Bisonga v Republic (Criminal Appeal 39 of 2015)
[2021] KECA 304 (KLR) (17 December 2021) (Judgment)

Neutral citation: [2021] KECA 304 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 39 OF 2015

PO KIAGE, J MOHAMMED & M NGUGI, JJA

DECEMBER 17, 2021

BETWEEN

BEN MOKUA BISONGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

((An appeal from the Judgment of the High Court of Kenya at Kisii (Sitati, J. and Muriithi, J.), dated 24th July, 2014 in HCCRA NO. 2 Of 2011))

JUDGMENT

1. 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 are that on the 23rd of June, 2010 at Nyangoge sub-location in Nyamira District within Nyanza Province, jointly with others not before court, while armed with offensive weapons, namely, pangas and clubs, he robbed Daniel Atinda Nyanchama of one mobile phone make Nokia 1110, cash Ksh. 11,500 and 1kg of meat, all valued at Ksh. 14,260 and or immediately before the time of such robbery, did use actual violence on him.

2. The appellant denied the charges leading to a trial in which the prosecution called 5 witnesses in support of its case. The magistrate (J. Wanjala, SPM) heard the testimonies, led by the complainant (PW1) who testified that on 23rd June, 2010 as a pillion passenger he was attacked by an armed gang of people who robbed him of a mobile phone, one kilogram of meat, tomatoes worth Ksh. 20 and cash amounting to Ksh. 11,500. The assailants, who were known to him, included the appellant who cut him with a sharp knife on his forehead and took his mobile phone.

3. The trial magistrate evaluated the evidence tendered before the court and found the appellant guilty as charged and sentenced him to death.

4. Aggrieved by the conviction and sentence, the appellant appealed to the High Court and judgment was delivered by Sitati and Muriithi, JJ on 24th July, 2014, dismissing the appeal in its entirety.

5. Still aggrieved, the appellant preferred the instant appeal based on 2 grounds, which are that;

    a. The Learned trial judge erred in law and fact in finding that the case against the appellant was proved beyond reasonable doubt;

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

6. During the hearing of the appeal, learned Counsel Mr. Okoyo appeared for the appellant, while the respondent was represented by Mr. Shitsama, the learned Prosecution Counsel. Counsel sought to entirely rely on their written submissions. In his written submissions, Mr. Okoyo, refers us to the Supreme Court decision in *Francis Karioko Muruatetu & Another -vs- Republic* [2017] eKLR for the proposition that the holding by the two courts below that the mandatory sentence for the offence of robbery with violence is death was an error in law. Counsel prays that the sentence of death be substituted with a favourable one.

7. We are also urged to consider the time the appellant has spent in custody in computing the sentence, in reliance of the High Court decision in *Vincent Sila Jona & 87 Others -vs- Kenya Prison Service & 2 Others* [2021] eKLR, which held that pursuant to section 333(2) of the *Criminal Procedure Code*, trial courts are enjoined to take into account the period spent in custody when imposing sentences other than the sentence of death.

8. In opposition to the appeal, Mr. Shitsama reminds us of our jurisdiction as a second appellate court, to only deal with matters of law and accept the concurrent findings of fact by the two courts below, unless those findings are not backed by evidence, or are based on a misapprehension of the evidence, or the two courts are shown demonstrably to have acted on wrong principles in making those findings. For the foregoing submission Counsel relies on section 361(a) of the Criminal Procedure Code and this Court's decision in *Njoroge Vs Republic* [1982] KLR 388.

9. Counsel drew our attention to the ingredients of the offence of robbery with violence as stated by this Court in *Oluoch -vs-republic* [1985] KLR 549 to include;

    a. The offender is armed with any dangerous and offensive weapon or instrument; or

    b. The offender is in company with one or more person of persons; or

    c. At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person.

10. According to Counsel the above ingredients were established by the respondent and the identity of the appellant well established by PW1, hence the ground of failure to prove the offence ought to be dismissed. Mr. Shitsama further contends that the appellant has not demonstrated that he deserves to be re-sentenced, that is, he has not provided any document to show that he is reformed nor that he is remorseful for his acts of violence against the complainant or that he has been rehabilitated. Counsel urges this Court to find the appeal unmeritorious and dismiss it. In the alternative, submits Counsel, if the Court finds it fit to resentence, the appellant should be sentenced to at least 25 years' imprisonment.

11. The jurisdiction of this Court on a second appeal has been well elucidated above by Counsel for the respondent, namely, to deal with matters of law only. The singular matter of law left for this Court to

consider is whether the appellant ought to be resentenced in view of the Supreme Court decision in *Francis Karioko Muruatetu* (supra).

12. The appellant contends that the sentence meted out on him ought to be substituted with a favourable one on account of the Supreme Court's decision in *Francis Karioko Muruatetu* (supra). The apex court held in that matter that a mandatory sentence is unconstitutional as it takes away judicial discretion to determine an appropriate sentence on a case by case basis.

13. The trial magistrate cannot, however, be faulted for sentencing the appellant to death as that is the sentence under the provisions of section 296(2) of the Penal Code. Similarly, the High Court cannot be reproached for upholding that sentence. Further, the aforementioned *Francis Muruatetu* had not been delivered at the time and so the two courts below did not have the lee way to reduce the sentence.

14. This Court has reduced sentences in various matters on account of that decision, including in *Jared Koita Injiri -vs-republic* [2019] eKLR, *Alex Kipchirchir Kiptoo -vs- Republic* [2018] eKLR, and *Abdalla Swalleh Awath -vs-republic* [2018] eKLR. In the circumstances, we find it fit to interfere with the trial court's sentence

15. We therefore dismiss the appeal against conviction. We allow it on sentence, to the extent that we set aside the sentence of death meted out by the trial court and upheld by the High court. We substitute it with a 20-year sentence to run from 29th December 2010 when the trial court passed the initial sentence.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2021.

P. O. KIAGE

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR