



REPUBLIC OF KENYA



KENYA LAW
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**Ogunda v Republic (Criminal Appeal 229 of 2018)
[2024] KECA 131 (KLR) (9 February 2024) (Judgment)**

Neutral citation: [2024] KECA 131 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 229 OF 2018
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
FEBRUARY 9, 2024**

BETWEEN

FELLA OKELLO OGUNDA APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from the Judgment of the High Court of Kenya at Kisumu
(Majanja, J.) dated 28th July, 2016 in HCCRA No. 90 of 2013)*

JUDGMENT

1. The appellant was arraigned before the Principal Magistrate's Court in Winam in Criminal Case No 1434 of 2013 and charged with the offence of robbery with violence contrary to section 296(2) of the *Penal Code*. The particulars of the offence were that on the 13th day of November 2012 at Kibos Sugar Agricultural Hostels in Kisumu District within Nyanza Province, being armed with dangerous weapons namely knife, panga, steel- cutter, robbed Ohm Bahadar one mobile phone make Nokia 8022 Model No 2700-2C valued at Kshs 6000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Ohm Bahadar.
2. The appellant also faced an alternative charge of handling stolen property contrary to section 322(1) of the *Penal Code*. The particulars were that on the 14th day of November 2012 at Kajulu village in Kisumu District within Nyanza Province, otherwise than in the cause of stealing dishonestly retained one mobile phone make Nokia 8022 Model 2700-2C knowing or having reason to believe it to be stolen.
3. The prosecution called five (5) witnesses. Their testimony was as follows. The complainant was at his house at Kibos Sugar Company relaxing at around mid-day on 13th November, 2012. A man forced his way in to the house using the backdoor. The unwelcomed intruder was armed with a pair of metal cutters and a panga. He struck the complainant on the head with the metal cutters and slashed him



on the left side of the abdomen just above the hip. The complainant raised alarm. The assailant stole his mobile phone and fled on foot.

4. The alarm the complainant raised attracted, among others, Samuel Ogendo, the Security Manager at Kibos Sugar Factory, and James Chacha, a security officer. They saw the assailant fleeing towards the fence carrying a yellow bag and a panga. They gave chase but the assailant outran them. They returned to the complainant's house to help him out. They took him to the hospital; and then reported the incident to Kibos Police Post where PC Kivuva took the report, issued a P3 form to the complainant and commenced investigations. The P3 form was filled by George Mwita, a clinical officer working at Jalaram Hospital, who treated the complainant. He produced the P3 form as evidence during the trial.
5. The two security officers, together with police officers from the Police Post mounted a search for the assailant. Later in the night, they found him in a house. He was sleeping. They recovered the yellow paper bag the security officers had seen him carrying, a panga, a pair of steel cutters and the complainant's mobile phone in the house. They also recovered the shirt which the security officers remembered seeing on the assailant as he fled.
6. Based on this evidence, the appellant was put on his defence. He gave an unsworn statement and called no witnesses. His defence was a denial and an alibi: he did not even know where Kibos Factory was, he said. On the material night, he sold onions, then he went to a certain house to drink chang'aa. He claimed he was arrested at the drinking den.
7. Neither the learned trial magistrate nor the learned Judge at the High Court (Majanja, J.) who heard the first appeal, found the appellant's alibi defence credible. On the other hand, both the two courts below were persuaded beyond reasonable doubt that the appellant was the assailant who attacked and robbed the complainant. Both courts relied on the doctrine of recent possession to convict the appellant: to wit that he was found with the complainant's mobile phone shortly after it had been stolen and was unable to explain how he came in to that possession.

Thus, the trial court convicted the appellant of the offence as charged and sentenced him to suffer death; and the High Court affirmed the conviction and sentence in a judgment dated 28th June, 2016.

8. The appellant is, yet again, disappointed by the decision of the High Court and is before us with his second appeal. In the Memorandum of Appeal dated 18th August 2023, the appellant has raised two (2) grounds of appeal as follows:
 1. That the learned trial judge erred in points of law by failing to uphold that failure to provide the appellant with witness statements violated his constitutional right to fair trial and vitiated the trial.
 2. The learned judge erred in law by failing to uphold that the testimony of PW I having been taken in Hindi, a language not of the court and not familiar to the appellant infringed on the appellant's right to a fair hearing.
9. This is a second appeal. Our jurisdiction is, therefore, 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 v 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 v R*, [1984] KLR 611.”

10. We have carefully considered the appeal, the rival submissions of the parties and the authorities cited in support of the opposing positions. In our view, the two grounds of appeal raised by the appellant are within our remit to consider as they are matters of law.
11. The appeal was canvassed by way of written submissions followed by oral highlighting during the plenary hearing. Ms. Anyango, learned counsel, appeared for the appellant while Mr. Okango, learned prosecution counsel, appeared for the respondent.
12. In the written and oral submissions, the appellant contends that the conviction should be quashed and sentence set aside because of two fair trial infirmities which, in his view, fatally vitiate the conviction. First, that he was never supplied with witness statement in violation of his constitutional rights. Second, that the evidence of PW1 was taken in Hindi, a language the appellant does not understand, and no interpretation was provided.
13. On the first point, the appellant argues that the appellant was never supplied with witness statements in violation of his rights under Article 50(2) (i) of the *Constitution*. He says that while the trial court directed that he should be supplied with the statements, he was never given the statements. He points out that the prosecution informed the court that they would have their file on 15/1/2013 and would be able to supply the appellant with the said statements. However, the appellant argues, a careful perusal of the record of appeal would reveal that after that date (15th January, 2013), there is no record that the statements were actually given to the appellant.
14. On this issue, the respondent points out that this complaint was raised before the first appellate court and was fully determined. The respondent argues that the appellant has not demonstrated where the first appellate court erred in law in determining the issue. The respondent urges that, while it is not directly recorded in the proceedings that the witness statements were availed, there is no evidence that the order of the trial court dated 11th January 2013 was not complied with. The respondent points out that at page 7 of the record, the matter was set for mention on 15th January 2013 “to confirm whether the appellant had been served.” On that 15th January 2013, the matter was set down for hearing on 24th January 2013 and 30th January 2013. There is no evidence that the appellant complained on 15th January 2013 or thereafter, that the statements had not been served as directed. Hence, the respondent argues, the allegations that he was not served with witness statements are unfounded.
15. The High Court dealt with this complaint. It expressed itself thus:

“The first issue was that he was not given witness statements. According to the record, the trial court directed on 15th November 2012, that the appellant be furnished with the charge sheet and witness statements at his cost. When the matter came up for mention on 11th January 2013, the accused stated, “I have no one to sent for copies.” In response the prosecutor stated that, “I will have the file on 15th March 2013.” The issue of statement was not raised again by the court, prosecutor or defence...

In this case though, the appellant did not raise the issue further as he had done and proceeded with the hearing including cross-examination of the witnesses.”
16. We agree with the analysis of the learned Judge on this point. The record is clear that the trial court directed that witness statements should be supplied to the appellant by 15th January, 2013. On that date, the appellant appeared in court. He did not raise the issue of statements; and neither did he raise



- it in any subsequent court appearances. The record also shows that the appellant participated actively in the trial including robustly cross-examining the witnesses.
17. There is no doubt at all that our Constitution requires the state to supply, at a minimum, the charge sheet, witness' statements and copies of any documents which the state intends to rely on in the prosecution of an accused person – see, in particular, Article 50(2)(c) and (j) of the *Constitution*. For judicial application of these provisions, see *Simon Gitbaka Malombe v R* [2015] eKLR (Court of Appeal Crim. App No 314 of 2010 at Nyeri).
 18. We must point out, however, that what the *Constitution* provides for is a substantive right; not a technical booby trap for the state: the obligation is for the state to provide the documents so that an accused person has adequate information to prepare his defence; the obligation is not to formulaically demonstrate technical compliance with the constitutional obligation. Hence, whereas it is a salutary practice for the court to record that an accused person confirms that he has received witness statements and other documents, it is not fatal for a conviction if there is no specific record indicating that the documents were supplied if the context is clear that they were, in fact, supplied. Furthermore, an accused person has a minimal obligation to bring it to the attention of the court that he has not been supplied with the witness statements (or any other prosecution documents) as ordered by the court. It is this minimum duty on the part of an accused person which triggers the court's duty to ensure that the documents are supplied before the trial commences. An accused person cannot fold his hands, string the court along only for him to strategically raise as a point on appeal that he was not supplied with witness statements.
 19. In the present case, there is evidence that the appellant participated in the trial vigorously through cross-examination which is an indication that he knew the case facing him well. There is also no indication that he had not been supplied with the witness statements pursuant to the trial court's directions. The appellant did not, for example, raise the issue again. In our view, these two factors lead to the conclusion that the fair trial rights of the appellant were not violated in this case: he either received the witness statements or failed to fulfill his minimal obligation to inform the court that he had not been given the statements.
 20. The second point of law raised by the appellant is whether PW1 testified in a language he does not understand (Hindi), and without the appellant benefitting from translation in to a language he understands.
 21. The appellant argues that the testimony of PW1 was taken in Hindi, a language which was not familiar to him; and that no translation was offered. He points out that when the case first came up for hearing on 24th January, 2013, it could not proceed as it was indicated that the complainant only understood Hindi. The matter was thus adjourned to secure the services of a Hindi interpreter. On 14th February, 2013, when the complainant testified, the record shows that he did so in Hindi. The court assistants present are indicated as being Onyuka/Ricky (page 10 of the record). The appellant argues that nowhere in the proceedings is it indicated that either of the two court assistants were the Hindi interpreters. The appellant argues that the complainant testified in Hindi, a language that is unknown to him. The appellant argues that, therefore, his rights under the *Constitution* at Article 50(2)(m) and section 198 of the *Criminal Procedure Code* were violated.
 22. The respondent disagrees that there was no translation or that the appellant's rights with regard to the language used during trial were violated. Mr. Okango argued that it is the complainant PW1 who only understood Hindi and not any other court language, hence the adjournment on 24th January, 2013 was necessitated by the fact that there was no interpreter. This interpreter was to be sourced to enable all



parties including the court to understand the testimony of PW1. This happened and the complainant successfully testified on 14th February, 2013.

23. The High Court considered this complaint on first appeal and rendered itself as follows:

“The second issue the appellant raised was that the proceedings were conducted in a language he did not understand as PW1 testified in Hindi and there was no interpretation. From the record, when the matter first came up for hearing on 24th January 2013, the matter could not proceed as there was no Hindi interpreter. The learned magistrate adjourned the matter to 14th February 2013. The record shows that there were two court assistants - Onyuka/Ricky - and that PW1 spoke in Hindi. When the accused was called upon to cross-examine the witness, he did so. Neither the court nor the appellant raised any issue about the translator. Although the record is insufficient in setting out the details of the translator, it is clear that the testimony of PW1 was translated to enable the appellant understand and ask questions in cross-examination”

24. We, again, agree with the learned Judge’s analysis on this point. It is true that the trial court record is inelegantly phrased and lacks the pettifogging details of the modalities of translation. However, the context makes it clear that the complainant testified in Hindi, the only language he was fluent in; and that the evidence was received in English, the language of the court. The appellant was able to cross-examine the appellant meaning that the testimony was translated to a language he understood. This interpretation of the version of events is buttressed by the fact that the court had adjourned on 24th January, 2013 in order to procure a Hindi translator. When the case resumed on 14th February, 2013, there were two court assistants and the trial proceeded. The record indicates that the witness testified in Hindi. It also shows that after his examination-in-chief, the appellant cross-examined him. The appellant, by his own admission, does not understand Hindi. The only logical conclusion from these series is that while the trial court record should have been more explicit, it is clear that PW1 testified in Hindi and the two court assistants translated the testimony to enable both the court and the appellant to understand the testimony; and for the appellant to cross-examine. This ground, therefore, also fails.

25. The upshot is that we find that this appeal lacks merit and we dismiss it in its entirety.

26. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 9TH DAY OF FEBRUARY, 2024.

HANNAH OKWENGU

.....
JUDGE OF APPEAL

H. A. OMONDI

.....
JUDGE OF APPEAL

JOEL NGUGI

.....
JUDGE OF APPEAL

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

Signed



DEPUTY REGISTRAR

