Godia v Republic (Criminal Appeal 1 of 2021)
[2025] KEHC 7485 (KLR) (27 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7485 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL 1 OF 2021

JN KAMAU, J

MAY 27, 2025

BETWEEN

WILLIAM GODIA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon G. Mmasi (SPM) delivered at Vihiga in Principal Magistrate's Court in Criminal Case No 592 of 2014 on 10th September 2014)

JUDGMENT

Introduction

1. The Appellant herein was charged with the offence of robbery with violence contrary to Section 295 as read with 296(2) of the *Penal Code*.

2. The Learned Trial Magistrate, Hon G. Mmasi (SPM) convicted him and sentenced him to death.

3. Being dissatisfied with the said Judgement, he lodged an appeal herein. His Petition of Appeal was dated 15th September 2014 and filed on 22nd September 2014. He set out nine (9) grounds of appeal.

4. In his Written Submissions dated 16th August 2024 and filed on 27th August 2024, he incorporated his Amended Grounds of Appeal. The Respondent's Written Submissions were dated and filed on 25th November 2024. 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 bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the case of Selle & Another vs 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 and his Written Submissions, this court noted that he only focused on the issue of sentencing. Therefore, the issue that had been placed before it for determination was 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 Appellant submitted that the death sentence that was imposed on him was arbitrary as it denied him the right to life. In this regard, he placed reliance to the case of Godfrey Ngotho Mutiso vs Republic Criminal Case No 17 of 2008 (eKLR citation not given) where he claimed the court held that death sentence was unconstitutional (sic). He argued that the circumstances of his case did not warrant the said sentence. He urged the court to re-evaluate the evidence and the circumstances of the case and pass appropriate sentence.

9. He further relied on the case of Joseph Yusuf Mimo vs Republic Criminal Appeal No 19 of 2010 (eKLR citation given) where the court set aside the death sentence and substituted it with five (5) years imprisonment and the case of Evanson Mwiruri Gichane vs Republic Criminal Case No 277/2007 (eKLR citation not given) where the court set aside death sentence and substituted it with a seven (7) years imprisonment.

10. He asserted that the death sentence was harsh, excessive, inhuman, cruel and unconstitutional amounting to unfair trial. He added that convicts sentenced to death were not accorded the opportunity to reform. He urged the court to review the same to a definite sentence. He pointed out that imposing of minimum sentences was not ideal.

11. He further cited the cases of Ogolla s/o Owuor vs Republic(1954)EACA 270 where it was held that the court did not alter a sentence unless the trial judge had acted upon wrong principles and Wanjema vs Republic(1971) E.A 493 where it was held that the appellate court was entitled to interfere with the sentencing discretion of the trial court in view of plain error of omnibus sentence and the illegality of the sentence.

12. He invoked Article 165(3) and 23 of *the Constitution* of Kenya, 2010 and urged the court to consider his mitigation and pass an appropriate sentence. He pleaded with the court to consider that he was a first offender, remorseful and a young man who was married and was willing to start a fresh life and have a family. He added that his parents and relatives were not aware of his whereabouts as he was arrested while at his place of work.

13. He stated that he had been incarcerated for ten (10) years since his arrest and he was rehabilitated and reformed. He asserted that he was of good character, a law-abiding citizen and that if given a chance, he would maintain peace in the country and never be found in conflict with the law. He sought a second chance to be re-integrated back into the society.

14. He further pointed out that mandatory life sentence was declared unconstitutional by the Court of Appeal in Kitsao Manyeso vs Republic Criminal Appeal No 12 of 2021(eKLR citation not given). He cited Section 333(2) of the *Criminal Procedure Code* and placed reliance on the case of Ahamed Abolfathi Mohammed & Another vs Republic[2018]eKLR where it was held that the sentence of imprisonment ought to run form the day of arrest.

15. On its part, the Respondent invoked Section 296(2) of the *Penal Code*, Article 25(c) and 26(3) of *the Constitution* of Kenya, 2010 and submitted that the limitation of life on the part of the Appellant was reasonable given the gravity of the offence he committed. It was emphatic that the application of the said limitation was not arbitrary but was justifiable under the law.

16. It pointed out that in the event this court found the death penalty to have been cruel and contrary to *the Constitution* of Kenya, it ought to be guided by the case of Mbushu & Another vs Republic(1995) TLR (CA), a Tanzanian case where the court held that the death penalty was inherently cruel, inhuman and degrading but declined to declare it unconstitutional.

17. It also invoked Section 362 and 364 of the *Criminal Procedure Code* and placed reliance on the case of Ogolla s/o Owuor vs Republic[1954] EACA 270 and Shadrack Kipkoech Kogo vs Republic Criminal Appeal No 253 of 2003 (eKLR citation was not given) where the common thread was that an appellate court would not interfere with a sentence unless the trial judge had acted upon wrong principles or overlooked some material factors.

18. It submitted that the Appellant had failed to raise any irrelevant factors relied on by the Trial Court in arriving at the death sentence. It added that the Trial Court considered the time the Appellant had spent in custody before sentencing him as was provided in Section 333(2) of the *Criminal Procedure Code*. It therefore urged this court to dismiss the Appeal herein as the death sentence that was meted out to him was proper, sound and lawful.

19. Notably, in the case of Mbugua & 9 Others vs 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 enjoy that right.

20. It observed that in the words of 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.

21. The court's decision was in line with the directions of the Supreme Court on 6th July 2021 in Francis Karioko Muruatetu and Another vs Republic [2017] eKLR (commonly now known as Muruatetu II) that the question of constitutionality of the death sentence in robbery with violence cases ought to commence at the High Court and thereafter escalated to the Court of Appeal, if necessary. It rendered itself as follows:-

> " 46. 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 (emphasis court)."

22. Sewe J also reached a similar conclusion as this court in the case of Ramadhan *& 8 others v General & another (Petition 5 of 2022* & Constitutional Petition 6 of 2022 (Consolidated)) [2024] KEHC 1173

(KLR) (6 February 2024) (Judgment) when she declared the mandatory nature of the death penalty as provided for under Section 296(2) and 297(2) of the *Penal Code* unconstitutional. She further directed that the petitioners be presented before the respective sentencing courts for sentence re-hearing upon appropriate applications

23. This court noted the Appellant's and Respondent's arguments and submissions on the review of the Appellant's sentence of death on the offence of robbery with violence. However, it found it prudent that the Appellant file his documents in support of his mitigating factors such as the certificates on programmes he had undergone in prison leading to his rehabilitation and his respective officer' in-charge prisons recommendation letter as this court had stated were necessary before an application for re-sentencing could be considered.

24. In Constitutional Petition No E002 of 2024 Mbugua & 6 Others vs The Hon Attorney General as consolidated with Constitutional Petition No E003 Alfred Eyase Kinamundu & 2 Others vs the Hon Attorney General & Others , this court rendered itself as follows:-

> "The purpose of incarceration is rehabilitation and reformation of prisoners. It was psychological torture for a prison to take numerous courses to improve himself or herself in prison but never use those skills in the society. Indeed, learning of skills had the purpose of easing the integration of prisoners back into the society. Life imprisonment denied convicts who were on life sentence hope for a better future. It was discriminatory that all convicts had hope of going home other than those who had been convicted of the offence of robbery with violence and attempted robbery with violence. There had to be a determinate period within which a person had to atone for their sins.
>
> The long indeterminate incarceration while undergoing rehabilitation programs without the prospect of being released was in the considered opinion of this court a blatant violation of the Petitioners' right to dignity contrary to Article 28 of *the Constitution* of Kenya....
>
> For those who had been convicted and did not have the benefit of mitigating before being sentenced such as the Petitioners herein, they had a reprieve in Article 50(2) of *the Constitution* of Kenya which sets out some of the principles that were considered to constitute fair trial. One of these principles was the right to lodge an appeal or apply for review in a higher court, if convicted as stipulated in Article 50 (2) (q)) of *the Constitution* of Kenya.
>
> Such mitigation, which would include the behaviour while in prison and proof of reformation and possibility of reintegration in the society which would enable an appellate and/or review court have a holistic view of the case. During appeal or review of a case, a higher court would have had all the facts and circumstances of the accused on record to enable it assess the appropriate sentence in case there was merit for a sentence reduction."

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

Disposition

26. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Amended Grounds of Appeal dated 16th August 2024 and filed on 27th August 2024 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 27th June 2025.

    c. That the Probation Office file Pre-Sentence Report in respect of the Appellant by 27th June 2025.

    d. That the Appellant be and is hereby directed to appear before this court for mitigation and sentencing on 17th July 2025.

27. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 27TH DAY OF MAY 2025

J. KAMAU

JUDGE