



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO 75, 75A, 75B, 75C AND 75D OF 2019

AUGUSTINE JUMA MUYANGE.....1ST APPELLANT

FREDERICK ODUOR.....2ND APPELLANT

PATRICK OPONDO OCHOLA.....3RD APPELLANT

HUSSEIN MOBUTU KHALASI.....4TH APPELLANT

GEORGE OMOLLO ODUOR.....5TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement (conviction and sentence) of Hon. K. W. KIARIE, CM,

delivered on 13/8/2012 in the Chief Magistrate's Court at Busia in Criminal Case No. 395 of 2012,

R v Augustine Juma Muyange, Frederick Oduor, Patrick Opondo, Hussein Mobutu and George Omollo)

JUDGEMENT

[Pursuant to section 201 (2) as read with section 200(1) (a) CPC]

Introduction

1. The Court of Appeal (E.M. Githinji, Hannah Okwengu and J. Mohamed, JJA) sitting at Kisumu vide *Criminal Appeal No. 23 of 2014, Patrick Opondo Ochola & 4 others v. Republic*, remitted this appeal back to the High Court for the 1st appeal to be re- heard by Judges of the High Court of competent jurisdiction, which judgement was signed by two Judges (E. M. Githinji & Hannah Okwengu,JJA) under *Rule 32 (2) of the Court of Appeal Rules*. The Court of Appeal found that the proceedings in the first appellate court (Tuiyot & Kibunja, JJ) were a nullity and therefore there was no proper judgement upon which the appeal before them could be based; since Mr. Justice Kibunja, who heard this appeal with Mr. Justice Tuiyot was employed as a judge of the Environment and Land Court. The Court of Appeal pointed out that the re-hearing was necessary following the decision of the Supreme Court in *Karisa Chengo & Others v Republic, being petition No. 5 of 2015*.

2. Initially this appeal was before Mr. Justice Kiare W. Kiare, who on 5th February 2019 transferred it for hearing in the High Court at Bungoma, since he was the trial court and could not therefore hear the appeal; following an order for a re-hearing of the appeal by the Court of Appeal.

3. The appellants have appealed against their conviction and sentence of death in respect of the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code (Cap 63) Laws of Kenya; in which all the appellants were charged in four counts of robbery with violence, amongst other charges.

4. Ms. Nyakibia, counsel for the respondent has supported both the conviction and sentences in respect of the appeals of the 1st and 2nd appellants. She has conceded the appeals of the 3rd, 4th and 5th appellants.

5. The appeal of each appellant is hereby considered separately.

Appeal of 1st appellant- Augustine Juma Muyange

6. In this court the appellant has raised five grounds in his petition of appeal.

7. In ground 1 the appellant has stated the unchallengeable fact that he did not plead guilty.

8. In ground 2 the appellant has faulted the trial court both in law and fact for convicting him on the evidence of identification that violated his fundamental rights as enshrined in the Bill of Rights. In this regard, the evidence of **CPI. Peter Odhiambo** (Pw 5), was that he saw 1st and 2nd appellant coming from the Uganda direction. The 1st appellant was holding onto the luggage that was on the bicycle, while the 2nd appellant was pushing/driving the bicycle. Pw 1 asked them what they were carrying. They told him that they were carrying tools of trade namely barber trade. They told him they were barbers in Uganda. They told him they were carrying a shaving machine, adaptor and a radio in the bag. Upon opening, Pw 5 did not see any shaving machine. Instead Pw 5 saw an adaptor, one green skirt, some cream (movit), a peuclear cream, a blue spot light, VCD and a pink lady's bag. Pw 5 was not satisfied with the explanation given about the items they had. As a result, Pw 5 escorted the 1st and 2nd appellant to Busia police station.

9. Furthermore, two days later Pw 5 learned of a woman who identified the property as hers. He was then asked to go and write a statement. The 1st appellant had a black and red colour phone (exhibit 14). The 2nd appellant had a black phone. Pw 5 then identified the items carried by 1st and 2nd appellant as follows. The spotlight exhibit 18. The radio exhibit 15. The VCD exhibit 14. The adaptor exhibit 3. The pink bag exhibit 9. The green skirt exhibit 10. The creams exhibit 11 and the bicycle exhibit 2. This phone exhibit 14 was the property of Margaret Moraa Onyancha (Pw 3). The evidence of Pw 3 in this regard was that inside that phone she had written her initials "I.M." Pw 3 is the complainant in count 2.

10. Isaac Mireri (Pw 4) the complainant in **count 3** testified that she knew the phone of Pw 3, which he identified as exhibit 17 (*sic*). (It is actually exhibit 14, because exhibit 17 is a black big bag). In re-examination Pw 4 identified his phone in re-examination, which was put in evidence as exhibit 15. He also had recorded its serial number in his note book; which note book was put in evidence as exhibit 16. Pw 4 identified the exhibits as did Pw 5.

11. Margaret Moraa Onyancha (Pw 3), the complainant in **count 2** testified that the robbers took her phone among other items including her cash money in the sum of Shs 650/= . The phone of Pw 3 was Nokia 110, and she had written her name on the battery of the phone. Pw 3 had written her initials "I.M." She identified her phone which was put in evidence as exhibit 14.

12. **Redemta Nyatichi** (Pw 2), the complainant in **count 1** testified that among the stolen items was her Nokia 2220s (exhibit 7). She identified all her items at the police station as did Pw 5. Pw 2 further testified that there was a photo of her child (Faith Nyaloke in her Nokia 222s phone), which she pointed out to the court when testifying. The photo indicated that it was taken on 4/8/2011 at 16.45.

13. In his defence the 1st appellant gave sworn evidence. He testified that he received a report from the 2nd appellant that there was someone who was selling a video deck, that he wanted to use in his barber shop. Both the 1st and 2nd appellant boarded a motor bike

and went to the 3rd appellant, who was selling the video deck. The 3rd appellant was in Uganda. The 1st appellant agreed to buy it for shs 2,500/= . 1st appellant paid shs 800/= and agreed to pay the balance after confirming that it was working. He then gave the 3rd appellant his phone number 0789xxxx. As they were leaving the 3rd appellant called the 2nd appellant back and they then entered into a house. Later the 2nd appellant came with a bicycle from that house and a black bag. He did not know what that bag was carrying and the bicycle was produced in court as an exhibit. They then proceeded to Kenya where they were arrested by CPI. Peter Odhiambo (Pw 5), who took them to Busia police station.

14. The next morning the 1st appellant took PC Noah Kipkemboi (Pw 6) to Ugunja to the 3rd appellant who had sold him the video deck. Ochola (the 3rd appellant) was arrested at a taxi park at Ugunja. The 3rd appellant took police to his home and they returned with the 3rd appellant together with the 4th appellant.

15. This is a first appeal court. As a first appeal court, I have independently re-assessed the evidence produced at trial. As a result, I find the 1st appellant was convicted and sentence on the basis that he was found in possession of recently stolen properties of the complainants (PW 2, Pw 3, Pw 3 and Pw 4). **Redemta Nyatichi** (Pw 2), the complainant in **count 1 positively identified her properties as described by CPI. Peter Odhiambo** (Pw 5). Among those properties is a Nokia phone model 2220s of Pw 2 (exhibit 7). In that phone there was a photo of her child (Faith Nyaloke), which she showed the trial court during her evidence. This positive identification was not challenged. Pw 2 was the complainant in count 1.

16. Furthermore, Margaret Moraa Onyanacha (Pw 3), the complainant in count 2 positively identified her Nokia phone 110 in which she had written her initials namely "I.M." Additionally, she also identified her other properties. This positive identification was also not challenged.

17. Finally, Isaac Mireri (Pw 4), who is the complainant in count 3 positively identified his phone (exhibit 15), whose serial number he had written in his note book, exhibit 16. This positively identification was also not challenged.

18. The explanation of the 1st appellant that he bought all these items from the 3rd appellant, while they were with the 2nd appellant was rejected by the trial court. The trial court saw and heard all the prosecution witnesses and the 1st appellant testify on oath, which advantage is not possessed by this court. The findings of the trial court are based on evidence that was adduced at trial. I find no basis for interfering with those findings.

19. The submission of the 1st appellant that he was convicted on the evidence of identification is not correct, since the conviction is based on possession of recently stolen properties. Ground 2 of his appeal is without merit and is hereby dismissed.

20. In grounds 3 the appellant has stated that he was supposed to be the key prosecution witness. The question as to who is to be called by the prosecution as a witness is for the prosecution to decide and not the court. The court is not allowed to direct the prosecution as to which witnesses it ought to call; for to do so will be inviting the court to interfere with the prosecutorial independence that is guaranteed to the prosecution by article 157 (10) of the 2010 Constitution of Kenya. This ground is dismissed for lacking in merit.

21. In ground 5 the appellant has faulted the trial court for convicting him in the absence of direct evidence. The appellant is convicted on circumstantial evidence, which is as good as direct evidence. This ground lacks merit and is hereby dismissed.

22. In ground 4 the appellant has faulted the trial court for imposing the death penalty, which is harsh, arbitrary and inhuman. In imposing the death penalty, the trial court took into account the mitigating factor namely that the 1st appellant was a first offender. It then proceeded to impose the death penalty; which was lawful as at that time. The Supreme Court in **Francis Muruatetu & Another v Republic [2017] EKLR** decided that trial courts have a discretion to impose an appropriate sentence; since it declared the death penalty was constitutional but not mandatory. I have taken into account that the 1st appellant is a first offender. I have also taken into account that the 1st appellant has been in custody since 2012, which translates to about 8 years. In the circumstances, I find that the death sentence is not warranted.

23. In the premises, I hereby quash the death penalty and in its place I impose a sentence of ten years' imprisonment, which will begin to run from the date of this judgement.

Appeal of the 2nd appellant- Frederick Oduor.

24. In a coalesced form, the 2nd appellant has in grounds 1, 2 and 3 of his petition of appeal and in grounds 1 and 2 of his supplementary grounds, faulted the trial court in respect of factual findings that were not supported by the evidence. The findings that I made in respect of the 1st appellant apply with equal force to this appellant.

25. In ground 3 of the supplementary grounds the 2nd appellant has faulted the trial court for failing to find that no medical evidence was tendered to prove violence; since he was convicted of robbery with violence. Violence may be proved in a charge of robbery without medical evidence. The evidence of Daniel Maragia (Pw 1) is that the robbers including this 2nd appellant is that after gaining entry into their house, the robbers ordered him to sit down. They then proceeded to tie his hands. This in itself constitutes violence. I find no merit in ground which I hereby dismiss.

26. In ground 4 the appellant has faulted the trial court for disregarding his defence evidence. The sworn evidence of the 2nd appellant was that after pouring water on a building that they were erecting, he decided to go home at about 7.30 pm. While en route, he saw the 1st appellant pushing a bicycle, which had a bag tied to it. He then went past him. He did not know the 1st appellant. After passing the 1st appellant he met three people in civilian clothes. These people stopped the 1st appellant. This appellant was then called from behind. He then went back to check as to why they were calling him. They asked him if he knew the 1st appellant. He answered in the negative. They said they were suspecting him. They then arrested him. He denied directing the 1st appellant in buying the video deck. I have re-assessed his defence and the evidence of CPL. **Peter Odhiambo** (Pw 5), who arrested him. I find that his evidence has no ring of truth. I find that this ground of appeal has no merit and is hereby dismissed.

27. The appeal of the 2nd appellant against conviction fails and is hereby dismissed.

28. In ground 5 the appellant has faulted the trial court for imposing the death penalty, which is unconstitutional. Although the sentence was imposed before the decision of the Supreme Court in *Francis Muruatetu & Another v Republic [2017] EKLK*, it was constitutional at the time and is still constitutional. The court decided that trial courts have a discretion to impose an appropriate sentence; since it declared the death penalty was constitutional but not mandatory. In re-assessing the appropriate sentence I have taken into account that the 2nd appellant is a first offender and has been in custody for since 2012, which translates to about 8 years. In the circumstances, I find that the death sentence is not warranted.

29. In the premises, I hereby quash the death penalty and in its place I impose a sentence of ten years' imprisonment, which will begin to run from the date of this judgement.

Appeal of the 3rd appellant- Patrick Opondo Ochola.

30. I have already pointed out that the respondent conceded the appeal of this 3rd appellant. I agree with counsel for the respondent that on the evidence her concession is correct. I therefore quash the convictions and sentence for robbery recorded against this appellant.

31. In the premises, 3rd appellant is hereby ordered released unless otherwise is held on other lawful warrants.

Appeal of the 4th appellant- Hussein Mobutu Khalasia.

32. I have already pointed out that the respondent conceded the appeal of the 3rd appellant. I agree with counsel for the respondent that on the evidence her concession is correct. I therefore quash the conviction and sentence for robbery recorded against this appellant.

Appeal of the 5th appellant- George Omollo Oduor

33. I have already pointed out that the respondent conceded the appeal of the 5th appellant. I agree with counsel for the respondent that on the evidence her concession is correct. I therefore quash the conviction and sentence for robbery.

34. In the premises, 5th appellant is hereby ordered released unless otherwise held on other lawful warrants.

Judgement signed and dated at Narok this 19th day of December, 2019.

J. M. Bwonwong'a

Judge

And

Judgement signed, dated and delivered in open court at Bungoma this 12th day of February, 2020.

S. N. Riechi

Judge

12/2/2020



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