Mwangale v Republic (Criminal Appeal E003 of 2022)
[2024] KECA 311 (KLR) (22 March 2024) (Judgment)

Neutral citation: [2024] KECA 311 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL E003 OF 2022

F SICHALE, FA OCHIENG & WK KORIR, JJA

MARCH 22, 2024

BETWEEN

RODGERS KIBIAMO MWANGALE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the Judgment of the High Court of Kenya at Eldoret (A.G.A. Etyang & O. Tunya, J.) dated 22nd January 2003 in H.C.CR.A No. 99 of 2000)

JUDGMENT

1. The appellant was charged jointly with two others, with the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. The particulars of the offence were that on 30th October 1999 at Kapsoya estate in the then Uasin Gishu District, of the then Rift Valley Province, the appellant, while armed with dangerous weapons, namely, pangas and rungus, together with others not before the court, robbed George Ohanga of his mattress, one water pump make Mitsubishi, two blankets, one bedsheet, computer screen, four gas cylinders, all valued at Kshs. 138,000/-, and immediately before or immediately after the time of such robbery, threatened to use actual violence against the said George Ohanga.

2. The appellant was also charged with an alternative charge of handling stolen goods contrary to Section 322(2) of the Penal Code. The particulars of the offence were that on diverse dates between 30th October 1999 and 5th December 1999 at Kapsoya estate in the then Uasin Gishu District, the appellant jointly with others not before court dishonestly retained a gas lamp, one gas cylinder make MEKO, one water pump make Mitsubishi, and one mattress, knowing or having reason to believe the same to have been stolen, or unlawfully obtained, all to the value of Kshs. 90,000/-; the property of George Ohanga.

3. The appellant denied the charges and trial ensued soon thereafter. At the conclusion of the trial, the appellant's co- accused persons were acquitted while the appellant was convicted under Section 296(2) of the Penal Code. He was sentenced to death.

4. The prosecution case was that: the complainant and his brother (PW2), were asleep in their residential house at Kapsoya estate when a large gang of assailants burst in through the main door. The assailants were armed with lethal crude weapons, which they threatened to use should the complainant and PW2 raise the alarm or resist the robbery. The assailants took away the items listed in the charge sheet and forced the complainant to drive them to Munyaka estate. After offloading the stolen items at a house in Munyaka estate, the assailants drove to the town center where they handed the vehicle back to the complainant.

5. The complainant and PW2 were not able to identify their assailants because it was dark, and the assailants were threatening them.

6. After about 5 days following the robbery, the appellant was introduced to a staff member at Moi University, (PW1) by one Isaac, as the friend who had a water pump for sale. The appellant sold the pump at Kshs. 15,000/-. PW1 gave the appellant Kshs. 9,000/-, with the understanding that the balance was to be paid after the pump had been tested by a mechanic. However, the water pump was positively identified by the complainant as part of the goods which had been stolen from him.

7. A little after two weeks following the robbery, the appellant was introduced to PW3, to whom he sold a gas lamp at the Lengut Hotel.

8. The 3rd accused was a brother to PW3. He introduced PW3 to the appellant. He testified on the circumstances surrounding the sale of the gas lamp to PW3.

9. Put to his defence, the appellant in his unsworn statement did not deny knowing the 3rd accused person. He denied the charges leveled against him.

10. The learned Judges held that the appellant was in possession of stolen property soon after it had been stolen. The learned Judges observed that, although PW1 was in actual possession of the water pump, he gave a vivid explanation to the court which absolved him of any culpability, even as an accomplice.

11. The learned Judges further held that the evidence of PW1 and PW3 was cogent and remained intact on cross-examination.

12. The learned Judges also held that even though the trial Magistrate did not warn herself of the possibility that PW3 may have been an accomplice, the totality of the evidence before the court would not have occasioned a mistrial.

13. The learned Judges also stated as follows;

> " Taking into account the type of goods which were robbed off the complainant, the ease or otherwise with which they may exchange hands through sale, the duration of time that lasted before the appellant was seen selling or possessing them, and the quantity recovered in relation to what was stolen, we hold that the doctrine of possession of recently stolen goods was correctly applied by the lower court as proof that appellant and others unidentified did in fact participate in the robbery on 30.10.99."

14. Subsequently, the learned Judges upheld the appellant's conviction and sentence.

15. Dissatisfied with the judgment, the appellant lodged the present appeal. He raised the following grounds of appeal:

> "a) The trial court erred in convicting the appellant without complying with Section 169(1) of the Criminal Procedure Code.
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> b. The learned Judges erred in upholding an unconstitutional sentence.
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> c. The doctrine of recent possession was not proved to the required standard hence the trial court erred in sustaining a conviction on the same.
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> d. The sentence meted against the appellant was harsh and excessive in the circumstances."

16. When the appeal came up for hearing on 5th December 2023, Mr. Sonkule, learned counsel appeared for the appellant whereas Ms. Sakari learned prosecution counsel was present for the respondent. Counsel relied on their respective written submissions.

17. The appellant submitted that the judgment of the trial court violated the provisions of Section 169(1) of the Criminal Procedure Code. According to the appellant, the court did not clearly state the points for determination in the judgment and instead made general conclusions. This, in turn, has caused prejudice to the appellant.

18. The appellant submitted that the death sentence has since been outlawed, and in any event, it is an unwarranted punishment for the offence of robbery with violence, especially in the present case where there were no aggravating factors.

19. While citing the case of Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v Republic, Criminal Appeal No. 272 of 2005, the appellant submitted that the complainant failed to positively identify the alleged stolen goods and did not provide any proof of ownership.

20. Opposing the appeal, the respondent pointed out that the judgment of the trial court on pages 31 to 33 of the record shows that the court stated how the evidence against the 1st and 3rd accused persons was unsatisfactory. The court also stated the role that had been played by the 1st accused, made a decision in that regard, and gave reasons for the said decision in lines 15 to

21. The respondent submitted that the court had correctly analyzed the evidence on record and arrived at its findings.

22. While relying on the cases of Hawaga Joseph Ansanga Ondiasa v Republic, Criminal Appeal No. 84 of 2001 and Samwiri Senyange v Republic [1953] eKLR, the respondent submitted that the failure by the court to observe Section 169(1) of the Criminal Procedure Code does not invalidate a trial; there was no injustice occasioned to the appellant.

23. The respondent submitted that the sentence meted against the appellant was legal and proper. It was neither excessive nor unconstitutional. The appellant was also given an opportunity to mitigate before the sentence was passed. Citing the case of Francis Karioko Muruatetu & Another v Republic [2017] eKLR, the respondent was of the view that the declaration of the death penalty under Section 204 of the Penal Code as being unconstitutional was only applicable in murder cases.

24. The respondent submitted that the appellant and his nine accomplices planned the robbery. The complainant, PW2, and their driver were held hostage and ordered to lie down and threatened. The assailants were armed with pangas, spears, and axes. The driver was injured near the eye. The respondent

submitted that robbery with violence is prevalent and that the death sentence was sufficient in the circumstances.

25. The respondent relied on the cases of William Oongo Arunda v Republic, Criminal Appeal No. 49 of 2020, Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v Republic (supra), Hassan v Republic [2005] eKLR and Section 111 of the *Evidence Act* in submitting that the appellant did not give any plausible reason on how he came into possession of the water pump and gas lamp.

26. This being a second appeal, we are legally constrained to consider only issues of law raised in the appeal and not to consider matters of fact tried by the trial court and the appellate court on the first appeal. This is by dint of Section 361(1)(a) of the Criminal Procedure Code. This position was reiterated in the case of M'Riungu v Republic [1983] KLR 455 where the court stated thus:

> " Where the right of appeal is confined to the question of law, an appellate court has loyalty to accept the findings of fact of the lower courts and resist the temptation to treat findings of fact as holdings of fact and law and it should not interfere with the decision of the trial court or the 1st appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision was bad in law."

27. We have carefully considered the record of appeal, submissions by counsel, the authorities cited, and the law. The main issues for our determination are; whether or not Section 169(1) of the Criminal Procedure Code was complied with, and if not, what is the effect; whether or not the doctrine of recent possession applied in the circumstances of this case; whether or not the case against the appellants was proved beyond reasonable doubt; and whether or not the sentence meted against the appellant was harsh and unconstitutional.

28. Section 169 of the Criminal Procedure Code provides as follows:

> " (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, shall contain the point or points for determination, the decision thereon and the reasons, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.
>
> 2. In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.
>
> 3. In the case of an acquittal, the judgment shall state the offence which the accused person is acquitted, and shall direct that he be set at liberty."

29. In the case of Samwiri Senyange v Republic, (supra), the court stated thus:

> " Where there had not been a strict compliance with the provisions of Sections 168 and 169 of the Criminal Procedure Code that will not necessarily invalidate a conviction and the court will entertain an appeal on its merit in such a case if it can be done with justice to the parties."

30. Similarly, in the case of Hawaga Joseph Ansanga Ondiasa v Republic, (supra), the court held that:

> " It is true that the trial magistrate may be criticized for the perfunctory way in which he expressed himself in his judgment. However, even if we were to hold that he did not prepare

his judgment strictly in accordance with section 169 of the Criminal Procedure, this would not, of itself mean that the conviction of the appellant was wrong or is to be invalidated."

31. In the case of Samuel Mwambuki & Another v Republic [2019] eKLR, this court when faced with similar facts as the appeal herein held that:

> " In the circumstances of this case, we find that the judgment of the trial court complied with the provisions of Section 169 of the CPC save for the absence of the points for determination. The appellants' conviction is therefore not invalidated on that ground."

32. In the result, we find that failure to comply with Section 169(1) does not render the judgment a nullity as a technical failure of this nature does not vitiate the trial particularly because the evidence on record is sufficient to support the conviction.

33. It is well-known that the doctrine of recent possession allows the court to infer guilt when the accused is found in possession of recently stolen property under unexplained circumstances. In the case of Eric Otieno Arum v Republic [2006] eKLR, the court stated as follows:

34. In the case of Republic v Kowkyk [1988] 2 SCR 59, by a majority, the Canadian Supreme Court held as follows:

> " Upon proof of the unexplained possession of recently stolen property, the trier of fact may –but not must-- draw an inference of guilt of theft or of offences incidental thereto. Where the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be for the trier of fact upon a consideration of all the circumstances to decide which, if either, inference should be drawn. In all recent possession cases the inference of guilt is permissive, not mandatory, and when an explanation is offered which might reasonably be true, even though the trier of fact is not satisfied of its truth, the doctrine will not apply."

35. he elements of the doctrine of recent possession were laid out in the case of Isaac Ng'ang'a alias Peter Ng'ang'a Kahiga v Republic, Cr App. No. 272 of 2005 (UR) where this Court held thus:

> " It is trite that before a court of law can rely on the Doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof;
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> i. that the property was found with the suspect;
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> ii. that the property is positively the property of the complainant;
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> iii. that the property was stolen from the complainant;
>
> iv. that the property was recently stolen from the complainant.
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> 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."

36. It follows that once the primary facts are established; the accused bears the evidential burden to provide a reasonable explanation for being in possession of the stolen property. The explanation need only be

a plausible one. This burden is evidential only and does not relieve the prosecution from proving its case to the required standard. In Paul Mwita Robi v Republic, (supra), the court observed that:

> " Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is (sic) especially within the knowledge of the accused and pursuant to the provisions of section 111 of the *Evidence Act* Chapter 80, the accused has to discharge that burden."

37. In this case, the two lower courts found the evidence of PW1 and PW3 to be credible, stating that they had purchased the water pump and the gas lamp from the appellant. These items were positively identified as some of the property of the complainant, which had been stolen on 30th October 1999. We hold the considered opinion that the items were of the nature that could not easily change hands. Therefore, as the appellant was found in possession of the water pump, barely 5 days after the same was stolen from the complainant, we hold that the doctrine of recent possession was correctly applied in the circumstances.

38. Our said finding is premised upon the failure by the appellant to offer any plausible explanation of how he came into possession of the complainant's stolen property.

39. In the result, we find that all the aforesaid elements of recent possession were proved in this case.

40. Section 296(2) of the Penal Code and the case of Oluoch v Republic [1985] KLR outline three circumstances that need to be proven to sustain a conviction for an offence of robbery with violence. The prosecution need only prove one. The circumstances are that:

> " a). The offender is armed with any dangerous or offensive weapon or instrument;
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> b. The offender is in the company of one or more person or persons; or
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> 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."

41. From the evidence on record, we are satisfied that two elements of robbery with violence were proved beyond any reasonable doubt. The appellant was in the company of other people when they entered the complainant's house to rob them. They were armed with pangas and rungus. They also threatened to use violence on the complainant and PW2 in the event they raised alarm or refused to cooperate with them.

42. In the circumstances, we find that the prosecution's case against the appellant was overwhelmingly credible.

43. The Supreme Court in the case of Francis Muruatetu & Another v Republic [2017] eKLR held that:

> " Consequently, we find that Section 204 of the penal code is inconsistent with *the Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum penalty."

44. Section 296(2) of the Penal Code provides that the offender convicted for robbery with violence in circumstances stipulated therein; "shall be sentenced to death."

45. In the case of William Okungu Kittiny v Republic (supra), this court 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."

46. In our view, what renders a sentence unconstitutional is the fact that the prescribed mandatory sentence completely precludes the court from exercising any discretion, regardless of whether or not the circumstances so require.

47. 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.

48. In the light of the current jurisprudence on sentencing, and after giving due consideration to the circumstances in which the offence was committed, and the fact that the appellant was in custody for four years before his conviction, we are persuaded that the appropriate sentence in the circumstances is 30 years' imprisonment.

49. Accordingly, we uphold the appellant's conviction. However, we set aside the death sentence and substitute it with a sentence of 30 years' imprisonment. In light of the fact that the appellant was in custody during trial, we direct that the sentence shall run from the date when the appellant was charged before the trial court pursuant Section 333(2) of the Criminal Procedure code.

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 22ND DAY OF MARCH, 2024.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR