Salim & another v Republic (Criminal Appeal 251 of 2018)
[2024] KECA 153 (KLR) (16 February 2024) (Judgment)

Neutral citation: [2024] KECA 153 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 251 OF 2018

F SICHALE, FA OCHIENG & WK KORIR, JJA

FEBRUARY 16, 2024

BETWEEN

MOHAMMED SALIM ..... 1ST APPELLANT

YUSUF KIBOR ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal against the Judgment of the High Court of Kenya at Eldoret (G. K. Kimondo & C. W. Githua, JJ.) dated 4th December, 2014inH.C.CR.A. Nos. 22 & 24 of 2012)

JUDGMENT

1. The appellants, Mohamed Salim and Yusuf Kibor were charged with 2 counts of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the charge were that on 27th February 2010, at [particulars withheld], Kapsoya Location in Uasin Gishu District within the then Rift Valley Province, jointly with others not before the court, being armed with offensive weapons, namely daggers, robbed MBW of mobile phone make Vodafone valued at Kshs. 2,000/-: And at or immediately before or immediately after the time of such robbery, threatened to use actual violence to the said MBW.

2. The appellants were also charged with the offence of gang rape contrary to Section 10 of the *Sexual Offences Act*. The particulars of that offence were that on 27th February 2010 at [particulars withheld], Kapsoya Location in Uasin Gishu District within the then Rift Valley Province, in association with another not before the court, did intentionally and unlawfully cause their respective genital organs (penis) to penetrate the genital organ (vagina) of MBW, without her consent.

3. In the alternative to the charge of gang rape, the appellants were charged with the offence of indecent act with an adult, by touching the genital organ (vagina) of the complainant, MBW.

4. Both appellants denied committing the offences.

5. In an endeavour to prove the cases against the appellants, the prosecution called eight witnesses.

6. After being put to their defence, the 1st appellant gave an unsworn testimony.

7. On his part, the 2nd appellant told the trial court that he was not ready to defend himself. The learned trial Magistrate construed the position taken by the 2nd appellant to imply that that appellant had no defence to offer.

8. On 19th January 2012, the trial court delivered its judgment, in which it convicted the appellants for the offences of robbery with violence, and also for gang rape.

9. On 1st February 2012 the trial court sentenced each of the appellants to death, for the offence of robbery with violence. And in respect to the offence of gang rape, the trial court handed down a sentence of 15 years imprisonment, to each of the appellants.

10. The trial court further directed that the sentence of imprisonment would be held in abeyance, whilst the death sentence would be carried out.

11. As the appellants were dissatisfied with the entire decision of the trial court, they lodged appeals at the High Court.

12. After giving due consideration to the consolidated appeals filed by the appellants, the High Court dismissed the same. It is that decision of the High Court that prompted the appeal before us.

In the appeal the appellants raised a total of 10 grounds of appeal, which we set out verbatim, herein, as follows;

> "1. That the learned trial Magistrate and the Judges erred in points of law in basing the reason for conviction on inconsistent and incredible evidence of recognition and/or identification without observing that the identification and/or recognition had a high probability of error owing to the time of the alleged offence, and the nature of the circumstances surrounding the events.
>
> 2. That the learned Judges erred in failing to find that no recoveries were made in respect of the goods allegedly stolen to conclusively make a determination that the charge of robbery with violence was proven.
>
> 3. That the learned Judges erred in failing to find that an identification parade ought to have been conducted in respect of both accused persons under the circumstances.
>
> 4. That the learned trial Magistrate and the Judges erred in failing to consider and find that in the absence of recognition or voice identification there was no corroboration of the prosecution evidence to justify a conviction of the appellant.
>
> 5. That the learned Judges erred in law in failing to consider that the prosecution evidence was insufficient to sustain the conviction.
>
> 6. That the trial Magistrate and the appellate Judges erred in law in convicting and sentencing the appellant without determining whether the charge was properly investigated.

7. That the learned Judges erred in law in convicting the appellant without considering the evidence tendered by the appellant and/or its defence witnesses.

8. That the learned Judge erred in law in sentencing the accused/appellant to death without considering the legality of the sentence and the mitigating factors of the appellants.

9. That the learned Judges erred in failing to regard the fact that the appellant was not afforded a fair trial.

10. That the analysis of the evidence on record by the trial court and the appellate court in their judgment was improper, faulty and prejudicial to the appellant."

13. The appellants filed their written submissions, through which they canvassed the appeal. Secondly, their advocate, Mr. Oyaro made oral submissions.

14. In answer to the appellants' submissions, Mr. Duncan Ondimu relied on his written submissions, together with an oral highlight of the said written submissions.

15. When canvassing the appeal, the appellants set out 3 issues for determination. The said issues are as follows:-

i. Whether the offence of Robbery with Violence was proved to the required standard.

ii. Whether the appellants were properly identified.

iii. Whether the sentence of death was harsh and unconstitutional.

i. Was the offence of Robbery with Violence proved to the required standard?

16. It was the submission of the appellants that the offence of robbery with violence is constituted by the two elements of;

> "... Stealing and the use of violence at or immediately before or immediately after the time of stealing."

17. The appellants noted that none of the items which had allegedly been stolen from the complainant were recovered from the appellants.

18. Furthermore, the appellants reasoned that there was no evidence to prove that at the time when the offence was committed, they were in possession of any items that were allegedly stolen from the complainant.

ii. Identification

19. The complainant testified that the incident took place at 9:00 pm.

Therefore, the appellants submitted that the issue of proper visual identification of the assailants was critical in reaching a fair determination.

20. According the appellants, no information was provided by the complainant, concerning the intensity or the brightness of the lights from the hostels.

21. In the absence of clear evidence about the intensity of the light, the appellants believe that the prosecution had failed to demonstrate that the circumstances for positive identification were conducive.

22. Furthermore, although the court had held that the complainant had given a description of the assailant, to the police officers who then pursued the said assailant, the appellant submitted that, that holding was not borne out from the evidence. In their understanding, the complainant did not give to the police officers, the description of the person or persons who robbed her, or who raped her.

The Sentence

23. The appellants submitted that the death sentence was harsh and unconstitutional. In that regard, the appellants cited the decision of the Supreme Court in Francis Karioko Muruatetu v Republic [2017] eKLR, which declared that the mandatory

nature of the death sentence, for an offence of murder, was unconstitutional.

24. The appellants also cited the case of William Okungu Kittiny v Republic [2018] eKR, in which the Court of Appeal held thus;

> "... the sentence of death under Section 296(2) and Section 297(2) of the Penal Code is the discretionary maximum punishment. To the extent that Section 296(2) and 297(2) of the Penal Code provides for mandatory death sentence, the sections are inconsistent with *the Constitution*."

25. In answer to the appeal, the respondent initially responded by highlighting the ingredients of the offense of robbery with violence as outlined in Section 296(2) of the Penal Code. The respondent pointed out that the ingredients were not limited to two, as claimed by the appellants.

26. As regards the robbery, the respondent submitted that the two mobile phones and the money which was stolen from the complainant, did not belong to the appellants.

27. He further pointed out that during the robbery, the offenders were more than one in number, and they were armed with an offensive weapon. Specifically, the offenders were armed with a knife, which they threatened to use against the complainant.

28. The appellant also submitted that there was sufficient lighting at the scene of crime. The lighting was said to have been both from the security lights which were at Poa Place and also at the gate to the students' hostels.

29. Coupled with the lighting, the respondent noted that the offenders spent a considerable length of time with the complainant.

30. In the process of sexually molesting the complainant, the offenders were in close physical proximity with her, which provided an opportunity for the complainant to clearly identify her assailants.

31. PW2 also testified that he identified the appellants during the robbery.

32. And because both the complainant and PW2 were able to identify the appellants during the Identification Parades which were conducted by the Police, the respondent submitted that the appellants had been positively identified during the robbery.

33. Having summarised the submissions made by both sides, we take the same into account, in making this determination.

34. First, it is well settled that this Court, on a second appeal, is required to give consideration only to matters of law. The court's said mandate is spelt out under Section 361 of the Criminal Procedure Code.

35. Bearing in mind the limited mandate that is bestowed upon us, when handling a second appeal, we are alive to the fact that this Court ought not to interfere with the decisions which the courts below had arrived at on matters of fact unless it is demonstrated that the said courts had given consideration to matters which they ought not to have considered, or if the said courts had failed to give consideration to matters which ought to have been considered; or if the decision arrived at was plainly wrong.

36. The first task that we shall undertake is to ensure that the ingredients of the offences, for which the appellants were convicted, are well defined.

37. Pursuant to Section 296(2) of the Penal Code;

> " The ingredients for the offence of robbery with violence, contrary to Section 296(2) of the Penal Code ... are as follows;
>
> a if the offender is armed with any dangerous or offensive weapon or instrument, or;
>
> b. if he is in the company with one or more other person or persons; or
>
> c. if at or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.'
>
> Proof of any one of the ingredients of robbery with violence is enough to sustain a conviction."

38. We adopt those words which this Court used when rendering judgment in the case of John Kariuki Gikonyo v Republic [2019] eKLR.

39. In other words, each of the ingredients are to be treated disjunctively from the others. It was thus sufficient if the offender was in the company of one or more other person or persons, at the time of the robbery.

40. If the perpetrators exceeded one, they did not need to either be armed or to use violence on the complainant.

41. In the alternative, the offender could be alone; but if he is armed with a dangerous or an offensive weapon or instrument, he will be liable to conviction, even if he did not visit violence upon the complainant.

42. In the further alternative, an offender may be convicted for robbery with violence if he visited violence on either the complainant or on any other person.

43. In this case, the offenders were more than one, and they were armed with offensive weapons or instruments. The offenders had a knife.

44. Furthermore, the offenders molested the complainant physically.

    They had carnal knowledge of the complainant, without her consent.

45. In the circumstances, we find that the offences of robbery with violence, and of gang rape were proved. We so find because the offenders not only robbed the complainant, but two of them raped her in turns.

When one was molesting her sexually, the other offender was holding a knife against her ribs. The third offender was holding down the complainant whilst the other 2 offenders raped her, in turns.

46. The next question is with regard to the identity of the offenders.

47. The incident took place after 9 pm. The complainant was walking from the Rift Valley Technical Institute, where she was a student.

She was walking in the company of her classmate (PW2). When they met some 3 men, the said men held The Complainantand then ransacked her. The men took her phone; make Nokia 1200, and another phone; make Voda phone.

48. The incident lasted a considerable length of time. The complainant testified thus;

> " I didn't lose sight of you when police were pursuing you. I was attacked at about 9:30 and we met police around 11:00 pm."

49. The encounters between the complainant and the offenders was not one of a fleeting nature.

50. The complainant was first robbed of two mobiles phones. The offenders ransacked the complainant's clothes during the robbery; that means that they were in close proximity.

51. Secondly, 2 of the offenders raped the complainant, in turns: that means that the offenders were literally in physical contact with the complainant.

52. She did not only see the person who was molesting her at any given moment, she smelt them, and she described the role which each offender played during the incident. But, is it not possible that the complainant might have been truthful, but mistaken?

53. Both the trial court and the first appellate court had the opportunity of closely evaluating the evidence tendered; and both courts were convinced that there was no room at all, of a mistaken identification.

54. We note that the complainant testified as follows, regarding the lights which enabled her to identify the offenders;

> " There are security lights for Institute gate and security lights for hostels gates."

55. During cross-examination, the complainant reiterated that;

> " There were security lights at the hostels where you confronted me. The 2nd security light was at Rift Valley Training Technical Institute, where you raped me. The third security light was at Poa Place, towards where you were leading me as a hostage, before we met the police."
>
> PW2, who had been escorting the complainant, said;
>
> " We saw 3 men ahead of us. They came from opposite direction and we met on railway line. They ordered us to sit down. We were seeing them face to face. There was security light from CPC, from Roma Hostels and from Poa Place."

56. PW2 testified that he stayed with the offenders for more than 10 minutes, during which time he marked their appearance.

57. When he was further cross-examined, PW2 said;

> "There are security lights at scene. The lights were less than 20 metres away."

58. In the circumstances, we are persuaded that the trial court and the High Court had a sound factual basis for making a finding that the appellants were positively identified.

59. Our said finding is further fortified by the fact that after the 1st appellant was apprehended by the police officers who had pursued him as he fled, he was returned to the scene where the complainant had been waiting, with one officer.

60. On seeing the 1st appellant, the complainant told the officers that that appellant had been armed with a knife, when the offenders robbed and raped her.

61. It is after that disclosure that the 1st appellant led the police officers back to the thicket where the police officers had apprehended him. At the said thicket, the officers recovered the knife.

62. In our considered opinion, the actions of the 1st appellant, in leading the police to recover the knife which had been used to threaten the complainant, is corroboration of the evidence tendered by the complainant. We so hold because if the said appellant was not one of the offenders, he could not have led the police to the thicket where knife was recovered.

63. Following his positive identification, the 1st appellant led the police officers to the house of his accomplice, who is the 2nd appellant.

64. At the house of the 2nd appellant, the police officers recovered a jacket which had many blood stains.

65. PW3 was one of the officers who went to the house of the 2nd appellant. When cross-examined, PW3 said that the 2nd appellant did not have any injury, which the blood could have come from.

66. The jacket was taken for analysis at the Government Chemist. PW6 is a Government Analyst, and he conducted analysis on the clothing. In his conclusion, the blood sample which was found on the clothing, was human blood which is group "A", PW6 concluded that the blood on the 2nd appellant's clothing could have originated from the complainant.

67. In our considered opinion, the totality of the evidence produced by the prosecution, proved that the appellants were some of the persons who committed the offences for which they were convicted by the trial court.

68. Accordingly, we find that the convictions of the appellants were founded upon solid evidence, which was not shaken by the appellants' defences. Therefore, the appeal against conviction lacks merit, and is dismissed.

69. On the issue of the sentences, it is noted that the same were handed down on 1st February 2012.

70. Thereafter, the High Court delivered its verdict on the first appeal, on 4th December 2014. In effect, both decisions were rendered prior to the decision of the Supreme Court in the case of Francis Karioko Muruatetu vs Republic [2017] eKLR.

71. The Supreme Court declared, in the said Muruatetu case, that the mandatory nature of the death penalty, in cases where a person was convicted for the offence of murder, was unconstitutional.

72. Subsequent to the said decision, this court in William Okungu Kittiny v Republic [2018] eKLR held that;

> "From the foregoing, we hold that the findings and holding of the Supreme Court, particularly in para. 69, applies Mutatis Mutandis to section 296 (2) and 297 (2) of the Penal

Code. Thus, the sentence of death under section 296 (2) and 297(2) of the Penal Code is a discretionary maximum punishment."

73. The current jurisprudence on the issue of mandatory sentences is that it is unconstitutional, as it deprives the court of the mandate to exercise its discretion in such a manner as to do justice in a way that imposes a sentence that is appropriate to the circumstances of the particular case which is at hand.

74. Accordingly, it is now settled that sentences which are couched in mandatory terms shall be construed as the maximum penalty that can be handed down.

75. In the light of the current jurisprudence on sentencing, we find that the following findings by the High Court cannot be sustained;

> " The mandatory sentence is death. There is no discretion. See Joseph Njuguna Mwaura & 2 Others v Republic, Nairobi Court of Appeal, Criminal Appeal No. 5 of 2008 [2013] eKLR."

76. Having so determined, and after giving due consideration to the circumstances in which the offences were committed, we are persuaded that an appropriate sentence for the offence of robbery with violence is 30 years' imprisonment. Accordingly, we set aside the death sentence and substitute it with a sentence of 30 years' imprisonment. The said sentence shall run from 1st February 2012, when the trial court first handed down the original sentences.

77. The said sentence shall run concurrently with the sentence of 15 years' imprisonment, which was in respect of the offences of gang rape.

Dated and delivered at Nakuru this 16th day of February, 2024.

F. SICHALE

.....

JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR