



**Anaya alias Kibito v Republic (Criminal Appeal 187 of 2016)
[2022] KECA 677 (KLR) (8 July 2022) (Judgment)**

Neutral citation: [2022] KECA 677 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 187 OF 2016
PO KIAGE, M NGUGI & F TUIYOTT, JJA
JULY 8, 2022**

BETWEEN

GEOFFREY ANAYA ALIAS KIBITO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Kakamega
(E.C. Mwita J) dated 7th September, 2016 in Criminal Appeal No. 70 of 2014)*

JUDGMENT

1. The appellant challenges the decision of E.C Mwita J sitting in Kakamega in which the learned judge dismissed the appellant's appeal and affirmed the death sentence imposed by the trial court.
2. In his memorandum of appeal dated 25th September, 2020, the appellant contends that the first appellate court erred in law for failing to set aside the death sentence since its mandatory nature was declared unconstitutional.
3. The appellant had been charged and was convicted of the offence of robbery with violence (count I) contrary to section 295 as read with section 296(2) of the *Penal Code*. The particulars of the offence were that on the 18th February 2013 at [Particulars withheld] village in Vihiga County within western province jointly with others not before court, while armed with offensive weapons, pangas, rungas, iron bars and bright torches, robbed NNO of a mobile phone make Nokia, 6kg gas cylinder of Total gas, JVC CD portable, 3 hand bags, two school bags containing books a purse and Kshs.6000 all valued at Kshs.35,000 and immediately before the time of such robbery used actual violence to the said NNO. The appellant was also charged with an alternative count of being in possession of stolen goods contrary to section 322(2) of the *penal code*. The particulars of this offence were that on the 20th of February, 2013 at Matsinguru village in Vihiga County other than in the course of stealing dishonestly,



retained one JVC CD portable and one school bag containing books knowing or having reason to believe them to be stolen goods.

4. In count II, the appellant was charged with gang rape contrary to section 10 of the *Sexual Offences Act* No.3 of 2006. The particulars of the offence are that on 18th February, 2013 at (withheld) village in Vihiga County in association with others not before court, he intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of NNO without her consent. He also faced an alternative count of indecent act contrary to section 11A of the *Sexual Offences Act*. The particulars of this offence were that on the same date, the 18th February, 2013, in association with others not before court, he intentionally and unlawfully caused his genital organ namely penis to come into contact with the genital organ, namely vagina of NNO.
5. The appellant faced at count IV, a charge of resisting arrest contrary to section 253 of the *Penal Code*. The charge against him stated that on 19th February 2013 at Matsunguru village in Vihiga County, he resisted arrest by police officers CP Mwangi, PC Mathenge, PC Patrick, PC Francisca Njoroge among others.
6. At the plenary hearing of the appeal, Learned Counsel, Ms. Anyango informed the Court that the appellant was not challenging his conviction but was appealing only on sentence. While conceding that in *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (Civ) (6 July 2021) (Directions) (Muruatetu 2) the Supreme Court had directed that its decision in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (Muruatetu 1) was not applicable in robbery with violence cases, Learned Counsel nonetheless submitted that this Court could still exercise its discretion and impose a sentence other than death on the appellant.
7. Ms. Anyango further submitted that from the record of proceedings, the appellant's mitigation had not been taken into consideration. The trial court had, instead, begun by stating that he is not a first offender and proceeded to sentence him to death without proof of prior record.
8. The State opposed the appeal. Learned Prosecution Counsel, Mr. Konga, submitted that the sentence for robbery with violence is death. Further, that Muruatetu 2 directed that persons charged and sentenced upon conviction for robbery with violence had the option of filing a petition in the High Court for consideration of the constitutionality of the sentence. Mitigation by the appellant would therefore not have made a difference to the sentence. He therefore urged us to dismiss the appeal.
9. We have considered the submissions of Counsel for the parties in this matter. In a recent decision in *Omudi v Republic* (Criminal Appeal 84 of 2018) [2022] KECA 436 (KLR) (11 March 2022) this Court observed as follows:

“20. 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.

21. 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.

22. 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.”

23. 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.
24. 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.”

10. The facts of the present case, we must observe, are vastly different from those in *Omudi v R*. The facts of this case, which the appellant does not challenge, demonstrate a level of violence and depravity that, even if a first offender, would probably call for the imposition of the death penalty. It should always be borne in mind that even where Muruatetu 1 is applicable, it is only the mandatory nature of the death penalty that was declared unconstitutional, not the death penalty itself.
11. In the circumstances, we find no merit in the present appeal. We hereby dismiss the appeal and uphold the decision of the first appellate court on sentence.

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

