



**Jumba alias Madiaba Agani v Republic (Criminal Appeal
1 of 2022) [2024] KEHC 3309 (KLR) (18 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3309 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL APPEAL 1 OF 2022
JN KAMAU, J
MARCH 18, 2024**

BETWEEN

SETH JUMBA ALIAS MADIABA AGANI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Judgment of Hon J. K. Ng'arng'ar (SPM) delivered at Hamisi in Senior Principal Magistrate's Court in Criminal Case No 422 of 2012 on 26th May 2014)

JUDGMENT

Introduction

1. The Appellant herein was charged jointly with two (2) others, namely Alfred Ayase and Francis Agani, 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. Ng'arng'ar, Senior Principal Magistrate who sentenced him to death.
3. Being dissatisfied with the said Judgment, on 22nd September 2014, he lodged the Appeal herein. The same was dated 1st September 2014. He set out four (4) grounds of appeal. Subsequently, on 10th October 2023, he filed Supplementary Grounds of Appeal. The same was undated. He set out five (5) Supplementary Grounds of Appeal.
4. His undated Written Submissions were filed on 10th October 2023. However, he subsequently, filed an Amended Written Submissions on 10th January 2023. The same was dated 14th December 2023. The Respondent's Written Submissions were dated 21st February 2024 and filed on 22nd February 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 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 said so, the Appellant pointed out that he was not contesting his conviction by the Trial Court. He urged the court to set aside the death sentence that was imposed against him and in its place pass an appropriate sentence. It was his case that the death sentence was arbitrary, disproportionate and denied him the right to life.
8. He invoked Article 23 of the Constitution of Kenya, 2010 and contended that this court had the discretion to review his sentence. He further cited Article 26 and especially Article 26(3) of the Constitution and argued that death penalty was inhuman and a degrading punishment that amounted to unfair trial. He was apprehensive that the issues surrounding the death sentence had not been fully settled by the Kenyan courts but relied on Article 165(3)(b) of the Constitution to urge this court to handle his appeal.
9. He asserted that death sentence was retributive and that a convict was not accorded an opportunity to reform. He placed reliance on the case of Godfrey Mutiso case (eKLR citation not given) where it was held that the death sentence should not be the only sentence in capital offences and that each case had to be determined according to circumstances. He pleaded with court to consider his rehabilitation and reformation for the ten (10) years he had been in prison and sentence him to a lenient sentence. He pointed out that he had studied theology in biblical studies and had acquired certificates which would assist him to earn a living once he left prison.
10. He was emphatic that the death sentence did not meet the main aim or objective of sentencing and the same was too excessive and harsh for a first offender like him. In this regard, he relied on the case of *Hezekiah Mwaura Kibe v Republic* (1976) KLR 118 where it was held that the antecedents of an accused person also came into play (sic) when the court was considering the appropriate sentence if an accused person was a first offender, the sentence ought to reflect this fact as the aim of the court was to encourage reform and discourage recidivism. He urged the court to consider his mitigation while reviewing his sentence.
11. He also invoked Section 333(2) of the Criminal Procedure Code and submitted that he was in custody throughout his trial which time should be taken into account in computing his sentence.
12. On its part, the Respondent only focused on the Appellant's conviction. Having filed its Written Submissions after the Appellant herein, it ought to have responded to his said Amended Written Submissions on the issue of sentence only. As he was not seeking review of the evidence that was adduced during trial, this court delved directly to the aspect of sentence.
13. Notably, Section 295 of the Penal Code Cap 63 (Laws of Kenya) states that:-

“ 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.”

14. Further, Section 296 (1) and (2) of the [Penal Code](#) 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.
15. The Appellant placed reliance on Article 26 of the [Constitution](#) of Kenya, 2010. The aforesaid Article provides that:-
 1. Every person has the right to life.
 2. The life of a person begins at conception
 3. A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law.
16. Notably, on 6th July 2021, the Supreme Court of Kenya gave guidelines in the case of [Francis Karioko Muruatetu & Another v Republic](#) [2017] eKLR to the effect that the said decision only applied in respect to sentences of murder under Sections 203 and 204 of the [Penal Code](#) and that it was not applicable to 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](#).
17. The holding in the case of Francis Karioko Muruatetu & Another vs Republic (Supra) was inapplicable herein as the Applicant had been charged and convicted of the offence of robbery with violence and not murder as was emphasised by the Supreme Court in its aforesaid guidelines. Until such time that further directions were given in respect of sentences in robbery with violence cases, the hands of this court were tied and could only mete out the punishment that was presented by law, which was death.
18. In the premises foregoing, Supplementary Grounds of Appeal No (5) was not merited and the same be and is hereby dismissed.

Disposition

19. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s undated Petition of Appeal that was lodged on 22nd September 2014 was not merited and the same be and is hereby dismissed. The Appellant’s conviction and death sentence be and are hereby upheld as they were both safe.
20. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 18TH DAY OF MARCH 2024

J. KAMAU

JUDGE

