



**Mamati & another v Republic (Criminal Appeal 69 of 2016)
[2022] KECA 1364 (KLR) (2 December 2022) (Judgment)**

Neutral citation: [2022] KECA 1364 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 69 OF 2016
PO KIAGE, M NGUGI & F TUIYOTT, JJA
DECEMBER 2, 2022**

BETWEEN

BONIFACE SHITIABAI MAMATI 1ST APPELLANT

ARTHUR ANGUBA MUTHESHI 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kakamega (R Sitati & N Mwangi, JJ) dated 8th March, 2016 in HCCRA No 132 & 133 of 2014)

JUDGMENT

1. The appellants, Boniface Shitabai Mamati and Arthur Anguba Mutheshi were arraigned before the Chief Magistrate's Court in Kakamega and jointly 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 November 6, 2013 at [particulars withheld] market in Kakamega East District within Kakamega County jointly being armed with dangerous weapons namely slashers, they robbed AA Kshs 6,150 in cash, a Sonitech radio make, an amplifier, a speaker and a Nokia mobile phone all valued at Kshs 11,450. Immediately before the time of such offence they threatened to use actual violence on the said AA.
2. The prosecution called 5 witnesses who testified that on the night of November 6, 2013 at 12.00am, while PW1, AA and his wife, MS, PW2 were asleep, the appellants broke into their home carrying flash lights. They switched the lights in PW1's house on and off 5 times and eventually left it on, before taking his phone and Kshs 3,150 in cash. PW1 identified the 1st appellant as one of the assailants as he knew him as a charcoal seller and recalled that he wore a reflector jacket. PW1 observed that the second assailant, whom he did not recognize, was wearing a scarf that had 'rasta' colours, a t-shirt printed with the number 10 and the name Roonie, and was carrying a slasher.



3. The assailants also took Kshs 50 in cash from PW2 and proceeded to drink some tea that was left in a flask. They took PW2 with them as they made away with the amplifier, radio, extension and a speaker. PW2 also identified the 1st appellant because she used to see him selling charcoal at Khayega Town. She testified that the appellants gang raped her. However, the appellants were later acquitted of this charge. PW1 and PW2 reported the matter to the police which led to the arrest of the appellants. PW1 led police constable Evans Makori, PW4 and his colleague Erick Ngetich, PW5 to the 1st appellant's house where he was promptly arrested and the stolen amplifier was recovered. The 1st appellant then led them to the 2nd appellant's house where they recovered the reflector jacket, the speaker and the slasher that was used during the robbery.
4. The appellants were put on their defence which consisted of mere denials and did not shake the overwhelming evidence against them. Thus, at the conclusion of the trial, Ong'ondo, PM delivered a judgment on September 11, 2014 in which he found the appellants guilty as charged and sentenced them to death as prescribed by section 296(2) of the [Penal Code](#).
5. Aggrieved, the appellants appealed to the High Court at Kakamega. By a judgment delivered on March 8, 2016, R Sitati and N Mwangi, JJ dismissed the appeal, upheld the appellants conviction and the death sentence as meted out by the trial court. They affirmed the trial court's finding that; the identification of the 1st appellant by PW1 and PW2 was by recognition; the doctrine of recent possession was properly applied; and the minor discrepancies in the witness's testimony did not vitiate the prosecution's case.
6. Disappointed by the High Court's decision, the appellants filed the instant appeal on 4 grounds, summarised as that the learned Judges erred in law and in fact by;
 - a. Admitting contradictory and inconsistent testimonies and arriving at a conclusion not supported by evidence.
 - b. Relying on a single witness testimony when circumstances were not favourable for positive identification.
 - c. Meting out the death sentence and failing to appreciate that its mandatory nature made it unfair.
7. During the hearing of the appeal, learned Counsel Mr Munuango appeared for the appellants while the learned Prosecution Counsel Ms Vitsengwa appeared for the respondent.
8. On behalf of the appellants, it was submitted that there was no proper identification of the appellants, given that the testimony adduced stated that the light was switched on and off 5 times and that the appellants had torches. However, the prosecution failed to establish a basis for the sufficiency of such lighting to ensure that there was no possibility of error and thereby guarantee that there was proper identification of the 1st appellant. Consequently, the conviction which was based on such unsafe identification ought to be quashed.
9. On the sentence, it was argued that the courts below erred by failing to appreciate the unconstitutionality of the mandatory nature of the sentence as prescribed by section 296(2) of the [Penal Code](#) and therefore should have utilized their discretion to mete out a lesser sentence more appropriate to the circumstances of this case. The lower courts also disregarded the sentencing guidelines as pronounced by the Supreme Court in [Francis Muruatetu & another vs Republic](#) [2017] eKLR. Finally, this court was urged to quash the conviction and sentence imposed on the appellants.



10. The state, through the learned Prosecuting Counsel, submitted that the issue of proper identification should not be a ground on a second appeal. Nevertheless, it was urged that there were two sources of light at the scene of the crime which was sufficient to enable PW1 and PW2 properly identify the 1st appellant. Furthermore, the 1st appellant was known to the PW1 and PW2; the robbery took a considerable amount of time which gave them ample time and opportunity for identification; and some clothing worn by the appellants as described by PW1 and PW2 were recovered from the formers' houses. All these show that the identification was proper and accurate.
11. The respondent contended that the sentence meted out against the appellants was fair and within the provisions of the law. The appellants committed robbery while armed with offensive weapons, thus the only available sentence was that of death. Lastly, the Supreme Court gave guidelines on the applicability of the *Muruatetu* case only with respect to the sentence of murder under section 203 and 204 of the *Penal Code*. We were urged to dismiss this appeal as it is unmeritorious.
12. We have considered the record of appeal as well as submissions made by both parties. We recognize our role as the second appellate court. Our jurisdiction is limited to matters of law as stipulated in section 361 (1) of the *Criminal Procedure Code* and affirmed by this court on numerous occasions. In *David Njoroge Macharia vs Republic* [2011] eKLR it was stated;

“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. The appellants are inviting us to quash the concurrent findings of the courts below based on the grounds that; there was no proper identification of the appellants; there were glaring inconsistencies in the prosecution's evidence; and the unfairness of the sentence due to its mandatory nature as prescribed in section 296(2) of the *Penal Code*.
14. The appellants insist that there was no proper identification. They maintain that the prosecution failed to establish that the identification was safe hence the conviction and sentence ought to be quashed. From our perusal of the record, we are satisfied that, the High Court properly re-evaluated the evidence and erred not in its affirmation of the trial court's finding that the identification was safe. The detailed description by PW1 of what the appellants wore was proof that PW1 positively identified the appellants. The ample time taken by the appellants during the incident, including indulging in the luxury of taking tea during the robbery and coupled by the lighting that was available was adequate for positive and error-free identification. Additionally, PW1 knew the 1st appellant by name. PW1 and PW2 both knew him as a charcoal seller, which was corroborated by the 1st appellant himself in his defence testimony that indeed he was a charcoal seller. Thus, the identification was by recognition which is more reliable as it is based on the witnesses' personal knowledge of an accused. See *Hashon Bundi Gitonga -vs- Republic* [2016] eKLR. Additionally, the positive identification was buttressed by the evidence of recent possession. See *Benson Maxwell Muigai -vs- Republic* [2014] eKLR.
15. We are thus satisfied that the appellants are guilty of the offence charged. The minor discrepancies alluded to by the appellants did not affect the overwhelming evidence presented by the prosecution and their conviction was therefore safe.
16. On sentence, the appellants relied on the holding of the Supreme Court in *Francis Muruatetu & another vs Republic (supra)* and criticized the lower courts for declining to use their discretion to



mete out a lesser sentence to accord with the circumstances of the case. However, the apex court did subsequently provide guidelines currently referred to as *Muruatetu 2*, by which it limited the application of that holding to murder cases unless a challenge should be mounted in a proper manner and granted in respect of other mandatory sentences. We are unaware of such petition having been decided in respect of the offence charged herein. In the premises, we defer to the superior court's guidance and will therefore not interfere with the sentence imposed.

17. In conclusion, we find that this appeal lacks merit and we dismiss it in its entirety in respect of both appellants.

Order accordingly.

DATED AND DELIVERED AT KISUMU THIS 2ND DAY OF DECEMBER, 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

