Chivoli v Republic (Criminal Appeal E037 of 2023)
[2024] KEHC 858 (KLR) (29 January 2024) (Judgment)

Neutral citation: [2024] KEHC 858 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E037 OF 2023

RE ABURILI, J

JANUARY 29, 2024

BETWEEN

PHILIP LUNGAYE CHIVOLI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the conviction and sentence by the Hon. R. Ohanda on the 13.12.2022 in the Principal Magistrate's Court in Winam in Criminal Case No. E286 of 2021)

JUDGMENT

Introduction

1. The appellant herein Phillip Lungaya Chivoli and 2 others were charged with the offence of robbery with violence contrary to section 295 as read with section 296(2) of the *Penal Code*. The appellant and the third accused in the lower court, David Ochieng Otieno alias Toto were convicted and sentenced to serve twenty years imprisonment while the second accused person, Dickson Munyane was found not guilty and was acquitted of the charge.

2. The particulars of the offence were that on the 9th day of April 2021 at Kibos in Kisumu East sub-county, Kisumu County, jointly with others not before court while armed with offensive weapons namely rungus, robbed one Pascal Omondi Oluoch of on mobile phone make Techno valued at Kshs. 5,500, one mobile phone make Oking valued at Kshs. 1,200, one mobile phone make Guava valued at Kshs. 1,200 and Kshs. 350,000 all valued at Kshs. 375,900 and immediately before the time of such robbery used actual violence against the said Pascal Owino Oluoch.

3. Aggrieved by the conviction and the sentence, the appellant filed the instant appeal on the 15th August 2023 setting out the following grounds of appeal:

i. That the trial court erred in law and facts in convicting I the appellant with the offense of robbery with violence c/sec 296(2) when the conditions for the identification were sufficient.

ii. That the learned trial magistrate erred in law and facts by taking into account extraneous matters that were neither in evidence nor proved thus error in law.

iii. That the trial court erred in both law and facts without considering that essential witnesses named in court during trial were not summoned to testify so as to clear doubts in the prosecution case.

iv. That the trial court erred in law without exercising greatest caution and circumstances before convicting on testimony of PW1 the only identifying witness thus error in law.

v. That the learned trial magistrate erred in law and facts by relying on evidence marred with a lot of contradiction thus possibility of error in his findings.

vi. That the trial court erred in law and facts without noting that there was no prove of ownership for the purported stolen items before court.

vii. That the trial court in law by convicting the appellant herein on defective charge.

viii. That the learned trial magistrate erred in law and facts without considering the appellant herein was a victim of mistaken identity along the road where the purported incident took place.

ix. That the learned trial magistrate erred in law by acting on wrong principles thus coming up with unjust decision against the appellant.

x. That the learned trial magistrate erred in law without putting into consideration and sworn alibi defence which remained unshaken by the prosecution side.

xi. That I will adduce more grounds when served with certified court proceedings.

4. When the matter came up for hearing before this court, the appellant withdrew his appeal against conviction on the grounds that the evidence against him was overwhelming.

5. The appellant urged the court to consider reducing the sentence imposed on him. It was his submission that he was 52 years old and that he had children and as his wife had died, the said children were alone. He testified that he was now a church person and that he was beaten to near death. It was his submission that he sought the court's mercy and leniency.

6. In response, the respondent through Mr. Onanda Senior Principal Prosecution Counsel submitted that they had no issue with the withdrawal of the appeal against conviction.

7. On the sentence, Mr. Onanda submitted that he left the same to the discretion of the court in light of the recent judgements coming from the Court of Appeal.

Analysis and Determination

8. I have considered the mitigation and the submissions by the appellant and the prosecution counsel. Section 296(2) of the *Penal Code* prescribes a mandatory death sentence upon conviction, for the offence of robbery with violence.

9. However, the Supreme Court in the case of *Francis Karioko Muruatetu & Another v Republic* (2017) eKLR declared the mandatory death sentence for murder under Section 204 of the *Penal Code* to be unconstitutional for the reason that it deprived courts of the inherent discretion to impose a sentence

other than the death sentence in an appropriate case, having regard to the circumstances of each case. Secondly, that the mandatoriness of death sentence also denied the convicted person the opportunity to mitigate before being sentenced.

10. Subsequently, the Court of Appeal in William Okungu Kittiny v Republic [2018] eKLR applied the Muruatetu case *mutandis mutatis* to the mandatory death sentence for robbery with violence under the provisions of section 296 (2) of the *Penal Code* and declared the said section to be unconstitutional on the same reasons stated by the Supreme Court in the Muruatetu case. The Court of Appeal stated as follows:

> " ...The appellant was sentenced to death for robbery with violence under Section 296 (2). The punishment provided for murder under Section 203 as read with Section 204 and for robbery with violence and attempted robbery with violence under Section 296 (2) and 297 (2) is death. By Article 27(1) of *the Constitution*, every person has *inter alia*, the right to equal protection and equal benefit of the law. Although the Muruatetu's case specifically dealt with the death sentence for murder, the decision broadly considered the constitutionality of the death sentence in general...From the foregoing, we hold that the findings and holding of the Supreme Court Particularly Paragraph 69 applies mutatis mutandis to Section 296 (2) and 297 (2) of the *Penal Code*. Thus the sentence ... is a discretionary ..."

11. In the premises, a trial court can in an appropriate case, impose a sentence other than the death sentence in a case of robbery with violence. This is because sentencing is in the discretion of the trial court although such discretion must be exercised judiciously and not capriciously. The discretion is however limited to the statutory minimum and maximum penalty prescribed for a particular offence.

12. In the case of *Shadrack Kipchoge Kogo v Republic* Criminal Appeal No. 253 of 2003(Eldoret), the Court of Appeal stated as follows:

> " Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant fact or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred"

13. Similarly, in the case of *Wanjema v Republic* (1971) E.A. 493 the court stated that:

> " An appellate court should not interfere with the discretion which a trial court has exercised as to the sentence unless it is evident that it overlooked some material factors, took into consideration some immaterial fact, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case."

14. The Supreme Court in the Francis Karioko Muruatetu *supra* decision gave the following guidelines to be applied by courts in considering the convicts for re-sentencing:

> " 71. As a consequence of this decision, paragraph 6.4 - 6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:
>
> 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-adaptation of the offender;

h. any other factor that the Court considers relevant.

72. We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process. This notwithstanding, we are obligated to point out here that paragraph 25 of the 2016 Judiciary Sentencing Policy Guidelines states that:

"25. Guideline Judgments

25.1. Where there are guideline judgments, that is, decisions from the superior courts on a sentencing principle, the subordinate courts are bounded by it. It is the duty of the court to keep abreast with the guideline judgments pronounced. Equally, it is the duty of the prosecutor and defence counsel to inform the court of existing guideline judgments on an issue before it."

15. The Court of Appeal in *William Okungu Kittiny v Republic* [2018] eKLR stated:

"...The appellant was sentenced to death for robbery with violence under Section 296 (2). The punishment provided for murder under Section 203 as read with Section 204 and for robbery with violence and attempted robbery with violence under Section 296 (2) and 297 (2) is death. By Article 27(1) of *the Constitution*, every person has inter alia, the right to equal protection and equal benefit of the law. Although the Muruatetu's case specifically dealt with the death sentence for murder, the decision broadly considered the constitutionality of the death sentence in general...From the foregoing, we hold that the findings and holding of the Supreme Court particularly Paragraph 69 applies mutatis mutandis to Section 296 (2) and 297 (2) of the *Penal Code*. Thus the sentence ... is a discretionary ..."

16. According to The *Sentencing Policy Guidelines*, 2016 ("the Guidelines") published by the Kenya Judiciary, the sentence imposed must meet the following objectives in totality;

(a) Retribution: To punish the offender for his/her criminal conduct in a just manner.

(b) Deterrence: To deter the offender from committing a similar offence subsequently as well as discourage other people from committing similar offences.

(c) Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person.

(d) Restorative justice: To address the needs arising from criminal conduct such as loss and damages.

(e) Community protection: To protect the community by incapacitating the offender.

(f) Denunciation: To communicates the community's condemnation of the criminal conduct."

17. The above were reiterated in the case of *Republic v Karakacha* (Criminal Case 24 of 2020) [2023] KEHC 18737 (KLR) (21 June 2023) (Sentence).

18. In the instant appeal, all the ingredients of robbery with violence were proved against the appellant beyond reasonable doubt and he so submitted, when he withdrew his appeal against conviction saying that the evidence against him was overwhelming hence he did not see the need to challenge his conviction at the hearing.

19. The appellant who was in the company of two others, robbed the complainant, and in the course of the robbery, used force and injured him. The complainant lost over Kshs 350,000 which was money for business. The assailants used a rungu to attack and harm the complainant.

20. The complainant testified that the appellant and his colleagues held him and hit him to the ground before they strangled him leading him to drop the bag of money that he had. In cross-examination, the complainant testified that the appellant was the one who held him as the other robbers took away his bag.

21. In his mitigation before the trial court, the appellant denied having committed the offence. He did not seem remorseful and further stated that he had children and a wife who depended on him. He stated that he had to be mobile in order to feed his family.

22. I have considered the appellant's mitigation in the trial court and before this court as detailed herein above. In the circumstances of this case, the 20-year sentence imposed on him was not harsh or excessive. However, as the appellant has withdrawn his appeal against conviction and owned up to the offence and pleaded for leniency saying he had reformed and owing to his age which is 52 years, and a first offender, I exercise discretion and review the twenty years imprisonment. I hereby set aside the twenty years imprisonment imposed on the appellant Phillip Lungaye Chivoli and substitute the same with ten (10) years imprisonment to be calculated from 9/4/2021 when he was arrested at the scene of crime.

23. Signal to issue and lower court file returned forthwith with a copy of judgment.

24. File is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 29TH DAY OF JANUARY, 2024

R.E. ABURILI

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR