Muiruri v Republic (Criminal Appeal 7 of 2022)
[2024] KECA 282 (KLR) (8 March 2024) (Judgment)

Neutral citation: [2024] KECA 282 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 7 OF 2022

MSA MAKHANDIA, A ALI-ARONI & JM MATIVO, JJA

MARCH 8, 2024

BETWEEN

WILSON NJOROGE MUIRURI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Kimaru & Lesiit, JJ.) dated 17th June 2015 in Nairobi HCCRA No. 164 of 2010)

JUDGMENT

1. This is an appeal from the judgment of the High Court at Nairobi (Kimaru & Lesiit, JJ.) delivered on 17th June 2015, in respect of Criminal Appeal No. 164 of 2010. The learned Judges upheld the conviction and sentence of the appellant and one, Daniel Kanguria Mwangi by the trial court on one count of robbery with violence contrary to section 296(2) of the penal code and possession of imitation firearms contrary to section 34 (1) & (3) of the *Firearm Act*.

2. The particulars of the 1st count were that on 1st October 2006 at Wangige market in Kiambu County, the appellants, while armed with dangerous weapons, namely, toy pistols, robbed John Thimba Njoroge "the complainant", of a mobile phone make Motorola C113 and Kshs 3,000.00 and at or immediately before or immediately after the time of such robbery, threatened to use actual violence on the said John Thimba Njoroge.

3. On the 2nd and 3rd counts, they were both charged with being in possession of imitation of firearms contrary to section 34(1) and (3) of the Firearm Act. The particulars of the offence were that on the same day and place, with intent to commit a felony, they were found in possession of objects resembling a firearm.

4. The appellant and co-accused entered a plea of not guilty and their trial ensued in earnest. The prosecution called five witnesses to prove its case against the appellant and co-accused. The prosecution

case was that on 1st October 2006, at about 7.00 p.m., while the complainant was walking home from Wangige Trading Centre, he was accosted by two men. They ordered him to sit down and surrender his mobile phone and the money that was in his possession. He surrendered his Motorola C113 phone and Kshs 3,000.00. The two men were able to subdue him because they threatened him with guns. The complainant recognized the two men as he used to see the appellant at Wangige Trading Centre prior to the robbery incident. As regards the co-accused, he knew him as Dan since they grew up together at Wangige. After the appellant and co-accused left, the complainant hired a taxi and went to report the incident at the Chief's Camp. He was accompanied back to the Shopping Centre by Administration Police Officers, PW2 Abdi Kala Golicha and PW3 IP Ephantus Ndirangu. The complainant pointed out the appellant, who was in a club and he was arrested. On being searched, he was found with a Motorola C113 mobile phone belonging to the complainant. The complainant positively identified the mobile phone as the one that had been robbed from him a few moments earlier. He produced a receipt he was issued with upon purchasing the same. After his arrest, the appellant led them to some bushes behind the petrol station where two toy pistols were recovered. The appellant thereafter, led the two police officers to where the co-accused was and he was also arrested. The complainant was emphatic that he was able to positively identify the appellants because, at the place where he was robbed, there was sufficient electricity light. PW2 and PW3 corroborated the testimony of the complainant in relation to the circumstances of the arrest of the appellants, and recovery of the mobile phone as well as the toy pistols. The appellant and co- accused were thereafter escorted to Kikuyu Police Station.

5. The two toy pistols were taken for examination by a ballistic expert PW5, SP Lawrence Nthiwa. After examining the two toy pistols, he formed the opinion that they were imitation firearms within the meaning ascribed to them in the *Firearms Act*. The case was investigated by PW4, SGT Francis Novauna. After the conclusion of his investigations, he charged the appellants with the offences.

6. When they were put on their defence, the 1st appellant gave an alibi defence. He testified that on the material day, he was at his sister's place at Ndenderu. In the evening, he went to a club. He was surprised when he saw the complainant with police officers who came and arrested him on the allegation that he had robbed the complainant. He denied committing the offences. On his part, the co-accused exercised his constitutional right to say nothing in his defence.

