



REPUBLIC OF KENYA



**Onyuro v Republic (Criminal Appeal 190 of 2016)
[2022] KECA 1038 (KLR) (23 September 2022) (Judgment)**

Neutral citation: [2022] KECA 1038 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 190 OF 2016
K M'INOTI, M NGUGI & F TUIYOT'T, JJA
SEPTEMBER 23, 2022**

BETWEEN

SILVESTER ODIWUOR ONYURO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Homa Bay (H. A. Omondi J) dated 29th July, 2016 in HCCRA NO. 4 OF 2015)

JUDGMENT

1. The appellant has brought the present appeal to challenge the decision of the High Court (Omondi J, as she then was) dismissing his appeal against a conviction for the offence of robbery with violence. In the information against him before the Chief Magistrate's Court at Mbita, 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 February 24, 2014 at Mangera area in Mbita, jointly with others not before the court, he robbed Matheus Oniala Odongo of a Toyota Hilux, Double Cabin Reg. No. KBR 802B valued at Kshs. 2.5 million, a mobile phone make Samsung Duos valued at Kshs. 4500/= and cash Kshs. 500/= all totalling to Kshs. 2,505,000. The charge stated further that immediately before or immediately after the said robbery, the appellant threatened to use actual violence against the said Matheus Oniala Odongo. He was convicted by the trial court and sentenced to death, a conviction and sentence that was upheld by the first appellate court.
2. The facts of the case as presented at trial were that on 24th February 2014 at about 9.30 p.m., the complainant Matheus Oniala Odongo (PW1) was using motor vehicle KBR 802B ferrying goods from Kisumu to Sindo. There was a bridge under construction along the way, so he slowed down and drove on the sides of the road. He had the vehicle's full headlights on. At some point, he saw what looked like a tomato crate placed on the right side of the road, and he swerved slowly to avoid hitting it. When he was about to join the main road, the driver's right side screen was shattered. Upon checking the side



- of the road, he noticed two people standing two meters away, one of whom was holding something which looked like a gun. Suddenly two more people appeared and stood on the left hand screen.
3. PW1 tried to drive away but the vehicle got stuck. As he tried to scream, the gang reached him and warned him that they would kill him if he did so. They turned off the car engine and ordered him to open the doors, and one of them took control of the car while the other sat on the passenger seat. PW1 was pushed to the back seat where he was sandwiched between two other people. He noticed that each of the attackers had a panga and he was also able to identify the man who was driving the car. He was able to see the appellant from the headlights of oncoming cars.
 4. They drove to various places and at 1:00 am, they got to the Kendu-Homa Bay road. By this time, the men had taken away his wallet containing Kshs. 500, his driving licence, a Samsung Android phone, two ATM cards for KCB and Equity banks. At 4.00 a.m., they got to Awasi area, diverted into a rough road and ordered him out of the car. They ordered him to remove all his clothes and to hide inside a sugar cane plantation, which he did. He eventually found his way to Nyangera police post where a good Samaritan assisted him with clothes.
 5. PW1 reported the incident on February 27, 2014. On 14th March 2014, Stephen Kibet (PW3) conducted an identification parade in which the appellant chose the position he wished to stand at and was identified by PW1. He was tried and convicted, and was sentenced to death.
 6. In his appeal before the High Court, the appellant raised eight grounds of appeal against his conviction and sentence. These grounds primarily centred around the issue of his identification. He contended that the trial court erred in law and fact in making a finding on the basis of the identification parade and failing to find that the complainant did not give a facial description of his alleged attacker to the police in his first report for effective and reliable identification; the court failed to observe that the complainant could not identify his attacker positively in view of his evidence that he was placed on the floor of the vehicle with his head facing down. He further challenged his identification on the basis that the source of light used by the complainant was not enough to enable him identify a stranger whose actions were swift.
 7. The appellant contended further that the trial court erred in law in failing to give due consideration to his objection regarding the manner in which the identification parade was conducted as the complainant had seen him at the police station before the parade was conducted. He was not given an opportunity to call a witness during the conduct of the identification parade.
 8. Upon re-evaluating the evidence before the trial court, the learned judge found that the appellant had been properly identified, and had not complained about the identification parade until after the parade was conducted. The complainant had been able to see him from the light of oncoming cars as the appellant had taken control of the vehicle; he had seen him by the vehicle headlights while trying to avoid the crate on the road, and had noted the scars on his right cheek, including the nipple-like scars on the appellant's right cheek. The complainant had also been able to see the appellant every time the vehicle's doors were opened as the internal lights would come on. The High Court therefore found that the appeal had no merit and dismissed it.
 9. In his memorandum of appeal dated 20th May, 2021, the appellant raises three grounds of appeal against the decision of the High Court. He contends that the first appellate court erred in law and fact in finding that the case against him was proved beyond reasonable doubt. In his second ground, he states that he is seeking refuge in the provisions of Article 165(3)(a)(b), 159(2)(a)(b) and 22(4) of the *Constitution* in light of the Supreme Court decision in *Francis Kariokor Muruatetu & Another vs Republic* (2017) eKLR (Muruatetu 1).



10. At the hearing of this appeal, Mr. Okoyo Omondi, learned counsel for the appellant, relied on the written submissions dated 21st May, 2021. In these submissions, the appellant contends that the Supreme Court in *Muruatetu 1* held that the mandatory nature of the death sentence as provided under section 204 of the Penal Code was unconstitutional. It is the appellant's contention that the holding by the trial court which was affirmed by the first appellate court that the only sentence upon conviction for robbery with violence is death was an error. We were therefore urged to substitute the death sentence with a more favourable sentence. Further, that in computing the term to mete out on the appellant, we should consider the time that he has spent in custody since his arrest. The appellant refers us to the case of *Vincent Sila Jona & 87 Others vs Kenya Prison Service & 2 Others* [2021] eKLR.
11. The State opposed the appeal. In submissions dated 9th February 2022, it contended that the ingredients of the offence of robbery with violence had been proved. The attack against the complainant had been carried out by more than one person; the attackers were armed with dangerous and offensive weapons; and the complainant was robbed of his motor vehicle. Additionally, the appellant was identified through an identification parade that was carried out in line with the laid down procedures under Rule 15 of the Police Force Standing Orders.
12. Regarding sentence, the State submits that while the appellant relies on *Muruatetu 1*, the Supreme Court had, in its directions issued on 6th July, 2021, clarified that the decision was not applicable to cases other than the offence of murder under section 203 as read with section 204 of the *Penal Code*.
13. In any event, according to the respondent, the appellant has not placed before this Court any proof that he is remorseful for the act he committed nor has he proved that he has reformed or been rehabilitated since his incarceration.
14. Finally, the respondent submits that in the event that this Court is inclined to interfere with the sentence, a term of 25 years imprisonment would be proper in the circumstances.
15. As a second appellate court, our jurisdiction is limited by section 361(1)(a) of the *Criminal Procedure Code* to a consideration of matters of law. The appellant argues in his appeal that the first appellate court did not evaluate the evidence before the trial court, particularly as regards his identification, as it is under an obligation to do. We have considered this contention against the record of proceedings before the first appellate court. We note that in recognition of its duty as a first appellate court, the High Court set out and considered the evidence presented before the trial court as well as the decision reached, evaluated it and reached its own conclusions of fact.
16. In considering the issue of identification that is at the core of the present appeal, the first appellate court noted the evidence of the complainant that while transporting goods from Kisumu to Sindo, he slowed down upon reaching a place where the road was under construction; that he noticed a crate on the road; that when he tried to swerve to avoid hitting it, he got stuck in the mud; that his screen (sic) was shattered and three people approached him and he was bundled into the back seat of his car and the appellant took control of the vehicle. The complainant was in the company of the assailants from 9:00 pm up to 4:00 a.m. His vehicle door had an automatic light which switched itself on whenever the car door was opened; that during the incident, the appellant was not hooded, and the complainant noticed nipple-like scars on his right cheek. This is what assisted the complainant to pick out the appellant in the identification parade conducted on March 14, 2014.



17. In considering the issue of identification in *Francis Kariuki Njiru & 7 others v Republic* [2001] eKLR, this Court stated as follows:

“The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the Court is satisfied that the identification is positive and free from the possibility of error.”

18. Having considered the record in this matter, we are satisfied that the evidence tendered by the complainant before the trial court, which was evaluated by the first appellate court, showed that the circumstances of the offence lent themselves to proper identification of the appellant. The complainant was in the company of the appellant for a period of almost seven hours, and he had ample time to observe the appellant and to pick him out at the identification parade. We find that the High Court properly evaluated the said evidence and reached the conclusion that the appellant had been properly identified as one of the perpetrators of the offence. We are not, therefore, satisfied that there is a basis for impugning the decision of the first appellate court.

19. The High Court upheld the sentence of death imposed on the appellant. This is the sentence prescribed under section 296(2) of the Penal Code. The appellant has sought to rely on the Supreme Court decision in *Muruatetu 1*. However, as submitted by the respondent, the Supreme Court directed in *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR that its decision in *Muruatetu 1* applied only to sentencing for the offence of murder under sections 203 as read with section 204 of the Penal Code. That directive is binding by dint of Article 163(7) of the *Constitution*.

20. In the circumstances, not having found a basis for interfering with the conviction of the appellant and unable to intervene as regards sentence, we find the present appeal to be without merit, and it is hereby dismissed.

21. It is so ordered

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF SEPTEMBER, 2022

K. M'INOTI

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR

