Ndirangu v Republic (Criminal Appeal 33 of 2018)
[2023] KEHC 3696 (KLR) (25 April 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL 33 OF 2018

SC CHIRCHIR, J

APRIL 25, 2023

BETWEEN

ANTHONY MWANGI NDIRANGU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal arising out of the judgment of Senior Resident Magistrate's Court at Kigumo delivered on 23rd May 2018 by Hon. A Mwangi(SRM) in Criminal Case No.575 of 2017)

JUDGMENT

1. The Appellant herein was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code.

2. It is alleged that on the 21st November 2016 at around 19.30hours at Iganjo Village in Murangá county jointly with others not before court being armed with dangerous weapons, namely a "panga" and a "rungu" robbed Esther Wanjuru Kariuki of a mobile phone Make Itel, 2 kg maize meal, ½Kg Sugar, ½ litres of milk, 10 grams of tea leaves, four pieces of Mandazi and kshs.500 all valued at Kshs.2,250/=

3. He was tried convicted and sentence to death. Aggrieved by the outcome, he filed this Appeal.

Grounds of Appeal

4. In his Amended Memorandum of appeal, he has set out 4 grounds which I have paraphrased as follows; -

    1. That he was not properly identified
    2. That the trial Magistrate erred in failing to appreciate that he was not connected to the crime
    3. That the trial court failed to appreciate that he was framed owing to a land dispute

4. That the case was not proved beyond reasonable doubt and that he was convicted on mere suspicion.

Appellant's submissions

5. On identification, it is the appellant submission that the time of the alleged robbery was 7.30pm and hence was already dark. That the prevailing conditions could not allow for proper identification. That as per report made to the police, the complainant identified only her brother, one Joel Mwangi among her attackers. That it was not stated whether the torch which the complainant allegedly had was shone on the faces of the attacker. That there was no identification parade held to identify him.

6. The Appellant further contends that though the complainant alleges that she recognized the Appellant, who is allegedly his cousin, this report was not given to the police; that the only identification was dock identification. The Appellant has relied on several decisions torching on identification to buttress his submissions.

7. On the nexus between him and the crime, the Appellant argues that no one identified him for purpose of arrest and that he had been in custody in relation to different charge, not the current offence.

8. He submits that there was bad blood between him and the complainant which the trial court failed to pay attention to.

9. On whether the case was proved beyond reasonable doubt, the Appellant submits that the failed identification was fatal to the prosecution's case.

Respondent submissions.

10. It is the Respondent's submission that the Appellant was properly identified, through recognition. On the mode of arrest , it is submitted that the Appellant was on the run after committing the offence until he was arrested in relation to a different one , and that there was nothing wrong with that manner of arrest. On the allegation that there was bad blood between the Complainant and the Appellant, the Respondent points out that the allegations were not made at the trial court , and are only being raised on the Appeal as an afterthought. The Respondent urges the court to dismiss the same. On whether the Appellant was convicted on mere suspicion as opposed to the case having been proved beyond reasonable doubt, it is the respondent submission that the ingredients of the charge of robbery with violence were proved beyond reasonable doubt.

Summary of the evidence tendered

11. PW9 was the complainant. She told the court that on 21st November 2016, she was coming from her shop, and as she approached home, she met 4 men, i.e. Anthony Mwangi (the Appellant), Ndungu Gathee, the late Joel mwangi ,George Musomi and Irungu sitting beside the road. The time was 7.30 pm.

12. It was slightly dark and she was relying on the torch and the moonlight for illumination. One of them , Irungu Gathee stood up and hit her on the head. She was then carried away to a banana planation and beaten, her thigh and right buttock were cut. The appellant stepped on her and hit her with a panga. She knew the Appellant, as he used to pass near her home, "when coming from selling alcohol". she lost consciousness and later found herself in a 35- feet quarry hole.

13. She managed to crawl out and went to Leah Wanjiku's house. Leah called other people and she was taken to Murangá hospital. She was admitted for 2½ weeks. She lost several items during the attack. She was later informed that the Appellant had been arrested.

14. On cross examination, she admitted that in her statement to the police, she indicated that the appellant strangled her with a headscarf. That she was able to see her attackers as she could see them as they attacked her. That she also knew the Appellant by his voice; that she managed to hear the appellant talking to Irungu. She lost consciousness in the banana plantation. She told the court that one of the attackers called Irungu, was her cousin. That the appellant too was also her cousin. That she had had no differences with the Appellant.

15. PW2 was Leah Wanjiku. She said that she was told to come and say there is nothing she knew. "I don't know anything" she asserted. The witness was then stood down at the request of the prosecution.

16. PW3 was a village Elder in Iganyo village. He told the court that on 22.11.2023 he was called to a certain place to "Identify people who kill others". At the identified place he found Joel Mwangi, who had been tied with a rob. The said Mwangi told PW3 that he is among those who attacked the complainant. PW3 told the court he had known the Appellant since he was born.

17. At cross examination he told the court that the appellant was a habitual offender. He did not witness this particular robbery. On re-examination he told the court that the person who called him to go "see the people who kill others" was Susan Njeri, who was also the Appellant's Aunt.

18. PW4 was the Investigating Officer. He told the court that on 1.5.2017, the OCS, Sabasaba police station, called him and gave him instructions to investigate a suspect who was held at sabasaba police station. He visited the complainant's home and amended her statement. He relied on witnesses statements to link the accused to the offence.

19. PW5 was the Clinical Officer. She produced the P3 form. she confirmed that the complainant sustained a fracture of the spine and right buttocks.

Determination

20. It is the duty of this court to look at the evidence a fresh, re-evaluate it and arrive at its own conclusions , while giving allowance to the fact that the trial court had the benefit of hearing and seeing the witnesses first hand.(Oneko vs Republic (1972) EA 132)

21. In my view the following issues arise for determination:

    a. Whether the appellant was properly identified

    b. Whether a nexus was established between the Appellant and the crime.

    c. Whether the charges against the appellant were motivated by a land dispute

    d. Whether the case was proved beyond reasonable doubt or was based on mere suspicion.

Whether the appellant was properly identified

22. This was a case of identification by a single witness, the complainant. She told the court that the time was 7.30pm, and there was moonlight. She was using her phone's torchlight. She saw 4 men seated at the footpath. She knew them by their names. They were Anthony Mwangi (the Appellant),a Ndungu Gathee, the late Joel Gathee, George Musomia and Irungu. Gathee stood up and hit her on the head. She fell and was carried off to a banana plantation. She was beaten and cut on the left high and right

buttock. The accused stepped on her and cut her with a panga "she knew the Appellant as he would pass by her home "when coming from selling alcohol."

23. On cross examination, she stated that she had seen the Appellant before losing consciousness. She also knew the accused from his voice .He was wearing timberland shoes, she added. She further stated, "Irungu hit me with a stone....Irungu is my cousin. Irungu is not in court, he took off. Only one attacker is here. The others took off. We are related, you are my cousin."

24. What clearly emerges from the above narrative by the complainant is that she was attacked by persons she knew very well, they were not strangers to her .The Appellant was one of them. She spelt out their names and was not challenged at all at cross examination in this regard. She knew what some of that attackers did. For instance, what she told the court thatb Irungu hit her on the head while the Appellant herein cut her with panga. The appellant used to pass near her home on his return trips from selling alcohol.

25. The Complainant not only knew the Appellant and other assailants, by name, she also stated that the appellant was her cousin. Again this piece of evidence was not contested at cross examination. It is evident therefore that the Appellant and the complainant not only knew each other but they were also relatives. Identification, therefore was by recognition.

26. Although the incident took place at night, the complainant had a torch and there was moonlight. She told the court that she could see attackers as they attacked her.

27. It is trite law that where the only evidence against the accused is evidence of identification or recognition, trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction. (See Hassan Abdallah Mohammed vs. Republic (2017)eKLR. While in Nzaro vs. Republic (1991) KAR 212, the court of Appeal held that evidence of identification by recognition must be absolutely watertight to justify conviction.

28. In Peter Okee Omukanga & another vs. Republic(2019) e KLR, the court while addressing the evidence of recognition at night stated "We have re-examined the evidence upon which the conclusion was made and we find that it was well founded, we have no doubt that Francis John and Jane were familiar with the appellant; that Francis and John were known to them by their appearance as "neighbours from the village" that they had played football from long time ago and that their voices were so familiar to them. Accordingly, we have no reasons to disturb that finding...."

29. In the instance case, it clearly emerged that the complainant not only knew the Appellant by name, the two were cousins. Am satisfied that identification by recognition was watertight.

30. What about recognition by voice?The complaint told the court that she heard the appellant talking to Irungu.

    In Vura Mwachi Rimbi vs. Republic (2016) eKLR. It was held, the voice recognition is admissible. The court went further: "in case of Choge vs. R (1985) KLR 1, this court held that evidence of voice identification is receivable and admissible and it can, depending on the circumstances, carry as much weight as visual identification".

31. And in the case of Safari Yaa Baya vs. R (2017) eKLR, the following conditions must be met on voice identification

    a. It was the accused voice

    b. The witness was familiar with it and recognized it

c. The conditions obtaining at the time it was made were such that there was not mistake in testifying to that which was said and who said it.

32. The complainant told the court that she heard the appellant talking to Irungu, but she did not state what she heard. Recognition by voice therefore fell short of the conditions out in Safari Case.(supra)

33. The Appellant has complained that no identification parade was held. In the case of Peter Okee (Supra) the court held that "As this was a case of Identification by recognition, an identification parade was unnecessary. Thus since identification was by recognition, an identification parade was not necessary in this case.

Whether a nexus was established between the Appellant and the crime

34. The nexus was established through the evidence of the complainant, and that evidence was one of recognition. The complainant saw the Appellant amongst the group of men, she knew them by their names, and she saw the Appellant as he slashed her with a panga. I find that nexus was established.

Whether the Appellant was framed

35. The appellant told the court that he had a land dispute with the complainant. The appellant gave an unsworn evidence and therefore the truth of his allegation was not tested through cross –examination. He also did not summon any witness to back up his claims.

36. As to the probative value of unsworn evidence, the court of Appeal in Jamaal Omar Hussein vs. Republic (2019) eKLR stated as follows: "there is a presumption that a person who swears to tell the truth will do so and since evidence tendered on oath is subject to cross examination to test its credibility and veracity, then the same carries more probative weight. This nonetheless not to say that unsworn evidence is totally waterless. It only means that the court considering such evidence has to consider it with circumspection and to look for corroboration from other evidence adduced in the matter. This court addressed these evidential value of unsworn statement in Mary vs. Republic (1981) KLR (Law miller & Potter m JJA) as follows:An unsworn statement is not strictly speaking, evidence and the rules of evidence cannot be applied to an unsworn statement. It has no probative value, but it should be considered in relation to the whole evidence. Its potential value is persuasive rather than evidential. For it to have any value it must be supported by the evidence corroborated in the case." Thus the Appellant's allegation that his prosecution was motivated by a land dispute between him and the complainant needed corroboration, if it was to have any evidential value. There was no corroboration and evidentially its value was diminished.

Whether the case was proved beyond reasonable doubt or was based on mere suspicion.

37. In the case of Johana Ndungu vs. Republic No. 116 of 2005(UR) the court of Appeal set out the ingredients of the offence of robbery with violence as follows:

a. The offender must be armed with any dangerous weapon or instrument or

b. He is in the company of one or more other person or persons; or

c. If at or immediately after the time of robbery, he wounds, beats, strikes or uses violence to any person.

38. The prosecution only need to prove the existence of one of these ingredients. The appellant's submission in this regard went back to the issue of identification. I have already addressed this issue and I need not revisit. . There is evidence that the accused was in the company of one Irungu and

Joel Mwangi; there is also evidence that the complainant was injured and had to be hospitalized; The complainant further told the court that Irungu hit him with a stone while the accused cut her with a panga. Therefore, there is also evidence that the accused and his companion had in their possession a panga and a stone.

I am satisfied that the all the ingredients of the offence of robbery with violence was proved.

39. In conclusion uphold the finding of the trial court on conviction.

40. There was no appeal against the sentence. I will not therefore address myself to it, suffice to state that the death sentence is the penalty provided for under section 296(2) of the penal code for the offence of robbery with violence. The sentence meted out was lawful.

41. The appeal is unmerited, I dismiss it in its entirety.

Dated, signed and delivered at Kakamega virtually on 25th day of April, 2023

S. CHIRCHIR

JUDGE

In the presence of:-

Susan- Court Assistant

Appellant- present

Ms Muriu for the Respondent.

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