7. After carefully evaluating the evidence adduced, the trial court was persuaded that the prosecution had proved its case beyond reasonable doubt, convicted and sentenced both to death on count 1 and 5 years each imprisonment in respect of counts 2 and 3. Aggrieved with the conviction and sentence, the appellant and co- accused lodged a first appeal in the High Court at Nairobi. After proper consideration, the High Court found the appeal to be bereft of merit and dismissed it in its entirety thereby provoking this second and perhaps last appeal. Though the appeal was dismissed, the co-accused or now co-appellant was however released from prison custody in mysterious circumstances. The less we say on this, the better.

8. Two grounds of appeal being pursued by the appellant are that the High Court erred in law: on the question of identification of the appellants and by relying on contradictory, insufficient, and inadmissible evidence. The appeal was heard on 22nd November 2023 on a virtual platform. Mr. Mwangale, learned counsel appeared for the appellant whereas O. J. Omondi, learned prosecution counsel appeared for the respondent.

9. Mr. Mwangale submitted that the complainant who was a key prosecution witness did not know the appellant before and there was no proof by the prosecution that he recognized or identified the appellant during the robbery. That the complainant did not give any features or descriptions of the appellant to the police officers. That considering that it was at night and the source of light was 100

metres away from the scene then the identification was under difficult circumstances a fact that the two lower courts failed to appreciate. Further, that the courts below failed to interrogate or analyze the intensity, distance, and direction of the source of light that the complainant allegedly used to identify the appellant. Relying on the cases of *James Chege Wania & Another v Republi*c [2014] eKLR, and *Wamunga v Republic* [1989] KLR 424, the appellant submitted that the circumstances obtaining at the scene of crime were not favourable for positive identification and or recognition of the appellant. That therefore the possibility of mistaken identity cannot be ruled out.

10. On contradictory and insufficient evidence, it was submitted that the evidence that was adduced before the trial court was full of material contradictions and therefore could not sustain a conviction. Some of the contradictions were that, whereas PW1 stated that when he together with the police officers arrested the appellant, he was searched and the complainant's phone was found in his left trouser pocket. This testimony was contrary to the testimony of PW2 who testified that the phone was recovered from the socks on the left leg. There were also contradictions as to where the toy pistols were recovered. Whereas PW1 stated that the firearms were found in a bush covered with tree leaves, PW2 stated that they were recovered behind a petrol station. Therefore, the court ought not to have relied on these contradictory pieces of evidence to convict the appellant. Counsel relied on the cases of *Vincent Kasuyla Kingoo v Republic* [2014] eKLR, *Josiah Afuna Angulu v Republi*c - Nakuru Criminal Appeal No. 277 of 2006 (UR), and *Charles Kiplangat Ngeno v Republic* - Criminal App. No. 77 of 2009 (UR), to submit that the two lower courts failed to appreciate and resolve the material contradictions in favour of the appellants. That the contradictions were not minor and that failure by the two courts below to reconcile them was prejudicial to the appellant and, occasioned a failure of justice.

11. In response, Mr. Omondi submitted that all the ingredients of the offence of robbery with violence set out in the case of *Oluoch v Republic* (1985) KLR 549 were proved. According to the respondent, two people attacked and robbed the complainant. The complainant recognized them from previous interactions and the scene of crime was well-lit with electricity.

12. The respondent further submitted that the appellant was connected directly to the robbery due to the fact that after the complainant went to the Chief's office to report the incident, PW2 in the company of PW3 accompanied him to look for the robbers at the Wangige shops. They were able to apprehend the appellant who upon being searched, the complainant's mobile phone was recovered from his person. The appellant was not able to demonstrate his ownership of the phone or give any plausible explanation as to how he came by it, thereby, making him one of the perpetrators of the crime. With regard to contradictory and inconsistent evidence, counsel submitted that though the record shows that there were contradictions as to where the stolen phone was found, the fact remains that the stolen phone was found on the person of the appellant and he was unable to give any logical explanation of how he had come into its possession. On the recovery of imitation pistols, the respondents submitted that though there were contradictions, they were minor and of no consequence. We were therefore urged to dismiss the appeal in its entirety.

13. Before we delve into consideration of the appeal, we first remind ourselves that this being a second appeal, by dint of the provisions of section 361 of the *Criminal Procedure Code*, we are enjoined to consider only matters of law. We can only interfere with the decision of the first appellate court on facts if it is demonstrated that the two courts below failed to consider matters, they should have considered, or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law. This much was restated in *Alvan Gitonga Mwosa v Republic* [2015] eKLR. The first issue of law for our determination is whether the appellants were properly identified as the perpetrators of the crime. In this regard, the appellants contended that their identification was not proper more so since no identification parade was conducted and that the

alleged identification was made in difficult circumstances. The evidence adduced by the complainant was that the appellant was a person well known to him as he grew up with him. That at the time of the robbery, he was able to recognize him. The complainant was emphatic that he was able to recognize the appellant because there was sufficient electric light, which illuminated the scene of the robbery. This was thus a case of recognition as opposed to identification of a stranger in difficult circumstances. In the premises, giving a description of the appellant to the police officers or conducting a police identification parade, would have been superfluous.

14. In the case of *Wanjohi & 2 Others v Republic* [1989] KLR 415, this Court held that:

> " Recognition is stronger than identification but an honest recognition may yet be mistaken."

In addition, in the words of Lord Widgery, CJ. in *R v Turnbull and Others* [1976] 3 All ER. 549:

> " Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made...
>
> All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger."

These principles were invoked by both courts below in arriving at their conclusions and we therefore find no plausible reason to interfere with those concurrent findings.

15. Further, the appellant was found in possession of the complainant's cell phone, which had been robbed from him some moments earlier an hour earlier. The complainant positively identified the phone as his by documentary evidence. The appellant could not prove that the phone was his nor could he explain how he had come by it. The doctrine of recent possession was applicable in the circumstances. In the case of *Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v R* [2006] eKLR, this Court expressed itself, thus, on the doctrine:

> " It is trite that 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 the 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 to the other."

16. We are satisfied that on the evidence, the above requirements were met and the two courts below properly invoked the doctrine in convicting the appellant.

17. On the ground that the prosecution failed to satisfy the ingredients of the offence of robbery with violence, since the evidence that was adduced before the trial court was full of material contradictions and therefore could not sustain a conviction, we revert to the case of *Odhiambo & Another v Republic* [2005] 2 KLR 176, where this Court explained the ingredients of the offence of robbery with violence as follows:

> " The act of being armed with a dangerous or offensive weapon is one of the elements or ingredients which distinguishes a robbery under section 296(2) and the one defined under section 295 of the *Penal code.* Other ingredients or elements under section 296(2) include

being in the company of one or more persons or wounding, beating etc the victim and since all these are modes of committing the offence under section 296(2), the prosecution must choose and state which of those elements distinguishes the charge from the one defined in section 295."

18. During the trial, it was proved that the robbery was committed by two people who were armed with toy pistols, made use of them, and in the process visited violence upon the complainant. It should be appreciated that the above ingredients of the offence are disjunctive and not conjunctive. Prove of any will suffice to find a conviction. See *Munyi alias Karaya v Republic* (2005) KLR 441.We are satisfied just like the trial and High Court that the ingredients of the offence were proved to the required threshold. The contradictions as to where the phone and imitation pistols were found did not dent the otherwise strong prosecution case. In any event, they were minor and did not go to the root of the prosecution case.

19. In the end, we find the entire appeal bereft of merit and accordingly dismiss it.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH, 2024.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

ALI-ARONI

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR