Kirui & another v Republic (Criminal Appeal E001 of 2023)
[2024] KEHC 4119 (KLR) (18 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4119 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERICHO

CRIMINAL APPEAL E001 OF 2023

JR KARANJA, J

APRIL 18, 2024

BETWEEN

COLLINS KIPLANGAT KIRUI ..... 1ST APPELLANT

DOMINIC KIMUTAI LANGAT ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgement 1{{^st}} December 2022 in Criminal Case No. E1433 of 2022 by Hon. B. R. Kipyegon, PM at Kericho, Chief Magistrate's Court)

JUDGMENT

1. The two Appellants, Collins Kiplangat Kirui and Dominic Kimutai Langat, separately appeared before the Principal Magistrate at Kericho facing individual charges of robbery with violence, contrary to Section 295 as read with Section 296(2) of the Penal Code.

   The charges were later consolidated into a single charge with particulars that on the 17th June 2022 within Kericho Town in Kericho County, the Appellants jointly robbed Enock Kiplangat Korir of a mobile phone make Samsung Galaxy S22 Ultra, a Rolex watch and a wallet all valued at Kshs. 195,200/- and immediately after the time of such robbery used actual violence to the said Enock Kiplangat Korir.

2. Both Appellants entered a plea of not guilty but after trial they were convicted and sentenced to suffer death.

   Being dissatisfied with the conviction and sentence, the Appellants filed separate appeal which were herein consolidated and argued together by way of written submissions. They generally complain that their respective conviction by the trial court was based on the evidence by the prosecution which was insufficient, contradictory, inconsistent and uncorroborated.

   The State/ Respondent opposed the appeal.

3. At the hearing of the appeal which was canvassed by written submissions, the Appellant one (Collins) was represented by Learned Counsel, Mr. Nyadimo. The Appellant two (Dominic) appeared in person while the Learned Prosecution Counsel, Mr. Ogutu, represented the state.

   Both sides filed their respective submissions which were given due consideration by this court.

4. In a first appeal the duty of the court is to reconsider the evidence and draw its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

   Accordingly, the prosecution case was founded on the evidence presented by six witnesses (PW1 to PW6) which indicated that on the material date at about 1:30am the Complainant Enock Kiplangat Korir (PW1), a businessman in Kericho Town was in the company of Ann Wanjiku (PW3), leaving the pink castle club and walking towards the Shell Petrol Station when a group of three (3) young men armed with a knife and an iron bar emerged and snatched the Complainant's mobile phone and ran away.

5. The Complainant gave chase and got hold of one of the robbers who used a knife and stabbed him on his hand. He (Complainant) was followed and rescued by Ann (PW3) who arrived at the scene closely followed by a motor cycle taxi rider (boda-boda), Japheth Kimutai (PW4). They found the Complainant struggling with and being assaulted by the three robbers. Two of the robbers escaped but the one in possession of a knife was overcome and apprehended with a crowd of people gathered at the scene "baying for his blood."

6. The police arrived at the scene. PC Danson Mwangi (PW5) saved the apprehended suspect from the lynching mob and arrested him. He took both the Complainant and the suspect to Kericho Police Station and later to Kericho County Referral Hospital for treatment.

   Jonah Kipkokei Chebunet (PW2), a Clinical Officer at the aforementioned hospital examined the Complainant and compiled the medical report P3 form (P. Ex. 1) which he signed and indicated therein that the Complainant suffered bodily injuries during the robbery.

7. Sgt. Naisea Mukona (PW6), received the necessary report from his colleague (PW5). He rushed to the scene where he found his colleague, the Complainant and a suspect who was apprehended while in possession of a knife (P. Ex. 3). Along with his colleague, they led the Complainant and the suspect to the police station. He (PW6) commenced investigations of the case and gathered that the Complainant had lost his mobile phone and a Rolex wrist-watch to the robbers. A second suspect was later arrested. Both suspects were eventually charged with the present offence.

8. The defence case was a denial by both Appellants of having committed the offence. The first Appellant (Collins) was the second Accused in the trial court. He indicated that he was a motor cycle rider and was away out of Kericho Town in his home at Litein from the 15th June 2022 to the 20th June 2022. He therefore implied that he was not at the scene of the offence at the material time and date.

9. The first Appellant further indicated that he was arrested when he later returned to his house at Nyagacho where he lived. He was in the process bundled into a police vehicle where he found two other people. They were all taken to the police station but the other two people were later released.

10. The Second Appellant (Dominic) was the first Accused in the trial court. He indicated that he was from Chepseon when along the way darkness set in. He was arrested and taken to the police station when people came running after and got hold of him for allegedly taking a phone. He contended that he did not take any phone.

11. The evidential facts emanating from the evidence in its totality clearly showed that there was no dispute with regard to the offence of robbery with violence having been committed against the Complainant on the material date by a group of three people who were at the time armed with offensive weapons including a knife and who in the process caused bodily injuries to the Complainant.

12. Indeed the prosecution evidence did establish and prove beyond any reasonable doubt the material ingredients of the offence of robbery with violence in terms of Section 295 and Section 296(2) of the Penal Code.

    Therefore, what emerged as the sole issue for determination was whether the two appellants were positively identified as having been part of the group of robbers who attacked and robbed the Complainant of his personal belongings.

13. The defence by both Appellant being a denial and an alibi on the part of the first Appellant it was incumbent upon the prosecution to prove by cogent and credible evidence that the two Appellants actually participated and were seen participating in the robbery against the Complainant.

14. In essence, the prosecution evidence of identification came from the Complainant (PW1) as corroborated by that of the Complainant's friend (PW3) and the Motor Cycle taxi rider (PW4).

    All these witnesses indicated that the offence occurred in the hours of darkness at about 1:30am or thereabout but they also indicated that the scene was well lit and brightened by electric street lights and that one of the three robbers was apprehended right at the scene of the offence.

    They further indicate that there was adequate opportunity to make a positive identification of the robbers and in particular, the one who was apprehended at the scene.

15. All the aforementioned factors were indisputably established by the prosecution evidence. Consequently, the Complainant's evidence of identification against the second Appellant (Dominic) was not only strong but also credible and reliable enough in proving beyond reasonable doubt that the second Appellant was among the group of three people who attacked and robbed the Complainant.

16. In that regard, there was credible corroborations from the Complainants friend (PW3) and the motor cycle rider (PW4).

    The second Appellant's apprehension at the scene of the offence while in the process of executing it added more weight and fortified the prosecutions evidence of identification against him. As it were, the second Appellant was caught at the scene "flagrante delicto" (caught in the act).

17. As for the first Appellant (Collins) an alibi defence was raised. The obligation to dispute and/or dislodge the same lay with prosecution by establishing that the Appellant one was seen and identified at the scene while in the act of committing the offence. In that regard, the relevant evidence was again that of the Complainant (PW1) as corroborated by that of Ann (PW3) and Japheth (PW4).

18. The Complainant indicated that the first Appellant was the person who snatched and took away his mobile phone which was never recovered and was also the person wearing a cap (P. Ex. 2) which fell down and was recovered at the scene. The Complainant's friend (PW3) confirmed as much.

    The motor cycle rider (PW4) arrived at the scene while the offence was in progress. He said that he found the first Appellant assaulting the Complainant and was wearing the cap at the time.

19. The offence having occurred in circumstances which provided favourable condition and adequate opportunity for the identification of the offenders, it may safely be stated that the first Appellant was also positively identified as one of the three people who attacked and robbed the Complainant on that

material date. His alibi defence was disproved by the identifying witness (PW1, 3 and 4) when they clearly and directly placed him at the scene of the offence.

20. Both Appellants were positively identified as being part of the gang of robbers who robbed the Complainant of his property and injured him in the process.

    Their respective conviction by the trial court was therefore proper, sound and safe and is hereby upheld by this court with the result that their respective grounds of appeal in respect thereof are hereby overruled and dismissed.

21. In any event, both appeals were basically on sentence rather than conviction. The Appellants argued in that regard that the sentence imposed by the trial court was harsh, excessive and unconstitutional in so far as it was a mandatory sentence. Indeed, in the famous case of Muruatetu and Another Vs. Republic (2017) eKLR, the Supreme Court outlawed the mandatory nature of the death sentence in murder cases. However, the court did not outlaw the death sentence itself such that a trial court could still impose such sentence where the circumstances of the case allowed.

    The principle pronounced by the court in the Muruatetu case would also apply to the death sentence under Section 296(2) of the Penal Code.

22. The trial court in sentencing the Appellant considered their respective mitigations and circumstances of the offence and deemed it fit to impose upon them the death sentence.

23. There is no doubt that the sentence was lawful. However, the Appellants were apparently first offenders who deserved a less severe but deterrent sentence other than a death sentence. Accordingly, the death sentence imposed upon them be and is hereby set aside and substituted for a sentence of thirty (30) years imprisonment for each of the Appellant. The appeal on conviction is otherwise dismissed.

DELIVERED AND DATED THIS 18TH DAY OF APRIL 2024

J. R. KARANJAH,

JUDGE

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