



REPUBLIC OF KENYA



KENYA LAW
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**Kadivani v Republic (Criminal Appeal 70 of 2016)
[2022] KECA 437 (KLR) (11 March 2022) (Judgment)**

Neutral citation: [2022] KECA 437 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 70 OF 2016
PO KIAGE, M NGUGI & F TUIYOTT, JJA
MARCH 11, 2022**

BETWEEN

SIMON KADIVANI ALIAS SOLOMON KADAGAYA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kakamega (R. Sitati and N. Mwangi, JJ) dated 3rd March, 2016 in Kakamega HCCRA No. 151 of 2014)

JUDGMENT

1. The appellant, Simon Kadivani alias Solomon Kadagaya is currently serving a sentence of death for the offence of robbery with violence pursuant to his trial and conviction before the Chief Magistrate's Court in Vihiga for the said offence. He had been charged with four counts of robbery with violence contrary to section 296 (2) of the *Penal Code*.
2. In count 1, it is alleged that on 28th July, 2013 at Logere village, Jepkoyai location, Vihiga County, jointly with others not before the court, and while armed with dangerous weapons, namely pangas, rungas and torches, robbed Everlyne Vugutsa Onacha of assorted items all valued at Kshs.115, 200/= the property of the said Everlyne Vugutsa Onacha and immediately before such robbery, threatened to use violence to the said Everlyne Vugutsa Onacha.
3. He faced an alternative charge of handling stolen goods contrary to section 322(1) as read with section 322(2) of the Penal Code. The particulars of this offence were that on the 17th day of August, 2013 at Bukhayo road, Chavakali market in Vihiga County, otherwise than in the course of stealing, he dishonestly retained one M-kopa Solar, one mobile phone make NOKIA serial no.xxxx, and one converter S/No.06/265755 knowing or having reason to believe them to be stolen goods. The particulars of the offence in counts II were that on the 28th July, 2013 at Logere village, Jepkoyai location, Vihiga County jointly with others not before Court while armed with dangerous weapons,



namely pangas, rungas and torches he robbed Joyce Ajema Onacha of her assorted household items all valued at Kshs.16,000 and immediately before such robbery threatened to use violence to the said Joyce Ajema Onacha.

4. In Count III, it was alleged that on the same day, place and time and in the same circumstances as in Count I and II, the appellant robbed Victor Anyasi Onacha of one mobile phone make Tecno No.250 S/No not known, and a pair of closed shoes all valued at Kshs. 3,500. The particulars of the offence in Count IV were that on the same day, time and circumstances as in Counts I, II and III, he robbed Racheal Onacha of assorted household goods all valued at Kshs. 26,800.
5. The appellant was tried and convicted on Counts I, III and IV. He was sentenced to death as prescribed under section 296(2) of the Penal Code.
6. Aggrieved by his conviction and sentence, the appellant appealed to the High Court. In its decision dated 3rd March, 2016, the first appellate court found no merit in the appellant's appeal. He has now preferred the present appeal to this Court in which he raises, in his supplementary ground of appeal, a single ground of appeal, namely that the first appellate court grossly erred in law by failing to find that the mandatory nature of the death sentence prescribed under section 296(2) of the Penal Code is unfair in the circumstances. His Learned Counsel, Mr. Munwango, also confirmed at the hearing of the appeal that the appellant would only raise the issue of sentencing, He had filed written submissions which he wished to rely on.
7. Mr. Konga, Learned Prosecution Counsel, indicated that he would also rely on his written submissions dated 18th November, 2021. While relying on the decision in *Francis Karioko Muruatetu & another -vs- Republic (2017) eKLR* ('the Muruatetu decision') Mr. Konga asked the Court to remit this matter back to the High Court for re-sentencing.
8. This is a second appeal. Consequently, our jurisdiction is limited to a consideration of matters of law. The sole issue of law for determination is whether the sentence imposed on the appellant by the trial court and upheld by the first appellate court was fair in the circumstances. Should we find in favour of the appellant's contention that it was not, then we would need to address ourselves to the question whether we have the jurisdiction to sentence the appellant appropriately or, as the respondent prays, remit the matter back to the High Court for sentencing.
9. The parties hereto have cited the Muruatetu decision in their respective submissions. The appellant submits that the trial court should have considered the degree of gravity and culpability of the offence or offender in sentencing the appellant. That we should also consider that murder is a graver offence than the offence of robbery with violence yet the law presently shies away from passing the death sentence upon a conviction for murder. In the appellant's view, the sentence of death was unlawfully imposed on him. The appellate further cites the case of *Misheck Ireri Njagi -vs- Republic [2019]* in which the guidelines on sentencing set out in Muruatetu were relied on,
10. In its written submissions, the State argued that the death sentence imposed on the appellant is legal, noting that section 296(2) of the Penal Code provides for the mandatory sentence of death when an offender is armed with dangerous or offensive weapons or instruments, when in the company of one or more persons and in the commission of the offence of robbery with violence uses violence on the victim(s). The State argues that the first appellate court had evaluated the evidence and was convinced that the evidence was sufficient, and it therefore upheld the sentence imposed by the trial court.
11. Regarding the Muruatetu decision, the State submitted that while the Supreme Court had held in its decision in Muruatetu in 2017 that the mandatory nature of the death sentence imposed by section 203 as read with section 204 of the Penal Code is inconsistent with the Constitution, it had



clarified its position in *Francis Karioko Muruatetu & Others -vs- Republic, Katiba Institute & 5 others (Amicus Curiae) (2021) eKLR*. The State submitted that the Supreme Court had seemed to suggest that the determination in Muruatetu that the mandatory death sentence imposed in murder cases is unconstitutional may not be applicable in other cases such as treason and robbery with violence where the mandatory death sentence is also prescribed.

12. The respondent urged this Court to find that the death sentence imposed by the High Court is lawful and that the Muruatetu decision does not apply in this case. Counsel for the State, however, submitted that the appellant may file an application at the High Court for review of the death sentence imposed by the trial court and upheld by the High Court in accordance with the Muruatetu decision, or we could remit the matter back to the High Court for re-sentencing.
13. The single issue for determination is whether the death sentence imposed on the appellant was lawful in the circumstances. The appellant was convicted of the offence of robbery with violence and sentenced to death. He has challenged the death sentence imposed on him and urges this Court to consider setting it aside in terms of the holding of the Supreme Court in the Muruatetu decision which declared the mandatory nature of the death sentence prescribed for the offence of murder in section 203 as read with 204 of the Penal Code inconsistent with the Constitution.
14. The Supreme Court had held in the Muruatetu decision that mandatory sentences are unconstitutional for divesting courts of sentencing discretion to allow for individualized consideration of each offence on its own merits. Section 296(2) of the Penal Code prescribes a mandatory death penalty for the offence of robbery with violence. By parity of reasoning, the death sentence prescribed for the offence of robbery with violence should also be deemed unconstitutional.
15. Indeed, prior to the 2021 Directions of the Supreme Court in the Muruatetu case, courts had considered themselves at liberty to exercise their discretion in sentencing, and to consider the particular circumstances of each case, as well as the mitigation offered by an accused person, in meting out sentence. In many cases of robbery with violence where the death penalty was mandatory, courts considered that the Muruatetu decision in 2017 applied to such decisions also- see for instance the decision in *Geoffrey Muchugia Gitonga & another -vs- Republic [2020] eKLR* and *Shadrack Shuatani Omwaka -vs- Republic (2020) eKLR*.
16. In the 2021 Directions, however, the Supreme Court clarified that its previous decision in Muruatetu applied only in respect to sentences under sections 203 as read with section 204 of the Penal Code. It stated that:

“We therefore reiterate that, this Court’s decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the Sexual Offences Act or any other statute.”
17. It further emphasized that Muruatetu as it now stands cannot directly be applicable to cases 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. Further, that challenges on the constitutional validity of the mandatory death penalty in those cases would have to be filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as in that case may be reached.
18. This Court had understood the rationale of the Supreme Court decision in the Muruatetu decision to be that judicial discretion in sentencing cannot be restricted by legislative prescription of mandatory sentences. This understanding notwithstanding, however, because of the hierarchical character of our



court structure and the binding nature of decisions of a court of a higher rank, we are constrained to give deference to the 2021 Supreme Court Directions in Muruatetu.

19. In the circumstances, we are unable to interfere or alter the decision of the trial court which was upheld by the High Court as it was in conformity with the legislative provisions. The appellant's appeal against sentence accordingly fails, and is hereby dismissed.

DATED AND DELIVERED AT KISUMU THIS 11TH DAY OF MARCH, 2022.

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.

