hear what the commotion was about; was ordered back inside the house; and after a while heard PW1 call for help only to go and find the deceased in a pool of blood. PW3, Eliud Nyakundi, the deceased's son was called and told of the happenings at his parents' house; he in turn called the police and rushed to the scene to find the deceased shot dead; later after investigations the police called him and showed him some mobile phones which he identified as belonging to his parents.

7. The appellant's defence was that he was charged together with strangers for an offence he knew nothing about; that he operated a changaa den in Kericho, and on 29th September 2010 he was arrested and told he would be informed of the charge later; next he was taken to Kisii Police Station and later arraigned in court.

8. Upon evaluation of the evidence presented as well as the defence offered, in a judgment delivered on 17th September, 2012, the trial magistrate, Hon. K.T. Kimutai (SRM) convicted the appellant herein on the two counts of robbery with violence his co-accused were acquitted of these two counts but Susan Kerubo Ondieki was convicted of the alternative charge of handling stolen goods, and sentenced to serve 315 hours of community service. The appellant was sentenced to death on both counts, and the sentences to be "executed concurrently".

9. The appellant was aggrieved by the outcome, and appealed against the conviction and sentence in the High Court via Kisii Criminal Appeal No 221 of 2012, on grounds that the case was not proved to the required standard; the evidence of the forensic expert was selective, and it perverted the course of justice; the circumstantial evidence was weakened by the co-existing evidence; and his defence was rejected without any cogent reasons.

10. By a judgment delivered on 24th February, 2016 the High Court (JR. Karanja, J) upheld the conviction and the sentence, and dismissed the appeal on grounds that the evidence on record did not raise any dispute with regards to the commission of the two acts of robbery, as there was sufficient evidence from PW1, 2 & 3 showing that the complainant and her husband were violently attacked by armed gangsters who ended up injuring the complainant and killing the deceased before fleeing from the scene with 2 mobile phones and an unknown amount of money. The court was thus persuaded that the necessary ingredients for the offence of robbery with violence were fully established by the prosecution.

11. On the question of identification, the learned Judge noted that none of the prosecution's witness identified/recognized the attackers; and that there was no basis for the trial court to rely on circumstantial evidence to establish a link between the offence and the appellant. The High Court faulted the trial court's reliance on the doctrine of recent possession, saying the prosecution having failed to establish ownership of the phone of the deceased, the doctrine was not applicable in this

matter; that there was very strong forensic evidence against the appellant in relation to the finger print impressions found at the scene of the offence taking into account that the appellant was not a regular visitor in that home, nor was he a relative to the owners of the home; that the forensic evidence was admissible under section 48 of the *Evidence Act*, as the finger and palm imprints lifted from various locations in the house were duly examined and analyzed by Julius Katua, PW10 the forensic expert; that the finger and palm impressions were found to be similar, raising a strong inference that the appellant was at the scene; that he did not give any explanation as to how his fingerprints ended up in that homestead; and that the only reasonable inference to draw was that the appellant was the un- invited visitor who had gone to carry out mischief and wreak havoc in the home.

In the final analysis the High Court dismissed the appeal but ordered the 2nd sentence in respect of the second count to be held in abeyance.

12. Aggrieved by the decision of the High Court, the appellant has come to this Court raising three grounds of appeal, which can be summarized as follows: that the charge as framed was defective; that the circumstantial evidence was inconsistent; and that the sentence was harsh and capricious. He proposes that the appeal be allowed, the sentence of death be set aside and translated to a term sentence of 30 years imprisonment. For good measure, he throws a spin into it, and urges us to order for his release.

13. This being a second appeal, this Court is mindful of its duty as a 2nd appellate court, that a 2nd appeal must only be confined to points of law and this Court will not interfere with concurrent findings of the two courts below unless based on no evidence. The test to be applied on a second appeal was discussed in the case of *Karani v R* [2010] 1 KLR 73:

> " 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."

14. Also, in *Njoroge v Republic* (1982) KLR 383, this Court stated that:

> "...on (this) second appeal, we are only concerned with the 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 evidence."

15. On the first issue, the appellant contends that the charge as framed was defective as he was charged under section 296(2) of the *Penal Code* which merely prescribes the punishments for the offence of robbery, yet he should have been charged under section 295 (which defines the offence of robbery), as read with section 296 (l) and (2) of the *Penal Code*; that the charges as framed did not conform to the rules of framing charges, as contained in section 137 of the *Criminal Procedure Code*, and in particular that if the offence charged is one created by enactment it shall contain a reference to the section of the enactment creating the offence.

16. The appellant thus contends that his constitutional right to a fair trial were violated particularly as section 77(2) (b) of the former *Constitution* of Kenya which provided that "every person charged with a criminal offence shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged," yet the appellant did not know of

the nature of the offence that he was charged with. In addition, that such violation goes to the root of the trial and should render the entire proceedings a mis-trial as section 77 (8) of the former *Constitution* provided that: 'no person shall be convicted of a criminal offence unless that offence is defined, and the penalty therefore is prescribed, in a written law....', as the appellant was charged under the punishment section only, and not under the section that defines the offence.

17. The respondent, on the other hand submits that the appellant has not demonstrated that the defect was so material as to prejudice him, to the extent that he was not able to understand the charge he was facing; that in the present instance, the appellant aptly understood the offence he faces; and he was able to marshal a defence. Further, that a five Judge bench of this Court having referred to its various decisions, in *Joseph Njuguna Mwaura & 2 others v Republic* [2013] eKLR, summed it up thus:

> "We reiterate what has been stated by this Court in various cases before us: the offence of robbery with violence ought to be charged under section 296 (2) of the *Penal Code*. This is the section that provides the ingredients of the offence which are either the offender armed with a dangerous weapon, is in the company of others or if he uses any personal violence to any person."

18. Going through the record of proceedings in the trial court and the High Court, it is apparent that this issue of the charge sheet being defective, is being raised for the first time before this Court. This should have been raised in the courts below so that this Court could have the benefit of their opinion, to warrant consideration by this Court. There is no record of the appellant's protestation on the alleged defectiveness of the charge. Consequently, the appellant cannot now say that he did not understand the nature of the charge as he participated in all the proceedings in both the lower courts.

19. There is also the protestation that only the fingerprints of the appellant were lifted despite there being 4 suspects, which to him translates to him having been considered already guilty. The appellant also contends that there was no tangible evidence that the fingerprints were lifted from the scene of the crime hence it was unsafe for the court to convict on basis of forensic evidence.

20. To this the respondent submits that the appellant is raising a factual matter that was well settled by both the trial court and the first appellate court. It is pointed out that PW16 was a Crimes Scenes Officer who visited the scene promptly on 20th September, 2010, took photos, and lifted various finger prints and palm prints, while in the company of OCPD Njenga, Issah and Sgt. Adan. Hence the allegation that PW16 was alone is not true; that in any event, at the particular time, the appellant had not been arrested for it to be said that PW16 targeted him. Further, that upon lifting the prints, they were handed over to PW10, a forensic finger print expert, who duly executed his duty and returned a finding that 5 prints were identical to those of the appellant. Hence, the scene was professionally processed and the prints duly lifted and examined.

21. The respondent also argues that criminal culpability is personal to an individual, therefore the appellant having been placed at the scene, and found guilty by the court, he cannot cite possibility of other people in an attempt to absolve himself; and that in any event, he was charged jointly with others not before Court. It is further pointed out that investigations are a prerogative of the police, and the police having found reasons to subject the appellant's finger prints to examination, they cannot be faulted. We are urged to take note that this issue was well settled by the first appellate court thus:

> "His contention that the failure by the police to forward finger and palm prints impression of his co-accused for necessary analysis was proof that he was maliciously implicated was far-

fetched and was in any event disapproved by the strong forensic evidence adduced against him"

22. This court notes that PW 10, the fingerprints expert examined the appellant's finger and palm prints, compared them with those lifted by PW16 from the scene and came to the conclusion that the prints belonged to the same person and a report produced to that effect as P. Exh 15.

23. The court in its judgment at paragraph 29 indeed explained how forensic evidence comes into play, at Paragraph 30 the trial court explained how the fingerprints were lifted at the various locations of the scene. The lifted prints were accordingly analyzed and compared with the appellant's impressions and the results were in the affirmative. We are of the considered view that it is only logical that for the appellant's prints to be found in the deceased's house, taking into consideration the fact that the mobile phones were found in his possession, then he must have been at the deceased's home. The appellant did not even bother to explain the said fingerprints. This Court is in agreement with the first appellate court's finding upholding the conviction of the appellant on the basis of clear and uncontroverted forensic evidence.

24. We take note that the appellant was not identified by any of the prosecution witnesses, thus the prosecution's case was hinged on circumstantial evidence. What we must then determine is whether the circumstantial evidence was established, and whether the circumstantial evidence pointed unerringly to the guilt of the appellant such as to lead to the conclusion that the trial Judge made a sound and proper conviction based only on circumstantial evidence.

25. This court in the case of *Ahamad Abolfathi Mohammed and another v Republic* [2018] eKLR stated:

> " However, it is a truism that the guilt of an accused person can be proved either by direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances of facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence."

26. Lord Heward CJ in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21:- stated:

> "It has been said that the evidence against the applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial."

27. This court has set out the parameters to be met in the application of circumstantial evidence in securing a conviction in the case of *Abanga Alias Onyango v Republic* CR. App No 32 of 1990 (UR) as follows:

> " it is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:
>
> i. the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established,
>
> ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused,

iii. the circumstance taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human possibility the crime was committed by the accused and no one else."

28. In *Sawe v Republic* [2003] KLR 364 this court reiterated on circumstantial evidence that:

> "in order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co - existing circumstance weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shifts to the accused.'

29. Having regard to these principles, did the prosecution evidence meet the threshold? It is not in dispute that none of the prosecution witnesses identified the accused. However, as discussed earlier, the appellants fingerprints were found at the scene of the crime. The prints were collected and analyzed by a fingerprint expert and the prints were established to belong to the appellant. We further note, that the appellant did not give any plausible explanation as to how his fingerprints were found at the deceased's house. The appellant was not an acquaintance of the deceasedor his family nor was the appellant a relative of the deceased and his family. We are thus satisfied that the parameters for circumstantial evidence were met, as the forensic evidence pointed irresistibly to the guilt of the appellant and the High Court did not err in finding that the appellant's conviction was sound.

30. On sentence, the learned Judge upheld the death sentence on the first count and ordered the death sentence on the 2nd count to be held in abeyance. The appellant argues that the sentence is too harsh and proposes that the death sentence in this case should be substituted with imprisonment for thirty years. Drawing from the aftermath of the Supreme Court decision in *Francis Kariokor Mauruatetu & another v Republic* [2017] eKLR the appellant contends that the death penalty is no longer mandatory, as the Supreme Court declared mandatory death penalty for murder as unconstitutional.

31. Further, that the court laid down guidelines to be followed with respect to sentencing which include:

a. age of the offender;

b. being an offender;

c. whether the offender pleaded guilty;

d. character and record of the offender;

e. commission of the offence in response to gender- based violence;

f. remorsefulness of the offender;

g. the possibility of reform and social re-adaptation of the offender;

h. any other factor that the Court considers relevant.

32. The appellant expresses remorse, while pointing out that he has no previous records, and has transformed, factors which the learned Judge did not take into account. He argues that, in sentencing the appellant, the learned Judge failed to take into account the mitigating factors put forth by the appellant and concentrated solely on the penal provisions to impose a harsh sentence. It is a well established principle that sentencing is a discretion of the court and the same should be exercised

judiciously. We are thus urged to rely on the case of *Gedion Kenga Maita v Republic* (COA Criminal Appeal No 35 of 1997) unreported which stated that:

> "...we are not saying that a court has no power to impose a sentence of life: a court can do so depending on the circumstances of a particular case the circumstances must include the circumstances under which the offence itself was committed, the circumstances of the accused person such as to whether he is a first offender, how long he has been in custody awaiting trial and things of that nature."

33. While acknowledging that the Supreme Court in *Francis Kariokor Muruatetu & another v Republic*, (Muruatetu1) held that the mandatory death sentence in section 204 of the *Penal Code* was unconstitutional, the respondent points out that the apex Court in *Francis Kariokor Muruatetu & another v Republic, Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR (Muruatetu 2) was categorical that:

> "(t)he decision of Muruatetu apply only in respect to sentences of murder under Sections 203 and 204 of the *Penal Code*."

34. The respondent urges us to find that the Supreme Court having given guidance that its decision in Muruatetu 1 does not apply to the offence of robbery with violence, death sentence pronounced by the trial Court and affirmed by the first appellate Court, is the legal and valid sentence in law. This Court is cognizant that the *Penal Code* prescribes the death sentence for the offence of robbery with violence and that sentence is still legal. Our reading of the Supreme Court's Advisory in *Muruatetu Case* at paragraph 4 (a) is that it directed that the mandatory nature of the death sentence as provided for under section 204 of the *Penal Code* was declared unconstitutional, but that the order did not disturb the validity of the death sentence under Article 26(3) of the *Constitution* in relation to the other offences which attract the mandatory death sentence. The writing is on the wall; and there can be no other question left for this Court to now answer as the sentence was lawful; and Muruatetu 1 does not offer refuge for persons convicted for the offence of robbery with violence. We thus have no reason to interfere with the sentence that was imposed on the appellant by the trial court and upheld by the High Court.

35. Ultimately, we find that this appeal lacks merit; it is dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 19TH DAY OF DECEMBER, 2023.

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