Makokha v Republic (Criminal Appeal 140 of 2016)
[2022] KECA 1115 (KLR) (7 October 2022) (Judgment)

Neutral citation: [2022] KECA 1115 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 140 OF 2016

PO KIAGE, M NGUGI & F TUIYOTT, JJA

OCTOBER 7, 2022

BETWEEN

ANDREW KHANDA MAKOKHA ALIAS FRANCIS MAKOKHA MAKULA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kakamega (Sitati & Mrima JJ.) dated 21st July, 2016 in HCCRA NO. 135 of 2013)

JUDGMENT

1. The appellant, Andrew Khanda Makokha alias Francis Makokha Makula and his co-accused were charged before and tried by the Principal Magistrate's Court on three counts of robbery with violence contrary to section 295 as read with section 296(2) of the *Penal Code*. The first count was that on the night of October 4, 2012 at Shitsitwi market in Butere district within Kakamega County, jointly with others not before court, while armed with dangerous weapons namely unknown type of rifle, pangas and clubs, they robbed Salim Oundo Tabiro of a television set make Sanyo, Dstv decoder, DVD make Sony, Samsung mobile phone, DVD make LG and a power regulator all valued at Ksh. 111,900 and at the time of such robbery used personal violence against him.

2. In count two, on the same day and night and in the same place, it was alleged that the appellant and his co-accused jointly with others not before court, while so armed they robbed Nicholas Oundo Amoyi of Samsung mobile phone, a wallet, identification card, ATM card KCB and Equity banks and cash Ksh. 2000 all valued at Ksh. 8,800 and at the time of such robbery used personal violence against him.

3. In count three, the particulars were that at the same time and place and while so armed they robbed Hassan Kweyu of a Nokia mobile phone valued at Ksh. 5,600 and at the time of such robbery used personal violence against him.

4. The accused denied the offence prompting a trial in which the prosecution tendered evidence through 11 witnesses to prove its case. The brief facts of the case were that on the material day at around 7.40pm, PW1 was at home watching Television "TV" with his family, his brother and a friend when suddenly, two people dressed like police officers entered the house and ordered them to lie down. PW1 was able to clearly see and identify the two because the florescent light in his house was on. They were the appellant who had a firearm and his co-accused who was armed with a machete *"panga"*, because the florescent light in his house was on. When they lay down, the appellant's co-accused ordered them to give him their phones and he proceeded to unplug the TV. He was however unable to disconnect the TV upon which PW1 was ordered by the appellant to help them remove it. The appellant and his co-accused then carried away the TV and other electronic items including; a GTV decoder, a DSTV decoder and a DVD machine together with their remote controls. PW1 reported the incident at Butere Police Station the same night. Later, on 11th October 2012, PW1 identified the appellant's co-accused as one of the robbers at an identification parade. The appellant, however, declined to participate in an identification parade scheduled for 7th November 2012, to which PW1 had been called.

5. PW1's account was corroborated by PW2, (his wife), PW3, (his employee), PW4 and PW10 his brothers. PW5 a girlfriend to the appellant who was living with him testified that a week before she moved in with the appellant, the appellant had gone home with a bag. On checking if she found AP uniforms and something that looked like a firearm. PW5 stated that a day later she was informed by the wife to the appellant's brother that the appellant had been arrested. She notified their landlady what had happened and the landlady's husband called the police. The police went to the appellant's house where they conducted an inventory of the house and carried all the items to the police station. PW5 identified some of the items in the inventory in court.

6. PW6, the landlady to the appellant, confirmed that she had rented out her house to the appellant on 10th October, 2012 and that he moved in with PW5. PW7, a police officer, gave evidence to the effect that PW6 had reported that she suspected her tenant was keeping stolen property. He accompanied PW6 to the house where they found PW5 who informed them that she suspected some of the items in the house were stolen. Upon carrying out an inventory of the items in the house, PW7 took the items to the Police Camp. PW8, the police officer who conducted the identification parade for the appellant and his co-accused testified that the appellant refused to participate in the identification parade.

7. PW9,the investigating officer gave evidence indicating that on 4th October 2012, he had received a report of robbery from PW1, and that later he called PW1 to identify some items that were recovered including a TV set, a power regulator, a remote control and a DVD, which PW1 ascertained to be his. PW11, who was the investigating officer, explained that he had arrested the appellant and his accomplices on 12th October, 2012 for a different offence of stealing a lorry carrying beans.

8. When put to his defence, the appellant gave sworn evidence denying the offence but did not call any witness.

9. At the end of the trial, the magistrate (E.S Olwande, CM) found the appellant guilty of the offence, convicted him and sentenced him to death. The appellant's co-accused was acquitted under section 215 of the Criminal Procedure Code.

10 Aggrieved by that decision, the appellant appealed to the High Court at Kakamega against both conviction and sentence. The appeal was dismissed in its entirety by the learned Sitati and Mrima, JJ.)

11. That dismissal provoked this appeal raising but a single ground in a memorandum of appeal filed on his behalf by Ariho Ngundu Advocate;

> " 1. The appellant is fully seeking refuge in the provisions of article 165(3)(a)(b), 159(2)(a)(b) and 22(4) of the Constitution of Kenya 2010 bearing in mind the Supreme Court decision in Francis Karioko Muruatetu & Another vs Republic [2017] eKLR".

12. During the hearing, counsel sought to rely on their filed written submissions with Mr Ariho learned counsel for the appellant urging that in light of the decision in Muruatetu, the matter should be referred back to the High Court for mitigation and resentencing, a submission that was concurred in by Mr Shitsama, learned Prosecution counsel for the respondent.

13. In the appellant's written submissions dated August 27, 2020, we were urged to set aside the death sentence and in its place impose a sentence of 8 years imprisonment, on the basis of the decision in Muruatetu, and further on the premise that the appellant has since reformed and regrets the mistake he made of trying to possess what he had not earned.

14. For the respondent, Mr Shitsama pointed out that the appellant had been convicted and sentenced prior to the decision in Muruatetu. He further contended that the appellant had not provided any evidence to show that he was remorseful or that he had been rehabilitated. Counsel asserted that considering that the appellant was armed when committing the offence, and threatened the victims of the offence with death, he should be sentenced to 40 years imprisonment.

15. This being a second appeal our jurisdiction is limited to a consideration of matters of law only by dint of section 361(a) of the *Criminal Procedure Code*. Indeed, the only question of law that we have been called upon to consider is that of resentencing in view of the Supreme Court decision in *Francis Karioko Muruatetu & Anor v Republic* [2017] eKLR, (muruatetu).

16. The Court in Muruatetu held that a mandatory sentence is unconstitutional as it takes away judicial discretion to determine an appropriate sentence on a case by case basis. This Court has adopted the reasoning of the Supreme Court and reduced various mandatory sentences on merit. However, subsequently, the Supreme Court revisited its decision in Muruatetu in *Muruatetu & Another Vs. Republic; Katiba Institute & 4 Others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions) and issued directions to the effect that the decision was to apply to the offence of murder under section 203 and 204 of the Penal Code and not to mandatory sentences generally. Thus, while we see the obvious injustice that such a position may cause, we are nonetheless bound to abide by those directions and will not therefore interfere with the sentence imposed herein. The appellant is not precluded from seeking a review before the appropriate court in the manner proposed in the Directions aforesaid.

17. We are cognizant that the principle in Muruatetu 1 has been extended to Sexual Offences upon proper petition's being lodged at the High Court as contemplated in Muruatetu II. We are not aware of similar pronouncements with regard to robbery with violence.

18. As things now stand, this appeal stands dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF OCTOBER, 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