Aburil & 2 others v Republic (Criminal Appeal 161 of 2016)
[2022] KECA 617 (KLR) (8 July 2022) (Judgment)

Neutral citation: [2022] KECA 617 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 161 OF 2016

PO KIAGE, M NGUGI & F TUIYOTT, JJA

JULY 8, 2022

BETWEEN

SOSPETER MOI ABURIL ..... 1ST APPELLANT

MOSES CHISIRA NAMAYI ..... 2ND APPELLANT

WILLIAM OKUMU ODUOR ..... 3RD APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment/Decree (Lenaola & Onyancha, JJ) delivered on 26th October, 2011 in Kakamega High Court case NO. 29 OF 2008)

JUDGMENT

1. On June 4, 2008, the three appellants were each convicted on two counts of robbery with violence contrary to section 296 (2) of the *Penal Code* and one count of causing grievous harm contrary to section 234 of the Penal Code.

2. Upon the said conviction, the trial court sentenced them to death in respect to the two counts of robbery with violence and to serve a 10 years' imprisonment for the offence of grievous harm, the latter two sentences being held in abeyance.

3. Their first appeal against both conviction and sentence was unsuccessful on conviction but as regards sentence, the High Court held;

> " As touches the sentences the honourable trial Magistrate pronounced a death sentence in count one, another death sentence in count two and 10 years jail sentence in respect to count three. In our view the sentences as they stand are wrong for being impractical and illegal. A

prisoner who has been sentenced to death, and assuming it were to be executed, cannot be available thereafter to undergo another death or other sentence.

We accordingly convert the death sentence to life sentences in respect to counts one and two. Each appellant will also serve the third sentence of 10 years imprisonment for causing grievous harm to PW1. The sentences will run concurrently. Otherwise than the conversion of sentences as aforestated the appeal of each appellant herein is rejected and dismissed."

4. The appellants are before us on a second appeal but only in respect to sentence. On this, Counsel Ariho appearing for them submits that the appellants have been in custody since July 7, 2006 and this should be taken into account. The appellants say they are remorseful, have learnt to be good citizens and acquired life skills while in prison. Citing the Supreme Court decision in *Francis Kariokor Muruatetu & another –vs- Republic* [2017] eKLR, this Court is urged to set aside the sentence of life and in its place to impose fifteen (15) years imprisonment.

5. In opposing the appeal, Ligami Shitsami, Prosecution Counsel, reminds us that the Supreme Court directions issued on 6th July, 2021 in regard to *Francis Karioko Muruatetu* clarifies that the decision was authority only in regard to sentences for offences under section 203 as read with section 204 of the *Penal Code*.

6. We have considered this appeal in the context of our duty as a second appeal court entertaining a challenge against sentence only. This duty was spelt out in *Joseph Wambua Mbuvi v Republic* [2019] eKLR to be: -

> "As stated before, sentence is a question of fact and in a second appeal our jurisdiction is confined to matters of law. In *David Munyao Mulela & another v Republic* [2013] this Court expressed itself as follows:
>
> "The complaint on severity of sentence is misplaced firstly because it was not an unlawful sentence imposed and secondly the issue of severity of sentence cannot be before us as it is a matter of fact."

7. The evidence before the trial court is that the appellants were fairly brutal in the course of robbing their victims. They inflicted serious injuries on Lydia Cherono Omusula, T A and Joseph Wandera. Lydia had a deep cut wound extending to the left side of her face, she suffered a swollen head and had injuries to her chest and upper hand. The doctor who examined her and filled the P3 form classified the injuries as maim. T A had a cut wound on the occipital region. She had bruises on the thorax region and left shoulder joint. She had suffered harm. Then there was Joseph Wandera. He had a deep cut to the left side of his face and cut wound on both the upper and lower lips and injuries to the chest and mouth.

8. Further, and this is not without significance, the trial court found that there was sufficient evidence to prove that the appellants, in addition to violently committing a robbery, had raped T A but acquitted them on account of defective charges.

9. In view of the brutality and viciousness with which the appellants committed the offences, we are not inclined to review the sentences imposed even if we had the power to do so. The appellants have already benefitted from the reduction of the sentence in regard to the offences of robbery with violence from the death sentence to life imprisonment. We see no reason to make any further reduction.

10. The appeal is dismissed.

DATED AND DELIVERED AT KISUMU THIS 8TH DAY OF JULY, 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