Maina v Republic (Criminal Appeal 14 of 2020)
[2023] KECA 667 (KLR) (9 June 2023) (Judgment)

Neutral citation: [2023] KECA 667 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 14 OF 2020

AK MURGOR, S OLE KANTAI & PM GACHOKA, JJA

JUNE 9, 2023

BETWEEN

PATRICK KAMENDE MAINA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Ojwang & Warasmae, JJ.) dated 15th October, 2009 in HC. CR. A. No. 577 of 2006)

JUDGMENT

1 The appellant Patrick Kamende Maina was charged before the Principal Magistrates Court, Kikuyu, on two main counts of robbery with violence contrary to Section 296 (2) of the *Penal Code*. It was alleged in count 1 that on February 18, 2006 at Karura village in the then Kiambu District jointly with others while armed with dangerous weapons namely a metal bar robbed Stanley Gathecha Kinyanjui of a pair of trousers, a pair of black shoes and cash Ksh.450 all valued at Ksh.1350 and that at or immediately before or immediately after the time of such robbery they used actual violence to the said person. There was an alternative charge of handling stolen goods. The particulars of the second count were that on the same day at the same place while similarly armed he jointly with others robbed Moses Gichuhi Ngethe of one mobile phone, a pair of black shoes, a cap and cash Ksh.270 all valued at Ksh.6400 and or immediately before or immediately after the time of such robbery they threatened to use actual violence to the said person. The prosecution called 5 witnesses in support of its case; the trial court found that the appellant had a case to answer; he gave an unsworn statement and the trial court found that the prosecution had proved the main counts and he was duly convicted and sentenced to death on each count. His appeal to the High Court of Kenya at Nairobi was dismissed by Ojwang and Warsame, JJ. (as they then were) in a Judgment delivered on October 15, 2009, the High Court ordering that the sentence in respect of Count 2 to remain in abeyance, pending execution of the sentence in Count 1.

2 The appellant is dissatisfied with those findings and has filed this second appeal. Our jurisdiction in such an appeal is limited by Section 361 (1) (a) *Criminal Procedure Code* to a consideration of issues law only; we must resist the temptation to go into facts of the case that have been considered by the trial court and reconsidered on first appeal – *John Kariuki Gikonyo v Republic* [2019] eKLR where this Court stated of that mandate:

> " (15) This being a second appeal as we have already stated, our jurisdiction is limited to matters of law only. In *David Njoroge v Republic*, [2011] eKLR, this court stated that under section 361 of the Criminal Procedure Code:
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> > " Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also Chemagong v Republic (1984) KLR 213"

3 We visit the facts of the case briefly purely to satisfy ourselves whether the two courts below carried out their mandate as required by law and to find out whether any issues of law are raised in this appeal calling for our consideration.

4 Stanley Gathecha (Gathecha – PW1) testified in respect of Count 1 and the alternative charge. He was on his way home on February 18, 2006 at 10 p.m. when he met 2 people who held him, threw him to the ground and hit him on the head. According to him:

> " .... I saw one of them and recognized him, he is Patrick accused 1 "

5 The 2 people took his pair of trousers, pair of shoes and money and he went home. He informed his neighbours the next morning of what had befallen him and they all went to the appellant's house where the trouser and shoes were recovered. The appellant was found wearing the said trousers whose pocket was torn. According to Gathecha he recognized the appellant's voice during the robbery and he had known the appellant for 1 month. The matter was reported to police who arrested the appellant and saved him from being lynched by a mob that had gathered at his home.

6 Moses Gichuhi Ngethe (Ngethe – PW3) was on the same day February 18, 2006 walking home at 11 p.m. when he met 2 people at his gate. The people were armed with metal objects that resembled pistols. They demanded money from him and he gave them money and his mobile phone. They took his pair of shoes, trouser and hat and ordered him to proceed home, not to look back as they would shoot him. According to him there was moonlight and he recognized the appellant as one of the robbers. He said of the appellant:

> " ... He had leather jacket black. He spoke in Swahili ..."

7 The next morning he learnt that Gathecha had also been attacked the same night. He accompanied Gathecha and other neighbours to the appellant's house and Gathecha's pair of shoes and trouser were recovered. The appellant and another were arrested by police as the mob that had gathered wanted to lynch them.

8 PC John Kenji of Kiambu Police Station was assigned to investigate the case. He took possession of items recovered after robbery of Gathecha and produced them in court as part of the evidence.

9 Henry Muthama Kamau (PW4), a carpenter in Karuri, learnt on the morning of February 19, 2006 that Gathecha and Ngethe had been robbed the night before. He is one of the neighbours who went to the appellant's house and recovered a pair of shoes and trousers identified as belonging to Gathecha stolen the night before.

10 The last prosecution witness was APC Joseph Koome of Gikuni AP Post. He was called on the morning of February 19, 2006 by a local chief who informed him that 2 robbers had been apprehended by members of the public who wanted to lynch them. When he rushed to the appellant's house Gathecha informed him of the robbery the previous night. He recovered a pair of shoes and trousers identified as belonging to Gathecha; he arrested the appellant and another person found in the appellant's house (this latter person was acquitted by the trial Court for lack of evidence) and took them to Kikuyu Police Station where they were charged with the offences we have spoken to.

11 As we have seen the trial Court found that a case had been made out for the appellant to answer. In an unsworn statement the appellant denied the offences stating that he was a stranger in the area (Karura village) and had quarreled with the complainant in the past when he (the complainant) had visited the hotel where he (the appellant) worked and wanted to eat food on credit which request the appellant had denied. He had also refused to buy beer for the complainant who had then threatened him.

12 The trial Court considered the case by both sides and convicted the appellant and the appeal to the High Court was dismissed.

13 There are 7 grounds of appeal set out in Supplementary Grounds of Appeal drawn by the appellant's lawyers M/S Carolene Kituku Advocates. It is said that the High Court on first appeal erred in law and fact by failing to analyse and re-evaluate the trial record and draw its own conclusions on evidence; that the High Court erred in law and fact by relying on evidence that was full of fatal contradictions and discrepancies that rendered the evidence "... scanty, inadmissible and incapable of sustaining a conviction and sentence"; that the case was not proved to the required standard; that the High Court erred by failing to note a variance between the charge and the evidence and convicted the appellant on a charge not supported by evidence; that the High Court erred in applying the doctrine of recent possession. It is stated in the penultimate ground that the High Court erred in law and fact by failing to find that the trial Court failed to grant the appellant an opportunity to mitigate ". and proceeded to sentence the appellant without considering and evaluating mitigating submissions and determine the appropriate sentence". Finally, that the High Court erred in sentencing the appellant to death in contravention of the recent developments in law regarding the mandatory death sentence for a conviction for the offence of robbery with violence contrary to Section 296(2) of the *Penal Code*. We are asked to allow the appeal and set aside the sentence.

14 When the appeal came up before us for hearing on a virtual platform on March 6, 2023 the appellant was present from Naivasha prison and was represented by learned counsel Miss Carolene Kituku while learned State Counsel Mr. Muriithi appeared for office of Director of Public Prosecutions. Both sides had filed written submissions and in a highlight counsel for the appellant submitted that there was a variance between the charge sheet and evidence presented by the prosecution and that had the High Court re- evaluated the evidence it would have reached a different conclusion. According to counsel there were discrepancies in evidence and it was not clear which weapon was used during the robberies and since it was at night identification was difficult. Further, that it was wrong for the High Court to apply the doctrine of recent possession when items stolen from Ngethe had not been recovered. Counsel concluded by submitting that it was wrong for the trial Court not to give the appellant an opportunity to offer mitigation.

15 In opposing the appeal Mr. Muriithi submitted that the appellant had been accorded a fair trial and had fully participated in it. Counsel submitted that both Gathecha and Ngethe had testified that the appellant and his accomplice were armed with a metal bar; Gathecha and Ngethe were attacked; stolen items were recovered from the appellant; Gathecha had a conversation with the appellant who he had known for 1 month. According to counsel failure by the trial Court to accord the appellant an opportunity to mitigate was not fatal to the case.

16 In reply counsel for the appellant stressed the importance of mitigation which according to her opportunity should never be taken away because an accused is entitled under Article 50 of the *Constitution* to receive the least sentence available in law.

17 We have considered the whole record, submissions made and the law. We identify in this appeal as issues of law calling for our consideration whether the case was proved to the required standard and whether the appellant was accorded an opportunity to mitigate after conviction and if not, what is the effect of the same.

18 On the first issue it is clear in the record that Gathecha and Ngethe were separately accosted the same night by 2 people armed who robbed them. Gathecha identified the appellant, a person he knew before. He led other villagers to the appellant's house the next morning and the appellant was found wearing a trouser that Gathecha identified as his that had been stolen from him the night before. A pair of shoes stolen from Gathecha were found in the appellant's house. There was sufficient evidence to convict the appellant and we agree with the High Court's finding that:

> " On the evidence, both complainants were able to recognize the appellant at the material time, in one case by voice, in another by appearance; and the evidence of these complainants is substantially corroborated by the unaswerable circumstance, that stolen items belonging to PW1 were found in the possession of the appellant; that is sufficient proof that the appellant was the offender. But it may be added, for good measure, that even if the doctrine of recent possession were applied, it would show the appellant to have been found in possession of things so recently stolen as to show him to have been the thief."

19 The conviction of the appellant was sound and we dismiss the appeal against conviction.

20 The appellant has raised a legal issue that he was denied an opportunity to mitigate after conviction.

21 The record shows that after the appellant was convicted the matter was adjourned a number of times for the prosecution to produce records of any previous conviction which in the end were not produced. The record does not state anything on mitigation and only shows that the appellant was sentenced to death on each of the main counts.

22 The importance of mitigation cannot be gainsaid. This Court and the Supreme Court of Kenya have pronounced on the importance of an accused person being accorded an opportunity to mitigate before sentence is passed by a trial Court. The Supreme Court of Kenya pronounced as follows in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR:

> ' [41] It is evident that the trial process does not stop at convicting the accused. There is no doubt in our minds that sentencing is a crucial component of a trial. It is during sentencing that the court hears submissions that impact on sentencing. This necessarily means that the principle of fair trial must be accorded to the sentencing stage too.

[42] Pursuant to Sections 216 and 329 of the *Criminal Procedure Code*, Chapter 75, Laws of Kenya, mitigation is a part of the trial process. Section 216 provides:

> The Court may, before passing sentence or making an order against an accused person under section 215 receive such evidence as it thinks fit in order to inform itself as to the sentence or order to be passed or made.
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> Section 329 of the *Criminal Procedure Code* provides:

The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.

[43] Therefore, from a reading of these Sections, it is without doubt that the Court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence. It is not lost on us that these provisions are couched in permissive terms. However, the Court of Appeal has consistently reiterated on the need for noting down mitigating factors. Not only because they might affect the sentence but also for futuristic endeavors such as when the appeal is placed before another body for clemency.

[43] In *Sango Mohamed Sango & another v Republic* [2015] eKLR, Makhandia, Ouko, M'inoti JJ.A. observed that although Sections 216 and 329 of the *Criminal Procedure Code* were couched in permissive terms, the Appellate Court has held over time that it is imperative for the trial court to afford an accused person an opportunity to mitigate and the trial court should record the mitigation factors. This applied even when accused persons had been convicted of offences where the prescribed sentence was death. The Appellate Court noted that the mitigating circumstances would be relevant if the matter went on appeal or before a clemency board or with regards to the age of the offender or pregnancy in the case of women convicts. Similar decisions can be seen in Henry Katap Kipkeu v. Republic, CR. App. No. 295 of 2008 and Dorcas Jebet Ketter & Another v. R, Cr. App. No. 10 of 2012.

[46] We are of the view that mitigation is an important congruent element of fair trial. The fact that mitigation is not expressly mentioned as a right in the Constitution does not deprive it of its necessity and essence in the fair trial process. In any case, the rights pertaining to fair trial of an accused pursuant to Article 50(2) of the *Constitution* are not exhaustive."

23 This Court had in the earlier case of *Edwin Otieno Odhiambo v Republic* [2009] eKLR stated:

> " On the issue of the sentence, it is clear to us that the trial court did not offer the appellant an opportunity to mitigate and on this we are in agreement with the appellant counsel's submission. Although we appreciate that section 216 of the Criminal Procedure Code is worded in permissive terms, we are certain that on matters of sentencing if a court disregards the provision and therefore fails to take into account mitigating circumstances, the chances of not coming up with an appropriate sentence are enhanced.
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> We are of the view that the superior court had a duty to record the mitigation after a conviction and before sentencing. This statement is not a reinvention of the wheel. In the

case of *John Muoki Mbathya V. Republic* Criminal Appeal No. 72 of 2007 (unreported) the principle was stated in these words:-

> ' As we have stated over and over again when considering sentences in respect of murder cases, the sentences should be reserved and pronounced only after mitigating factors are known. This is important because in mitigation, matters such as age, and pregnancy in cases of women convicts, may affect the sentence even in cases where death sentence is mandatory. In our view, no sentence should be made part of the main judgment. Sentence should be reserved and be pronounced only after the court receives mitigating circumstances if any are offered."

This Court followed the same path in the case of *Fred Michael Bwayo V. Republic* Criminal Appeal No. 130 of 2007 (unreported) and came to the conclusion because the principles of sentencing were erroneously applied in the case, reduction of the sentence was justified.

For those reasons, we are in the circumstances entitled to interfere with the sentence."

As we have seen, the appellant was not accorded an opportunity to mitigate and this was wrong on the part of the trial court as the appellant was entitled to give mitigation before he was sentenced. This issue was not raised and was not considered by the High Court. It has been raised before us and we have considered it. The final orders we make are that the appeal on conviction is dismissed for lacking merit. The sentence is hereby set aside. We remit the file to the High Court for the appellant's plea in mitigation prior to sentencing.

24 Accordingly, the appeal against conviction is dismissed, while the appeal against sentence succeeds. The file is remitted back to the High Court for sentencing.

25 This Judgment is signed by 2 Judges in accordance with Rule 34 (3) *Court of Appeal Rules*, 2022, Gachoka, JA. having refused to sign.

Dated and delivered at Nairobi this 9th day of June, 2023.

A.K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR