Amai v Republic (Criminal Appeal 19 of 2021)
[2025] KEHC 5369 (KLR) (30 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5369 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL 19 OF 2021

JN KAMAU, J

APRIL 30, 2025

BETWEEN

JACKSON SONGOLE AMAI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon J. K. Nga'rng'ar (SPM) delivered at Hamisi in the Principal Magistrate's Court in Criminal Case No 93 of 2012 on 25th September 2012)

JUDGMENT

Introduction

1. The Appellant herein was charged with the offence of robbery with violence contrary to Section 296 (2) of the *Penal Code* Cap 63 (Laws of Kenya).

2. He was tried and convicted by the Learned Trial Magistrate, Hon J. K. Nga'rnga'r (SPM) and sentenced to death.

3. Being dissatisfied with the said Judgement, on 6th August 2018, he lodged the Appeal herein. The same was dated 27th July 2018. He set out four (4) grounds of appeal. In his Written Submissions dated and filed on 14th October 2024, he incorporated his Amended Grounds of Appeal of even date. He set out five (5) Amended Grounds of Appeal.

4. The Respondent's Written Submissions were dated 7th January 2025 and filed on 8th January 2025. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the case of Selle & Another v Associated Motor Boat Co Ltd & Others [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.

7. Having looked at the Appellant's Amended Grounds of Appeal, his Written Submissions and those of the Respondent, it appeared to this court that the issues that had been placed before it for determination were as follows:-

    a. Whether or not the Prosecution proved its case beyond reasonable doubt; and

    b. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.

8. The court dealt with the said issues under the following distinct and separate heads.

I. Right To Fair Trial

9. The Appellant raised the Ground of Appeal relating to his right to fair trial Articles 47 and 50 of *the Constitution* of Kenya, 2010 in the Amended Grounds of Appeal Nos (1) and (3) that were contained in his Written Submissions. However, he did not submit on this issue.

10. On its part, the Respondent submitted that he was accorded a fair trial. It pointed out that the charge was read out to him in a language he understood and he responded to it. It added that the said charge was proper and complied with Section 134 of the *Criminal Procedure Code*.

11. It was categorical that whereas he faced a serious charge that would attract death, he did not demonstrate that he did not understand the charge facing him or that the case was complex or that he was not able to defend himself. It asserted that the right to legal representation was not absolute and that there were situations where it could be limited. It added that it must be established that from the commencement of the trial the accused raised concern about his inability to afford legal representation and that he would suffer substantial injustice as was held in the case of Charles Maina Gitonga v Republic[2020]eKLR.

12. It further submitted that he followed the proceedings very keenly, informed by the fact that he participated in the trial by cross-examining the prosecution witnesses on salient points related to the charge. It pointed out that his detailed defence also showed he understood the charges he was facing and the evidence presented, thus, there was no evidence that the Appellant was incapacitated in the trial for lack of legal representation.

13. It contended that he was supplied with statements before the hearing commenced and was given sufficient time to prepare for the hearing before the start of the case therefore he was aware of the charge he faced.

14. Article 47 of *the Constitution* of Kenya provides that:-

> " Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."

15. Article 50(1) of *the Constitution* of Kenya further states that:-

> " Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

16. Article 50(2) of *the Constitution* provides for the right of an accused person to fair trial. The Appellant herein did not specifically set out his rights that were allegedly infringed under Article 50(2) of *the Constitution*.

17. A perusal of the proceedings of the lower court showed that on several occasions, the Appellant informed the Trial Court that he was ready to proceed with the case. He took plea on 15th February 2012 and matter was set down for hearing. On 21st March 2012, he sought to be supplied with witness statements and the same were availed by the Prosecution.

18. When the matter came up in court on 4th June 2012, he indicated that he was to proceed with the hearing. The Trial Court proceeded to hear the case and he cross-examined all Prosecution witnesses. At no point did he indicate that he needed legal representation.

19. When the Trial Court found him to have a case to answer on 5th August 2013 and put him on defence, he said that he would tender unsworn evidence and would not call any witness. When the matter came up for defence hearing on 3rd September 2013, he informed the Trial Court that he was ready to proceed with the hearing and tendered his evidence.

20. In the absence of proof of violation of his right to fair trial, this court was not persuaded that it should find that the trial was rendered a nullity necessitating a retrial.

21. In the premises foregoing, Amended Grounds of Appeal No (1) and (3) were not merited and the same be and are hereby dismissed.

II. Proof Of Prosecution Case

22. The court dealt with the above issue under the following distinct and separate heads.

A. Identification

23. Amended Ground of Appeal No (1) was dealt with under this head.

24. The Appellant submitted that there was no identification parade that was carried out as was required in the *Criminal Procedure Code*. He disputed the Prosecution's assertions that the people who were attacked switched on a torch which enabled them identify him. He asserted that it was late at night and as such, the trauma and fleeting glances at the attackers could not justify any identification necessitating an identification parade.

25. He contended that the Prosecution's evidence was that it found wet shoes at his residence on the material night. He argued that there was no evidence tendered in court to link the wet shoes with the robbery and that in any case, the daily weather changes were unpredictable thus the wet shoes ought not

to be an issue in this case. He was categorical that such evidence was detrimental to the administration of justice and should have been excluded under Article 50(4) of *the Constitution* of Kenya.

26. He disputed the Prosecution's assertion that he was positively identified on grounds that a mob was said to have attacked Richard Masitsa (hereinafter referred to as "PW 2") and it therefore was difficult to clearly identify a suspect under such circumstances. He argued that the lack of a proper parade made his conviction unsafe as he was convicted on insufficient evidence and where the criminal procedure was not followed.

27. He added that the modern technology could easily compromise identification issues in that a police officer could use a cell phone to take a photo of a suspect even without his or her knowledge, show it to the complainant as a result of which the complainant would have had prior knowledge and/or familiarity of a suspect's facial appearance, type and colour of clothing they were wearing and any other prior knowledge.

28. He pointed out that in the past, miscarriages of justice occurred because of honest but mistaken identification of a defendant by prosecution witnesses.

29. He submitted that the UK Court of Appeal agreed that visual identification presented special difficulties in criminal trial and recommended a new approach for trial magistrates to deal with problems of identification evidence as seen in R v Turnbull (1977)QB. He added that the guidelines set out in the said case were that the magistrate had to be cautious before convicting on any identification evidence, warn himself/herself that there was a possibility that mistaken witnesses could be convincing, examine closely the circumstances in which each identification was done and point out weaknesses and that the said guidelines provided a safeguard where if the prosecution case relied upon contested identification evidence of poor quality and there was no other evidence to support the identification, then the duty of the magistrate was to order an acquittal. He pointed out that the evidence of PW 2 did not appear to be genuine and reliable and therefore the guidelines on the Turnbull case ought to have applied.

30. He blamed the Trial Court for not being cautious and failing to warn itself that there was a possibility that mistaken witnesses could be confusing. He placed reliance on several cases among them the cases of Peter Mwangi Wanjiku v Republic Criminal Appeal No 21 of 2019 and Charles Matu Mburu v Republic (both eKLR citations not given) where the appellants were set free as their identification was found to have been unsatisfactory.

31. On its part, the Respondent submitted that PW 2 testified that on the material night he was able to identify the Appellant who was well known to him and that together with his wife Jane Mmbone (hereinafter referred to as "PW 3"), they recognised the Appellant as a neighbour and placed him at the scene of the crime. It was emphatic that there was proper identification as there was prior knowledge of the Appellant.

32. It argued that there was therefore no need of conducting an identification parade since identification was by recognition which has been held by courts to be more reliable and weightier than that of a stranger as was held in the case of Anjononi & Others v Republic [1976-80] 1 KLR.

33. A perusal of the proceedings of the lower court showed that on the material night of 12th February 2012 at around 11.55p.m, PW 2 was in his house with PW 3 when they were attacked by four (4) people who broke into their house. PW 2 testified that he identified the Appellant using the light from a torch and called him by name but the Appellant cut him on the face. PW 3 corroborated his evidence and said that cut PW 2 twice on the head. She also confirmed that the Appellant was their neighbour.

34. This court had due regard to the case of Kinyanjui & 2 Others v Republic [1989] KLR 60, where it was held that the purpose of an identification parade was to give an opportunity to a witness under controlled and fair conditions to pick out the people he was able to identify, and for a proper record to be made of that event to remove possible later confusion.

35. Having analysed the evidence that was adduced, this court noted that there was no confusion relating to the identification of the Appellant by PW 2 and PW 3 which would have necessitated the need of an identification parade to be conducted. They were both able to identify him in a conducive environment through the light of a torch as a motor cycle rider and their neighbour. PW 2 even called out his name. They told the police that it was the Appellant who had attacked them and they arrested him.

36. The lighting condition was favourable for the positive identification of the Appellant by both PW 2 and PW 3. This court was satisfied that identification was by recognition. The Appellant's argument that there was need for an identification parade therefore fell by the wayside.

37. In the premises foregoing, Amended Ground of Appeal No 92) was not merited and the same be and is hereby dismissed.

B. Proof Of The Offence

38. The Appellant submitted that the Trial Court erred in finding that the Prosecution had established a prima facie case. He contended that the case was not proved beyond reasonable doubt as required in criminal proceedings. He asserted that the Prosecution fell short of discharging its legal burden of proof to the required standard due to insufficient and contradictory evidence.

39. He argued that no recoveries were made of the items allegedly stolen and it was ironical that even a mobile phone could not be recovered while it was usually tracked in order to apprehend a suspect. It was his contention that the Prosecution did not put effort to make its case water-tight by looking for the other suspects.

40. He invoked Section 296(2) of the *Penal Code* and asserted that it was question of fact and law if a theft could be proved as no exhibit was tendered in court and no explanation was given on the same. He blamed the Trial Court for not considering his defence.

41. He further contended that the burden of proof in criminal proceedings provided protection to an accused person from the power of the State so that the Prosecution could justify the allegations. He added that the said standard of proof was very high because the accused's liberty was at stake as was held in the case of R v Summers [1947] All ER 372.

42. He referred this court to the case of Hamisi Bakari & Another v Republic [1987]eKLR where the court found that the prosecution had presented insufficient evidence and hence, the case was not proved beyond reasonable doubt.

43. On its part, the Respondent placed reliance on the case of Oluoch v Republic[1985]KLR where it was held that robbery with violence was committed where the offender is armed with any dangerous and offensive weapon or instrument, or was in company with one or more person or persons; or at or immediately before or immediately after the time of the robbery the offender wounds, beat, struck or used other personal violence on any person.

44. It also relied on the case of *Dima Denge Dima & Others v Republic Criminal Appeal No 300 of 2007* (eKLR citation was not given) where it was held that the three (3) elements of the offence under Section 296(2) of the *Penal Code* had to be read disjunctively and not conjunctively and hence one element was sufficient to prove an offence of robbery with violence.

45. It pointed out that the evidence on record was apparent that the Appellant was armed with a dangerous weapon, a panga, he was in company of three (3) others at the time of the robbery and that he used actual violence at the time of the robbery.

46. It further contended that he chose to give unsworn statement and did not call any witnesses pursuant to Section 211 of the *Criminal Procedure Code*. It asserted that he gave an alibi defence but never called any of his witnesses to support his claim. It argued that the governing principle on alibi defence was that a failure to disclose an alibi at a sufficiently early opportunity to permit it to be investigated by the police was a factor which may be considered in determining the weight given to it as was held in the case of Charles Kasena Chogo v Republic[2019]eKLR.

47. It was its contention that the Appellant did not rebut its evidence thus his claim that the Trial Court did not consider his defence was without merit.

48. During trial, PW 2 testified that the Appellant had a rungu and they robbed them Kshs 3,500/= which was beside the bed. The Clinical Officer, Eric Kosgei (hereinafter referred to as "PW 1") examined him and confirmed that he had injury on the face, back, left cheek, shoulder and a bruise on the upper limb. PW 1 told the Trial Court that the injury was one (1) day old and had been caused by both sharp and blunt object. He classified the said injuries as "harm". He produced the P3 Form he filled on 14th February 2012 as exhibit in the case.

49. PW 3 explained that she administered first-aid on PW 2 and called the police. No 83936 PC Michael Otieno Atsango (hereinafter referred to as "PW 4") from Serem Police Station confirmed issuing P3 Form to PW 2.

50. The evidence of No 20050107 APC Julius Yegon (hereinafter referred to as "PW 5") who was the Investigating Officer in this case also corroborated the evidence of PW 1, PW 2, PW 3, and PW 4.

51. The Appellant gave an unsworn statement and did not call any witness. He averred that he was in his house on the material night and denied knowing about the robbery. This was his alibi.

52. This this court had due regard to the definition of "alibi" in the Black's Law Dictionary, 10th Edition where it was defined as:-

> " A defence based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time".

53. It was also trite law that once a respondent raised an alibi defence, the onus shifted to the prosecution to displace the same as was held by the Court of Appeal in the case of Victor Mwendwa Mulinge v Republic [2014] eKLR.

54. In this case, the defence of alibi was raised at the defence hearing and not at the beginning of the trial. The Prosecution did not rebut the same despite having the option of doing so as provided in Section 309 of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) that provides that:-

> " If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it."

55. Section 295 of the *Penal Code* stipulates that the elements of robbery with violence are :-

a. That the offender is armed with any dangerous weapon or offensive weapon or instrument;

b. That the offender is in the company of one or more persons;

c. That or if at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person.

56. It was evident that the Prosecution had proved all the element of the offence of robbery with violence that were set out by the Court of Appeal in Oluoch v Republic [1985]KLR as being that at the time the offence was committed, the offender was armed with any dangerous and offensive weapon or instrument or the offender was in company with one or more person or persons or at or immediately before or after the time of the robbery the offender wounded, beat, struck or used other personal violence to any person.

57. PW 2 testified that he sustained cuts which PW 1 and PW 3 confirmed. PW 2 and PW 3 testified that the Appellant was in the company of others when he entered their house armed with a rungu. PW 2 and PW 3 told the Appellant and his co-accused persons robbed them of their Kshs 3,500/= which was beside their bed.

58. Weighed against the evidence that was adduced by the Prosecution witnesses, this court did not therefore find the Appellant's alibi evidence to have been watertight enough to have weakened the inference of guilt on his part. The chain of events was unbroken.

59. The Trial Court thus proceeded correctly when it found that all the ingredients of proving the offence of robbery with violence had been satisfied and hence convicted him accordingly.

60. In the premises foregoing, Amended Ground of Appeal No (1) was not merited and the same be and is hereby dismissed.

III. Sentencing

61. Amended Grounds of Appeal Nos (4) and (5) were dealt with under this head.

62. The Appellant submitted that death and life sentences were slated for reform in Parliament in the *Criminal Procedure Code* and *Penal Code* Amendment Bills 2023 and that that meant the said sentences were untenable. He contended that he spent one (1) year and four (4) months in remand and prayed that this court considers Section 333(2) of the *Criminal Procedure Code* while dealing with his sentence.

63. He blamed the Trial Court for not considering his mitigation. He placed reliance on the case of John Gaitho Chege & Another v Republic Criminal Appeal No 92 of 2023 (eKLR citation not given) where the appellants were sentenced to twenty (20) years only for robbery with violence where one was killed and another seriously injured. He pleaded with court to acquit him on grounds that the items allegedly stolen were low value items which were not aggravating as in cases of loss of millions and deaths of persons.

64. He was emphatic that his sentence was harsh and disproportionate in the circumstances. He pointed out that he had undergone rehabilitation programmes such as diploma in Biblical Studies from AFCM International Training Centre, Certificate in public reading of scripture from the Grace and Mercy Foundation and Certificate in mind education training from the international youth fellowship. He added that he was of good character, a family man and a worker.

65. On its part, the Respondent submitted that the offence of robbery with violence attracted a mandatory death penalty and that the sentence of life imprisonment was commensurate to the offence committed and this court should not interfere with it.

66. It invoked Section 329 of the *Criminal Procedure Code* and placed reliance on the cases of Shadrack Kipchoge Kogo v Republic Criminal Appeal No 253 of 2003 (eKLR citation not given) and Benard Kimani Gacheru v Republic[2002]eKLR where the common thread was that sentence is essentially an exercise of the trial court and for any court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or that the sentence was too harsh and excessive that an error in principle must be inferred.

67. It asserted that the Trial Court took into consideration the evidence, the nature of the offence, the circumstances of the case, the relevant factors and the legal principles of the law in arriving at the appropriate sentence. It was emphatic that the Appellant's sentence was lawful and befitting of the offence committed.

68. It further relied on the case of Republic v Jagani & Another [2001] KLR 590 where it was held that the purpose of sentence was to separate offenders from society if necessary, to assist in rehabilitation of offenders. It was categorical that the Muruatetu case did not outlaw the death sentence but that the same could be prescribed in law in appropriate cases. He invoked Section 333(2) of the *Criminal Procedure Code* and placed reliance on the case of Ahamad Abolfathi Mohammed & Another v Republic[2018]eKLR where it was held that courts are obliged to take into account the period spent in custody before sentencing. It agreed that indeed the Trial Court was silent on the said Section hence it was not opposed to the Appellant's prayer.

69. Notably, the Appellant was found guilty of the offence of robbery with violence. The sentence that could be meted on him was contained in Section Section 296 (1) and (2) of the *Penal Code* which provides as follows:-

    1. Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

    2. If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

70. The Trial Court could not therefore have been faulted for having sentenced the Appellant to death as the same was lawful.

71. Having said so, in the case of Mbugua & 6 Others v Attorney General & 3 Others (Constitutional Petition E002 & E003 of 2024 (Consolidated)) [2025] KEHC 1248 (KLR) (24 February 2025) (Judgment) this very court held that it was discriminatory to deny offenders who had been convicted of the offence of robbery with violence and attempted robbery with violence the right to have their mitigation during trial considered, while the non-capital offenders enjoyed that right. It noted that under Article 27(1) of *the Constitution* of Kenya, persons who had been convicted for robbery with violence and attempted robbery with violence were also equal before the law, they had a right to be protected before the law and must derive equal benefit from the law as the non- capital offenders.

72. In this regard, it found that applicants who were seeking re-sentencing ought to file documents to support their mitigating factors. These documents could include certificates of programmes they had undergone in prison leading to their rehabilitation and recommendation letters from the In charges of prisons.

73. As it had both original and appellate jurisdiction to hear criminal and civil cases as provided in Article 165(3)(a) of *the Constitution* of Kenya and further it could review the decision of the lower court as provided under Article 50 (2) (q) of *the Constitution* of Kenya, to avoid further delays in this matter,

this court found it prudent to consider the mitigation and re-sentencing of the Appellant herein as it already had the lower court file.

Disposition

74. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 6th August 2018 was partially merited and the same be and is hereby allowed in the following terms:-

    a. That the conviction of the offence of robbery with violence against the Appellant be and is hereby upheld as the same was safe.

    b. That the Appellant do provide documents to support his mitigation by 15th May 2025.

    c. That the Probation Office file a Pre-Sentence Report by 30th May 2025.

    d. That the Appellant be and is hereby directed to appear before this court for mitigation and sentencing on 19th June 2025.

75. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 30TH DAY OF APRIL 2025

J. KAMAU

JUDGE