**Muriithi v Republic**

**Division:** High Court of Kenya at Nairobi

**Date of judgment:** 10 November 2006

**Case Number:** 311/05

**Before:** Githinji, Waki and Onyango-Otieno JJA

**Sourced by:** LawAfrica

**Summarised by:** R Rogo

*[1] Appellate jurisdiction – Duty of a first appellate court to re-evaluate evidence tendered in a trial*

*court – Method of re-evaluating the evidence – Sentencing procedure where the offences charged carry*

*both capital and imprisonment terms.*

**Editor’s Summary**

The appellant was arrested and charged with the offences of robbery with violence contrary to section 296(2) of the Penal Code, being in possession of a firearm without certificate contrary to section 4(1) of the Firearm Act, being in possession of ammunition without a Firearm certificate contrary to section 4(2) of the Firearm Act and preparation to commit a felony contrary to section 308(1) of the Penal Code. He later recorded a statement under inquiry which amounted to a confession. However, he later retracted the same alleging that he was put in a cell and was beaten up and forced to record an incriminating statement against his will. The trial magistrate however admitted the statement and being satisfied beyond reasonable doubt, sentenced the accused to death on count one, and to terms of imprisonment for 18 months on the other two counts, the sentences to run consecutively. The appellant appealed to the Superior Court on the grounds *inter alia* that the prosecution case was riddled with discrepancies, inconsistencies and contradictions; the appellant was only a victim of circumstances, there was insufficient evidence to connect him with possession of the firearm and preparation to commit a felony; and that his defence was disregarded without reasons. The Superior Court came to the conclusion that the appellant was properly convicted on count 1 relating to robbery with violence. The court however noted conflicting evidence relating to the identification of the colt pistol which the appellant was alleged to have had and gave the benefit of doubt to the appellant thereby allowing the appeal on that count and count 4. The convictions on those counts were set aside. The sentence of death nevertheless remained. Hence this present appeal.

**Held** – Once a sentence of death is imposed, the other counts are left in abeyance so that if there was a successful appeal on the count on which the death penalty has been imposed, the court dealing with the appeal would consider all the counts and if necessary, impose the appropriate sentence on the count on which the appeal is not allowed. (*Boye and another v R* criminal appeal number 19 of 2001 (UR); *Kaimoi v R* criminal appeal number 47 of 2001 (UR); *Gachuru v R* criminal appeal number 261 of 2003; *Muiruri v R* [1980] KLR 70 followed). Only matters of law may be raised on second appeal as the Court will not interfere with concurrent findings of fact unless they were based on no evidence as all or on a perversion of it. (*Njoroge v R* [1982] KLR 388; *Karingo v R* [1982] KLR 213 followed). It is trite law that on a first appeal, the Superior Court has a duty to reconsider the evidence, evaluate it itself and drew its own conclusion in deciding whether the judgment of the trial court should be upheld. In so doing however, allowance must be made for the fact that the trial court had the advantage of hearing and seeing witnesses. (*Okeno v R* [1972] EA 32; *Peters v Sunday Post* [1958] EA 424 followed). There were no inconsistencies, contradictions or discrepancy and any such inconsistencies as there were, were immaterial and incapable of affecting the totality of the incriminating evidence against the appellant. There is no yardstick for the manner in which the first appellate court ought to carry out the duty of re-evaluation or fresh scrutiny of evidence. The extent and manner in which evaluation may be done depends on the circumstances of each case and the style used by the appellate court. The test of adequacy remains a question of substance. The evidence upon which the appellant was convicted on count 1 was soundly and carefully re-evaluated by the Superior Court. (*Uganda Breweries Limited v Uganda Railways Corporation* [2002] EA 634 followed).

Appeal dismissed.

**Cases referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

***East Africa***

*Boye and another v R* criminal appeal number 19 of 2001 (UR) – **F**

*Gachuru v R* criminal appeal number 261 of 2003 – **F**

*Kaimoi v R* criminal appeal number 47 of 2001 (UR) – **F**

*Karingo v R* [1982] KLR 213 – **F**

*Muiruri v R* [1980] KLR 70 – **F**

*Njoroge v R* [1982] KLR 388 – **F**

*Odongo and another v Bonge* Supreme Court Uganda civil appeal 10 of 1987

*Okeno v R* [1972] EA 32 – **F**

*Peters v Sunday Post* [1958] EA 424 – **F**

*Sembuya v Alports Services Uganda Limited* [1999] LLR 109 (SCU)

*Uganda Breweries Limited v Uganda Railways Corporation* [2002] EA 634 – **F**