



REPUBLIC OF KENYA



KENYA LAW
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**Shikoma v Republic (Criminal Appeal 73 of 2016)
[2022] KECA 64 (KLR) (4 February 2022) (Judgment)**

Neutral citation: [2022] KECA 64 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 73 OF 2016
PO KIAGE, KI LAIBUTA & J MOHAMMED, JJA
FEBRUARY 4, 2022**

BETWEEN

RONALD KHAMASI SHIKOMA APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kakamega (Sitati & Mrima, JJ.) dated 10th February, 2016 in HCCRA NOS. 101 & 102 OF 2014)

JUDGMENT

1. The appellant was jointly charged with one Felix Muhongo Murwa for the offence of robbery with violence contrary to Section 296 (2) of the *Penal Code*. The particulars were that on 8th September, 2013 at Mukulusu sub-location, Kakamega East District within Kakamega County, jointly with others not before court, while armed with dangerous weapons namely, pangas, he robbed David Chumba India, of Ksh. 5000 and immediately after the time of such robbery used actual violence on him.
2. The appellant was arrested and arraigned before the Chief Magistrate's Court at Kakamega and charged via Criminal Case No. 2096 of 2013. The trial magistrate (S. M. Shitubi, CM) evaluated the evidence tendered before the court, convicted the appellant and sentenced him to death.
3. Aggrieved by the conviction and sentence, the appellant appealed to the High Court. The appeal was heard by Sitati & Mrima, AJ. who, by a judgment delivered on 10th February, 2016, upheld the conviction and sentence and dismissed the appeal.
4. Further aggrieved, the appellant filed the instant appeal, on 4 grounds, complaining that the learned judges erred in law and fact by:
 - a) Basing the conviction on the evidence of identification by recognition adduced by PW1 and PW2, and admitting the alleged identification without carrying out an identification parade.



- b) Failing to re-appraise the evidence produced at the trial court and upholding the conviction based on uncorroborated evidence.
 - c) Disregarding the contradiction in the testimonies of PW1 and PW2.
 - d) Failing to observe that the prosecution’s case was not proved beyond reasonable doubt.
5. During the hearing of the appeal, learned Counsel Mr. Okoyo held brief for Maua & Company Associates** which law firm is on record for the appellant while the respondent was represented by Mr. Onanda, the learned Principal Prosecution Counsel.
 6. While relying on the filed submissions, Mr. Okoyo briefly highlighted the ground of identification at the scene, contending that light was not sufficient at the scene for PW1 to recognise and identify the appellant, the tin lamp at the scene of the incident having been put out immediately the robbers entered the house. Thus, Counsel argues, identification was unsafe. For this argument Counsel cites various cases including; *CHARLES O. MAITANYI -VS- R CRIMINAL APPEAL NO. 6 of 1986*, *WANGOMBE -VS- REPUBLIC [1980] KLR 149*, *WALTER A. AMOLO -VS- REPUBLIC [1991] 2 KAR 254*, *CLEOPHAS O. WAMUNGA -VS- REPUBLIC [1989] eKLR* Mr. Okoyo further faults the respondent for failing to summon some of the witnesses to testify, such as the Administration Police officer who apprehended the appellant, urging this Court to allow the appeal, quash the conviction and set aside the sentence of death imposed.
 7. In opposing the appeal, Mr. Onanda, also sought to rely on the filed submissions entirely. In the submissions Counsel points out the jurisdiction of this Court as a second appellate court, namely, to deal with matters of law only. It is further argued on behalf of the respondent that all elements of the offence of robbery with violence as elaborated in *OLUOCH -VS- REPUBLIC [1985] KLR 549* were established against the appellant.
 8. On the question of identification, Mr. Onanda submits that PW1 and PW2’s evidence was that the appellant was well known to them as they were village mates. Further, the offence occurred when they had their tin lamp on. In the circumstances, Counsel argues that this was a case of recognition and not identification, and hence there was no need for an identification parade. For this proposition, Counsel relies on the case of *REUBEN TAABU ANJONONI & 2 OTHERS -VS- REPUBLIC [1980] eKLR*. Mr. Onanda further concedes that in view of the Supreme Court decision in *FRANCIS KARIOKO MURUATETU -VS- REPUBLIC [2017] eKLR* in which the mandatory nature of the death sentence was declared unconstitutional, this Court is at liberty to revisit the sentence. In the end, Counsel beseeches us to find the appeal unmeritorious and dismiss it.
 9. As this is a second appeal, our jurisdiction as rightly pointed out by Counsel for the respondent, is confined to consideration of questions of law only by dint of section 361(a) of the *Criminal Procedure Code*. We think that the appellant, who was well known to PW1 and PW2 was properly and safely identified at the scene and we must respect the concurrent findings of the two courts below as we do not see a basis for our interference in this case. We agree with what this Court had to say in *SAMUEL WARUI KARIMI -VS- REPUBLIC [2016] eKLR*: This is a second appeal and this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See *Chemangong -vs- R, [1984] KLR 611.*”
 10. The only issue of law in this appeal to be determined is that of the mandatory death sentence. From the record, it is clear that the appellant was found guilty of robbery with violence by the trial court and



sentenced to death as provided for in Section 296(2) of the Penal Code. The same was upheld by the two judge bench at the High Court.

11. The said Section 296(2) provides as follows;

(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.

12. It is doubtless couched in mandatory terms. However, following the ground breaking decision by the Supreme Court in FRANCIS KARIOKO MURUATETU (supra), courts do retain a discretion and may impose a sentence other than that of death upon returning or upholding a conviction for robbery with violence. In the circumstances, we set aside the death sentence and substitute it with a term of 25 years' imprisonment with effect from the date of conviction.

DATED AND DELIVERED AT NAIROBI THIS 4TH OF FEBRUARY, 2022.

P. O. KIAGE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

