Kinywa & another v Republic (Criminal Appeal 37 of 2017)
[2024] KECA 514 (KLR) (26 April 2024) (Judgment)

Neutral citation: [2024] KECA 514 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 37 OF 2017

MSA MAKHANDIA, M NGUGI & PM GACHOKA, JJA

APRIL 26, 2024

BETWEEN

SILVESTER MUASYA KINYWA ..... 1ST APPELLANT

JOSPHAT MADOLI SIMWA ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (G.W. Ngenye-Macharia, J.) dated 11{{^th}} October, 2016 in HCCRA No. 52 & 54 of 2014)

JUDGMENT

1. Silvester Muasya Kinywa and Josphat Madoli Simwa, the appellants, have preferred this appeal against the decision of the High Court of Kenya at Nairobi (G W Ngenye-Macharia, J.) (as she then was) in which the first appellate court dismissed their appeal against conviction and sentence.

2. The appellants were jointly 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 13th December (year undisclosed), at about 19.30 hours at Kwa Njenga area in Embakasi Division within Nairobi County, the appellants, jointly with others not before the court, while armed with a dangerous weapon namely a pistol, robbed Ali Ibrahim Kshs. 1,570.00 cash and a mobile phone make Nokia 1110 valued at Kshs. 4,000.00, all valued at Kshs. 5,570.00 and at or immediately before, or immediately after the time of such robbery, threatened to use actual violence to the said Ali Ibrahim.

3. When the appellants were arraigned before the trial court on 16th December, 2011, they pleaded not guilty to the offence. After a full trial, the trial court held that the prosecution had established beyond reasonable doubt that the appellants had committed the offence. They were accordingly convicted and sentenced to death.

4. Aggrieved by those findings, the appellants appealed at the High Court. Upon re-evaluating the evidence that was before the trial court, the learned Judge dismissed the appeal and upheld both the conviction and sentence. It is those findings that have impelled the appellants to file the present appeal.

5. This being a second appeal, section 361 of the *Criminal Procedure Code* limits the jurisdiction of this Court to determining questions of law only. The limitation of this Court's jurisdiction was articulated by this Court in *Karingo vs. R* [1982] KLR 213 as follows:

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

6. The 1st appellant impugned the High Court's findings on the following pertinent grounds which we have taken the liberty to summarize as follows: the charge was incurably defective; that the first appellate court was not properly constituted; that the two courts failed to comply with section 169 (1) and 200 (3) & (4) of the *Criminal Procedure Code*; and that the doctrine of common intention was not proved.

7. The 2nd appellant raised the following relevant abridged grounds challenging the findings of the High Court: that the charge sheet was fatally defective; that the evidence of the prosecution was impeachable under section 163 (1) (c) of the *Evidence Act*; and that the plea was equivocal.

8. All parties filed their respective written submissions that were relied on when the appeal was heard. The 1st appellant filed his written submissions dated 1st December, 2023. On matters of law, the 1st appellant submitted that the charge sheet was defective because the year of the offence was omitted. Furthermore, although the charge sheet indicated that the offence was reported on 14th December, 2011, the evidence of the witnesses was that the offence was reported on 13th December, 2011. Resultantly, since he had a proper alibi on 13th December, 2011, coupled with a violation of section 214 of the *Criminal Procedure Code*, the subordinate courts occasioned a miscarriage of justice. He urged this Court to allow his appeal.

9. The 2nd appellant filed his written submissions dated 29th November, 2019. He submitted that section 200 of the *Criminal Procedure Code* was not complied with. This is because while they conceded to proceed with the trial from where it had reached, they were not informed by the trial magistrate of their right to re-summon and re-hear any witness of their choosing. For those reasons, he prayed that the appeal be allowed.

10. The respondent opposed the appeal. It filed its written submissions dated 4th December, 2023. It submitted that all the ingredients of the charge of robbery with violence were proved to the required standard, being proof beyond reasonable doubt. In addition, it submitted that the learned Judge re-evaluated the evidence and arrived at a just independent opinion. Cautioning this Court to strictly determine matters of law, it submitted that the appellants were properly identified as the perpetrators of the offence. For those reasons, it urged this Court to dismiss the appeal.

11. In order to properly examine the issues for determination, it is important to lay a brief background of the facts as captured in the record. On 13th December, 2011, PW1, the complainant, was heading home at Kwa Njenga. While walking towards Sinai area at around 7:30 p.m., the complainant was approached by 5 people. They surrounded him as one assailant pointed a pistol at his head.

12. PW1 was then asked to sit down and keep quiet. Obeying his attackers, PW1 sat down. While the pistol remained pointed at him, the other 4 accosters ransacked his pockets. They found Kshs. 1,570 cash and a Nokia 1110 mobile phone, both belonging to the complainant. They snatched those items and then commanded the complainant to run ahead and not look back.

13. PW1 did run until he met PW2, PC Ibrahim Marko and PW3, PC Francis Rotich, both police officers patrolling the area, within a 5-minute window period. As he was informing them about what had transpired, the complainant spotted the five men, who had just robbed him, robbing another victim. The complainant confidently identified recognized the appellants on sight, as the security lights that were on in that area were bright, and alerted PW2 and PW3.

14. Upon this turn of events, PW2 and PW3 commanded the perpetrators to stop but they fled the scene. However, PW2 and PW3 managed to arrest the appellants while the others escaped. While being arrested, the 2nd appellant threw a mobile phone on the ground, and PW1 instantaneously identified it as belonging to him. PW2 called PW1's mobile number and that is when they ascertained that the said mobile phone affirmatively belonged to PW1.

15. During the course of trial, the trial magistrate who had the conduct of the matter was transferred. As a matter of law and practice, the said trial magistrate was replaced by another magistrate. Consequently, on 26th April, 2013, the court record reveals as follows:

> " Court: section 200 *CPC* extended (sic) to the accused person in a language they understand – Swahili and which they reply.
>
> Accused 1 – I request the matter to proceed from where it had reached.
>
> Accused 2 – I request the matter to proceed from where it had reached.
>
> Court – section 200 complied with."

16. The trial proceeded. At the close of the prosecution case, the trial court found that a prima facie case had been established against the appellants. When placed on their defences, the appellants elected to give unsworn testimony. DW1's testimony was that on 13th December, 2011, at around 7:30 p.m., he was on his way home from work when he was apprehended by police officers. He was accused of robbing the complainant which he denied. He maintained that he had been framed. Similarly, DW2 testified that on the same day and time, he was confronted by police officers on his way home. He was then informed that he was under arrest for committing the offence. He also lamented that he had been framed.

17. As stated, on a second appeal, this Court is confined to determining matters of law. Accordingly, we find that the following issues of law fall for determination: whether the charge sheet was defective; whether section 200 of the *Criminal Procedure Code* was complied with; whether section 163 (1) of the *Evidence Act* was adhered to; and whether the doctrine of common intention was proved to the required standard of proof.

18. Section 134 of the *Criminal Procedure Code* establishes the constituent elements of a charge sheet as follows:

> " Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

19. The relevance of the said provision was enunciated by this Court in *Sigilani vs. Republic* (2004) 2 KLR, 480 as follows:

> "The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific (sic) charge that he can understand. It will also enable the accused to prepare his defence."

20. On the first issue, the appellants contended that the charge sheet was defective on account of the fact that it did not disclose the year of the offence. However, we find that notwithstanding, the charge sheet met the parameters set out in section 134 of the *Criminal Procedure Code* to the extent that it contained the necessary particulars of the offence. Furthermore, the unwavering evidence of the prosecution affirmed that the appellants committed the offence that they were charged with on 13th December, 2011. The omission of the year of the offence was thus curable under section 382 of the *Criminal Procedure Code* for it did not occasion a miscarriage of justice. Suffice to add that they entered an unequivocal plea of not guilty when the offence and the particulars thereof were read to the appellants in a language that they understood. In *Olel vs. Republic* [1989] KLR 444, it was held that:

> "Where a plea is unequivocal, an appeal against conviction does not lie. Section 348 of the *Criminal Procedure Code* (Cap 75) does not merely limit the right of appeal in such cases but bars it completely."

21. Consequently, we find this ground lacking in merit, and it must therefore fail.

22. On the second issue, we note that section 200 (3) of the *Criminal Procedure Code*, which the appellants complained was never complied with, provides as follows:

> "Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re- summoned and reheard and the succeeding magistrate shall inform the accused person of that right."

23. We appreciate that indeed the wording of the said provision are couched in mandatory terms. However, a reading of the proceedings aptly captured on 26th April, 2013 reveals that section 200 of the *Criminal Procedure Code*, in its entirety, was read out to the appellants. We understand it to mean that the appellants were informed of their rights captured in the entire provision. Furthermore, the plea taking was made in clear and unambiguous terms. That ground must consequently fail.

24. The next issue for determination was whether the High Court failed to conform to section 200 (4) of the *Criminal Procedure Code*. The same reads as follows:

> "Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial."

25. We find that the evidence adduced in the trial court was wholly recorded by the convicting magistrate. Thus, the first appellate court found no material prejudice at all and for those reasons, did not set aside the conviction to pave the way for a new trial. We have carefully read the record and we are satisfied that the first appellate court properly revaluated the evidence in upholding the conviction and sentence.

26. The appellants further complained that section 163 (1) (c) of the *Evidence Act* ought to have been invoked. The said section provides that:

> " the credit of a witness may be impeached by the adverse party, or, with the consent of the court, by the party who calls him by proof of former statements, whether written or oral, inconsistent with any part of his evidence which is liable to be contradicted."

27. The appellants only cited the provision in their grounds of appeal but did not address us as to how it was applicable. That ground must consequently fail.

28. On the doctrine of common intention, section 21 of the *Penal Code* provides as follows:

> " When two or more persons, form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence."

29. This doctrine was explained by the Ugandan Court of Appeal in *Ismael Kiseregwa & Another vs. Uganda* [1978] UGSC 6 as follows:

> " In order to make the doctrine of common intention applicable, it must be shown that the accused had shared with the actual perpetrator of the crime a common intention to pursue a specific unlawful purpose, which led to the commission of the offence. It can be shown that the accused persons shared with one another a common intention to pursue a specific unlawful purpose, and in the prosecution of that unlawful purpose an offence was committed, the doctrine of common intention would apply irrespective of whether the offence committed..."

30. In the present case, the prosecution led evidence to establish that the appellants were jointly together when robbing the complainant of his cash and mobile phone. They were later caught red handed attempting to commit the same offence within the same vicinity. The evidence of the prosecution was unshaken and spoke to a collaborative commission of an offence. For those reasons, we find that the said doctrine was properly analyzed and established in the affirmative. That ground must thus fail.

31. Lastly, the appellants lamented that the surrounding circumstances did not justify the death sentence. They argued that since PW1 was not harmed but only ordered to sit down, this Court should interfere with the sentence. Furthermore, they argued that they had been in lawful custody since 2011. The prosecution opposed that argument stating that the sentence was lawful.

32. Section 361(1)(a) of the *Criminal Procedure Code* provides that the Court of Appeal shall not hear an appeal under this section on a matter of fact, and severity of sentence is a matter of fact. The appellants in essence argued that the sentence meted out was severe. It is premised on this provision that we see no reason to interfere with the sentence imposed upon the appellant. Be that as it may, the sentence meted out was lawful. Consequently, the appeal against sentence lacks merit and it is hereby dismissed.

33. In view of the foregoing, we are not persuaded that the appellants' appeal is merited. The upshot of our above analysis is that the appeal is dismissed. We affirm the conviction and uphold the sentence.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR