Kigotho v Republic (Criminal Appeal 62 of 2018)
[2024] KECA 1026 (KLR) (26 April 2024) (Judgment)

Neutral citation: [2024] KECA 1026 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 62 OF 2018

J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA

APRIL 26, 2024

BETWEEN

JOHN WANJOHI KIGOTHO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Murang'a (Kiarie, J.) dated and delivered on 19th August, 2016inCriminal Appeal No. 154 of 2016)

JUDGMENT

1. The appellant, John Wanjohi Kigotho, was charged with three counts of robbery with violence contrary to Section 296 (2) of the *Penal Code*. The particulars of the offence were that on 18th November 2012, at Kayu village in Kangema in Murang'a County, the appellant, jointly with others not before court, while armed with a pistol, robbed Rebecca Muthoni, Peter Muchiri and Daniel Mwangi, (the complainants), of cash, mobile phone and various items listed in the charge sheet all valued at Kshs. 16,900/-. When the appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge.

2. After a full trial, the appellant was convicted of one of the counts of robbery with violence but acquitted of the two other counts. He was sentenced to suffer death.

3. Aggrieved by this verdict, the appellant filed an appeal to the High Court sitting at Murang'a. In his petition of appeal, the appellant challenged his conviction, inter alia, on the basis that he had been convicted on the evidence of identification that did not meet the legal threshold. He faulted the trial magistrate for convicting him on the basis of insufficient and inadequate evidence of the prosecution that did not establish his guilt to the required standard of proof. He was of the view that his defence was not considered before the trial magistrate arrived at the verdict. He urged the first appellate court to allow his appeal.

4. In its considered judgment, the High Court (Kiarie W. Kiarie, J.) dismissed the appeal. The learned Judge found as a fact that the appellant was apprehended at the scene of crime, was found with some of the items which had just been robbed from the complainant and further that circumstantial evidence eliminated any doubt that existed in regard to the guilt of the appellant.

5. At the material part of his judgment, the learned Judge had this to say:

> " Though the trial magistrate did not give much weight to the issue of identification, it is worth noting that the appellant was arrested at the complainant's gate and had not had any chance to change his clothes. Even without invoking the doctrine of recent possession, the appellant was arrested at the scene of crime with some of the items robbed from the complainant. The Court of Appeal on the doctrine of recent possession in the case of Matu v Republic[2004] IKLR 510 stated:
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> 'The inevitable conclusion therefore, is that the appellant was in possession of the goods stolen from the complainant's kiosk and he could not offer any acceptable explanation of how he came by them. The two courts below came to the same conclusions and rightly so, in our view, that the appellant was one of the robbers.'
>
> In invoking the doctrine of recent possession, the learned trial magistrate did not err but was merely bolstering his argument in an already strong case against the appellant."
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> The first appellate court then dismissed the appellant's appeal both against conviction and sentence."

6. Undeterred, the appellant has filed his second and final appeal to this Court. In this memorandum of appeal, the appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of the prosecution's evidence that did not establish his guilt to the required standard of proof. The appellant was of the firm view that the courts below had wrongly applied that doctrine of recent possession as the ownership of the alleged recovered items had not been established. He faulted the court for confirming the sentence of the appellant without taking into consideration his mitigation. In the premises, the appellant urged the Court to allow the appeal.

7. During the hearing of the appeal, Prof. Nandwa for the appellant submitted that the entire evidence adduced by the prosecution did not establish the appellant's guilt to the required standard of proof. He asserted that the court did not address the question whether the appellant was found in possession of the items that were alleged to have been robbed from the complainant, and if so, whether the said items were properly identified and established to belong to the complainant. In the absence of this proof, learned counsel for the appellant urged this Court to find that the doctrine of recent possession could not be applied in the circumstances. He pointed out that there were contradictions in the testimony of the prosecution witnesses in regard to what items were robbed from them. On sentence, Prof. Nandwa urged the Court to re-consider the death sentence that was imposed on the appellant as in his view, the same was harsh and excessive.

8. Mr. Onjoro, for the respondent, relied on their written submissions. In the said submission, the respondent urged the Court to dismiss the appeal on the grounds that; the charge was proved to the required standard of proof; the appellant, while armed with a pistol, and in the company of others, robbed the complainants of their property; the appellant was identified by one of the victims; the appellant was apprehended immediately after the robbery was committed while at the scene of the robbery; the doctrine of recent possession was properly applied in the appellant's case. The respondent urged the Court to uphold the appellant's conviction and sentence.

9. This is a second appeal. Our mandate on second appeal is confined to consideration of matters of law only as provided under Section 361 of the *Criminal Procedure Code*. In *Karingo v Republic* [1982] KLR 213, the Court held thus:

> "A second appeal must be confined to points of law and this Court will not interfere with concurrent findings arrived at in the two courts below unless based on no evidence. The test to be applied on second appeals is whether there was evidence on which the trial court could find as it did (*Reuben Karari s/o Karanja v R* [1956] 17 EACA 146."

10. In the present appeal, the appellant has essentially raised three issues for our determination:

    1. Whether the prosecution proved the charge of robbery with violence contrary to Section 296 (2) of the Penal Code to the required standard of proof.
    2. Whether the doctrine of recent possession was properly applied to convict the appellant.
    3. Whether the death sentence that was imposed on the appellant should be interfered with by the court.

11. In regard to the first issue, it was the prosecution's case that on the night of 18th November 2012, at Kayu Village, the home of the complainant was invaded by robbers. The robbers, who posed as police officers, were armed with a pistol. They managed to gain access to the complainant's residence after identifying themselves as police. They then robbed the complainant of cash, their mobile phones and other valuables. It was the prosecution's case that soon after the robbery, the complainants' raised alarm resulting in the appellant's apprehension at their gate by members of the public. The appellant was found in possession of the three radios and a battery which had a few moments earlier, been robbed from the complainants. He was taken to the police station where he was later arraigned in court and charged with the offence that he was convicted.

12. Both the courts below found as a fact that although the appellant's identification during the robbery could not, in the circumstances, be said to be watertight, nevertheless, the evidence adduced by the complainant in regard to the clothes that the appellant wore and in addition, the fact that he was apprehended by members of the public within the vicinity where the robbery incident had been committed, established that indeed the appellant had participated in the robbery. Our re- evaluation of the findings by the two court's below in light of the submission made before us leads us to the same conclusion that the evidence adduced by the prosecution in that regard established to the required standard of proof that the appellant was one of the robbers. We are unable to depart from the concurrent findings of fact by the two courts below.

13. As regards the application of the doctrine of recent possession, this Court in *Eric Otieno Arum v Republic* [2006] eKLR held thus:

> "In our view, 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, 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."

14. In the present appeal, the appellant urged that the property which was found in the appellant's possession was not established to belong to the complainants. The appellant submitted that in the

absence of such positive identification that the stolen property belonged to the complainants, the doctrine of recent possession cannot be applied to convict the appellant.

15. What was the evidence that was adduced by the prosecution in this regard? The complainants testified that they were robbed of three small radios and a battery. When alarm was raised and the appellant was arrested a few moments after the robbery, he was found in possession of the radios and the battery hidden within his clothing. When the complainants testified before court, the appellant did not lay claim to the said radios or the battery. He did not challenge the evidence of the complainants that they owned the said radios and battery.

16. The appellant cannot raise the issue of the ownership of the said stolen properties at this stage of the proceedings i.e. at the second appeal since the appellant did not challenge the ownership of the said items during trial, and in the first appeal. This Court, cannot in the circumstances disagree with the concurrent findings of the two courts below that the complainants proved ownership of the stolen items that were found in the appellant's possession when he was apprehended by members of the public soon after the robbery incident.

17. Both the trial and the appellate court properly and correctly applied the doctrine of recent possession in further proof that the appellant committed the robbery. The appellant's appeal against conviction in the circumstances, lacks merit and is hereby dismissed.

18. On sentence, the appellant was sentenced to death by both the trial and the first appellate court before the recent jurisprudence regarding how courts should consider the mitigation of the convict before imposing such sentence. We agree with appellant that in the circumstances of the case the death sentence that was imposed on him was harsh. We have considered his mitigation. We set aside the death sentence that was imposed on him and substitute it with a sentence of twenty (20) years imprisonment which shall take effect from 19th November 2012, when the appellant was arrested.

19. It is so ordered.

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

JAMILA MOHAMMED

JUDGE OF APPEAL

.....

L. KIMARU

JUDGE OF APPEAL

.....

A. O. MUCHELULE

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR