Imutoka v Republic (Criminal Appeal 121 of 2019) [2024] KECA 259 (KLR) (8 March 2024) (Judgment)

Neutral citation: [2024] KECA 259 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 121 OF 2019

F SICHALE, FA OCHIENG & WK KORIR, JJA

MARCH 8, 2024

BETWEEN

DAVID ERIAMA IMUTOKA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Bungoma, (Ombija & G.B.M Kariuki JJ.), dated and delivered on 26th February 2008) in HC. CRA NO.'s 42 & 43 OF 2004)

JUDGMENT

1. David Eriama Imutoka (the appellant herein), has preferred this second appeal challenging the dismissal of his first appeal by the High Court which he had lodged against his conviction and sentence for the offence of robbery with violence contrary to Section 296 (2) of the *Penal Code* CAP 63 of the Laws of Kenya, in which he had been charged alongside Jeremiah Ingusi Ngala.

2. The particulars of the offence were that on the night of 15th and 16th July 2003 at Generations Estate, Wananchi village,Webuye Location in Bungoma District within the then Western Province, together with Jeremiah Ingusu Ngala and with others not before court, being armed with offensive weapons namely: sword, panga, stick and a rubber whip jointly, robbed Moses Okemeri Imutoka of one Video deck make Panasonic Serial No. C 6HG O2752, one radio cassette make Panasonic model Number CRC 3308 and cash Kshs 5,500/= all valued at Kshs 46,500/= and at or immediately before or immediately after the time of such robbery, wounded the said Moses Okemeri Imutoka.

3. The appellant and his co-accused denied the charge after which a full trial ensued with the State calling a total of 7 prosecution witnesses while the appellant elected to give an unsworn statement and called 3 witnesses.

4. In a judgment delivered on 26th July 2004, Hon. L.N Mutende (then SRM), found the appellant guilty of the offence. She convicted and sentenced him to suffer death as by law provided.

5. When the matter came up for plenary hearing on 7th November 2023, Miss Too learned counsel appeared for the appellant whereas Mr. Mugun appeared for the respondent. Miss Too relied on her written submissions dated 9th October 2023, which she briefly orally highlighted. She intimated to Court that they were not challenging the appellant's conviction and submitted that the sentence of death was meted out on the appellant for the offence of robbery with violence was harsh and erodes the right to life and dignity.

6. It was submitted for the appellant that he was convicted to suffer death as that then was the mandatory sentence for the offence of robbery with violence; that the mandatory death sentence under Section 296 (2) of the Penal Code was harsh and contrary to the general rules of International Law and or Treaties and Conventions ratified by Kenya and that the sentence offends the provisions of Article 26 (1) of the *Constitution* which provides that every person shall have the right to life.

7. It was thus submitted that the sentence of death erodes the dignity of an individual and the appellant was thus deprived of his inherent right to life and fundamental freedoms set out under Articles 24, 26, 28 and 29 of the *Constitution*.

8. To buttress this position, the appellant relied on the Supreme Court decision of *Francis Karioko Muruatetu v Republic* [2017] eKLR and the subsequent directives in *Francis Karioko Muruatetu & Another v Republic, Katiba Institute & 5 Others (AMICUS CURIAE)* [2021] eKLR where the Court observed that the mandatory death penalty prescribed in Section 204 of the *Penal Code* for the offence of murder was unconstitutional.

9. It was further submitted that this Court ought to consider reduction of sentence of the appellant taking into consideration the period that the appellant has been in custody having been convicted on 26th July 2004; then the plea was taken on 23rd July 2003 and the trial having been conducted while he was in custody he had therefore been in custody for a period of 20 years and that he had undergone various rehabilitation programmes that have reformed him.

10. On the other hand, Mr. Mugun for the respondent relied entirely on his submissions dated 3.11.023. It was submitted for the respondent that pursuant to the provisions of Section 361 (1) (b) of the *Criminal Procedure Code* CAP 75 of the Laws of Kenya, this Court's powers to review a sentence could only be invoked where it was enhanced by the High Court or where the trial court lacked the jurisdiction, and that in the instant matter, the appellant was sentenced to suffer death as prescribed by Section 296 (2) of the *Penal Code* by a magistrate who had jurisdiction.

11. Further, while conceding that case law had not been settled on whether or not this Court could interfere with mandatory sentences, the respondent submitted that in deserving cases, courts should and have confirmed the sentence of death. In the instant case, the evidence on record showed that this crime was committed with brutal force and that had the complainant not received urgent medical attention, his life would not have been saved. He was of the view that the appellant was deserving of the custodial sentence he is currently serving.

12. We have carefully considered the record, the rival written submissions by the parties, the authorities cited and the law. The appeal before us is a second appeal. Our mandate as regards a second appeal is clear. By dint of Section 361 (1) (a) of the *Criminal Procedure Code*, we are mandated to consider only

matters of law. In *Kados vs. Republic Nyeri* Cr. Appeal No. 149 of 2006 (UR) this Court rendered itself thus on this issue:

> " …This being a second appeal we are reminded of our primary role as a second appellate court, namely to steer clear of all issues of facts and only concern ourselves with issues of law …"

13. In *David Njoroge Macharia vs. Republic*[2011] eKLR it was stated that under Section 361 of the *Criminal Procedure Code*:

> " 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 are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also *Chemagong vs. Republic* [1984] KLR 213)."

14. Having carefully gone through the record, and in light of the fact the appellant is not challenging his conviction, we have only been called upon to pronounce ourselves on only one sole issue namely; "whether the Honourable Trial Court erred in law and in fact by upholding conviction to death sentence which is manifestly harsh and excessive for the offence of robbery with violence." Consequently, we do not consider it necessary to rehash the evidence of the witnesses who testified before the trial court as doing so would be otiose.

15. Be that as it may, it is indeed not in dispute that on 25th July 2003, the appellant and his co accused were charged with the offence of robbery with violence at the Webuye Senior Resident Magistrate's Court and subsequently sentenced to suffer death as by law provided by Hon L.N Mutende (SRM) (as then was) on 26th July 2004.

16. Being dissatisfied by the aforesaid conviction and sentence, the appellants preferred an appeal before the high court in Bungoma and *vide* a judgment delivered on 26th February 2008, the high court Ombija & G.B.M Kariuki JJ, dismissed their appeals and upheld the conviction and affirmed the sentence of death.

17. Being aggrieved with the dismissal of the appeal the appellant has now filed this appeal in which he contends that the high court erred in law and fact by upholding the conviction of death sentence which is manifestly harsh and excessive for the offence of robbery with violence.

18. The provisions of Section 296 (2) of the *Penal Code* CAP 63 of the Laws of Kenya provides that a person who is convicted of the offence of robbery with violence shall be sentenced to death. It is instructive to note that the provisions of the said section are couched in mandatory terms and therefore leave no room for judicial discretion. Consequently, we cannot fault the two courts below in passing and confirming the sentence of death which is a lawful sentence.

19. Be that as it may, the jurisprudence that has been emerging from the Superior Courts in this country is that the Courts have been frowning upon mandatory nature of sentences as provided for in our statutes.

20. In the all now famous case of *Francis Karioko Muruatetu & Another v Republic* (*supra*) commonly referred to as "Muruatetu I" the Supreme Court of Kenya while *inter alia* holding that the mandatory

nature of the death sentence as provided for under Section 204 of the *Penal Code* was unconstitutional, stated as follows:

> "(47) Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights, and in the same vein Article 25(c) of the *Constitution* elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse.
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> (48) Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the *Constitution*; an absolute right.
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> ...
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> 50. We consider Reyes and Woodson persuasive on the necessity of mitigation before imposing a death sentence for murder. We will add another perspective. Article 28 of the *Constitution* provides that every person has inherent dignity and the right to have that dignity protected. It is for this Court to ensure that all persons enjoy the rights to dignity. Failing to allow a Judge discretion to take into consideration the convicts' mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence thereby treating them as an undifferentiated mass, violates their right to dignity.
>
> 50. The dignity of the person is ignored if the death sentence, which is final and irrevocable is imposed without the individual having any chance to mitigate. We say so because we cannot shut our eyes to the distinct possibility of the differing culpability of different murderers. Such differential culpability can be addressed in Kenya by allowing judicial discretion when considering whether or not to impose a death sentence. To our minds a formal equal penalty for unequally wicked crimes and criminals is not in keeping with the tenets of fair trial." (Emphasis added)

21. We appreciate and we are alive to the fact that in *Muruatetu & Another v Republic; Katiba Institute & 4 Others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6July 2021) (Directions), (now commonly referred to as Muruatetu II) the Supreme Court of Kenya limited the applicability of its decision in *Muruatetu I* to the provisions of Section 204 of the *Penal Code* which provides for a mandatory death sentence for persons convicted for the offence of murder.

22. Be that as it may, we are of the considered opinion that the ratio decidendi of the Supreme Court in Muruatetu I on the unconstitutional nature of mandatory death sentences under the provisions of Section 204 of the *Penal Code* equally applies mutatis mutandis and by parity of reasoning to the mandatory nature of death sentences provided for under the provisions of Section 296 (2) of the *Penal*

Code CAP 63 of the Laws of Kenya as it cannot be said that the mandatory nature of the death sentence is unconstitutional in one section of the *Penal Code* and constitutional in another. To hold otherwise would be absurd and untenable.

23. Faced with a similar situation in the case of *Christopher Ochieng Vs. Republic* [2018] eKLR where the appellant had been sentenced to a mandatory life imprisonment pursuant to the provisions of Section 8 (1) of the *Sexual Offences Act* this Court opined thus:

> " In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis." (Emphasis Ours)

24. Again, in *Joshua Gichuki Mwangi v Republic* Criminal Appeal No 84 of 2015 this Court rendered itself thus;

> " We acknowledge the power of the Legislature to enact laws as enshrined in the *Constitution*.
>
> However, the imposition of mandatory sentences by the Legislature conflicts with the principle of separation of powers, in view of the fact that the legislature cannot arrogate itself the power to determine what constitutes appropriate sentences for specific cases yet it does not adjudicate particular cases hence cannot appreciate the intricacies faced by judges in their mandate to dispense justice. Circumstances and facts of cases are as diverse as the various cases and merely charging them under a particular provision of laws does not homogenize them and justify a general sentence. This being a judicial function, it is impermissible for the Legislature to eliminate judicial discretion and seek to compel judges to mete out sentences that in some instances may be grossly disproportionate to what would otherwise be an appropriate sentence. This goes against the independence of the Judiciary as enshrined in Article 160 of the *Constitution*. Further, the Judiciary has a mandate under Article 159 (2) (a) and (e) of the *Constitution* to exercise judicial authority in a manner that justice shall be done to all and to protect the purpose and principles of the Page 18 of 19 Constitution. This includes the provision of Article 25 which provides that the right to a fair trial is among the bill of rights that shall not be limited." (Emphasis Ours)

25. We fully agree and adopt the reasoning by the Court in the above case. Be that as it may, we have considered the appellant's mitigation before the trial court and note that he was related to the (PW1) as they are brothers. Additionally, we note that he was a first offender and it was submitted that he had since reconciled with his brother and the entire family members a fact that the respondent has not disputed. Further, we note that the appellant was sentenced and convicted on 26th July 2004 whereas he was first arraigned in court on 25th July 2003 and he conducted his trial while in custody. The appellant has therefore been in a custody for a period of slightly over 20 years.

26. In view of the above, we are inclined to exercise our discretion in favour of the appellant and substitute the sentence of death that was meted out upon him with an order that that he be sentenced to the term already served.

27. Accordingly, the appellant's appeal on sentence is hereby allowed. We set aside the sentence of death and order that he be set at liberty forthwith unless otherwise lawfully held.

28. It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 8TH DAY OF MARCH, 2024.

F. SICHALE

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JUDGE OF APPEAL

F.A OCHIENG

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JUDGE OF APPEAL

W. KORIR

....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR