Mugambi v Republic (Criminal Appeal E005 of 2021)
[2022] KEHC 524 (KLR) (24 March 2022) (Judgment)

Neutral citation: [2022] KEHC 524 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CRIMINAL APPEAL E005 OF 2021

LW GITARI, J

MARCH 24, 2022

BETWEEN

SABASTIAN MUTUGI MUGAMBI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant herein was charged in Marimanti S.P.M's Court Criminal Case No. 48 of 2018 with the offence of robbery with violence contrary to Section 296(2) of the *Penal Code*.

2. The Appellant denied the charge and the matter proceeded to full trial with the prosecution calling a total of four (4) witnesses in support of its case. At the close of the prosecution's case, the Appellant was placed on his defence and he testified as the sole witness in support of his case. (sic)

3. The trial court delivered its judgment on 30th January 2019. The Appellant was convicted of the offence and sentenced to death.

4. Being aggrieved by the said conviction and sentence the Appellant raised the following grounds of appeal:

    a. That there is a miscarriage of justice in this case but the trial magistrate did not even alter to overlook for that demeanour which existed during the hearing and determination of the case.

    b. That the learned trial magistrate erred in both points of law and facts by failing to consider the number of the said robbers who were not availed before the court and the appellant herein could have been a mistaken identity since on the spot there were people passing by on the public road.

c. That the learned trial magistrate still erred in both matters of laws and facts by failing to consider that there was no recovery of the said stolen money totaling Kshs. 3,000/= from the complainant hence breaching the law by meting out a death sentence to the appellant.

d. That the learned trial magistrate still erred in both matters of laws and facts by imposing a harsh sentence without considering the facts that there was no first report which implicated that the appellant was to the status quo but a group pf seven goons.

e. That the learned trial magistrate erred in both points of law and facts by failing to consider the appellant's defence.

f. That the learned trial magistrate erred in both points of law and facts by failing to consider that I refused the sub-chief to testify before the court by the honourable magistrate and yet the arresting officer recorded his statement at the OB.

It is desired that the appeal be allowed conviction be quashed, sentence be set aside and he be set at liberty.

5. This being the first appellate court, the duty of the is well settled as to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. [See: *Okeno -vs- Republic* [1972] E.A. 32]

6. The particulars of the offence as disclosed in the charge sheet is that on 21st January 2018 at Gakurungu Location, Tharaka South sub-county within Tharaka Nithi County the Appellant, jointly with others not before court, robbed David Mwenda Muriungi Kshs. 3,000/= and at or immediately before the time of such robbery, beat the said David Mwenda Muriungi.

Analysis of the Evidence before the Trial Court

7. David Mwenda Muriungi (PW1) was the complainant. He testified that he is a butcher and on the material day he was riding a motorcycle heading to Tunyai to buy cows in the company of his friend Nathan Mainda (PW2). He met the Appellant at about 7.00 – 9.00p.m. PW1 had never seen the Appellant before. They saw the road was blocked with stones and there were seven men. PW1 went to the block and slowed. PW1 was ordered to alight from the motorcycle. He switched off the motorcycle and when he reached to remove the ignition keys, he was hit with a club on his left-hand fingers. The Appellant then grabbed PW1, and they started struggling. Other gang members joined. PW1 had a total of Kshs. 73,000/= on him which were in various pockets of his trouser. As PW1 was still struggling with the Appellant, another man held him from behind and took away Kshs. 3,000/= from the pocket of his trouser. At that time, PW2 was fighting with the other gang member. PW1 and PW2 screamed for help and many people responded.

8. The members of the gang ran away except the Appellant as PW1 was left holding him by his hands. The Appellant was still holding a club. PW2 went and assisted PW1 in holding the Appellant who was forced to surrender. PW1 then rushed and reported the matter to the police in Tunyai leaving PW2 and others restraining the Appellant. He then returned to the scene with the police and found the Appellant was still restrained. The Appellant was then arrested. PW1 was hit with the club on his left fingers and left shoulders. He first received treatment at Mitunguu hospital and later at Marimanti hospital. On being recalled for further cross-examination, it was PW1's testimony that he was treated on 23rd January 2018 at Mituguu Dispensary.

9. PW2 was Nathan Mainda. He identified the Appellant in court and corroborated the evidence of PW1 on the events that transpired on the material night. It was further PW2's testimony that during

the incident, he was also hit with a club on his back and legs and that he was treated at Mitunguu Dispensary.

10. PW3 was Benard Chabari, a clinical officer stationed at Marimanti Level 4 Hospital. He produced the P3 Form that was filled on 15th February 2018 by his colleague, Andrew Kinyua, who was on his annual leave at the time. He testified that he had worked with the said Andrew Kinyua for 3 years and was familiar with his handwriting and signature. He confirmed that the said Andrew Kinyua was the one who filled PW1's P3 Form and produced the P3 in evidence as PEXh1.

11. PC David Mutua (PW4) was the investigating officer in this case. He recalled that on the material day at around 8.30 p.m., he was on duty at Tunyai Police Post when PW1 went and reported that he had been attacked on the same night at around 7.30p.m. at Gachaine area along Gakurungu to Tunyai market road. They proceeded to the scene in the company of two other police officers and found the Appellant had been restrained. They then arrested the Appellant and took him to the police post. PW4 then recorded the statement of PW1 and PW2 and referred PW1 for treatment. He also referred him to Marimanti Police Station to get a P3. According to PW4, the Appellant was known to him as he had severally been at the police post over other matters.

12. In his defence, the Appellant gave a sworn testimony. He denied robbing PW1. According to him, he left his place of work at about 5.00 p.m. on the material day. He then went to the bus terminus where he met one David, a police officer. The said David demanded some money from him for allegedly letting him go free on 13th January 2018 without taking him to court. It is then, according to the Appellant, that a struggle ensued, and he was arrested and taken to a cell. The next day, two men came and alleged that the Appellant had robbed them. It was therefore his case that he was framed of the charges.

The Appeal

13. The appeal was canvassed by *viva voce* evidence. The parties made oral submissions in open court.

14. The appellant took issue with the alleged failure by the prosecution to call the arresting officer as a witness in the case. He also challenged his identification noting that the complainant (PW1) indicated that he did not know the Appellant before. He thus urged this court to consider all the grounds he has raised in support of this appeal.

15. The Respondent opposed the appeal by submitting that the identification of the Appellant was clear as the Appellant was at the scene of the crime. The Respondent further submitted that it is not mandatory for stolen property to be recovered for a conviction to stand. In addition, the Respondent submitted that the Appellant's defence of *alibi* was considered by the trial court but failed. With regards to Appellant's claim that some witnesses were not called, it was the Respondent's submission that it called the necessary witnesses and that there were no gaps in the prosecution's case. Finally, it was the Respondent's submission that the sentence meted against the Appellant was as provided by law and therefore proper considering that the Appellant was a repeat offender.

Issues for determination

16. I have considered the grounds of appeal, the respective submissions of the parties and the evidence adduced before the trial court. In my view, the main issues for determination are:

    a. Whether the Appellant's identification was proper;

    b. Whether the prosecution proved its case to the required standard;

    c. Whether the sentence meted out was harsh in the circumstances.

Analysis

Identification of the Appellant

17. On the issue of identification, the Court of Appeal's decision in the case of Mwaura –vs- Republic [1987] KLR 645 is relevant. The said court held as follows:

> " In cases of visual identification by one or more witnesses, a reference to the circumstances usually require a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light."

This is to say that the circumstances under which an accused person was identified is crucial and a relevant matter for consideration.

18. Again, the Court of Appeal in *Anjononi and Others –vs- Republic* [1976- 1980] KLR 1566 held that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of stranger because it depends upon some personal knowledge of the assailant in some form or other.

19. It is noteworthy that the incident in question took place past 7 p.m. on the material date. As such, the evidence of identification at such times should be tested with great care and should be absolutely watertight in order to justify a conviction. In the cited case of *Republic –vs- Turnball & Others* [1976] 3 ALLER 549 Lord Widgery CJ laid down the circumstances necessary for consideration whenever an issue of identification of perpetrator is in question namely:

    a. How long did the witness have the accused under observations?

    b. What was the sufficiency of lighting?

    c. Was the observation impeded in any way as for example by passing traffic of group of people?

    d. Had the witness seen the accused before and if so, how often?

    e. Were there any special features about the accused?

    f. How much time elapsed between the original observation and the subsequent identification to the police by the complainant when first seen and the actual appearance?

20. Again, in the case of *Maitanyi –vs- Republic* [1986] eKLR the Court of Appeal stated that in determining the quality of identification of using light at night, it is at least essential to ascertain the nature of the light available, what sort of light available, what sort of light, its size and position from the suspect and the witnesses.

21. It is not in dispute that the Appellant was not known to both PW1 and PW2 before the material day. The Appellant alleges that he is a victim of mistaken identity. According to both PW1 and PW2, the incident took place at around 7 p.m. The lighting of the scene was not identified. Nonetheless, it was the Appellant's case that he was able to identify the Appellant as a struggle ensued between them. PW2 went in to assist PW1 after the other gang members ran away and also got a chance to identify the Appellant. In addition, when they managed to restrain the Appellant, PW2 had adequate to identify him. Furthermore, PW1 promptly made a report of the incident at the police post at around 8.30 p.m. before proceeding to the scene with police officers. PW4 confirmed that it was the Appellant who they found and arrested at the scene after he had been restrained by PW2 and other members of the public. In the circumstances, it is my view that the Appellant's the identification was positive and

safe by any standards as the same can be said to have been free from error. The circumstances under which the appellant was arrested are relevant as he was arrested in the act. He was placed squarely in the action of robbing the complainant. The trial magistrate did not find any difficulties in finding that the identification of the appellant was reliable.

The trial magistrate found, See page 49 from line 21-22

> " The accused person actually manhandled and beat the complainant and PW2 after barricading a public road."

At page 52 from line 23 the trial magistrate stated-

> " The only issues now outstanding are whether the accused person was positively identified as one of the perpetrator of this offence and whether he was at the scene of crime as alleged. The prosecution relied on direct evidence to establish the identity of the accused person and link him to the instant offence. On the identity of the attacker, it is clear from the evidence on record that the accused person was positively identified by the complainant, PW2 and PW4.

The complainant and PW2 stated that the offence was committed at around 7.00 pm and on a public road. They further stated that the complainant was left holding onto the accused person when the alarm they had raised attracted some unidentified people to the since of crime. They stated that the accused person's attempts to free himself from the complainant's grip and flee the scene along with his accomplices were futile. The accused person was then kept under guard until the time PW4 and his colleagues moved to the scene and arrested him.

It follows that this is a case of recognition. The accused person was actually subdued during the attack and arrested while still at the scene of crime. I am guided by the decision in the case of *Wamunga-v-Republic*[1989] KLR 424, where the Court of Appeal held *inter alia*:

> "Where the only evidence against the defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that circumstances of identification were favourable and free from possibility of error before it can safely make it a basis of a conviction."

Recognition entails seeing a person who is known to the other person and can easily say this is a person I know by traits like features name a relative and so on.

It is different from identification which entails seeing a person who is a stranger and who is not known to the person identity. The appellant was not known to the complainant and PW2 but the circumstances under which he was arrested leaves no doubt that he was in the gang that attacked the complainant. The court has to determine whether there was a possibility of error and whether the circumstances cast doubts on the identification of the appellant as the person who committed the offence. In this case there was no possibility of error as the appellant was caught by his victim after a struggle and there can be no doubt he was positively identified and detained during the robbery.

Whether the prosecution proved its case to the required standard

22. As regards the second issue, the prosecution was under a duty to establish the elements of the offence of robbery with violence contrary to Section 296(2) of the *Penal Code*. The same provides as follows:

> " If the offender is armed with any dangerous or offensive weapons or instrument, or is in company with or more other persons, or is in company with one or more other persons, or

if at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or use any other personal violence to any person, he shall be sentenced to death."

23. The ingredients of offence of robbery with violence were clearly set out by the Court of Appeal in the case of *Oluoch –vs – Republic* [1985] KLR where it was held:

> " Robbery with violence is committed in any of the following circumstances:
>
> a. The offender is armed with any dangerous and offensive weapon or instrument; or
>
> b. The offender is in company with one or more person or persons; or
>
> c. At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person..."

24. The use of the word "OR" in this definition means that proof of any one of the above ingredients is sufficient to establish an offence under Section 296(2) of the *Penal Code*. This was the holding in the Court of Appeal case of *Dima Denge Dima & Others v Republic* [2013] eKLR where it was held that:

> " The elements of the offence under Section 296 (2) are, however, three in number and they are to be read not conjunctively, but disjunctively. One element is enough to found a conviction."

25. In this case, PW1 testified that he had carried PW2 on a motorcycle when then met a roadblock on the material night. A gang of around six men was at the roadblock, with the Appellant being one of them. The Appellant was armed with a club and ordered PW1 to get out of the motorcycle. A struggle ensued and the Appellant hit PW1 with the club causing him injuries on his left fingers and left shoulder. His evidence was corroborated by the testimony of PW2. The injuries sustained by PW1 were confirmed by the testimony of PW3 who produced his P3 form as evidence. The injuries were assessed as "harm".

26. According to PW1, one of the members of the gang held him from behind and took Kshs. 3,000/= from his pocket.

27. Section 20 of the *Penal Code* provides as follows:

> (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence , and may be charged with actually committing it, that is to say-
>
> (a) every person who actually does the act or makes the omission which constitutes the offence; (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence; (c) every person who aids or abets another person in committing the offence;
>
> (d) any person who counsels or procures any other person to commit the offence and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission. (2) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.
>
> (3) Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part is guilty of an offence of the same kind, and is liable to the same punishment,

as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission."

28. It matters not that when a number of people commit a crime, it is the person who actually commits the crime who is to be convicted. The *Penal Code* also defines what is a common intention.

29. Section 21 of the *Penal Code* provides:

> When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

30. In the case of *David Nduati Njogu –v- Republic* (2010) eKLR it was stated that a common intention arises where two or more people are shown to have had a plan to persue a common unlawful objective. A common intention can arise in the cause of a commission of an offence. See *Francis Ngina Kagiri – v- Republic* Court of Appeal, Criminal Appeal No.264/2009 (2009) eKLR

31. The Court of Appeal in the case of *Dickson Mwangi Munene and Alexander Chepkonga* (2014) eKLR held;

> The law is settled on the definition and in what circumstances common intention can be inferred it is not expressed or obvious common intention is deduced where there are two or more parties that intends to persue or to further unlawful object or a lawful object by unlawful mean and so act or express themselves as to reveal such intention. It implies a pre-arranged plan. Although common intention can develop in the course of the commission of an offence, it is normally anterior in point of time to the commission of the crime showing a pre-meditated plan to act in concert it comes into being, in point of time, prior to the commission of act."

32. Section 21 of the *Penal Code* has been variously interpreted in decisions of this court and the Court of Appeal. In *Njoroge –v- Republic* 1983 KLR 197 at 204 the Court of Appeal stated-

> If several persons combine for unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of the endevours to effect he common object of the assembly."

33. See *Republic- v- Tabulayeuka s/o Kirya* (1943) EACA 51 where the court stated that common intention may be inferred from their presence, their actions and the omission of either of them.

34. From the foregoing, it is clear that what the court has to consider the intention to act in concert can be inferred from their action. The Court of Appeal in the case of *Dickson Munene* supra laid down the principles which the prosecution must prove. These are criminal intent, the act was committed by one or more of the perpetrators in respect of which it is sought to find accused guilty was foreseable consequence of effecting that common purpose and that the accused was aware of this when he agreed to participate in that joint criminal act.

35. In this case facts not in dispute are that seven persons had blocked the road using stones. When the complainant approached, he was arrested and in the process the appellant assaulted him using a stick while one of the accomplices robbed him Kshs.3000/-. The common intention is established by the fact they had blocked the road using stones and all attacked the complainant and his friend PW2.

36. The appellant was in the group. His participation is a clear indication that he knew that the consequences of their actions. It matters not that he is not the one who actually stole the Kshs.3000/-, it is proved that he had an intention to rob the complainant. Failure to recover the stolen cash from him or that he is not the one who stole does not remove the guilt from him. He participated in the robbery and is the one who injured the complainant.

37. I find that the prosecution proved that the appellant had criminal intention to commit an unlawful act,that is robbery with violence with others not before the court. The prosecution proved the case beyond any reasonable doubts.

Whether the sentence was harsh:

38. The punishment for offence of robbery with violence under Section 296(2) of the *Penal Code* is death. The trial magistrate reasoned that the death penalty was deserved as the appellant was a repeat offender. The appellate court will normally not interfere with the exercise of discretion by the trial magistrate unless it proved that the sentence was manifestly harsh. I find the sentence imposed was no doubt harsh irrespective of the fact that he had previous conviction of assault.

39. I therefore have reason to interfere with the sentence. I have considered the ground that the trial magistrate did not consider the defence of the appellant. This however is not born out by the Judgment. The trial magistrate considered the defence at length and rejected it in the light of the overwhelming evidence implicating the appellant. The ground has no merits.

40. As regards ground No.6, the allegations are not borne out by the record and are dismissed.

In Conclusion:

41. From the foregoing I find that the appeal on conviction lacks merits and is dismissed.

42. The appeal on the sentence is allowed. The sentence of the learned trial magistrate is set aside. It is substituted with a sentence of imprisonment for twenty (20) years effective from 23/1/2018 when the appellant was remanded in custody to await trial.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 24TH DAY OF MARCH 2022.

L.W. GITARI

JUDGE

24/3/2022

The Judgment has been read out in open court.

L.W. GITARI

JUDGE

24/3/2022