



REPUBLIC OF KENYA



**Agani v Republic (Criminal Appeal 2 of 2022)  
[2024] KEHC 2892 (KLR) (18 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2892 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CRIMINAL APPEAL 2 OF 2022  
JN KAMAU, J  
MARCH 18, 2024**

**BETWEEN**

**FRANCIS 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 Seth Jumba alias Madiaba 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 Judgement, on 22<sup>nd</sup> September 2014, he lodged the Appeal herein. The same was dated 3<sup>rd</sup> September 2014. He set out four (4) grounds of appeal. A reading of his undated Amended Written Submissions filed on 10<sup>th</sup> January 2024 indicated that he had filed Supplementary Grounds of Appeal. However, the same were not in the court file at the time of writing this Judgment.
4. His original Written Submissions were also missing in the court file. The Respondent's Written Submissions were dated 16<sup>th</sup> February 2024 and filed on 19<sup>th</sup> 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 and subjected him to inhuman and psychological torture.
8. He added that the death sentence was inconsistent with *the constitution* and in that regard, he placed reliance on the case of *Godfrey Ng'otho Mutiso v Republic* Criminal Appeal No 17 of 2008 Mombasa (eKLR citation not given) where it was held that the death sentence was inconsistent with *the constitution*.
9. He urged the court to set aside his death sentence and in its place mete an appropriate sentence. He was apprehensive that the issue of death sentence had not been fully settled by the Kenyan courts and that where a convict was sentenced to death he was not accorded an opportunity to reform. He pointed out that in certain situation the offence called for such punishment but in other situations the death sentence appeared to be excessive.
10. He contended that the idea of imposing minimum sentence was not ideal and that judicial officers should be given discretion as to what sentence to impose given the circumstances of the case. He pointed out that the issue of death sentence had raised many question as to whether it was unconstitutional and contrary to the general rules of International law, treaties and conventions ratified by Kenya and if so, whether it violated Article 24, 26, 28 and 29 of *the Constitution* of Kenya, 2010, whether it deprived a court of law the discretion to consider mitigation and circumstances in which the offence was committed and whether a court could mete a different sentence other than the mandatory death sentence.
11. He placed reliance on the cases of *Ogolla s/o Owuor v Republic* (1954) E.A.C.A 270, *R v Shershowsky* (1912) CCA 28<sup>TH</sup> R 263 and *Wanjema v Republic* (1971) E.A 493, 494 where the common thread was that a court would not alter a sentence unless the trial judge had acted upon wrong principles or overlooked some material facts.
12. He pleaded with court to consider his mitigation while reviewing his sentence. He asserted that he was a first offender, remorseful, rehabilitated, reformed, of good character and a law-abiding citizen. He further contended that he had been incarcerated for ten (10) years and prayed for a lenient non-custodial sentence as was prescribed under Article 50(2)(p) of *the Constitution* of Kenya, 2010.
13. He also urged the court to consider Section 333(2) of the *Criminal Procedure Code* when determining his re-sentencing. He pointed out that he had been in custody since the year 2012 when he was arrested.
14. On its part, the Respondent relied on directions issued by the Supreme Court of Kenya on 6<sup>th</sup> July 2021 in the case of *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR where it referred to



- Section 204 of the [Penal Code](#) only and found that it deprived the High Court its legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases.
15. It was its case that the Appellant's sentence was lawful at the time it was passed and submitted that this court had the jurisdiction to entertain the Appellant's appeal on grounds that the issue raised was in tandem with the directions of the Supreme Court of Kenya dated 6<sup>th</sup> July 2021 (sic).
  16. 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.”
  17. 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.
  18. 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.
  19. Notably, on 6<sup>th</sup> 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](#).
  20. The holding in the case of [Francis Karioko Muruatetu & Another v 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.
  21. In the premises foregoing, the Appellant's Grounds of Appeal on the issue of sentence were not merited and the same be and are hereby dismissed. The court could not therefore consider the question of the time spent in custody under Section 333(2) of the [Criminal Procedure Code](#) Cap 75 (Laws of Kenya) that mandates courts to consider the period an accused person had spent in custody before conviction and sentencing.



**Disposition**

22. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal on sentence was not merited and the same be and is hereby dismissed. The Appellant's conviction and sentence be and are hereby upheld as they were both safe.

23. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 18<sup>TH</sup> DAY OF MARCH 2024**

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**J. KAMAU**

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**JUDGE**

