Omudi v Republic (Criminal Appeal 84 of 2018)
[2022] KECA 436 (KLR) (11 March 2022) (Judgment)

Neutral citation: [2022] KECA 436 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 84 OF 2018

PO KIAGE, J MOHAMMED & M NGUGI, JJA

MARCH 11, 2022

BETWEEN

DOUGLAS NYAMWAYA OMUDI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Eldoret (Kimondo J.) dated 8th December 2016 in HCCRA No. 205 of 2014)

JUDGMENT

1. Douglas Nyamwaya Omudi, the appellant, 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 28th November,2012 at Airport area in Wareng' District within the former Rift Valley Province, jointly with another not before court, the appellant robbed Evans Geseya Onyogi of his motor cycle registration No. KMCV 926K valued at Kshs. 80,000 and immediately before the time of such robbery wounded the said Evans Gesaya Onyogi.

2. Briefly, the facts of the case were that on 28th November, 2013 at around 2.00 p.m., the complainant, Evans Geseya Onyogi, a boda-boda (motor cycle) rider was hired by the appellant to drop him at the airport at an agreed price of Kshs 700. The appellant was allegedly going to the airport to repair a customer's vehicle. On the way to the airport, they met a second person who was known to the appellant and who also claimed to be heading to the airport to repair the motor vehicle. The three went to the airport where they stayed till about 6 p.m.

3. At some point the complainant said he was hungry and they all went to the airport cafeteria where the appellant had milk. At around 6.00 p.m., the appellant and his accomplice asked the complainant to take them back to where they had come from. While the complainant was carrying both of them on the back of his motorcycle, they threw a rope around his neck and he lost control of the motor cycle

which overturned and the complainant fell to the ground. The appellant and his accomplice pinned the complainant down and threatened to kill him whilst one of them was holding a knife. They later tied him up, covered him with his sweater, threw him into the forest and took off with his motorcycle.

4. Thereafter, the appellant was arrested upon being tracked down through the call data from the complainant's phone. Through information that the appellant gave to the police, the motorcycle was recovered in Kisii town. The appellant was tried and convicted of the offence as charged in the Chief Magistrate's Court at Eldoret and sentenced to death.

5. Dissatisfied with the decision of the trial court, the appellant filed a Petition of Appeal in the High Court dated 24th December 2014. Pursuant to an application in that regard, the appellant was granted leave on 2nd June 2016 to amend his grounds of appeal. The amended grounds of appeal before the High Court were that the trial court failed to comply with the provisions of section 200(3) of the Criminal Procedure Code; that his identification was doubtful; that the investigating officer was incompetent to produce exhibits before the court; that the trial magistrate erred by relying on a confession procured when the appellant was in custody; and that the prosecution evidence against him was inconsistent.

6. Upon considering the appellant's grounds of appeal against the evidence adduced before the trial court, the High Court concluded that the appellant was positively identified; the ingredients of the offence of robbery with violence had been established beyond reasonable doubt; and the trial court had complied with the provisions of section 200(3) of the Criminal Procedure Code. It further found that the evidence adduced by the prosecution was sufficient- the material evidence had been given by the complainant and the clinical officer, and the conviction of the appellant did not turn on the information he had given following his arrest on the whereabouts of the motor cycle that he and his accomplice were charged with robbing the complainant of. The High Court accordingly found no merit in the appellant's appeal and upheld both his conviction and sentence, noting that on the authority of *Joseph Njuguna Mwaura and others v Republic [2013] eKLR* the sentence of death for the offence of robbery with violence is mandatory.

7. The appellant then filed the present appeal in which he raised five grounds of appeal in his Memorandum of Appeal dated 14th December 2016. He appears to have abandoned these grounds, however, for in his submissions dated 27th January 2020, he addressed this Court on four grounds of appeal namely:

    i. That the case against the appellant was not proved beyond the required standards.

    ii. That the learned judge erred in law by upholding the conviction and yet failed to find that the case involved a single witness.

    iii. That the learned judge erred in law by confirming the death sentence as the only sentence.

    iv. That the courts below failed to find that the felicity of the evidence of PW1 is wanting.

8. The appellant submitted in support of his first ground that the case against him was not proved beyond reasonable doubt. He contended that the prosecution only relied on the testimony of the eye witness who was the complainant-PW1, but the said evidence was full of doubt and could not be relied upon. The appellant cited in support the case of *Ndungu Kimani vs Republic Criminal Appeal No. 22 of 1979*.

9. The appellant argued further that the Safaricom data produced as Exhibit 10 before the trial court was erroneously admitted into evidence against the provisions of section 106(3)(1)(4) of the *Evidence Act*. It was also his submission that crucial evidence was not adduced during trial as the person who claimed to have informed the complainant that it was his brother who gave him the motor cycle was not called as a witness.

10. The appellant submitted that the trial court erred in confirming the death sentence as the only sentence for the offence of robbery with violence. He relied on the decision of the Supreme Court in *Francis Karioko Muruatetu & Another vs Republic [2017] eKLR* (the 'Muruatetu case') to submit that the High Court erred in sentencing him to death without considering the new developments on mandatory sentencing set by the Supreme Court.

11. In submissions in response, the State argued that the ingredients of the offence of robbery with violence, which were set out by the Court of Appeal in the case of *Oluoch v R [1985] KLR* were established as against the appellant. It further relied on the case of *Simon Materu Munialu v Republic [2007]eKLR* in which the court also considered the ingredients of the offence of robbery with violence. The respondent submitted that in this case, the complainant had stated that he was assaulted by the appellant and his accomplice, and that he was threatened by the appellant, who was holding a knife, that they would kill him. He had also testified that he was strangled with a rope, and the injuries he sustained were confirmed in the P3 form produced in court by PW2 Joel Sutere. The State's submission was that the ingredients of the offence of robbery with violence were therefore all met and the prosecution had proved its case beyond reasonable doubt.

12. With regard to the issue of identification, the respondent submitted that the appellant was positively identified by the complainant, who had met the appellant at 2 p.m. The appellant, his accomplice and the complainant had stayed together from about 2 p.m. up to 6 p.m. They even had refreshments together at the Airport. They had therefore spent 5 hours together, in broad daylight, where visibility was not compromised.

13. To the appellant's complaint about sentencing, the respondent submits that in the Muruatetu case, the Supreme Court was categorical that the death penalty was not unconstitutional but the only issue was the mandatory nature of the sentence. Its submission is that the death sentence is still lawful and remains in the Penal Code. The respondent therefore asked the Court to uphold both the conviction and sentence.

14. This is a second appeal, and we are conscious of our duty as a second appellate court, which is confined to a consideration of issues of law. As was succinctly enunciated in the case of *Karani vs. 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."

15. We begin by observing that with the exception of the appellant's third ground of appeal relating to his sentence, the other grounds all relate to questions of fact. We have briefly set out the facts of the case and the considerations and conclusions of the High Court with respect thereto. We are unable to find

that the High Court considered or failed to consider any matters that would justify interference with its decision by this court.

16. In its decision in *Johana Ndungu v Republic [1996] eKLR* the court considered the ingredients of the offence of robbery with violence and observed as follows:

> "In order to appreciate properly as to what acts constitute an offence under Section 296 (2) of one must consider the subsection in conjunction with Section 295 of the PC. The essential ingredient of robbery under Section 295 is use of or threat to use actual violence against any person or property at or immediately after to further in any manner the act of stealing. Thereafter, 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."

17. The prosecution evidence before the trial court, which was considered and re-evaluated by the High Court, showed that the appellant contracted to be transported by the complainant to the airport at 2 p.m.; that he borrowed the complainant's phone to make a call; that he and his accomplice spent about 4 hours with the complainant, during daylight hours, and even had tea together at the airport cafeteria. Further, that on the way back from the airport, the appellant and his accomplice attacked the complainant with a rope round his neck, threatened him with a knife, and then went off with his motor cycle. The appellant was traced through phone data from the complainant's phone, and it was he who gave information, following his arrest, that led to the recovery of the complainant's motor cycle in Kisii.

18. The ingredients of the offence of robbery with violence were established against the appellant. He was also properly identified-indeed, the evidence before the court was one of recognition, not identification, given the time he had spent in the company of the complainant. In our view therefore, the first appellate court properly came to the conclusion that the conviction of the appellant was merited and did not interfere with it. The appellant's appeal to this Court in relation to his conviction has no merit.

19. We have considered the appellant's appeal with regard to sentence. In its decision in the Muruatetu case, the Supreme Court held that the mandatory nature of the death sentence prescribed for the offence of murder by section 204 of the Penal Code is unconstitutional. Pursuant to that decision, this Court, upon consideration of the implications of the Supreme Court decision to sentencing upon conviction for the offence of robbery with violence, had taken the view that where the facts and circumstances permit, the Court can impose a lesser sentence- see *Swaley Muhaya Lubanga v Republic [2021] eKLR* and *Mohammed Barrack v Republic [2020] eKLR*.

20. The facts and circumstances of this case, in our view, lend themselves to the exercise of the court's discretion in favour of the appellant, and to the imposition of a sentence other than the sentence of death. The appellant and his accomplice threw a rope around the complainant's neck as a result of which the motor cycle overturned. The appellant and his accomplice threatened the complainant with a knife. They tied him up and left him in the forest. The motor cycle that they robbed him of was recovered following information that the appellant gave to the police. The evidence of the

Clinical Officer, PW2, was that the complainant sustained injuries to the chest and neck that were classified as harm. Thus, though the ingredients of the offence of robbery with violence were met, the circumstances were not so egregious as to warrant the imposition of the death penalty.

21. However, in Directions issued on 6th July 2021 in *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR*, the Supreme Court clarified that its decision in 2017 in the Muruatetu case applied only in respect to sentences under sections 203 as read with section 204 of the Penal Code. It stated as follows:

> "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."

22. The Supreme Court 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. 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 that in the Muruatetu case may be reached.

23. Notwithstanding, therefore, this Court's understanding of the rationale of the 2017 Supreme Court decision in Muruatetu to be that judicial discretion in sentencing cannot be restricted by legislative prescription of mandatory sentences, because of the principle of stare decisis and the binding nature of decisions of superior courts, we are constrained to give deference to the 2021 Supreme Court Directions in Muruatetu.

24. In the circumstances, we are unable to interfere with 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 must therefore also fail. The upshot of the above is that this appeal fails with respect to both conviction and sentence, and is hereby dismissed.

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

P. O. KIAGE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.