



**Achola v Republic (Criminal Appeal 195 of 2016)
[2022] KECA 1231 (KLR) (4 November 2022) (Judgment)**

Neutral citation: [2022] KECA 1231 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 195 OF 2016
PO KIAGE, M NGUGI & F TUIYOTT, JJA
NOVEMBER 4, 2022**

BETWEEN

ERICK OSEWE ACHOLA APPLICANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at Siaya
(Makau, J) dated 22nd November, 2016 in SIAYA HCCRCA. NO. 41 of 2016)*

JUDGMENT

1. This is a second appeal. It is brought by Erick Osewe Achola (the appellant) against a conviction and sentence for the offence of robbery with violence contrary to section 296 (2) of the Penal Code.
2. At trial, the prosecution case was that on the 14th day of August 2015 at about 11.00 pm at Useno-Opala murram road in Kanyadet sub-location in Gem sub-county within Siaya, with other people not before court while armed with dangerous weapons namely a panga, a rungu and a torch he robbed Jairo Onyango Onyango of a mobile phone make Tecno and cash Kshs 1,500 and immediately before or immediately after the time of such robbery used actual violence to the said Jairo Onyango Onyango. The prosecution called five witnesses to prove its case.
3. Jairo Ogolla Onyango (PW1) and Fredrick Otieno Omondi (PW4) are brothers. They attended a *disco matanga* on August 14, 2015 together with their siblings Alloice, Duncan, Faith and Judith. A *disco matanga* is a party of dance and music in the home of a person who has just died attended by friends, family members and neighbours of the deceased in the days or day preceding the burial. At about 11.00pm, they made their way back home but their walk back was not without incident. They met three people who ordered them to stop. The three carried spotlights which they used to shine light on the faces of the siblings.



4. It was the testimony of PW1 that he, too, had a spotlight which he used to flash on the three. His brothers and sisters took to their heels. PW1 too attempted to get away but was caught by the three who assaulted him. The assailants cut PW1 on the head and leg. The evidence of PW1 was that during the incident he lost his phone, make Tecno, and Kshs 1,500.
5. After assaulting him, the assailants led PW1 back towards the home that hosted the *disco matanga* but on the way changed their minds and let him go. PW1 went home and woke up his other brother Erick Otieno Onyango (PW2). PW1 told PW2 that he had been assaulted by one Erick. Together, they went to the home where the party was. At the home, PW1 identified the appellant as one of the assailants. He was dressed in a jacket with a KPLC logo and jungle trousers. These were the same clothes he was wearing during the attack. The appellant asked PW1 why they had returned to the home and then removed a blood stained panga from his trouser in a bid to attack but PW2 caught his hand and, with the help of other people who were at the home, arrested the appellant and took him to Akala Police Station where CPL John Turunya (PW5) re-arrested him. The complainant who had accompanied members of the public to the police station was still bleeding from the head and right leg. PW5 asked members of the public to take him to hospital.
6. PW2 took PW1 to Akala Health Centre where he was treated as an outpatient. The following day, August 15, 2015, PW1 visited Siaya Hospital where he was examined by Jared Obiero Opondo, a clinical officer, and a P3 form completed. The examination revealed that PW1 had suffered multiple cut wounds to his scalp and a deep cut wound on his right leg.
7. PW4 who was with PW1 at the time of the attack gave similar evidence to PW1. When the three people confronted them, he was able to recognize the appellant whom he knew as Omondi Rasta. On his part, he successfully escaped and on returning to the scene of the attack, he found PW1 who had sustained injuries. He accompanied PW1 back home and was present when PW1 and PW2 returned to the *disco matanga*. He, too, pointed out the appellant as one of the three people who had confronted them in the night and was present when the appellant was arrested.
8. In his defence, the appellant gave alibi evidence that at the time of the alleged incident, he was sleeping in his house. He heard the sound of a motor cycle outside his house and on getting out, he saw a crowd of people. A person in the crowd hit him on the head alleging that he (the appellant) had beaten his brother. He was arrested and escorted to the police station where he was detained and later arraigned in court on the charge for which he was convicted.
9. After considering the evidence presented at trial, the trial magistrate Otieno, PM concluded that the prosecution had successfully proved a case of robbery with violence contrary to section 296 (2) of the [Penal Code](#) against the appellant and sentenced him to death. The appellant's first appeal failed when both the conviction and sentence were upheld by JA Makau J on November 22, 2016.
10. Undeterred, the appellant is now before us on a second appeal in which he asserts that the learned Judge erred in law and fact by affirming a conviction that was based on identification evidence without observing that the conditions prevailing at the scene of crime made identification absolutely difficult; by failing to evaluate the evidence as a whole and to observe that the prosecution never proved its case beyond reasonable doubt; by not considering that no identification parade was conducted; and by affirming the death sentence without exploring other forms of punishment.
11. At the hearing of the appeal, Miss Miheso, learned counsel, represented the appellant. She relied on written submissions filed on April 21, 2022 on behalf of the appellant. Counsel submits that evidence of a single identifying witness, where conditions for positive identification are difficult, must be tested with greatest care especially where the life of an accused is at stake. Counsel relies on the often-cited



decisions of *Maitanyi vs Republic* [1986] KLR 198 and *Republic vs Turnbull & others* [1976] 3 ALL ER 549, and also the decision of this court in *John Muriithi Nyagah vs Republic* [2014] eKLR. Counsel argues that it was difficult to conclude that the evidence was free from mistake or error and that in the absence of circumstantial or other direct evidence then the prosecution failed to prove its case beyond reasonable doubt.

12. On sentence, the appellant relies on the Supreme Court decision in *Francis Karioko Muruatetu vs Republic* [2017] eKLR (Muruatetu 1) for the argument that the mandatory death sentence is unconstitutional and that while the decision did not outlaw the death penalty, the sentence meted upon the appellant required to be revisited.
13. In concise written submissions filed on behalf of the state, Miss Mogo, learned Prosecution Counsel, reminds the court that our jurisdiction in a second appeal is limited by Section 361 (a) of the *Criminal Procedure Code* to matters of law only. Counsel submits that PW1 positively identified the appellant as one of the robbers by way of recognition since he was able to see his face with the help of torch light, and because he knew the appellant as a person from a nearby village. Counsel further submits that the evidence of PW1 was corroborated by that of PW2 and PW4 who knew the appellant by the name Omosh Rasta, being the name commonly used to refer to people with dreadlocks and which fits the description of the appellant made by PW4.
14. On sentence, the state contends that the death sentence is the only prescribed sentence but nevertheless suggested that we were at liberty to review the sentence and in doing so to consider mitigating factors.
15. It is common learning, as submitted by learned prosecution counsel, that our mandate as a second appellate court is delimited by the provisions of section 361(a) of the *Criminal Procedure Code* to dealing with matters of law only. Elaborating on this remit, this court in *Njoroge Vs Republic* [1982] KLR 388 stated:

“On a second appeal, the Court of Appeal is only concerned with points of law. On such an appeal, the court was bound by the concurrent findings of fact made by the lower courts, unless those findings were shown not to be based on the evidence.”

16. The appeal substantially focuses on whether the recognition evidence of PW1 and PW4 was sufficient to found a safe conviction. The attack happened in the dead of night, at 11.00pm. The attack was sudden and the order by the assailants to the complainant and his siblings to stop would have left the victims terrified. Indeed, all run away in fear. Those circumstances would ordinarily not be ideal for identification. Yet, the evidence of PW1 and PW4 was that they were able to see the appellant as one of the assailants because of the light provided by torches carried by the assailants and one which was with PW1. This evidence was;

“They flashed spotlight in their faces. I also had a spotlight. I flashed at them.”

17. The light enabled PW1 and PW4 to see the appellant’s face, a person known to them. They were able to recognize him as a person they knew before the incident. PW4 gave further evidence of how he was able to recognize the appellant from the dreadlocks he kept. The witnesses also saw the clothes which the appellant wore at the time of the attack, jungle trousers and a ‘KPLC’ branded jacket. These are the clothes he was still wearing at the time of the arrest later that night. It would also be an odd coincidence that at the time of arrest, the appellant would be armed with a panga that had blood stains and that the weapon that inflicted bloody cuts on the victim was a panga.
18. Just as the two courts below, we are satisfied that the evidence of recognition by PW1 and PW4, corroborated by PW2, was sufficiently strong to found a firm and safe conviction. We also add that



the proposition by the appellant that the evidence of recognition was weak because it was not tested through an identification parade is without merit. Once the evidence of two witnesses was that they knew the appellant prior to the incident then an identification parade would serve no purpose because they would simply point out the person they would already have told the police they had recognized.

19. On sentence, the Supreme Court in *Francis Muruatetu (Muruatetu 2)* clarified that Muruatetu 1 was not authority for contending that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the *Constitution*. The court gave the following directions;

“To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences 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*, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly 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 this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases.”

20. Taking the cue, the minimum sentence prescribed under the Sexual Offence Act were successfully challenged in *Philip Mueke Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEELC 2936 (KLR) (17 May 2022) (Judgment) and *Edwin Wachira & 9 others v Republic*: Mombasa Petition Nos 97, 88, 90 and 57 of 2021 (Consolidated) (Unreported). We are not aware of a similar challenge regarding the mandatory death sentence in respect of robbery with violence under Section 296 (2) and whatever our view is as to whether the rationale in Muruatetu 1 is sufficient authority to find that the mandatory death sentence for the offence is unconstitutional, we must give deference to the directions in Muruatetu 2.

21. Accordingly, we dismiss the appeal both on conviction and sentence.

DATED AND DELIVERED AT KISUMU THIS 4TH DAY OF NOVEMBER, 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.

