Omoto v Republic (Criminal Appeal 190 of 2018)
[2025] KECA 9 (KLR) (10 January 2025) (Judgment)

Neutral citation: [2025] KECA 9 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 190 OF 2018

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

JANUARY 10, 2025

BETWEEN

LAZARUS OMOTO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Busia (Kiarie, J.) dated 29th May 2018 in HCCRA No. 21 of 2016)

JUDGMENT

1. The appellant, Lazarus Omoto, was arraigned before the Magistrate's Court at Busia charged with a single count of robbery with violence contrary to section 296(2) of the Penal Code. It was alleged that, on the 25th day of June, 2014, at Ekungali village in Butula, Busia County, jointly with another who was not before the court, they robbed Abdi Wanga Masinde of a mobile phone make Samsung GT 2230 and Kshs. 2,000, all valued at Kshs. 7,500 and that during the robbery, they used actual violence on the said Abdi Wanga Masinde.

2. The appellant pleaded not guilty and the case proceeded to full trial during which seven (7) prosecution witnesses testified. The appellant gave a sworn statement and called no witnesses. At the conclusion of the trial, the appellant was convicted and sentenced to death as prescribed under section 296(2) of the Penal Code. He appealed to the High Court on both conviction and sentence. Both were dismissed in a judgment dated 29/05/2018 by Kiarie J. The present appeal arises from that judgment.

3. Briefly, the facts that emerged from the trial were as follows.

4. The complainant, Abdi Wanga Masinde (Abdi), was walking home from the mosque on 25/05/2014. It was around 9:00pm at night. The road was narrow, and it was raining. Abdi saw a motor cycle approaching, riding in the same direction as he was heading. The motor cycle had the rider and a pillion passenger. He stood aside to let it pass. It did not. When it got to where he was, the pillion passenger

jumped off, approached him and suddenly head butted him. Abdi fell to the ground bleeding. His phone fell off. The assailant grabbed it. The assailant also yanked off Abdi's jacket off his back. He then jumped back on the motor cycle and the duo rode off. Abdi stood up and raised alarm while running towards the motor cycle.

5. As it had rained, the road was muddy and slippery preventing the duo from too quick an escape. Good Samaritans heard Abdi's screams and confronted the duo. They held them but one of the two managed to escape. The other – the one riding the motor cycle - was not as lucky. He was arrested by members of the public. At this point, Abdi recognized the person: he was his former student, the appellant. He was taken to the police where he was re-arrested. Abdi was, then, sent to Khunyangu Health Centre for treatment. A P3 form was later filled out and produced in court. During the trial, Abdi testified as PW1 and gave this narration.

6. Two members of the public who responded to Abdi's alarm, accosted the duo and arrested the appellant were Joshua Oduol Wanzala and Moses Opondo. They testified as PW2 and PW3 respectively. They corroborated Abdi's account about how they responded to his screams that he had been robbed and accosted the fleeing duo; and ended up arresting the appellant.

7. The other witnesses at the trial were the doctor who treated Abdi, who testified as PW4; the police officer who re-arrested the appellant, who testified as PW5; and the investigating officer, who testified as PW6.

8. When put on his defence, the appellant denied robbing Abdi and testified that he was actually the victim of a robbery: that he had been hired by a passenger to take him to Butula but on his return, he was attacked by three robbers. He sped off but fell. It is at that point when the crowd converged on him alleging that he had robbed Abdi.

9. The trial court disbelieved the appellant's narrative while crediting the prosecution witnesses as truthful. It found Abdi's testimony "very cogent and concise account of the events of that day", one which "remained unshaken under cross-examination by the accused." The court found the circumstances optimal for positive identification noting that the appellant was known to Abdi prior to the attack. The court also noted that the appellant was found with Abdi's jacket.

10. The appellant's appeal to the High Court contained four grounds: that his constitutional rights were violated because he was not given an opportunity to cross-examine the initial investigating officer (who was not called a witness); that not all the ingredients of the offence were proved; that the learned magistrate erred by relying on insufficient prosecution evidence; and that the trial court disregarded the entire defence.

11. The High Court considered each of the grounds and found them unmeritorious. Upon conducting a re-evaluation of the evidence de novo as it was required to do, the High Court found all the ingredients of the offence of robbery with violence were proved and affirmed the conviction and sentence.

12. In the appeal before us, the appellant's dissatisfaction with the judgment of the High Court is based on four grounds as follows:

    1. That the trial court and the learned superior court erred in law as it (sic) failed to apply the principles of recognition;

    2. That the trial court and the learned superior court erred in law by not informing the appellant that he was entitled to representation;

    3. That the trial court and the learned superior court erred in law by finding that the prosecution proved its case beyond reasonable doubt against the appellant; and

4. That the trial court and the learned superior court erred in law by meting out an excessive sentence.

13. The appeal was canvassed by way of written submissions followed by brief oral highlights. During the plenary hearing, Ms. Ongonga, learned counsel, appeared on behalf of Mr. Menezes for the appellant, while Mr. Chacha, learned Prosecution Counsel, appeared for the respondent.

14. This is a second appeal. As such, our jurisdiction is limited to a consideration of matters of law only, by dint of section 361(1) of the Criminal Procedure Code. It is only on rare occasions that we interfere with concurrent findings of fact by the two courts below. In Samuel Warui Karimi vs. Republic [2016] eKLR, it was held as follows:

> " This is a second appeal and this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See Chemangong -vs- R, [1984] KLR 611."

15. We have carefully considered the appeal, the rival submissions of the parties and the authorities cited in support of the opposing positions.

16. The first ground raised by the appellant is that the two courts below misapplied the doctrines applicable to evidence of recognition thereby arriving at the wrong conclusion that it was the appellant who had committed the robbery. The appellant has cited a number of our famous cases in support of his argument.

His argument is that the robbery happened at night, at 9:00pm; that it was raining and therefore it must have been very dark; and that the complainant confirmed so in cross-examination and that, therefore, the conditions were not ideal for identification or recognition. The appellant cited Wamunga vs. R [1998] KLR 424

17. In response, the respondent pointed out that in this case, any possibilities for error are eliminated by the fact that the appellant placed himself at the scene in his defence; that this was identification by recognition; and that the appellant was caught in the act of fleeing. Additionally, the identification evidence was fortified by evidence of recent possession since the appellant was also found with the complainant's jacket which had just been stolen.

18. The appellant is correct that identification evidence must be received with much caution because it can lead to wrong convictions where there is error in identification. Courts have developed principles to test identification to make sure it is ironclad before it can be relied on to convict. These principles, enunciated in cases such as Wamunga vs. Republic (1989) KLR 424 and Nzaro vs. Republic (1991) KLR 70, ensure that such evidence is credible and not based on suspicion or error. The first consideration is the circumstances under which the identification was made. Courts examine factors such as the lighting at the scene, the distance between the witness and the suspect, and the duration the witness had to observe the suspect. The method of identification is another key factor. Courts exercise caution when dealing with single witness identification, particularly if no corroborative evidence is available, or dock identification, where a suspect is identified in court without a prior identification parade. However, Courts have pointed out that the risk of misidentification is vastly reduced when the identification evidence is one of recognition.

19. In the present case, Abdi testified that the appellant was one of the two people who robbed him. He jumped on to a motor cycle and tried to escape. All the while, Abdi was following closely behind

screaming for help. Abdi never lost sight of the assailant, who was arrested by members of the public only slightly ahead. While it is true that it was only when he was arrested that Abdi recognized that the appellant was his former student and that, therefore, this cannot in the strict sense be said to be identification by recognition, other factors make the identification here error- free. The first one is that, as aforesaid, Abdi did not lose sight of the appellant as he gave chase screaming. Secondly, the appellant was arrested in the act of fleeing. In addition to Abdi, two other witnesses corroborated this narrative. Third, and most importantly, the appellant was caught with Abdi's jacket which had just been stolen. He had no explanation for having the jacket.

20. In the present case, therefore, the identification evidence was fortified by the evidence of recent possession. Under our law, the doctrine of recent possession is a principle of circumstantial evidence that states that if someone is found in possession of recently stolen property without a reasonable explanation, then a rebuttable presumption can be drawn that they stole the property or received it knowing it was stolen.

21. This Court restated the doctrine and the elements which must be proved before the doctrine can be applied in Erick Otieno Arum v Republic Criminal Appeal 85 Of 2005 [2006] eKLR where it held:

> In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.

22. In the present case, the appellant was found with the jacket which had only a few minutes earlier been stolen from Abdi. Abdi identified it as his; and the appellant never contested the ownership. There were concurrent findings of fact by the two courts below that the appellant was found in possession of the jacket, which findings we pay homage to. The appellant did not offer any explanation why the jacket was in his possession. This, without more, would have been sufficient to link the appellant with the robbery. In this case, it fortifies the identification evidence as analyzed above.

23. In our view this analysis also responds to the appellant's third ground of appeal which is that the case against him was not proved beyond reasonable doubt. The analysis of the facts of the case done by the two courts below, which we have no reason to depart from, shows that all the ingredients of the offence of robbery with violence. In particular, the evidence on record, as analyzed above, shows that there was more than one assailant; and at least one of them used force (by head butting the victim). Either of these two facts coupled with the fact that they also robbed the victim of a mobile phone and a jacket would have been sufficient to establish the offence of robbery with violence under section 296(2) of the Penal Code. See Oluoch v Republic (1985) KLR and Joseph Njuguna Mwaura & 2 others vs. Republic [2013] eKLR

24. The second ground taken up by the appellant on this appeal is a constitutional one: that the conviction should be quashed because the trial court did not inform the appellant of his right to representation. As the respondent correctly points out, this issue has been raised for the first time before us. It has, thus, not been properly preserved for consideration before this Court. The Supreme Court recently reminded this Court that it has no jurisdiction, in second appeals, to hear grounds of appeal which were not raised and considered before the High Court. This was in Republic -vs- Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34

(KLR). We, therefore, need not belabour the point. We are precluded from considering this ground on jurisdictional grounds.

25. The final issue taken up on appeal is that given the circumstances in which the offence was committed in this case, the death sentence was a manifestly excessive punishment. The appellant points out that the rider of the motor cycle did not mete out any violence on the victim; and even then, the pillion passenger head butted the victim and no weapons were used to commit the offence. He cites a persuasive High Court decision – James Kariuki Wagana v Republic [2018] eKLR – for the proposition that the death penalty should be reserved for the most heinous levels of robbery with violence and murder.

26. The appellant failed to note that the cited decision by the High Court was delivered before the Supreme Court issued its guidelines in Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 Others (Amicus Curiae) [2021] eKLR (popularly known as "Muruatetu 2") to the effect that:

> " To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under Section 40 (3), robbery with violence under Section 296 (2), and attempted robbery with violence under Section 297
>
> (2) of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases."

27. The upshot is that as matters stand currently, neither this Court nor the Supreme Court has had the opportunity to consider a constitutional petition properly escalated to it on the constitutional validity of the mandatory death sentence for the offence of robbery with violence under section 296(2) of the Penal Code. This means, under the binding Supreme Court authority, the mandatory death penalty under section 296(2) of the Penal Code remains the only lawful sentence for that offence.

28. The upshot is that the appeal herein has no merit. We hereby dismiss it in its entirety.

29. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 10TH DAY OF JANUARY, 2025.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR