Sutse v Republic (Criminal Appeal 158 of 2016)
[2022] KECA 678 (KLR) (8 July 2022) (Judgment)

Neutral citation: [2022] KECA 678 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 158 OF 2016

PO KIAGE, M NGUGI & F TUIYOTT, JJA

JULY 8, 2022

BETWEEN

GABRIEL ANDATI SUTSE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the judgment of the High Court of Kenya at Kakamega, (Chitembwe &Dulu JJ.) dated 9th July, 2017 in HCCRA No. 159 of 2012)

JUDGMENT

1. The appellant was charged with the offence of attempted robbery with violence contrary to section 297(2) of the *Penal Code*. He was however, convicted of the offence of robbery with violence contrary to section 296(2) of the *Penal Code*. He appealed against his conviction and sentence and in the judgment dated 9th July 2017, the first appellate court (Chitembwe and Dulu JJ) set aside his conviction and substituted it with a conviction for the offence of attempted robbery with violence contrary to section 297(2) of the *Penal Code*. The first appellate court, however, upheld the death sentence imposed on him, noting that it was the proper sentence for the offence charged.

2. The information against the appellant was that on the 30th day of October 2010 at around 7.30p.m. at Mwikali village Munganga Sub-location East Wanga Location in Mumias District of Kakamega County, jointly with another not before court while armed with dangerous weapons namely pangas and rungus, he attempted to rob one Elishama Andayi Akhuya of a motorcycle registration number KAMCM 862 valued at Kshs. 85,000 and at the time of the said robbery used personal violence on the said Elishama Andayi Akhuya.

3. The evidence of the complainant, (PW1) was that he is a pastor with Jeshi La Wokovu Church which is off Munganga Shianda road and he lives at the Church compound. On the material night, he had a Church Board meeting and was riding the motor cycle back home at about 7.30p.m. When he turned

to enter the road leading to the church, he saw two people ahead of him, about 150 meters from the church. He was able to see them clearly as the motor cycle had its lights on. He recognised the appellant when the appellant was about 20 meters from him. He knew the appellant as Mark Too, a person he often used to greet within that area. He also saw the other person who was with the appellant but he was a stranger.

4. As he was passing, the appellant said: "Pastor, what we need is the motorbike". PW1 was immediately cut at the back of his head and he fell on the ground together with the motor cycle. While he was on the ground, he noticed that one of his assailants was having difficulty in igniting the motor cycle and as the other was assisting the rider, one of them dropped a panga. PW1 managed to get up, grab the panga and raise it high in his right hand as he screamed for help. People came to his rescue, among them Luka Khayere Okomba, (PW2). The assailants then ran away.

5. PW2 testified that upon hearing PW1's screams, he rushed to the scene, ignited the motor cycle and was able to take PW1, who was bleeding from the back of his head, to a private hospital in Shianda before proceeding to report the incident to police. It was his testimony that the complainant told him that it was "Mark Too" who had attacked him. PW2 knew 'Mark Too', the appellant, as PW2 had taught him in class 8 in Butere Primary School in 2004.

6. The appellant was arrested from his home by Mohammed Kweyu, the area Chief (PW3) and Winston Ochola Shiliebo, Assistant Chief (PW4) Bunini Sub-location in East Wanga, both of whom knew the appellant well. They escorted him to Mumias Police Station along with the panga and helmet number 53303.

7. Investigation of the offence was carried out by P.C. Michael Muya (PW5), who also issued the complainant with a P3 form upon discharge. Akwabi Maloba (PW6) from Kakamega Provincial Hospital where the complaint sought further treatment completed the P3 form and produced it together with the treatment notes from St. Mary's Hospital where the complainant had been treated initially.

8. In his defence, the appellant only narrated how he was arrested. He did not call any witnesses. He was found guilty of the offence of robbery with violence and sentenced to death, and he preferred his appeal to the High Court.

9. In his appeal to the High Court, the appellant raised eight grounds of appeal. These were, among others, that the trial court erred in: relying on the exaggerated evidence of the prosecution witnesses; failing to consider that the alleged offence occurred at night and it was swift and it was difficult to identify the alleged assailants; failing to consider that the alleged alias 'Mark Too' was not the appellant's; and ignoring the appellant's defence.

10. While dismissing the appeal against conviction, the High Court set aside the conviction and sentence for robbery with violence contrary to section 296(2) and substituted it with a conviction for the offence of attempted robbery with violence contrary to section 297(2) of the *Penal Code*. It however, maintained the sentence of death, noting that this was the penalty provided in law for the offence.

11. The appellant now appeals to this Court and in his rather prolix undated Memorandum of Appeal, he raises some seventeen grounds of appeal. We note that the appellant raises mainly factual matters relating to the evidence that was before the trial court, inter alia that: he was not accorded a fair trial contrary to Article 50(2) of *the Constitution*; the first appellate court erred in points of law in relying on a duplex and incurably defective charge sheet to dismiss his appeal contrary to section 134 of the *Criminal Procedure Code*; erred in law and fact in upholding his conviction and sentence on the basis of the circumstantial evidence which fell below the standards required; failed to deal with

the contradictions and conflicts in the prosecution evidence; failed to consider or deal with his alibi defence; and failed to note that the prosecution did not establish its case beyond reasonable doubt.

12. Under section 361 of the *Criminal Procedure Code*, we are required, as a second appellate court, to address our minds only to matters of law. This duty is well captured in the case of *David Njoroge Macharia v Republic* [2011] eKLR;

> "That being so only matters of law fall for consideration–see section 361 of the Criminal Procedure Code. As 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 *Chemagong v. R [1984] KLR 611*."

13. While most of the grounds set out in the Memorandum of Appeal raise factual matters which do not fall for consideration before us, the appellant does raise two issues of law therein. At ground 17 of his memorandum of appeal, he advances the argument that the sentence provided under section 389 of the *Penal Code* for the offence of which he was convicted is seven years imprisonment. Further, he contends at ground 16 that in light of the decision of the Supreme Court in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (Muruatetu 1) the mandatory nature of the death penalty was outlawed and courts have a discretion in sentencing for murder and other capital offences. He therefore asks this Court to remit his case to the High Court for mitigation and sentencing.

14. The appellant filed written submissions which he indicated he would be relying on. In these submissions, he raises the question of his identification by the complainant. He contends that his identification by recognition did not meet the threshold laid down in section 165 of the *Evidence Act*, relying in support on the case of *Cleophas Otieno Wamunga vs Republic* (1989) eKLR. He also contends that he was denied a fair trial, and that he was denied the constitutional right to legal representation.

15. In his submissions in response, Learned Counsel for the State, Mr. Onanda, noted that the appellant had raised three issues in his appeal: that his identification was not proper; that he was not accorded a fair trial; and that he lacked legal representation during his initial trial and also at the High Court. Mr. Onanda submitted that the appellant had been granted adequate and proper opportunity to conduct his case, and that his identification by the complainant was correct. Further, that the appellant had not shown how he was not granted a fair trial.

16. Regarding the appellant's contention that he did not have legal representation at his trial, Mr. Onanda submitted that as the appellant was charged with a capital offence, he did require legal representation. However, he had not raised the issue at the trial court, though Mr. Onanda conceded before us that the appellant should have been made aware of the right to legal representation. Nonetheless, the State's position was that the appellant's rights were not violated by the failure to accord him legal representation. The State therefore urged the Court to dismiss the appeal as lacking in merit and uphold the conviction and sentence.

17. We have considered the appellant's grounds of appeal and the submissions of the parties. We note that the appellant raises additional grounds in his submissions that differ from the grounds in his memorandum of appeal. Bearing in mind, however, that he was unrepresented and prepared the submissions himself, we shall consider the issues of law that he has raised in both his memorandum of appeal and in the written submissions.

18. The first issue of law that arises is the question of his identification. The trial and first appellate court found that the appellant was recognised by the complainant. This was a case of recognition, not identification. The evidence before the trial court was that the appellant was known to the complainant. The complainant recognised the appellant when he and his accomplice stopped the complainant as he was turning into the church compound. The complainant knew the appellant, describing him as a very talkative person who 'used to sit and idle at Eshikulu market.' He even knew his alias, 'Mark Too'. We are satisfied that the first appellate court was correct in its finding that the appellant was recognised by the complainant as the person who attempted to rob him of the motor cycle. This was not a case of identification but of recognition. We are not persuaded that we should depart from the concurrent findings on this issue of the two courts below.

19. The appellant has argued that he was not accorded the right to a fair trial. We have considered this contention against the proceedings and the decision of the first appellate court. We note that the issue of a fair trial was not one of the issues raised before the court on first appeal. Nonetheless, the issue of a fair trial is a critical constitutional question that merits consideration at this stage. We are not satisfied, however, that the appellant has demonstrated violation of the right to fair trial. Other than his argument, which we shall consider shortly, that he was not afforded legal representation, he has just made a general statement that he was denied the right to a fair trial guaranteed under Article 50(2).

20. We note from the proceedings before the trial court, however, that he was accorded an opportunity to present his case; there is no argument made that he was not given access to the evidence that the prosecution intended to rely on in order to present his defence; the trial court directed that he should be given statements; when the trial commenced, there was no complaint that he had not received the witness statements; he had the opportunity to and did cross-examine the prosecution witnesses; and he was able to present his defence before the trial court. We are, in the circumstances, unable to discern any violation or denial of his right to a fair hearing.

21. The appellant has argued that he was denied the right to legal representation. Again, we note that this issue was not raised, either in the trial court or in the first appellate court. Under Article 50(2)(h) and section 36 of the *Legal Aid Act*, 2016, the State is under an obligation to provide legal aid where denial of legal aid 'would result in substantial injustice to the applicant.'

22. There is no definition of 'substantial injustice' either in *the Constitution* or the *Legal Aid Act*. However, in considering the issue in *Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati v. Republic* [2015] eKLR this Court cited the case of *David Macharia Njoroge v. Republic* [2011] eKLR in which it was held that:

> " "State funded legal representation is a right in certain instances. Article 50(1) provides that an accused shall have an advocate assigned to him by the State and at state expense, if substantial injustice would otherwise result (emphasis added). Substantial injustice is not defined under *the Constitution*, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2(6). Therefore provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory.
>
> We are of the considered view that in addition to situations where 'substantial injustice would otherwise result.' persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re-trial where no such

legal representation was provided. The reasons are that, firstly, the provisions of the new Constitution will not apply retroactively, and secondly every case must be decided on its own merit to determine if there was serious prejudice occasioned by reason of such omission."

23. The Court further stated that:

> " Substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise."

24. The appellant in this case was charged with attempted robbery with violence contrary to section 297(2) of the *Penal Code.* This section 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 assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

25. While the appellant was charged with a capital offence, the obligation on the State to provide legal representation to avoid substantial injustice only arises, as this Court stated in *Karisa Chengo,* where the accused person

> " is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another." (Emphasis added.)

26. In this case, while the appellant argues that he was denied legal representation, he has not brought himself within the principle set in *Karisa Chengo*. We are not satisfied that the fact that he was not given legal representation by the State compromised his trial, or resulted in substantial injustice to him.

27. The appellant makes two arguments with respect to his sentence. The first is that under section 389 of the *Penal Code*, the penalty for the offence of which he was convicted, attempted robbery with violence, is seven years imprisonment.

28. In its decision in *Charles Mulandi Mbula v Republic* [2014] eKLR this Court considered a similar argument and held as follows:

> " Section 389 of the Penal Code provides that
>
> "Any person who attempts to commit a felony or a misdemeanour is guilty of an offence and is liable, if no other punishment is provided, to one-half of such punishment as may be provided for the offence attempted, but so that if that offence is one punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years." (Emphasis supplied)
>
> 22. It is clear from a plain reading of Section 389 of the Penal Code that it applies only where no other punishment is expressly prescribed in the penal statute. Section 297(2) of the Penal Code provides for a specific penalty for attempted

robbery with violence, and is thus ousted from the remit of Section 389 of the Penal Code.

29. We need say no more on this issue. While the appellant was charged with the offence of attempted robbery with violence under section 297(2) but erroneously convicted of the offence of robbery with violence under section 296(2), the first appellate court imposed the correct sentence for the offence with which he was charged.

30. The appellant has argued, finally, that in light of the decision of the Supreme Court in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR which declared the mandatory nature of the death penalty on a conviction for murder unconstitutional, courts have a discretion in sentencing for murder and other capital offences. He asks that we remit this case to the High Court for mitigation and re-sentencing.

31. It is correct that in its decision in Muruatetu 1 the Supreme Court did declare the mandatory nature of the death penalty in murder cases unconstitutional. Courts thereafter interpreted this decision to mean that all mandatory sentences prescribed for all offences were unconstitutional. However, in its directions issued on 6th July 2021 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) the Supreme Court clarified that its decision in Muruatetu 1 was applicable only to cases of murder under section 204 of the Penal Code, and the decision is therefore of no assistance to the appellant.

32. The upshot of our findings above is that the appeal has no merit, and it is hereby dismissed.

DATED AND DELIVERED AT KISUMU THIS 8TH DAY OF JULY, 2022.

P. O. KIAGE

.....

JUDGE OF APPEAL

.....

MUMBI NGUGI

JUDGE OF APPEAL

.....

F. TUIYOTT

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR