Gitaka & 2 others v Republic (Criminal Appeal 56 of 2019)
[2024] KECA 1046 (KLR) (26 April 2024) (Judgment)

Neutral citation: [2024] KECA 1046 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 56 OF 2019

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

APRIL 26, 2024

BETWEEN

DAVID MUNENE GITAKA ..... 1ST APPELLANT

JOHN BUNDI MUNENE ..... 2ND APPELLANT

FRANCIS NYAMU MUNENE ..... 3RD APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Kerugoya (Gitari, J.) dated and delivered on 8th February, 2018 in Criminal Appeal No. 7 of 2014)

JUDGMENT

1. The appellants, David Munene Gitaka, John Bundi Munene and Francis Nyamu Munene, were charged before the Chief Magistrate's Court at Kerugoya with robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of the offence were that on 10th November 2008 at Komboini at the then Kirinyaga South District, the appellants, while armed with dangerous weapons, namely, pangas, robbed Cecily Wangeci Kinyua (the complainant) of Kshs.46,000 and at or immediately before or immediately after the time of such robbery, wounded the complainant. The appellants pleaded not guilty to the charge. After full trial, they were convicted as charged and sentenced to death.

2. Aggrieved by this verdict, the appellants appealed against the said decision to the High Court sitting at Kerugoya. The thrust of the appellant's appeal was that they had not been properly identified at the scene of crime. They were of the view that the evidence of identification that was relied upon by the trial Magistrate to convict them did not meet the legal threshold as to exclude the possibility of mistaken identity.

3. Upon hearing the appeal, the High Court (L. W. Gitari, J.) upheld the trial Magistrate's decision on both conviction and sentence. At the material part of the judgment when addressing the appellant's assertion that they had not been identified at the scene of crime, the learned Judge stated as follows:

> "My view is that the appellants were recognized during the robbery. There were no other suspects. It was not suspicion but recognition which placed them at the scene of the robbery. The respondent submits and rightly so, that as correctly put by PW 1 in her evidence she may not have had proper memory as she had been cut on the head, however, the fact that the appellants were people who were well known to her even before the act, negates the appeal on this ground as it does not matter at what point PW1 was able to give the names of the attackers to her relatives and the police."

4. Undaunted, the appellants have filed a second and final appeal to this Court. The appellant's grounds of appeal may be condensed into three areas:- that the evidence of identification that was relied upon to convict them by the courts below was unreliable and could not form a basis for sustaining their conviction; that the evidence adduced by the prosecution was insufficient and incredible that it could not establish, to the required standard of proof, that it was the appellants who had committed the crime; that the trial and the first appellate courts did not consider the appellant's alibi defence before convicting them; and, finally, that their respective mitigations were not considered before they were sentenced. The appellants urged the Court to allow their appeal.

5. Prior to the hearing of the appeal, the appellants and the respondent filed written submissions in support of their respective opposing positions. Mr. Mwendwa for the appellants submitted that both the trial and the first appellate courts misapprehended the evidence that was adduced before the trial court and arrived at the wrong conclusion. He pointed out that the robbery incident occurred at night. The prosecution witnesses who testified as to the circumstances of the robbery, gave contradictory and inconsistent evidence in regard to how the appellants were able to be positively identified. The source of light was doubtful. There was contradictory evidence in regard to what weapon was used to assault the complainant during the course of the robbery. Whereas some witnesses stated that it was a panga others testified that it was an axe.

6. Learned counsel submitted that a crucial witness was not called to testify in the case, in this case, the investigating Officer. Relying on the case of Michael Kinuthia Muturi v Republic [2011] eKLR, the appellants urged the court to find this failure to produce this critical witness in court to have adversely caused miscarriage of justice to the appellants.

7. As regards whether the prosecution had established all the elements of the offence of robbery with violence under Section 296(2) of the Penal Code, the appellants contended that it was not established to the required standard of proof the particular weapon that was used during the commission of the robbery, the number of persons who participated in the robbery and finally the exact person (if it was the appellants, which specific appellant) who assaulted the appellant. The appellant relied on the case of Dima Donge Dima & Others v R [2013] eKLR in support of his submissions.

8. The learned counsel for the appellants submitted that the alibi defence adduced by the 2nd and 3rd appellants was not displaced by any evidence adduced by the prosecution. He asserted that failure by the prosecution to impeach the appellants' alibi defence meant that the court could not discredit or disprove the appellants' evidence that they were not at the scene of crime when the robbery occurred. He relied on the case of Erick Otieno Mede v Republic [2019] eKLR.

9. On sentence, the appellants urged the Court to review the same in light of the Supreme Court's decision of Francis Karioko Muruatetu –v- Republic [2017] eKLR.

10. On its part, the respondent opposed the appeal. It was submitted that the prosecution had established all the ingredients to support the charge and conviction of the appellants on the evidence of identification. It was the prosecution's case that three witnesses give direct evidence that they had recognized the appellants during the robbery incident. The appellants were known to the said witnesses prior to the robbery and, therefore, there was no possibility that they were mistaken. The respondent submitted that the evidence adduced by the prosecution placed the appellants at the scene of crime. The testimony of the witnesses was consistent, reliable, cogent, direct and overwhelming.

11. The respondent asserted that there were no material inconsistencies and contradictions that would lessen the strength of the evidence that was adduced by the prosecution witness in support of the charge. On the alibi defence of the appellants, the respondent submitted that the same was considered in light of the evidence adduced by the prosecution witnesses and found not worthy of credit.

12. On sentence, Mr. Naulikha for the respondent urged the Court not to interfere with the same as the appellants' sentence was not one of the sentences amenable to intervention by the Court under the sentencing principle in the Francis Karioko Muruatetu (supra) case. The respondent urged the Court to dismiss the appeal.

13. This is a second appeal. Our duty as a second appellate court is circumscribed. We are required to consider matters of law only. In Karani v Republic [2010] 1 KLR 73 the Court held thus:

> " This is a second appeal. By dint of the provision of Section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they 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 such omission or commission would be treated as matters of law."

14. There were broadly three grounds of appeal that the appellants urged before us in their bid to have their conviction set aside. The first ground was the evidence of identification. The appellant faulted both the trial and the first appellate courts for improperly evaluating the evidence of identification that was adduced by the prosecution witnesses and arriving at the erroneous conclusion that the appellants had been positively identified at the scene of the robbery.

15. Our re-evaluation of the evidence that was adduced before the trial court leads us to the same conclusion as the two courts below. This is because; the appellants were known to the identifying witnesses prior to the robbery incident; and there was sufficient light which enabled the said prosecution witnesses to identify the appellants. The appellants' identification of the appellants was that of recognition and not a mere identification of a stranger. As was held by this Court in Anjononi & Others –v- Republic [1980] eKLR where the evidence of recognition was in issue:

> " This was, however, a case of recognition, not identification, of the assailants; 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. We drew attention to the distinct – between recognition and identification in Siro ole Giteya v The Republic (unreported)."

16. We, are therefore, unable to disagree with the concurrent finding of fact made by the two courts below that the appellants were indeed positively identified during the course of the robbery.

17. The appellants urged the Court to find that the evidence adduced by the prosecution witnesses did not establish the necessary ingredients to support the charge of robbery with violence under Section 296 (2) of the Penal Code. The appellants pointed out that it was not established to the satisfaction of the Court the type of weapon used or the number of assailants who participated in the robbery. As was held by this Court in Oluoch –v- Republic [1984] eKLR:

> " Under Section 296 (2) of the Penal Code robbery with violence is committed in any of the following circumstances:
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> 1. The offender is armed with any dangerous or offensive weapon or instrument, or
> 2. the offender is in company of one or more person or persons or
> 3. at or immediately before or immediately after the time of the robbery the offender wounds, beats, striker or uses other personal violence to any person."

18. In the present appeal, the prosecution was required to establish any of the above ingredients to establish the charge of robbery with violence under Section 296 (2) of the Penal Code. As was found by the two courts below, the prosecution was able to establish that the complainant was injured during the course of the robbery when she was cut on her head with a sharp object. It was immaterial whether the sharp object was a panga or an axe. The prosecution was also able to establish to the satisfaction of the two courts below that the appellants, being more than one, committed the robbery. Again, we cannot, disturb the concurrent finding of fact by the courts below in regard to the ingredients of the offence of robbery with violence that was established by the prosecution.

19. The alibi defence adduced by the appellants, in our considered view, was properly evaluated by the two courts below who found the same did not displace the strong culpatory evidence that was adduced by the prosecution witnesses which had placed the appellants at the scene of crime. Again, without stronger evidence, we are unable to disagree with the concurrent finding of fact by the two courts below.

20. The upshot of the above is that the appellants' appeal against conviction lacks merit and is hereby dismissed.

21. On sentence, we have considered the entire circumstances of the case and the appellants' respective mitigations. We are of the considered view that the appellants should benefit from the recent developments in sentencing jurisprudence that was not available to them at the time of their initial sentencing both by the trial court and the first appellate court. The respective sentences of death that were imposed upon each of the appellants is set aside and we substitute therefor a sentence of thirty-five (35) years imprisonment which shall take effect from 6th August 2012, when they were first arraigned before the trial court.

22. It is so ordered.

DATED AND DELIVERED AT NYERI THIS 26TH DAY OF APRIL, 2024.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR