Ndakwa & another v Republic (Criminal Appeal E033 of 2022)
[2023] KEHC 20367 (KLR) (21 July 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E033 OF 2022

WM MUSYOKA, J

JULY 21, 2023

BETWEEN

MARK SIFUNA NDAKWA ..... 1ST APPELLANT

JOSEPH NYONGESA UKHEVI ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from judgment of Hon. B Ochieng, Chief Magistrate, CM, in Kakamega CMCCRC No. 1008 of 2017, of 1st March 2022)

JUDGMENT

1. The appellants, Mark Sifuna Ndakwa and Joseph Nyongesa Ukhevi, had been charged before the primary court, with the offence of robbery with violence, contrary to section 296(2) of the *Penal Code*, Cap 63, Laws of Kenya. The particulars were that on March 30, 2017, at Kisembe village, Sidikho Sub-Location, within Kakamega County, jointly with others not before court, while armed with dangerous weapons, namely a pistol, rungus and pangas, robbed Solomon Wesonga Ndakwa, of a motorcycle registration number and mark KMDL 733L, valued at Kshs 85, 000.00; and cash Kshs 16, 000.00; and immediately before or after the time of such robbery, used actual violence against the said Solomon Wesonga Ndakwa. They pleaded not guilty to the charge, and a trial was conducted. 4 prosecution witnesses testified.

2. The complainant, PW1, Solomon Wesonga Ndakwa, testified that as he was riding his motorcycle KMDL 733L home, on March 30, 2017, at about 8.00 PM, he was waylaid by a gang of people, who forced him to stop. He identified the 2 who stopped him, but not the others who emerged from the darkness. He was hit on the head with a metal bar by the 1st appellant, and slashed with a panga by the 2nd appellant on the elbow. He fell off the motorcycle, and his attackers continued to beat him. He lost consciousness. He lost the motorcycle and Kshs 16, 000.00 to those people. When he came to, he found

his way home. The police came. He was escorted to hospital. The injuries he sustained were serious enough to warrant having his arm amputated below the elbow. PW2, Benjamin Wawire Ndakwa, was a brother of PW1. He was alerted of the incident by the wife of PW1. He was the one who called the police. He went to the scene, and removed PW1, and took him to hospital. He had lost consciousness. When he came to, he mentioned that it was the appellants, among others, who had attacked him.

3. PW3, Raphael Otoyi Andera, was a clinician. He attended to PW1 on March 30, 2017, at Navakholo Sub-County Hospital. The clothes that PW1 wore were bloody, and he was in semi-coma state. He had a deep cut on the cheek, 2 cut wounds on the temporal region of his head, a cut wound on the right shoulder, and a deep cut wound on the left upper arm almost separating the palm. He attended to him about 1½ hours after the assault. He testified that he underwent specialized treatment at Moi Referral Hospital at Eldoret. PW4, No 6436 Police Sergeant Gilbert Sang, was the investigating officer. He detailed the steps he took in the investigation of the case.

4. The appellants were put on their defence. They made sworn statements. The 1st appellant denied the charges. He said that PW1 had brought other criminal cases against him, which were dismissed by the court. He said that his brothers had chased him away from home, and he went to live elsewhere. The 2nd appellant testified that he was at home on the material day. He heard screams from the home of PW1, and he was among the responders. He found PW1 lying outside the main door, surrounded by neighbours, bleeding profusely, and unconscious. The police came, and PW1 was taken away. The 2nd appellant was then arrested, at 2.00 AM. He complained that the case was a frame up, and the charges trumped up.

5. The appellants called witnesses. DW3, Lucy Kinyanji Musigo, was the wife of the 1st appellant. She said that on the material day she was at her home at Sichirai, with her husband. DW4, Judith Awinja Waswa, was the wife of the 2nd appellant. She said that she was among the persons who responded to the distress call from PW1. She found him lying at his doorstep, bleeding profusely. She said that the police later came at midnight, and arrested the 2nd appellant. She said that the 2nd appellant had come home at 7.00 PM, and the incident happened at 9.00 PM. DW5, Elijah Wekesa Muiyungu, testified on the dispute between the 1st appellant and his brothers. He said that at the material time of the incident, he was at home, and he only got to hear of it later.

6. In its judgment, the trial court found that the 2 appellants were sufficiently identified by PW1, for he knew them prior, and there was lighting from the motorcycle headlamp. He also found that all the elements for the offence of robbery with violence had been established beyond reasonable doubt.

7. The appellants were aggrieved, and brought the instant appeal, founded on the grounds set out in their respective memoranda of appeal. They state that the evidence was flimsy; the case was driven by a grudge and the desire for revenge; crucial witnesses were not called; the convictions were based on the evidence of a single witness; identification and recognition was doubtful; the court relied on the testimonies of PW1 and PW2 who were witnesses in another criminal matter between the same parties; and the sentence was not discretionary.

8. Directions were given on June 9, 2022, for disposal of the appeal, by way of written submissions. Submissions were filed by the appellants and the victim. I have perused the same, and noted the arguments made. The appellants submit around identification not being adequate, witnesses who were not summoned, investigations were shoddy, exhibits not produced, ownership of the motorcycle not proved, defence not considered, the criminal cases between the 1st appellant and PW1, among others.

9. On identification, the issue is that the incident happened at 9.00 PM. The appellants were persons that PW1 knew, being, as they were, his brother and cousin, respectively. Under normal circumstances, he

would recognize them. Were the conditions ideal for identification of the appellants by PW1? PW1 said that they were ideal. He was riding a motorcycle, with its headlamp on. He said it could shine light up to 100 metres. He said that the appellants stepped into the light, to stop him, and he stopped. He said that he recognized them from a distance of 10 metres. I am persuaded that the conditions were favourable for identification. PW1 was not under distress, when he saw his brother and cousin, 10 metres away, using the light from his motorcycle, and he stopped. He says that he saw them, and stopped, before they attacked him. He identified them before the attack, and, therefore, before the distress set in.

10. The appellants submit that certain witnesses were not called. They mention the wife of PW1 and another individual. I am not clear on what those witnesses would have come to tell the court, for when the incident happened, PW1 was alone. He did not mention any other person as having been with him. The prosecution is not bound to call every other person, who might know something about the incident. The obligation is to call such number of witnesses as would be sufficient to prove its case. What matters is not the number of witnesses called, but the quality of the evidence that the witnesses present.

11. They submit that the investigations were shoddy. The trial court is not required to assess whether or not the investigations conducted, with respect to the criminal matter, are adequate or shoddy or not. The criminal case is not an audit of the investigations. The concern of the court is with whether or not the evidence placed before it establishes that a crime had been committed, and does so to the required standard. Whether the investigations were shoddy or adequate or otherwise is neither here nor there.

12. I will consider the matter of production of exhibits next. It is submitted that no exhibits were presented. A robbery has 2 principle wrongs about it. There is a theft and force or violence, directed at the victim. Where there is recovery of the stolen items, they may be produced as exhibits, to show the items that had been the subject of the theft. Where no recoveries were made, there would be no exhibits of the items alleged to have been stolen. The violence or force element may require production of the weapons used to bring force or violence to bear on the victim or victims of the crime. Such items can only be presented as exhibits, where a recovery of the same was made. The case presented by the prosecution was that no recoveries were made, of either the stolen items or the weapons used, so, the issue of exhibits being produced did not arise.

13. The other issue is about production of evidence on the ownership of the motorcycle. It is submitted that the prosecution failed to prove that the motorcycle that PW1 was alleged to have been robbed of was proved to have belonged to him. My understanding of this submission is that the appellants are not contesting the fact that there was a theft of a motorcycle, their concern appears to be that there was no proof that it belonged to PW1. If that is their position, then the answer to their submission would be that it would not matter, whether ownership is proved or not, and it would suffice that PW1 was in possession of a motorcycle that was taken away from him, in a manner that amounted to a crime. If it was taken away from him, in the manner that he described, then the offence of robbery with violence was committed, so long as the said motorcycle was in his possession and control, and that those who took it from him had no warrant to wrest control and possession from him in the manner that they did. The submission would only be of some value, if the complaint is that there was doubt about him being robbed of a motorcycle. In such case, then the prosecution would be bound to lead evidence that PW1 had a motorcycle, either owned by him, or by someone else. That, however, does not appear to be what the appellants have issue with. In any case, the loss of the motorcycle was not the only issue that PW1 had. He said that he had money, which he lost in that incident, and he testified that it was taken from him by the 2nd appellant.

14. It is also submitted that their defences were not considered, particularly on the bad blood between the 1st appellant and his brothers, PW1 included, as well as the alibi that they were elsewhere. The trial

court considered both defences, at pages 7 and 8 of the judgment, and dismissed them. It is, therefore, not true nor correct, that the defences were not taken into account.

15. Therefore, founded on what I have discussed above, I am persuaded that the appellants were properly convicted.

16. The final ground relates to sentence. The appellants have raised the issue of sentence in a manner that is not altogether coherent to me. They were sentenced to death. It is the mandatory sentence imposed under section 296(2) of the Penal Code. *Francis Karioko Muruatetu & another vs. Republic [2017] eKLR* (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ) has declared the death penalty as inhuman and unconstitutional. The sentence herein was imposed after the determination in Francis Karioko Muruatetu & another vs. Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ). Initially, trial courts, and the High Court and the Court of Appeal, presumed that the principle stated in that case applied to all mandatory sentences. However, it was clarified, in Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ), that Francis Karioko Muruatetu & another vs. Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ) only applied to murder, and I guess that it was for that reason that the trial court, in this case, imposed the death penalty, rather than consider other senetnces.

17. I hold the view that the decision in Francis Karioko Muruatetu & another vs. Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), states a principle of general application, and I shall apply it here, notwithstanding that this is not a case of murder, but robbery with violence. I shall, accordingly, as I hereby do, set aside the death sentence imposed, and I shall proceed to exercise discretion, based on the principles set out in Francis Karioko Muruatetu & another vs. Republic [2017] eKLR (Maraga CJ & P, Mwilu DCJ &VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), to consider the sentence to impose in substitution of the death sentence.

18. I note from the trial record, that the appellants were afforded an opportunity to mitigate after their conviction. Advantage of the chance was taken, for a statement in mitigation was made, for both appellants. The maximum penalty for simple robbery is 14 years in jail. Where discretion has to be exercised for a sentence for robbery with violence, that has to be taken into account, for robbery with violence is the aggravated form of simple robbery. I note that the injuries inflicted on PW1, in the course of the robbery, were life threatening. He lost consciousness for a long period of time, and was in hospital for quite some time. Part of his arm was amputated. Consequently, I hereby sentence the appellants to 40 years in prison, for robbery with violence, contrary to section 296(2) of the Penal Code. Section 333(2) of the *Criminal Procedure Code*, Cap 75, Laws of Kenya, shall be reckoned, with respect to calculation of sentence. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 21ST DAY OF JULY 2023

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Mr. Otsyeno, instructed by EK Owinyi & Company, Advocates for the appellant.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the respondent.

Ms. Repha, instructed by Mokeira Brayce Repha & Company, Advocates for the victim.