Muthoni v Republic (Criminal Appeal 5 of 2017)
[2024] KEHC 8925 (KLR) (19 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8925 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL 5 OF 2017

S MBUNGI, J

JULY 19, 2024

BETWEEN

MICHAEL NDUNGU MUTHONI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

Introduction

1. This appeal arises from the judgement of Hon. M. Kinyanjui, SRM, at Kandara Law Courts delivered on 17th January, 2017 which sentenced the appellant to suffer death sentence in the matter of robbery with violence Contrary to Section 296 (2) of the *Penal Code*.

2. The appellant was charged with the offence of robbery with violence Contrary to Section 296 (2) of the *Penal Code*.

3. The particulars of the charge are that on the 30th day of April, 2016 at Branan area along Thika-Kandara road, jointly with another not before court while armed with dangerous weapons namely one modified slasher (sword-like) and one sword robbed Godfrey Chege Thiera of his mobile phone make techno valued at kshs. 1200 and seventy – five Kenya shillings in cash.

4. The appellant having being dissatisfied with the judgment of the court appealed seeking the following orders that: -

   (a) The conviction be quashed.

   (b) The sentence be set aside.

5. The appellant's grounds of appeal are as follows: -

i. That the learned trial Magistrate erred in matters of law and fact by failing to find that there was no adverse positive first report for the identification to corroborate his purported identification and/or recognition at the scene of the crime.

ii. That the trial Magistrate erred in matters of law and fact by failing to test the evidence of a single witness by carefully inquiring as to the circumstances that prevailed during the attack and whether the witness was able to make a true impression and description of the assailants during the night.

iii. That the learned trial Magistrate erred in matters of law and fact by failing to find that the 2nd appellant herein was implicated as an accomplice through coercion by first accused who was thoroughly beaten by the police officers and that mere suspicion cannot form the basis of inferring guilty.

iv. That the learned trial Magistrate erred in matters of law and fact by failing to find that it is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

v. That the learned trial Magistrate erred in matters of law and fact by failing to find that the police officers arrested the appellant herein who was alleged to have been on their criminal watch list as a local criminal not as identified by the complainant and thus his mode of arrest is wanting.

vi. That the trial Magistrate erred in matters of law and fact by not giving regard to my sworn defense, which plausibly underpinned the doubtful circumstances circumventing his mode of arrest and identification.

vii. That the learned trial Magistrate erred in matters of law and fact by failing to consider the mitigation and section 216 and 329 of the *Criminal Procedure Code* and provide for an alternative lesser severe sentence.

6. The respondent opposed the appeal and cited the following grounds: -

a. That the appeal lacks merit, is incompetent and does not meet the threshold of granting the orders sought.

b. That the appeal is an abuse of the court process as the applicant was property convicted before the trial court and the prosecution discharged its burden beyond reasonable doubt.

c. That the appeal lacks merit and the same should be dismissed in its entirety.

7. The court directed the appeal be disposed off by way of written submissions.

8. Both the parties filed their written submissions.

Appellants Submisisons

9. The appellant stated that there was no proper identification done because;

I. The offence is said to have been committed at night.

II. The complainant never gave description of the attackers or their names to the police officers he reported to, given that later he said he knew the attackers.

III. The complainant when he reported to the police he never said he knew the attackers.

IV. The trail court did not consider that he was allegedly mentioned by the first accused who in his evidence denied ever mentioning him.

10. On sentencing the appellant faulted the trial court for imposing harsh and excessive sentence and referred the court the case of *Shadrack Kipchoge Kogo v Republic* in which the court of appeal stated: see Makhandia J (as he then was in *Simon Ndungu Murage v Republic*, Criminal Appeal No. 275 of 2007, Nyeri, Criminal Appeal No. 253 f 2003 (Eldoret), Omolo, O'kubasu and Onyango JJA). "sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence the court took into account an irrelevant factor or that wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred."

Respondents submission

11. The respondent opposed the appellants appeal and submitted that:

    i. There was evidence that he was in company with other people who were armed with dangerous weapons and used actual violence on the complainant.

    ii. The appellant was properly identified by the complainant as one of the attackers.

12. On sentencing; the respondent submitted that the trial court took into account all the aggravating circumstances and the appellant's mitigation but conceded that the trial court did not take into account the time spent in custody by the appellant pursuant to section 333 (2)(1) of the *Criminal Procedure Code*.

Duty Of The Court

13. This being the first appeal, it is the duty of the Honourabe court as the first appellant court, to re-examine, re-evaluate, and reconsider the evidence a fresh and make its own conclusion on it. This was the holding of the court of appeal in *Okeno v Republic* [1972] EA 32 as thus; An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v Republic*) [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (*Shantilal M. Ruwala v Republic* [1957] EA 570.) It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's conclusions. It must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See. *Peters v Sunday Post*, [1958] EA 424)."

14. I have looked at the proceedings of the lower court grounds of appeal and submissions.

Issues For Determinaton

I. Whether the ingredients of the offence were proved.

II. Whether the appellant was positively identified by complainant.

Determination

15. To prove the offence of robbery with violence the prosecution evidence should establish the following: -

    i. Whether the offender was armed with a dangerous or offensive weapon or instrument or

ii. Whether the offender was in company with one or more other person or persons or

iii. Whether they immediately before or immediately after the time of robbery, wounded, beat, struck or used any other personal violence to the complainant.

16. From the submissions the appeal will succeed or fail on the issue of identification.

17. The appellant maintained that he was not properly identified as one of the attackers of the complainant for he was not at the scene and that he was arrested for a different matter and charged together with the first accused after the first allegedly mentioned him as an accomplice. His defence was captured by the trial court as follows: -

> The 2nd accused in his sworn evidence said on the material day he left work at 5.30 p.m and went home. At midnight he was a woken by officers and he opened for them. They said they were searching for stolen machines and he showed them receipts for his T.V and DVD's. He didn't have a receipt for one of the DVD's so they arrested him. He said he never knew the co-accused before, they only met in court. On cross examination he said he used to see PW1 in the village but did not know him by name."

18. I have reviewed the evidence given by the complainant. In part he testified "..... I also know second accused, I used to see him on the road when going to work, I have seen him for a long time. He has been raised there. The 2nd accused was named by the 1st accused, he was arrested .....".

19. In cross examination by the 1st accused in part he testified "....I was robbed by three people who I did not recognize well...".

20. On being cross examined by the 2nd accused he testified ".....I have known you for about five years. I was able to recognize the three of you during the robbery. I recognized you because someone lit a touch, I was able to tell it was you. The 1st accused is the one who mentioned you. I said three people robbed me. I never gave their names..."

> 21. On the issue of identification, the trial court had this to say.... "The 2nd accused denied committing the offence and said he was arrested because some machines had been stolen and he was suspect. Again, this is a total lie. PW1 said he saw him when he was giving them his pin number during the attack. PW1 also said he knew the 2nd accused as he'd seen him on the road and they had no grudge. PW2 and PW3 said he was able to see the 1st and 2nd accused and he one who ran off when he 1st stopped them before they ran off. I see no reason why PW1, PW2 and PW3 would frame him. I am also convinced that the 1st accused also mentioned him since they were caught in the act and I therefore reject the 2nd accused defense...."

22. The appellant cited several cases which in detail dealt with the issue of identification like: -

i. *Wamunga v R*, [1989] KLR 424

ii. *George Bundi M'Rimberia v R*, Criminal Appeal No. 352 of 2006

iii. *Lesarau v Republic*,[1988] KRL 783

iv. *Republic v Turnbull*, [1976]3 ALL ER 551.

v. *Simiyu & Another v Republic*, [2005] 1 KLR 192 at 195, this court faces with facts similar to the instant case expressed itself as follows: -

> " If PW1 and PW3 recognized the appellants as their immediate neighbours then why did they not give their names to the police soon after the attack upon them? In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of al by person or persons who gave the description and purport to identify the accused and then by the person or person to whom the description was given (See *R v Kabogo S/O Wagunyu* 23 (1) KLR 50). The omission on the part of the complainants to mention their attackers to the police goes to show that the complaints were not sure of the attacker's identity. The failure by the superior court to consider this aspect of the evidence shows that the superior court dealt with the evidence in a perfunctory manner. There was no exhaustive appraisal of the evidence tending to connect each appellant with the commission of the offences to see whether their respective convictions were safe.... Thought he prosecution case against the appellants was presented as one of recognition or visual identification, it is manifest that the quality of identification by the witnesses was not good and gives rise to a danger of mistaken identification.....in the circumstances, we have no doubt that the appellants' convictions are both unsafe and unsatisfactory"

23. The appellant also cited the case of *James omondo onyango v* criminal appeal no. 27 of 2012, observed as follows: -

> " If indeed Otieno and Odongo had recognized the appellant at the scene as they alleged in their evidence, why was the name not given to the police when Otieno reported the matter the next morning"

24. From the above analysis the question to answer is whether the evidence of identification by the complainant can be said to free of any error.

25. In his evidence the complainant that the incident occurred at night and it was raining, he was able to see his assailants for there was light from a torch light which one of the assailants had.

26. The complainant also told the court that despite the light he could not recognize the assailants well.

27. It is not worthy that the complainant did not mention the names of the assailants to the police officers he met shortly after the incident neither did he give any descriptions of the assailants.

28. The complainant also told the court that the 2nd accused was mentioned by the first accused after he was interrogated by the police. The 1st accused denied knowing the 2nd accused.

29. This court is alive to the fact that a fact can be proved by evidence of a single witness so long as the court believes in its truth. It was held in the case of *James Omondi Onyango v Republic* (Supra)

> " 1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favoring a correct identification were difficult

2. when testing he evidence of a single witness a careful inquiry ought to e made into the nature of the light available conditions and whether the witness was able to make a true impression and description.

3. the court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision; it must do so when the evidence is being considered and before decision is made.

4. failure to undertake an inquiry of careful testing is an error or law and such evidence cannot safely support a conviction.....the trial court did to undertake any analysis of the evidence given by tpw1 and as was held in *Maitanyi v Republic* (supra), failure to do so is an error of law and such evidence cannot sustain a conviction. See also republic v Turnbull and others [1976] 3 ALL ER 549.

30. Having tested the evidence of complainant against the tests set out in the above cited cases, I am of the view that his evidence as to the identification of the 2nd accused is not free of error, for even he did tell the court for how long the incident took such that he could say he had enough time to closely look and mark his assailants, and also he did not tell the court how strong/intense or bright the torch light was.

31. Therefore, I find the issue of identification was not adequately proved. I will let the 2nd accused enjoy the benefit of doubt.

32. There was also no attempt by the prosecution to rebut the 2nd accused defence of alibi.

33. All in all, I find that the trial court erred by basing the conviction on the evidence of identification which was not free from error. The conviction was unsafe in absence of any other evidence supporting identification.

34. I therefore find the appeal has merit, the conviction is quashed and sentence is set aside. The appellant is set at liberty forthwith unless lawfully held.

Right of appeal 14 days.

SIGNED, DATED AND DELIVERED ON 19TH DAY OF JULY, 2024 AT KAKAMEGA

HON S. MBUNGI - J

In the absence/presence of: -

1. The appellant- Present

2. The respondent- Present.

3. Mr. Waweru for the DPP present

4. Court assistant- Elizabeth Angong'a