Muikamba v Republic (Criminal Appeal E026 of 2023)
[2025] KEHC 6987 (KLR) (28 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6987 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CRIMINAL APPEAL E026 OF 2023

JK NG'ARNG'AR, J

MAY 28, 2025

BETWEEN

STEPHEN NDAMBIRI MUIKAMBA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against both conviction and sentence arising from org. case No. E012 of 2023 delivered on 30th May 2023 by Hon. G. W. Kirugumi (PM)

JUDGMENT

1. The Appellant before this court was charged with robbery with violence contrary to Section 295 as read with Section 296(2) of the *Penal Code*. Particulars stated that on the night of 25/12/2022 at Kerugoya township within Kirinyaga county with others not before court robbed off Kshs. 5,600/= and a mobile phone make Infix X23 worth Kshs. 18,000/= the property of Samson Karimi Wanjiku and immediately before and after such robbery he used actual violence thereby occasioning bodily harm.
2. The Appellant was convicted of the charge and sentenced to death.
3. Being aggrieved by both the conviction and sentence, the accused filed the instant appeal on the following grounds: -
    i. That the learned trial magistrate erred in law and facts by failing to consider that there was no positive proof on how the complainant identified the appellant in this case bearing in mind that the incident happened at night at around 2245hrs in full of darkness.
    ii. That the learned trial magistrate erred in law and facts by severely sentencing me relying on PW1 and PW2 who are son and mother's testimonies not considering our family indifferences.
    iii. That the learned trial magistrate failed to consider that the investigations done by the prosecution were shoddy and unfounded.

iv. That the learned trial magistrate failed to consider that PW1 gave false testimony by telling the court that he laid unconscious on the ground outside the express hotel from 2245hrs to 0300hrs after being hit by a blunt object where he was working yet he had gone outside to pick a call due to noise of the people inside the hotel and no one saw him or heard the commotion outside that hotel.

v. That the learned trial magistrate erred in law and facts by imposing a harsh and excessive sentence without considering being a first offender, my fundamental rights and freedoms enriched in *the constitution*.

vi. That the trial magistrate erred in law and facts by not considering that the prosecution didn't call my mother to testify even after her being mentioned in the entire statements of PW1 and PW2 as the one who rescued the complainant.

vii. That the trial magistrate erred in law and facts by failing to consider by defense and mitigating factors.

viii. That the trial magistrate failed to consider that the prosecution didn't proof his case beyond reasonable doubt as it stipulated in law.

Appellants' submissions

4. It was the appellants' submission that their rights under Article 50 (1) and (2) of *the Constitution* were infringed by the trial court as the trial proceeded in the absence of a pro bono advocate for the appellant at the state's expense despite that the case was for a capital offense of robbery with violence. That the court record did not indicate whether the appellant was cognizant of the fact that the appellant lacked an advocate. The appellant added that his right to have legal representation was thus infringed as it is mandatory that accused persons charged with a capital offence have a right to legal representation. It was submitted that the appellant was a first-time offender and did not know court processes and he was therefore occasioned an injustice in the trial warranting an acquittal or orders for re-trial. The submissions by the appellants led to one conclusion, which is the fact that they were not accorded a fair hearing.

5. On whether the evidence was sufficient to convict the appellants, it was submitted in the negative. Regarding identification, the appellants submitted that thought identification by recognition was more assuring, the court ought to warn itself of the dangers of relying on visual identification. It was submitted that the incident occurred at night past 10:00pm and the victim PW1 never testified on the distance that was between him and the offenders, the length of time which he observed them, or whether he had the opportunity to hear their voices as those were the factors to consider in recognizing the assailants.

6. That the victim could only have seen the appellant occasionally as the appellant was not his customer. It was thus submitted that the recognition by the victim was not reliable or sufficient for a conviction of robbery with violence. It was further submitted that the victim's testimony in court contradicted what he told the clinical officer being that the three perpetrators were well known to him, whereas he testified that he only recognized the appellant. That the investigations done by the police were shoddy as they did not visit the crime scene to confirm the physical appearance or clarify that the place had light as testified by the victim.

7. It was further submitted that the prosecution failed to call the appellant's mother as a witness despite that it was testified by PW1 and PW2 that she saw the alleged attack on the victim. That the prosecution did not have any eye witness despite that the incident occurred at night in the vicinity of Maasais.

That the prosecution failed to call eye witnesses as they would have contradicted the prosecution's witnesses and, in the circumstances, the truth was not established. The appellant also submitted that the prosecution failed to call the arresting officer to shed light on the circumstances of the appellant's arrest. That failure two call the two crucial witnesses was substantial as they would have clarified the truth.

8. The appellant thus submitted that the case was not proven beyond reasonable doubt which was the applicable standard of proof in an offence for robbery with violence. That no weapon was produced before court to ascertain the allegations thus this element failed. As for the use of violence, it was submitted that the degree of injury was harm and the victim was in general good condition and had changed his clothes. That he had also been treated elsewhere and only suffered minor injuries.

9. The appellant added that he was not in possession of any of the items stolen from the victim. That there was no evidence of theft as no stolen property was found on the plaintiff and the victim never produced the receipt of the stolen phone. That the explanation that the receipt was behind the phone for two years since purchase was irrational and was made up to frame the appellant. It was thus submitted that the ingredients for robbery with violence were not met.

10. On the sentence, the appellant submitted that the mandatory nature of the death sentence was declared unconstitutional by the Supreme Court thus the trial court imposed an illegal sentence. That the trial court had discretion to impose a sentence other than death in accordance with the circumstances of the case. That there was justification in interefering with the sentence as the appellant did not use excessive force or unnecessarily injure the complainant. This court was urged to find that the maximum sentence imposed on the appellant was excessive and unwarranted as the appellant was young and a first time offender.

11. The appellant urged this Court to quash the conviction and set aside the sentence.

Respondent's submissions

12. In making its submissions, the Respondent conceded that the death sentence was not proportional and did not object to a review on the same. The respondent however maintained that the offence of robbery with violence was proven.

13. On recognition, it was submitted that the victim PW1 knew the appellant well as they were childhood friends and neighbors, there were street lights at the scene of the crime, PW1's testimony on identification was consistent and he was able to identify the clothes worn by the appellant during the incident. That PW2's evidence was credible and corroborated PW1's in that he went home at 3 am severely injured, and further that PW1 knew the appellant as they were neighbors.

14. It was thus submitted that the evidence that the appellant was among the robbers was strong and corroborated. That the defense of alibi was unbelievable as no witness was called to confirm the appellant's khat business. That DW2 opened the gate few minutes to 12 am and did not see the appellant. That there was therefore no evidence to pace the appellant away from the crime scene at 10pm as DW2 left for home at 8pm and opened the gate at 12am by which time the offence had already occurred.

15. The respondent submitted that the appellant's mother did not cooperate with the police and her evidence had less probabtive value to the prosecution. That DW4 confirmed that she declined to record a statement and testify against her son and that the defense was at liberty to call her as a witness but failed to.

16. On sentence, it was added that punishment in criminal law was meant to rehabilitate and reform offenders and not terminate their lives more so where the complainant did not die or suffer grievous harm. That PW1 suffered injuries classified as harm thus the death sentence was not only un-proportional, it striped off the appellant of dignity and subjected him to degrading and inhumane treatment. The respondent proposed a 40-year imprisonment submitting that the same was proportional and would serve as deterrence.

Analysis and Determination

17. The duty of the first appellate court in criminal cases was restated in the case of Charles Mwita v Republic, C. A. Criminal Appeal No 248 of 2003 (Eldoret) (unreported) where the Court of Appeal, at page 5, recalled that: -

> " In Okeno v R [1972] E.A. 32 at page 36 the predecessor of this Court stated: - "An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v R [1957] EA. 336) and to the appellate court's own decision on the evidence".

18. Being a 1st Appeal Court I must, weigh conflicting evidence and draw conclusions. As held in Shantilal M. Ruwalla v R [1957] EA 570, it is not the function of a 1st Appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusion; it must make its own findings and draw its own conclusions Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post, [1958] EA 424.

19. See Okeno v Republic [1972] EA 32. The court should also bear in mind that it did not see witnesses testify and give due consideration for that.

20. Having considered the grounds of appeal, and evidence adduced before the trial court, it is my considered opinion that the paramount issue for determination is whether the prosecution proved it case to the required standard and the issue of legal representation.

21. On the question of legal representation, Article 50 (2) (g) of *the Constitution*. states as follows: -

> " 50(2) Every accused person has the right to a fair trial, which includes the right-
>
> (g) to choose, and be represented by an advocate, and to be informed of this right promptly."

22. In its decision in Republic v Karisa Chengo & 2 Others [2017] eKLR, the Supreme Court considered the issue of legal representation at state expense and stated:

> " Article 50(2) (h) of *the Constitution* provides that "[every accused person has the right to a fair trial, which includes the right…to have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly." It does not define what "substantial injustice" means. However, in David Macharia Njoroge vs Republic, (supra), the Court of Appeal held that "substantial injustice" results to "persons accused of capital offences" with "loss of life" as the penalty if they have no counsel during their trials. We do not entirely concur with that holding, as it has the effect of limiting the right to legal representation in criminal trials only to cases where the accused person is charged with a capital offence. The operative words in Article 50 (2)

(h) are "if substantial injustice would otherwise result...." While it is therefore undeniable that a person facing a death penalty and who cannot afford legal representation is likely to suffer substantial injustice during his trial; the protection embedded in Article 50 (2) (h) goes beyond capital offence trials. The Court of Appeal indeed appears to have embraced this reasoning in a recent decision in Thomas Alugha Ndegwa vs Republic; C.A. No. 2 of 2004, when it allowed an application for legal representation by the appellant who had been convicted of defilement and sentenced to life imprisonment.

> In addition to the above, we do not agree with the Court of Appeal's holding in the instant case to the effect that the right guaranteed in Article 50 (2) (h) of *the Constitution* is progressive and that it can only be realized when certain legislative steps have been taken, such as the enactment of the *Legal Aid Act*. While this is true regarding the general scheme of legal aid which the Act is set to fully implement, the same cannot be the case regarding the right in Article 50 (2) (h). We are thus in agreement with Mr. Ole Kina, that the right to legal representation at state expense, under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more. We must however emphasize the fact that in accordance with the language of *the Constitution*, this particular right is not open ended. It only becomes available "if substantial injustice would otherwise result".

23. In Bernard Kiprono Koech vs Republic [2017] eKLR in considering an argument similar to what is now before me, Justice Mumbi Ngugi stated: -

> "Secondly, there is now a framework in place, which was not in place at the time of the appellant's trial, under which an accused person can apply under section 40 of the *Legal Aid Act* No. 6 of 2016 for legal representation at state expense. Section 43 of the Act imposes a duty on the court to inform an accused person of his right to apply for legal representation. It provides as follows:
>
> 43. (1) A court before which an unrepresented accused person is presented shall —
>
> (a) promptly inform the accused of his or her right to legal representation;
>
> (b) if substantial injustice is likely to result, promptly inform the accused of the right to have an advocate assigned to him or her; and
>
> (c) inform the Service to provide legal aid to the accused person.
>
> 40. I am satisfied that in the present case, there was, first, no substantial injustice as suggested in the Karisa Chengo case resulting to the appellant. Secondly, it is evident that the accused fully understood the charges facing him, and was able to address himself to the issues that arose."

24. In the instant case, the appellant was arraigned before the trial court in Kerugoya on 10/1/2023 where he was accordingly charged. The charges were presented to him in a language that he understood and a plea of not guilty was entered and bond terms given. The appellant was issued with all requisite documents including the charge sheet, statements and medical documents and the matter was fixed for hearing. On the date of the hearing, the appellant confirmed that he was ready to proceed and PW1

and PW2 testified. When the prosecution sought an adjournment for purposes of amending the charge sheet, the appellant made an application to be furnished with the investigation diary and the same was availed. The matter proceeded on 23/2/2023 wherein the amended charges were read to the accused in Kiswahili as before and a plea of not guilty was entered for both counts.

25. The court then ordered that PW1 and PW2 be recalled for re-examination on the basis of the amended charge and set a hearing date for 2/3/2023. On that date, the appellant sought an adjournment on grounds that he had not read the statements and the adjournment was allowed. The matter then proceeded on 9/3/2023 and PW1 and PW2 was recalled for further cross-examination. PW3 also testified and the matter was adjourned till 14/3/2023 when PW4 testified as the final witness and the prosecution closed its case.

26. The appellant was thereafter placed on his defence and the court duly complied with the provisions of section 211 of the *Criminal Procedure Code*. The record was not however clear on whether the appellant was informed of his right to legal representation. The Appellant elected to give sworn testimony and called one witness, DW1

27. Was there any substantive injustice in the trial process? I note that the appellant fully participated in the trial. He was able to intensely cross-examine each witness and he was elaborate in the manner he conducted the cross-examination the witnesses. The trial court was also mindful of procedure when it recalled the two prosecution witnesses after the amended charge sheet was read to the appellant and a plea of guilt entered. The appellant rightfully applied for the investigation diary and was immediately furnished with the same.

28. When the appellant applied for an adjournment to enable him read the statements and prepare for re-cross examination, the same was allowed. I also note that the timelines between adjournments were quite reasonable and there was no unreasonable delay in the hearing of the matter. The trial court also issued bond terms. I do also note that the trial court waited for and considered the sentencing report before delivering sentence judgment.

29. I note that throughout the trail, the appellant seemed well versed and understanding of the charges that faced him. The appellant ably put up the defence of alibi and elaborated on his whereabouts on the material day. The appellant also called one witness to further buttress his case.

30. From how the trial was carried out from the very beginning to the end, I have found no reason to arrive at the conclusion that the appellant suffered any substantial prejudice. The entire process was fair to the appellant.

31. In the circumstances, I am satisfied that no substantial injustice resulted on the appellant by the failure of provision of legal representation. It is my opinion that the appellant's right to a fair trial as enshrined in Article 50 (2) of *the Constitution* was not infringed. That ground of the appeal cannot succeed.

Whether the case against the appellant was proved beyond reasonable doubt

32. As to whether the offence of robbery with violence was proven to the required standard, I note that the offense is provided for in Sections 295 and 296(2) of the *Penal Code* which states: -

> " 295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

296(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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

33. In Jeremiah Oloo Odira v Republic [2018] eKLR the court held that: -

> "Robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto. Two things must therefore be proved for the offence of robbery to be established: Theft and the use of or threat to use actual violence. On the other hand, the offence of robbery with violence is committed when robbery is proved and further if any one of the following three ingredients are established: -
>
> i. The offender is armed with any dangerous or offensive weapon or instrument, or
>
> ii. The offender is in the company of one or more other person or persons, or
>
> iii. The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person" See Olouch v Republic (1985) KLR)"

34. The prosecution's case was that the offence of robbery with violence was established as the complainant, PW1, was assaulted prior and after the theft. It was the prosecution's case that on the material night at around 10:00pm, the appellant was outside the apartment that he was visiting and was answering a phone call when he saw three men approaching him. He recognized one, the appellant, as they were child hood friends and neighbors, and their families were also friends. The men were not armed and since he knew one of them, he did not worry. That the three men, inclusive of the appellant, proceeded to attack him and he was hit on the forehead above the eyes and he bled a lot. That the three of them beat him up and stole his phone and money and it was not until the appellant's mother showed up and pleaded for his life that the assault stopped.

35. PW1 testified that during the theft, the appellant stood in front of him and hit him causing the phone to fall and as he attempted to pick it, the appellant stepped on his hand to take the phone from him. This was collaborated by the injury on the complainant's wrist as testified by PW3 who stated that PW1 had swelling with tenderness on his right wrist joint with limited movement. The appellant also hit the complainant with a stone which landed on his pelvic and knee. PW3 produced medical evidence signifying that the complainant had suffered injuries categorized as harm and the same were fresh having occurred approximately 12 hours earlier. PW2 also collaborated the complainant's testimony that he lay unconscious till around 3am when he went home and PW2 gave him first aid before taking him to hospital the next day.

36. From the foregoing, the ingredients of robbery with violence were all established and proven by the prosecution in that the appellant used a stone and a blunt object to occasion the compliant harm as he stole from him. The appellant also stole the complainant's phone and money and assaulted him as per the medical evidence. The appellant was also in the company of two other men. All these prove the offense of robbery with violence as correctly found by the trial court.

37. Though the appellant took an issue with identification, I do note that the prosecution was able to prove that the complainant positively identified the appellant as one of the robbers. PW1 testified that he knew the appellant well as they grew up as childhood friends and were neighbors. He was also able to clearly elaborate what the appellant was wearing during the robbery and it turned out that the appellant was still wearing the pullover he was spotted with. This then confirms PW1's testimony that there was enough lighting. I do also note that the appellant stood in front of the complainant and hit him thus the complainant had a good chance to confirm that it was him.

38. This testimony was collaborated by PW2 who confirmed that she too knew the appellant as they were neighbors. Noting that PW1 had informed her that the appellant's mother had saved his life, PW2 went to the appellant's home to request for his phone and money and the appellant's mother denied having either. This confirms that PW1 and the appellant are neighbors and that the appellant was well known to the complainant. I do find that the appellant was positively identified.

39. As to the defendant's defense of alibi, I do agree with the trial court that the prosecution's case outweighed the defendant's. DW1 could not account for the appellant's whereabouts around 10:00pm when the offense was taking place so as to place the appellant away from the scene of the crime. DW1 did not also see the appellant at 12am as she testified that she only opened the gate and left without seeing the appellant.

40. Considering the entire record, the foregoing and the comprehensive judgment of the trial court which I have considered, I wholly agree with the findings of the trial court that the elements of robbery with violence were properly established and as such the conviction was proper.

41. It then follows that the finding of the trial court on conviction is upheld.

Whether the sentence was manifestly harsh and should be interfered with

42. As noted above: -

> " 295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.296(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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

43. In Francis Karioko Muruatetu & Another v Republic [2017] eKLR, the Supreme Court held that mandatory death penalty for murder is unconstitutional. In that case, the Supreme Court outlined the following guidelines as being applicable when the Court was considering re-sentencing: -

> " (a) age of the offender;
>
> (b) being a first offender;
>
> (c) whether the offender pleaded guilty;
>
> (d) character and record of the offender;
>
> (e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaption of the offender;

(h) any other factor that the Court considers relevant."

44. It then follows that the accused mitigation ought to count in sentencing. I am also cognizant of the principles of sentencing as captured in High Court criminal appeal decision in Dahir Hussein v. Republic Criminal Appeal No. 1 of 2015; [2015] eKLR. In the said case, the High Court held that the objectives include: -

> " deterrence, rehabilitation, accountability for one's actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim."

45. In Duncan Kyalo Muange & another v Republic [2019] eKLR, the Court held that: -

> " In my view, fairness to the accused where a sentence re-hearing is considered appropriate would require a consideration of the circumstances prior to the commission of the offence, at the time of the trial and subsequent to conviction. The conduct of the accused during the three stages may therefore be a factor to be considered in determining the appropriate sentence. The need to protect the society clearly requires the Court to consider the impact of the incarceration of the offender whether beneficial to him and the society or not hence the necessity for considering a pre-sentencing report."

46. The sentencing objectives in Kenya have been captured in the Sentencing guidelines 2023 to be the following: -

> " 1) Retribution: to punish the offender for his/her criminal conduct in a just manner.
>
> 2) Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
>
> 3) Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law-abiding person.
>
> 4) Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.
>
> 5) Community protection: to protect the community by incapacitating the offender.
>
> 6) Denunciation: to communicate the community's condemnation of the criminal conduct.
>
> 7) Reconciliation: To mend the relationship between the offender, the victim and the community.
>
> 8) Reintegration: To facilitate the re-entry of the offender into the society."

47. On whether an appellate court can interfere with the sentence of the trial court, the Court of Appeal in the cases of Shadrack Kipkoech Kogo –vs- R Eldoret Criminal Appeal No. 253 of 2003 stated that: -

> " Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (See also Sayeka –vs- (1989 KLR 306)."

48. In Bernard Kimani Gacheru vs Republic (2002) vs- Republic (2002) eKLR the Court of Appeal held restated that: -

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong materials or acted on a wrong principle. Even if the Appellate Court feels that the sentence is heavy and that the Appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."

49. In considering the above-mentioned factors and circumstances of the case, more so considering the mitigation of the appellant/accused, category of harm caused on the complainant being harm and that the extent of force used was not aggravating, I will interfere with the sentence and substitute it with 40 years' imprisonment. In compliance with Section 333 (2) of the *Criminal Procedure Code*, the sentence will start running from 10/1/2023 when the appellant was first arraigned in Court.

It is so ordered.

JUDGEMENT DATED AND SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF MAY, 2025.

J.K.NG'ARNG'AR

JUDGE

Judgement delivered in the presence of the Appellant and Mamba for the Respondent. Siele/Mark (Court Assistants).