Moses v Republic (Criminal Appeal 5 of 2018)
[2025] KECA 122 (KLR) (6 February 2025) (Judgment)

Neutral citation: [2025] KECA 122 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 5 OF 2018

S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA

FEBRUARY 6, 2025

BETWEEN

TITUS MURITHI MOSES ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Meru (A. C. Mrima, J.) delivered on 23rd October, 2017 in H.C. CRA No. 53 of 2017)

JUDGMENT

1. This is a second appeal from the original conviction and sentence of the appellant, Titus Muriithi Moses, by the Resident Magistrate's Court at Githongo. He was charged with the offence of robbery with violence contrary to section 296 of the Penal Code, particulars being that on 6th February 2015 at 6 p.m. at Karindine village in the then Imenti Central District within Meru County jointly with others not before the court being armed with an offensive weapon namely a stone, they robbed Elias Mwaki Muthee of his cash Kshs.2700. He was convicted and sentenced to death.

2. His first appeal to the High Court of Kenya at Meru was dismissed by Mrima, J. in a judgment delivered on 23rd October, 2017. Being a second appeal our mandate is circumscribed by section 361 (1)(a) Criminal Procedure Code to consider only issues of law if we find that there are any raised in the appeal.

3. That mandate has received judicial pronouncements in various decisions of this Court such as Stephen M'Irungi & Another vs. Republic [1982 – 88] 1 KAR 360 where it was stated:

> "Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed finding of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no

reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

4. We shall briefly look at the facts of the case to see whether the two courts below carried out their mandate as required by law.

5. The prosecution called four witnesses in support of its case against the appellant. Elias Mwaki Muthee (Muthee PW1) testified that he was a stone cutter and that on 6th April 2015, after the day's work, he left his place of work at the quarry at 6 pm. He immediately met three boys near Karindine Primary School. He stated that they were Titus Muriithi (the appellant) Patrick Mugira and Josphat Muriungi. They were smoking something, and they asked him for something he had got from the quarry. "I informed them that what I had was for my child, wife, and I." The appellant and Muriungi got hold of him, and in the struggle Mugira picked a big stone which he hit Muthee on the head with. He lost consciousness and found himself at Nkubu Consolata Hospital, where he had been admitted. He was treated for about four weeks and according to him it was his brother Patrick Mutwiri (PW2) who rescued him and took him to that hospital. He was robbed of Kshs.2700 which was in his pocket. He produced for identification treatment notes and P3 Form. He identified the appellant as one of the attackers and stated that he knew him and the other two boys who he used to see at Karindine market.

6. Mutwiri testified that he was also a stone cutter, and on the material day, he had worked with his brother Muthee, and when it came time to leave for home Muthee left a few minutes before him. Reaching Karindine junction he found several people, including the appellant and two other boys, who he had seen leaving the scene. He found Muthee lying on the ground unconscious, and he took him to hospital. He saw an injury on Muthee's head. He knew the appellant and the two other boys and gave their names to the court. He saw the stone used to injure his brother Muthee.

7. Doctor Kirimi Stephen (PW3) was the medical officer at Githongo Hospital. He produced the P3 Form prepared by his colleague. He also produced documents from Consolata Hospital in respect of Muthee, who was admitted at that hospital on 6th April 2015 and discharged on 21st April, 2015. The severity of the injuries suffered by Muthee were put at 13, which was said to be moderate. The central nervous system was affected; the pupil on the left eye was swollen which was a sign of brain injury; CT scan revealed massive extra-dural heamotoma which showed a collection of blood on the extraduraI space with massive effect it was pushing the brain on one side which affected the brain and was a medical emergency which could lead to death. The hospital carried out craniotomy which involved removal of window to drain back the brain into its space. The patient was also given medication to avert meningitis as the head had been opened. According to the doctor, Muthee suffered life threatening injury. He produced the P3 Form and treatment notes into evidence.

8. The last witness called was Corporal Tarasisio Wahome (PW4) of Kariene Police Station. He investigated the case and concluded that Muthee had been assaulted by the appellant, among others, and robbed of cash. The appellant was arrested on 15th October, 2015 by Senior Sergeant Chepkonga after Muthee identified him. The other accomplices fled and were not found.

9. That marked the close of the prosecution case, and upon evaluation, the trial magistrate found that the prosecution had established a prima facie case which the appellant was called upon to answer. In a sworn statement, the appellant testified that he was a welder and that on the material day, 6th April, 2015 he was at home and did not go to work. At 2 p.m. of that day, he visited a neighbor Josphat Muriungi, to partake of traditional brew. Present in the house were two boys who were also drinking alcohol. According to him, they were Elias Mwaki and Patrick Mugiira. According to him the two started quarrelling and fighting over a game they were playing. He did not intervene. Elias Mwaki left for home while Patrick went to report the incident to the police. He wondered why he was arrested

on 15th October 2015 6 months after the incident and stated that he was initially charged with assault and he was surprised that he was later charged with the offence of robbery with violence. He denied the charge.

10. Upon consideration and as we have seen, the appellant was convicted and sentenced and his first appeal was dismissed. Those findings provoked this appeal grounded on the homemade memorandum of appeal where 10 grounds of appeal are set out. In essence, the appellant complains that the Judge erred in law by failing to note that the appellant was not present during the commission of the offence; that the Judge erred in law in failing to note that the prosecution did not produce the stone which, according to him is a fatal omission; that the Judge erred by upholding conviction when the evidence adduced by the prosecution was inadequate and contradictory; that the Judge erred in law and fact by rejecting the appellant's defence; that the evidence was not re-evaluated as required in law; that there were doubts in the prosecution's case and that the appellant's constitutional rights were violated contrary to Article 50 (2)(g)(h) of *the Constitution*.

11. When the appeal came up for hearing before us on 30th October 2024, the appellant was represented by learned counsel Mr. Guantai while Miss Adhi appeared for the office of Director of Public Prosecutions. Mr. Guantai informed us that he was relying entirely on submissions filed by the appellant in person. In those submissions the appellant gives facts of the case as we have shown. He submits that the Judge erred in matters of law by failing to note that there were doubts in the prosecution's case. According to him theft was not proved beyond reasonable doubt for a safe conviction to be made. He further submits that the Judge erred for failing to take cognizance that his mitigation was not taken into account at the sentencing stage and that he should be allowed to benefit from the findings of the Supreme Court in the case of Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR. The appellant submits that the case which was reported to the police was one of assault and not robbery with violence. He submits that because Muthee became unconscious, he could not tell who had hit him with the stone or who had stolen his money. On the issue of sentence, he submits that the mandatory death sentence awarded is unconstitutional.

12. The respondent, in its written submission also gives a history of the case. The respondent submits that the appellant was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The respondent gave the definition of robbery in section 295 of the Penal Code and punishment for robbery in section 296 as was set out in the case of Oluoch vs. Republic [1985] KLR 549, where this Court held:

> " Robbery with violence is committed in any of the following circumstances:
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> a. The offender is armed with any dangerous and offensive weapon or instrument; or
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> b. The offender is in company with one or more person or 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."

13. It was submitted that the prosecution was able to establish the ingredients for the offence of robbery with violence through the evidence of PW1 and PW2 which placed the appellant at the scene of crime.

14. It was submitted that it was not mandatory to produce the weapon as an exhibit in the case and the case of Peter Kihia Mwaniki vs. Republic [2010] eKLR is cited where it was held: "It would have been proper to avail the exhibits but failure to produce them was not fatal to the prosecution case." It is

submitted that the stone used in the commission of the offence was not produced because one of the assailants ran away with it.

15. On the alleged breach of constitutional right, it was submitted that the appellant was represented by an advocate, one Mr. Ndubi, throughout the trial. We are urged to dismiss the appeal.

16. We have considered the whole record and submission made.

17. The appellant submitted that there were doubts in the prosecution case. The trial court and the High Court considered that issue at length and found that the case of prosecution was proved to the required standard. We agree with those findings. Muthee stated clearly how he was confronted by the appellant and two others, that he knew all the three of them. He even gave their names to the trial court and to the police on first report. He described who did what as he was attacked and robbed. It was 6 p.m., and he saw his attackers clearly. It was a case of recognition and as it was held in the case of Anjononi vs. Republic [1980] KLR 59 that:

> ..."recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

18. This ground of appeal fails and is dismissed.

19. The appellant complains that his defence was not considered. We have gone through the record and find that that allegation was incorrect. The trial magistrate properly considered the appellant's defence and found that it was displaced by the strong prosecution case. This finding was upheld by the High Court and we agree with it.

20. There was no breach of any of the appellant's constitutional rights, as the record shows that he was represented by a lawyer during the case. We find no merits in any of the grounds of the appeal which we hereby dismiss.

DATED AND DELIVERED AT NYERI THIS 6TH DAY OF FEBRUARY, 2025.

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

ALI - ARONI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR