Kamande v Republic (Criminal Appeal 5 of 2018)
[2023] KEHC 3524 (KLR) (18 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3524 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL 5 OF 2018

SC CHIRCHIR, J

APRIL 18, 2023

BETWEEN

FRANCIS NJOROGE KAMANDE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal arising out of the judgment of Chief Magistrate's Court at Kandara delivered on 16th January 2018 by Hon. M. Kinyanjui (SRM) in Criminal Case No. 1051 of 2016)

JUDGMENT

1. On 22.11.2016, the Appellant was charged with 2 counts of robbery with violence contrary to section 296(2) as read with Section 295 of the *penal code* at the Chief Magsitate's Court at Kandara.

2. On the first count, it was alleged that on the 14th day of November 2016 at Paradise Bar in Mutitu trading Centre in Kandara sub-County, within Muranga County, jointly with others not before court while armed with crude weapons namely metal bars and stones and or immediately before the time of such robbery threatened to use actual violence on the said Mary Wanjiku and robbed her of one Keg Pump 3 crates of beer and cash. Kshs 18,000 all valued at kshs. 48,050 the property of Mary Wanjiku.

3. On the 2nd count it was alleged that on the 14th November 2016 at Vision Bar in Mutitu trading Centre, Kandara Sub-County within Murangá county with others not before court, while armed with crude weapons namely metal bars and stones used actual violence on the said Elizabeth Muthoni Kimani and robbed her of one Keg Pump, one television set make Sanyo and cash ksh.15,000/= all valued at kshs. 45,000 the property of Elizabeth Muthoni Kimani.

4. He was found guilty on both counts and sentenced to death. This Appeal is against the said conviction and sentence.

Grounds of Appeal

5. In his amended grounds of Appeal, the Appellant has set out the following grounds: -

   a. That the learned magistrate erred in law and fact by failing to observe the provisions of section 169 of the *criminal procedure code* while writing Judgment.

   b. The learned Magistrate erred in law and fact by failing to find that the identification and identification parade was marred with serious irregularities.

   c. That there were material contradictions, inconsistences and discrepancies that went into the root cause of the prosecution's case.

   d. That the prosecution's case was not proved beyond reasonable doubt.

   e. That the trial court misdirected itself by imposing a harsh and excessive sentence, and which sentence violated his right to fair trial.

Appellant's Submissions

6. It is the Appellant's submissions that having been charged with 2 counts, the judgment was defective in that it did not specify whether he was found guilty of one or both counts and thus the Judgment failed to comply with the provisions of section 169 of the *criminal procedure code*.

7. It is further submitted that the identification and the identification parade was manned with serious irregularities.

8. It is argued that while the trial court wholly relied on identification parade to convict the Appellant, the manner in which the parade was conducted violated the provisions of the police service standing orders. The appellant relied on the case of *Daniel Mwita Wanja & others v Republic* (2007) eKLR, *James T Omwenga v Republic* (CRA No. 143 of 2011), blic and *Oscar Muliwa & another v Republic* (2016) eKLR

9. The Appellant contends that the prosecution's case was full of contradictions and inconsistencies. The Appellant cites the contradiction between the PW1 and PW2's evidence as to whether they knew the Appellant prior to the incident. Another instance he cites is where PW1 told the court he did not know the Appellant, yet PW2 told the court that it was the same PW1 who informed her that the Appellant was called "Msumari" He also points that while PW1 told the court that PW2 was taken to hospital by the police, PW3 told the court that he found her on the floor, unconscious. He urges the court to resolve the inconsistencies and contradictions in his favour. He has relied on the case of *Richard Munene v Republic* (2018) eKLR and *Ramkirshan Pandya* (1967) EACA 339 to buttress his submission

10. It is further contended that the case was not proved beyond reasonable doubt, and cites in particular the manner in which the identification parade was conducted.

11. He further submits that he was not informed of his right to legal representation or given an Advocate by the state and thus his rights under Article 50(2)(g) and (h) were violated and that this violation was fatal to the trial.

12. It is the Appellant's final submission that the sentencing violated his right to fair trial. Whereas he admits that the supreme court in Muruatetu Case (*Francis Muruatetu v The A.G* (2017) eKLR applied only to section 204 of the penal code, he argues that the principles leading to the said declarations in

respect to section 204 should equally apply to robbery with violence offences. He further relies on the court of Appeal decision in *Joseph Kaberia Kainga & others. v AG* (Petition No. 618 of 2011

Respondent's Submissions

13. On whether the trial court complied with the requirements of section 169 it is the Respondent's submissions that having set out the charge at the opening paragraphs of the judgment, it was not necessary for the Trial court to restate the charges at the conclusion of the Judgment.

14. The Respondent further submits that, such omissions in any event do not invalidated the judgment. The Respondent has based its submission in this regard on the court's finding in the case of *Joseph Ansanga v Republic* (CRA. No. 84 of 2001) and *Samwiri Seyange v Republic* (1953) 20 EACA.

15. On whether the Appellant was properly identified, it is the Respondent's submissions that PW1 was able to see the Appellant while the 2nd complainant PW2 recognized him. While relying on the case of *Reuben, Taabu & 2 others v Republic* (1980)eKLR, it is the Respondent's further submission that identification through recognition is more reliable.

    The Respondent further submits that PW1 spend considerable amount of time with her assailants to allow for proper identification. The same submission is made with respect to the time spent by PW2 with the assailants.

16. On the identification parade, the Respondent submits that it only went to prove that the identification of the Appellant was unequivocal.

17. On whether the case was proved beyond reasonable doubt, it is the respondent submissions that all the ingredients of the charge were proved beyond reasonable doubt

18. On the alleged inconsistences, the prosecution contends that there were hardly any inconsistences that would warrant the reversal of the trial court' finding. The respondent has relied on a number of authorities on its particular issue which I have perused and considered.

19. On whether the accused's rights under Article 50(2) of the *constitution* were violated, the respondent submits that lack of representation did not prejudice the Appellant's case as he was able to sufficiently cross examine the witnesses. To the Respondent, raising this complain at this point is merely an afterthought as the complain was not brought to the attention of the trial court. In support of this contention the Respondent relied on the case of *Charles Maina Gitonga v Republic* (2020)eKLR .

20. On the sentence, it is the Respondent's submission that the call to review his sentence on the basis of *Muruatetu Case* (*supra*) is misguided as the findings in the case applied to murder offences only. It is finally submitted that, sentencing being an act of discretion, the trial Magistrate exercised her discretion correctly, and there is no reason for this court to interfere with it.

Anaylsis of the Evidence and Determination

21. I have read the record and considered the grounds of Appeal, the rival submissions and the authorities relied on.

    The Role of this court as the first Appellate court is to look at the evidence afresh, carry out its own assessment, and arrive at its own findings. (*Okeno v Republic* (1972) EA 32)

22. I will proceed to address myself, to the grounds of Appeal as set out by the Appellant.

Whether the trial court failed to comply with the provisions of section 169 of the criminal procedure code.

23. Section 169 provides as follows:

> " Contents of judgment:
>
> (i) .....
>
> (ii) On the case of a conviction, the judgment shall specify the offence of which, and the section of the penal code or other law under which the accused person is convicted and the punishment to which he is sentenced.
>
> (iii) .....

24. It is the Appellant's complain that the court did not specify which count the appellant was found guilty of, on whether it is count 1 or 2, or both.

In the last paragraph of the judgment (First Paragraph of Pg 38) the court stated: "I do find the prosecution proved its case beyond reasonable doubt and I proceed to convict the accused as herein charged under section 215 of *Criminal Procedure code*"

25. It is true that in her concluding remarks the trial magistrate did not specify whether the conviction was in respect of one or both counts, however she indicated that she "was convicting him as charged". The first two paragraphs of the Judgment set out the charges in detail and having done so in the opening paragraphs, she need not have repeated herself verbatim in concluding paragraphs of her judgment.

I find that there was compliance with section 169.

26. It is trite law that failure to comply with section 169 of the *Criminal Procedure Code* will not necessarily invalidate a conviction (See *Hawaga Joseph Ansanga Ondwasa v Republic* (Criminal Appeal No. 84 of 2001 and Samwel Senyange v Republic (1953) 20 EACA both cited with approval in the court of Appeal decision in the case of *Samuel Mwamboke & another v Republic* (2019) eKLR.

Whether the identification and identification parade was marred with irregularities

27. On identification, PW1 a worker of the said Bar was sleeping in a bedroom located inside the Bar when the robbers entered the premises. She told the court: ".... at the counter (bar counter) it was dark, so they asked me to switch on the lights so I was able to see them" ..... "I did not know him before" (i.e. the Appellant). On cross examination she addressed the Appellant "you are the one who removed my trouser so I was able to see your face, I used the light since I switched on the lights". At re-examination, she told the court that she also saw the accused several hours later on the same night at a murder scene and on the said scene the Appellant was still wearing the same clothes.

28. On her part PW2 told the court that "I was able to recognize the accused and another man who had a beard" she further stated "the bar had electricity but they used torch light, but in my room, I had electricity light.... I know the accused, I used to see him in Kariti as a tout". At cross examination she addressed the Appellant. "I used to see you touting. I was able to recognize you. My room had electricity light so I saw you". Further still on cross examination, she stated. "I didn't know you and Wanjiku said you are called Musumari but I used to see you"

29. The circumstances to be considered in identification were set out in the case of *Republic v Turnbull & others* (1976) 3 A..... 1949 as cited with approval in the case of *Benson Kioko Masai v Republic* (2021) eKLR. where it was held that the court should consider the following circumstances.

> " How long did the witness have the accused under observation?" At what distance? In what light? Was the observation impeded in any way..... Had the witness ever seen the accused before....."

30. PW1 told the court that the assailants instructed her to put on the counter light and she was able to use the same light to see the accused; the accused was also the one who removed her trouser in search of money. I am satisfied that the light was adequate to provide sufficient illumination.

The Trouser search also meant that PW1 and the assailant were at a close range to allow for proper identification.

31. On the time spent with the attackers I am equally satisfied that the time spend was adequate. I have arrived on this conclusion based on the following: The Appellant and his accomplices had to took time ransack the first Bar. PW1 told the court "they took the phone and we went till the counter, they took the money- Kshs8,000. I had put kshs.10,000 under the mattress. They removed the Keg pump. They said I add more money. They hit me with a metal on my hand and I told them the rest of the money was under the mattress. They took kshs.10,000. They removed my trouser and looked for the money and didn't find. They went and took crates of tusker balozi and white cap.... among other items. They were putting it in their pockets. They were taking and giving others outside". After they were done with the first bar, they again took PW1 to the next bar in order to wake up the occupant. She stood under guard by one of the robbers as the 2nd robbery went on. I am satisfied that from the time PW1 opened the door until she was made to stand outside the 2nd Bar, that time was ample enough to allow PW1 to properly identify the Appellant.

PW1 also testified that, later the same night, another incident was reported, in which a person was killed. She went to the scene and recognized the Appellant amongst those arrested. She notified the police.

32. PW2 told the court that whereas the assailants were using touches to light up the bar, the light in her bedroom was already on when the Appellant and his accomplices entered. She also told the court that she knew him previously when the Appellant used to work as a tout at kariti. She further told the court that even though she did not know the appellant's name, she had seen him before. Her testimony in this regard was emphatic and was not shaken in cross examination.

33. In the case of *Anjononi & others v Republic* (1980) KLR cited with approval in the case of *Mohammed Ali v Republic* (2013) eKLR relied on by the Respondent herein, it was held that evidence of recognition was "more satisfactory, more assuring and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant".

I find that the Appellant was properly identified by both PW1 and PW2.

Was the identification parade marred with irregularities?

34. The rules governing identification parades are set out in paragraph 49 of the police standing orders. The Appellant's complain is that PW1 had seen the Appellant at the police station, before the identification parade. One of the rules of the parades is that the witness or witnesses should not see the accused person, before the identification parade (paragraph 7(5) (c)). The identification parade was carried out by PW5, deputy OCS Kandara Police Station, at kabati police station. He told the court that he

informed the Appellant the purpose of the parade; the Appellant chose his position on the line-up; the officer inquired if the appellant had a lawyer or a friend and he responded in the negative. The witness told the court that he ensured that the witness had not seen the accused person, prior to the parade; PW1 identified the accused by touching him.

Looking at the cross examination of this witness, there was not much challenge on the manner in which the parade had been conducted neither have I identified any violation of the procedures. PW1 on the other hand was not taken to task on the events of the identification parade.

35. The appellant has not demonstrated any violation of the identification parade rules. This complain is without merit.

Whether there were material contradictions, inconsistences and discrepancies on the prosecution's case.

36. In this regard, the Appellant's points out that whereas PW1 claimed not to have known the Appellant prior to the robbery, PW2 claimed that it was PW1 who gave her the name of the Appellant. This contention in my view is a misreporting of the facts. PW1told the court that she heard his accomplices addressing the Appellant as "Msumari", and later she conveyed this name to PW2. on the other hand, PW2 told the court that he knew the Appellant before, as he used to work at Kariti as a tout. At cross examination she stated: "I didn't know your name and Wanjiku said you are called Msumari but I used to see you....". Thus all that PW1 did was to give the name, which name she overheard as the assailants conversed during the robbery. Such reporting has no effect on the testimony of PW2 to the effect that she knew the Appellant previously. She was emphatic that she knew the Appellant before, only that she didn't know his name.

37. Another alleged contradiction is that whereas according toPW4 the police took PW2 to hospital, PW3 told the court that she met PW2 on the floor at her place of work. Again, I have perused the testimony of PW1and PW4 and I did not see any contradiction. As a matter of fact, it is not indicated anywhere that police took PW2 to hospital, neither is it mentioned anywhere that PW2 was taken before PW4 arrived.

38. Another contradiction, the Appellant contends, is where the investigation's officer points out that PW2 could not recognize the Appellant as she was hit on the head, while PW2 in her testimony told the court that she saw and indeed recognized the Appellant. The investigating officer was giving a report, the basis of which he never stated. PW2 on the other hand was giving direct evidence, hearsay evidence cannot be treated as a contradiction to an eye witness account.

39. In my view the appellant is at pains to point out contradictions and inconsistencies while none really exist. I do not find any contradiction that can be said to be so substantial as to affect the prosecution's case. In the case of *Erick Onyango Odeng'v Republic* (2014) eKLR the court cited with approval the case of *Twehangane Alfred v Uganda* CRA No. 139 of 2001(2003) UG CA in which it was held "with regards to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions, unless satisfactorily explained, will usually but not necessarily, lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

Whether the case was proved beyond reasonable doubt

40. The Appellant argues that identification was not proved and hence the case was not proved beyond reasonable doubt. I have already addressed the issue of identification and I need not revisit it

41. In a charge of robbery with violence, the prosecution need to prove the existence of the following circumstances:

    a). That the offender was armed with any dangerous and offensive weapon or instrument; or

    b). The offender was in company of one of the more 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.

42. Prove of any one such circumstances suffices. In the present case, the prosecution proved that the appellant was in the company of others. PW1 told the court that some were removing items in the bar and handing them to those outside. And when they went to the 2nd bar, PW1 was made to stand outside under guard of one of the attackers as the rest went into the 2nd bar. There is sufficient proof therefore that the Appellant was in the company of other persons.

    The testimony of PW1, PW2 and PW3 (who produced PW2's treatment chit) indicate that PW2 was injured during the incident.

    I do find that contrary to the appellant's assertion, the case was proved beyond reasonable doubt.

Whether the appellant's right to fair trial was violated

43. The Appellant has complained that he was not informed of his right to be represented by an Advocate or have one assigned to him.

    In *Charles Maina Gitonga v Republic* (2010) eKLR cited by the Respondent, it was held that for the accused to benefit from the omission of the court, he must have raised the issue of his inability to represent himself at the earliest during trial. The Appellant never raised the issue of his inability to represent himself. Under Article 50(2)(g) of the *constitution*, an accused person has a right to have an advocate assigned to him by the state and at the state expense if substantial injustice would otherwise occur and be informed of this right promptly.

44. In determining whether substantial injustice may result, the court is required to consider facts such as the seriousness of the offence, the severity of the sentence, the ability of the accused person to pay for his legal representation, whether the accused is a minor, the literacy of the accused, the complexity of the charges against him. (see *Karisa Chengo & 2 others v republic* (2015)eKLR.

45. The offence in this case was serious and sentence prescribed mandatory. But did this omission occasioned prejudice? I think not. The appellant actively participated in the proceedings. He cross examined witnesses on the issues of identification parade. I am satisfied that appellant was not prejudiced by lack of representation. Also there is nothing on record that he alerted the court of his inability to represent himself.

Was the sentence too excessive.

46. It is the Appellant submissions that the court did not take into account his mitigation and that meting out the minimum mandatory sentence was erroneous. He relied on the case of *Francis Karioki Muruatetu & another v Republic* (2017) eKLR and *Joseph Kaberia Kahinga & others v AG* (2016) eKLR. It is his submission that the findings in *Muruatetu Case* (*supra*) should equally apply to robbery with violence cases.

47. In sentencing the Appellant, the trial court indicated that its hands were tied by law, obviously informed by the mandatory sentence prescribed under Section 296(2) of the *penal code*.

48. Am alive to the decision of the court of Appeal in *Joseph Kaberia's case*(*supra*) but following the subsequent clarification by the supreme court to the effect that its finding in *Muruatetu case* was only applicable to section 204 of the *penal code* , the correct position as it stands therefore is that the minimum sentence for this kind of offence is death.

I have no reason to vacate the sentence handed down by the lower court as the same is founded in law.

The Appeal is unmerited. It is hereby dismissed it in its entirety.

DATED, SIGNED AND DELIVERED AT KAKAMEGA VIRTUALLY ON 18TH DAY OF APRIL, 2023

S. CHIRCHIR

JUDGE

In the presence of:

Susan- Court Assistant

Appellant- present

Ms Muriu for the Respondent.