Murunga & another v Republic (Criminal Appeal 207 of 2018)
[2024] KECA 550 (KLR) (23 May 2024) (Judgment)

Neutral citation: [2024] KECA 550 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 207 OF 2018

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

MAY 23, 2024

BETWEEN

KENNEDY MURUNGA ..... 1ST APPELLANT

WYCLIFFE MBISHI ADRIANO ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgement of the High Court of Kenya at Kakamega (Sitati, J.) dated 15th November, 2017 in HCRA No. 33 of 2015 consolidated with 35 of 2015)

JUDGMENT

1. Kennedy Murunga (Kennedy) and Wycliffe Mbishi Adriano (Wycliffe), who are the 1st and 2nd appellants respectively herein, together with four others, were charged before the Kakamega Chief Magistrate Court with the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. It was alleged that on the night of 24th and 25th December, 2013 at Lurambi estate, while armed with dangerous weapons namely a gun, rungus, and pangas, they robbed BA Oyungi (B) of several items, all valued at Kshs. 548,000/= and immediately before the time of such robbery they used actual violence to the said B.

2. The appellants and the co-accused all pleaded not guilty to the charge. At the hearing before the trial court, five witnesses testified in proof of the prosecution case. Kennedy and Wycliff (who were 3rd and 1st accused), Josphat Manyiego [(Manyiego), Felix Majanja(Felix) and Patrick Bahati Majanja (Patrick) who were 2nd, 4th and 6th accused, were each placed on their defence, after Benedict Shivonje Luyiekha (Benedict) who was 5th accused was acquitted under Section 210 of the Criminal Procedure Code. The two appellants and the three co-accused each gave sworn statements in their defence. The trial magistrate upon considering the evidence before her, found the two appellants guilty, of the offence and convicted them, and sentenced each to death, while the three co- accused were all acquitted.

3. The appellants, who were aggrieved by the decision of the trial court, appealed to the High Court. Upon considering the appeal, the High Court upheld the appellants conviction and sentence and dismissed the appeal. The appellants, who were once again disatisfied with the decision of the High Court, appealed to this Court against both conviction and sentence. Their appeal before this Court was initially premised on their self-generated memorandum of appeal in which they faulted the learned Judge for failing to find that the identification parade was not proper; that no description was made in the initial report to the police; that the identification of the appellant was not positive; that the evidence was contradictory and the charge sheet defective; and for dismissing the appellant's defence of alibi.

4. The appellants' counsel later filed a supplementary memorandum of appeal in which counsel faulted the High Court for finding that the case was proved beyond reasonable doubt; and failing to find that the appellant's trial was not fair.

5. Briefly, the prosecution case was that on the night of 24th to 25th December 2013 at around 2.00 am, B was asleep in her house with her sister T, when she was woken up by some noise coming from the side of the main gate. She was not alarmed as she thought that one of her neighbours was coming in. Shortly thereafter, someone stated from outside that they were policemen, and immediately thereafter, the door to her house flew open and five men entered. One was armed with a gun, while the others had pangas and rungus. During this time, both the corridor lights and the next bedroom lights were on, and B could see the assailants as they entered.

6. Upon entering the house, the assailants ordered T to cover her face and, lie on the bed facing the wall. Two of the robbers stood next to B issuing orders as to what items were to be taken from the house while the others took the items as ordered before they all left. At some point, the assailants threatened to rape the two victims, but B pleaded with them not to rape them, but to take whatever they wanted.

7. After the assailants left, the robbery was reported to the police who commenced investigation. On 30th December, 2013 at about 3: 00 am, Inspector Joseph Ndonda Kimanga, the Deputy Officer in charge of Kakamega Police Station, Cpl David Sunguti, the in charge of Crime section at the station, and other police officers acting on information from an informer, proceeded to Muranda area where they searched various houses. They first went to the house of Joseph Manyengo (2nd accused) where 2 brooms and a roll of cannabis sativa (bhang), and 5 litres of changaa were recovered. Manyengo, led the officers to the house of Patrick who was not in the house, but his son Felix led the officers to the house of Kennedy, where 10 rolls of bhang was recovered. Kennedy and his brother Bernard were apprehended. The apprehended persons then led the officers to the house of Wycliffe where a black suitcase, an electric lamp, and a handbag were recovered. Several other items were also recovered from a suspect who escaped.

8. All the recovered items were identified by B as part of the items that were stolen from her house during the robbery. Identification parades were later organized by Inspector Harrison Onyapidi the then OCS of Ziwa Police station, and B was able to identify the two appellants and Patrick, as having been among the gang who robbed her.

9. In their sworn statement of defence each of the appellants denied committing the offence, and explained that they were each arrested from their respective houses after the houses were searched and changaa was recovered. Wycliffe stated that a mattress and 10 rolls of bhang were also recovered from his house. He admitted having participated in an identification parade but maintained that the identification parade was not properly conducted as the witness identified him after the police officer stood infront of him and asked her whether he was the one.

10. On his part, Kennedy testified that while at his home on 30th December, 2013, Police officers arrived, arrested him, searched the house and recovered 2 litres of Chang'aa. He was then taken to Kakamega Police Station where he was charged with an offence he knew nothing about. He also testified that he was not aware of any identification parade conducted, and that B never identified him.

11. In support of the appeal, the appellants filed written submissions and their advocate also filed supplementary submissions which we do not find necessary to reproduce herein. Suffice to note that the appellants relied on David Mwita Wanja and 2 Others vs Republic (2007) eKLR in support of the contention that the evidence on identification and recognition that was relied upon was not proper; that Kennedy did not participate in the parade as his name was not on the lists of the members of the parade; that for the evidence of identification to have some probative value, the identification parade must comply with the laid down procedure; and that B was told to identify the suspect, which is contrary to the standing orders relating to identification parades.

12. On the alibi defence that was raised by appellants, it was argued that the same was never rebutted by the prosecution, as the appellants evidence that on the material day, they were at their respective homes was not controverted; that when one raises an alibi defence, it is not upon him to prove the truth of the said alibi as the burden of proving the case to the required standard always remains with the prosecution and never shifts to the defence. Reliance for this proposition was placed on Kiarie vs Republic (1984) KLR 739.

13. The respondent, who was represented by Ms. Busienei from the office of the Director of Public Prosecution, opposed the appeal. In submissions dated 19th October 2023, Ms. Busienei submitted that the ingredients of the offence of which the appellants were charged were proved to the required standard; that this was apparent from the evidence of B who stated that she was accosted by five men who were armed with a gun and pangas; that she was able to see the assailants clearly as their faces were not masked, and the lights in the room opposite hers as well as the lights on the corridor were on; that when the robbers entered the house, Wycliffe stood beside B's bed giving her commands, while Kennedy told Wycliffe what to take; that the robbers had torches that also helped B to see them and to observe their physical attributes, and this made it possible for her to pick out the appellants during the identification parade.

14. Ms. Busienei submitted that in carrying out the identification parade, Inspector Harrison Onyapidi, complied with all the procedures governing police identification parades as provided for in the Police Force Standing Orders pursuant to the *National Police Service Act*, as explained in R v Mwango s/o Manaa and Ssentale v Uganda.

15. With regards to the doctrine of recent possession, Ms. Busienei contended that B confirmed and positively identified the stolen items that Wycliffe had been found in possession of, and that Wycliffe was not able to explain how he came into possession of the said items. In addition, counsel maintained that the appellant's alibi was considered and rightly rejected as the alibis were only raised during the defence hearing, and were not relevant as they related to the date of arrest which was on 30/12/2013, and not the date of the robbery.

16. This being a second appeal, the jurisdiction of this Court as specified under Section 361(1) of the Criminal Procedure Code is limited to matters of law only. As stated by this Court in Chamagong vs. Republic (1984) KLR 611:

> "A court on appeal will not normally interfere with a finding of fact by the trial Court whether in a Civil or Criminal case unless it is based on no evidence or on a misapprehension

of the evidence, or the Judge is shown demonstrably to have acted in wrong principles in reaching the findings he do."

17. We have considered the record of appeal, the oral and written submissions, and the law, bearing in mind our jurisdiction as aforestated. One material concurrent finding of fact established by the two lower courts, is that B was attacked and robbed of several items on the night of 24th and 25th December, 2013 by a gang of robbers who were at least three. B's evidence was that the assailants were armed with pangas and rungus, and even threatened to rape her and her sister. The ingredients of the offence of robbery with violence under Section 296(2), as laid out in Johanna Ndungu vs Republic 1996 eKLR, that is, theft accompanied by threats of violence, perpetrated by more than one person, armed with dangerous weapons, were, therefore, established. Another material concurrent finding of fact was that the two appellants were amongst a group of persons who were arrested for the robbery a few days later.

18. We discern three main issues that fall for our determination.

    These are, first, whether the two appellants were positively identified as having participated in the robbery that took place at B's house; second, whether some of the stolen items were recovered from any of the two appellants; and third, whether the doctrine of recent possession can be applied to the circumstances that were before the trial court. With regard to the appeal against sentence, there is the issue whether it is within this Court's jurisdiction to intervene, and if so whether the death sentence imposed upon the appellants was lawful

19. Before we address the main issues that we have identified, there are some other issues that we must dispose of at the outset. First, is an issue that was also raised in the supplementary memorandum of appeal concerning the violation of the appellant's right to a fair trial, and, second, is the issue whether the charge against the appellants was defective. We have not given these issues much prominence because they were not issues that were raised in the trial court, nor were they seriously canvassed in the High Court.

20. In John Kariuki Gikonyo v Republic [2019] eKLR, this Court held that where an issue which is raised on second appeal, was neither raised in the trial court, nor in the first appellate court, the second appellate court cannot deal with the issue because it does not have an opinion from either of the two lower courts, from which it can address the issue on second appeal. In the instant appeal, other than a blanket statement that the appellants were not accorded a fair hearing, there are no details in the appellants' submissions regarding how the appellants rights were violated, or in what way the chargesheet is defective. Moreover, Kennedy, who had the benefit of being represented by counsel in the High Court, did not raise the two issues either in his memo of appeal or in his submissions. Wycliffe, who was in person, only raised the issue of defect in the chargesheet in his amended petition of appeal, but said nothing on it in his submissions. In our view, nothing turns on this grounds.

21. As to whether the appellants were properly identified, B was the single identifying witness. In Maitanyi vs Republic 1986 KLR 198, the Court laid the following principles in regard to the evidence of identification by a single identifying witness:

    i. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.

    ii. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light, available conditions and whether the witness was able to make a true impression and description.

iii. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.

iv. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.

22. B explained that she was able to see three of the assailants clearly, and this included the two appellants. Both the trial court and the first appellate court warned itself and cautiously addressed the evidence of B. The following extract from the judgment of the first appellate court confirms this:

> "
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> "30. It is clear from the foregoing that a court can still convict on the evidence of a single identifying witness if the evidence is sufficient and the court properly warns itself of the danger of relying on such evidence. In this case the offence was committed at night. B testified that she identified three of her attackers that morning among them these two appellants. In her testimony she testified that before her bedroom was broken into, the robbers who entered her house through a window then opened the main door, switched on the lights of the bedroom opposite hers and also the light along the corridor. She averred that the light from these two places lit her room and further that when the robbers broke into her room they had torches which were lit.
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> 31. B also testified that the appellants were close to her during the robbery, as the 1st appellant was receiving instructions from 2nd appellant, and that she could hear them and also see them. The bedroom light and the light in the corridors were electric lights which were bright enough. I am therefore satisfied that B properly identified the appellants who also took time in choosing what items to take from the room and what not to take. Bgave a very congent and considered account of the events of that morning raid. She remained unshaken even under cross examination by the appellant.
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> It is my considered opinion that the circumstances were optimal for a positive identification with or without any other corroborative evidence."

23. The two lower courts were alive to the fact that B was a single identifying witness and appropriately addressed her evidence. On our part, we are satisfied that B was clear on the source of light that enabled her to see her assailants. She was also clear of her proximity to the assailants, the time they took in collecting the stolen items, and the opportunity she had to observe the assailants. The circumstances as enumerated by B were appropriate for a positive identification, and this was consistent with her picking out the two appellants at the identification parade.

24. The identication of Kennedy by B at the identification parade was flawless as the arrangements of the parade members was done by the Parade officer, Inspector Onyapindi, in accordance with the Force Standing Orders. Kennedy's contention that he did not participate in the parade was, therefore, properly rejected. As for Wycliffe, the identification parade was vitiated by the fact that the members of the parade were the same as that of Kennedy and the identifying witness being the same, the parade exposed Wycliffe, as the new face in the parade.

25. The learned Judge of the 1st appellate court was alive to the inadequacy of the evidence of identification in regard to Wycliffe, and, therefore, upheld Wycliffe's conviction based on the doctrine of recent

possession. The doctrine of recent possession is a principle that allows a court to draw an inference of guilt where the accused is found in possession of recently stolen property and is not able to provide a satisfactory explanation for his possession.

26. In Erick Otieno Arum v Republic [2006] eKLR, this Court stated as follows on the application of the doctrine of recent possession:

> "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 that; that 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 person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses."

27. The evidence of Cpl Sungut and Inspector Joseph Nonda both of whom testified that they carried out a search in Wycliff's house a few days after the robbery, and recovered a black suitcase, a rechargeable electic lamp and a handbag, and that the search and recovery were done Wycliffe's prescence; and the evidence of B who identified the items as some of her properties that were stolen during the robbery, satisfied the requirements in Erick Otieno Arum v Republic (supra), as it proved the recovery of the items from Wycliffe, and the positive identification of the items as belonging to B and having been stolen from her house.

28. In his defence, Wycliffe simply denied the recovery of the items from his house, but given the clear evidence of recovery, his denial was not sufficient to rebut the fact that the items were recovered from his house. As Wycliffe did not provide any satisfactory explanation for his possession of the stolen items, the recovery provided independent evidence incriminating Wycliffe with the commission of the robbery against B. Therefore, the learned Judge of the 1st appellate court did not err in upholding Wycliffe's conviction based on the doctrine of recent possession.

29. Lastly, on the issue of sentence, as earlier stated under Section 361(1)(a) of the Criminal Procedure Code, this Court's jurisdiction on second appeal is limited to issues of law, and severity of sentence is excluded from the Court's jurisdiction as it is identified as an issue of fact. Under Section 361(1)(b) the Court has jurisdiction to consider the issue of sentence only where it was enhanced by the High Court or where the surbodinate court had no power to impose the sentence.

30. Section 296(2) of the Penal Code prescribes the death penalty as the mandatory sentence for the offence of robbery with violence. The appellants herein were sentenced to death by the trial court which had the power to impose that sentence. Since the Supreme Court decision in Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR (Muruatetu 1) which declared unconstitutional the mandatory nature of the death sentence provided under section 204 of the Penal Code for the offence of murder, the issue of the constitutionality of the mandatory death sentence for the offence of robbery with violence under Section 296(2) of the Penal Code has remained a matter of interesting debate.

31. The Supreme Court has waded in the discussion by giving guidance in Francis Karioko Muruatetu & Another vs. Republic; Katiba Institute & 5 others (Amicus Curiae) (2021) eKLR (Muruatetu 2) ; that (Muruatetu 1) is not applicable to the offence of robbery with violence, and that the sentence of death provided under Section 296(2) of the Penal Code remains a lawful sentence until an appropriate

petition on the constitutionality of that sentence, in regard to that offence, is heard by the High Court and escalated to the Court of Appeal. For this reason the sentence imposed on the appellants is lawful and we have no jurisdiction to intervene.

32. The upshot of the above is that, we uphold the appellants conviction and sentence, and dismiss the appeals in their entirety.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF MAY, 2024

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR