Andunkai v Republic (Criminal Appeal 42 of 2016) [2024] KECA 476 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KECA 476 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 42 OF 2016

F SICHALE, FA OCHIENG & WK KORIR, JJA

MAY 9, 2024

BETWEEN

EVANS MUYANZI ANDUNKAI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Nakuru (M. Odero & A. Ndung'u JJ) delivered and dated 30th September 2016 in HCCRA No. 304 of 2010)

JUDGMENT

1. The appellant, Evans Munyanzi Andukai, was charged with the offence of robbery with violence contrary to section 296(2) of the *Penal Code*. The particulars of the charge stated that on 28th June 2009 at Green Park in Naivasha District within the then Rift Valley Province, the appellant jointly with others not before the Court while armed with a pistol robbed Akalia Indonya of his mobile phone make Motorola C113, ignition keys, assorted household goods and a motor vehicle registration number KAK 365W make Toyota Prado all valued at Kshs. 2,743,500 and at or immediately before the time of such robbery threatened to use actual violence on the said Akalia Indonya.

2. The appellant pleaded not guilty to the offence but at the conclusion of the trial he was found guilty, convicted and sentenced to suffer death. Being dissatisfied with the judgment of the trial Court, the appellant preferred an appeal to the High Court which appeal was dismissed by M. Odero & A. Ndung'u, JJ in a judgment delivered on 30th September 2016. The appellant undeterred is once more before us raising the following grounds of appeal: that the death sentence was manifestly harsh; that the learned Judges erred in relying on the uncorroborated evidence of a single witness; and that his defence was dismissed without cogent reasons.

3. In support of the prosecution's case, Akalia Indonya (PW1) testified that on 28th June 2009 he was at his place of work. At about 7.15 pm when taking tea to the appellant who was also at work as a watchman

he was accosted by 4 people. He was about 10 metres from the appellant's work station and although the appellant saw what was happening to him he did nothing. One person brandished a pistol while another one strangled him. The assailants asked him to escort them to his employer's house which he obliged even as the appellant was also called into the house. PW1 then attempted to escape but one of the assailants caught up with him and while he was subdued, the appellant asked him for the car keys. PW1 then asked the appellant to go and raise an alarm but he declined. PW1 was tied and left in the farm and by the time he regained his freedom, the assailants and the appellant were nowhere to be seen.

4. Schoenemann Horst (PW2) stated that he was in Germany on the material day when he received a phone call informing him that his property had been broken into. Upon arriving back in the country, he found that his motor vehicle registration number KAK 365W was missing alongside assorted household items and jewellery valued at over KSh. 2 million. He testified that he left the property in the care of PW1 and the appellant when he went to Germany but did not find the appellant when he came back.

5. Jeffrey Bernard (PW3), the manager of Green Park Estate, testified that on 28th June 2009, he received a phone call from one of the security guards that the car belonging to PW2 had been stolen. He proceeded to the scene alongside his backup security personnel and found PW1 gagged and bound. He did not find the appellant at the scene. He then called the police and informed them of what had transpired.

6. Matayo Musungu (PW4) worked as a gardener for PW2. He stated that on the material day, he was at work until 6.30 pm when he handed over to the appellant after the appellant informed him that he had met his (PW4's) wife taking their ill child to the hospital. When he reported on duty the next morning he found that there had been a robbery the previous night.

7. PW5 was Corporal Michael Korir who testified that he investigated the incident. The witness recounted the evidence he gathered from the witnesses. According to the witness, the evidence led him to the conclusion that the appellant was a participant in the robbery and that is why he had him arrested and charged.

8. In his defence, the appellant denied committing the offence and stated that on the material day 5 people invaded his place of work. They snatched his radio call and mobile phone. Thereafter, they ordered him to follow them into the house where they told PW1 to lie down. The assailants ransacked the place before leading him to the parking lot where they bungled him into the vehicle and drove off. After approximately 1 Km, he was asked to take a certain drink after which he became unconscious. He later found himself in some isolated house. When he left the isolated house, he found himself at the weighbridge at Mlolongo along Mombasa road where police officers asked a long-distance driver to offer him a lift to his home. On 8th July 2009, he went and reported the matter to the OCS and surrendered himself.

9. When this appeal came up for hearing on the Court's virtual platform, learned counsel Ms Odhiambo appeared for the appellant while learned counsel Ms Kisoo was present holding brief for learned counsel Ms Torosi for the respondent. Counsel for the parties had filed written submissions which they sought to wholly rely on.

10. In support of the appeal, Ms Odhiambo set off her submissions dated 28th April 2023 by referring to the case of *Stephen M'Irungu v Republic* [1982-88] KLR 360 in acknowledgement of the limited jurisdiction of this Court on a second appeal. Turning to the sentence imposed upon the appellant, counsel submitted that the same was manifestly excessive and harsh because the Court did not consider all the circumstances of the case. Counsel cited, among other decisions, the cases of *William Okungu Kittiny v. Republic* [2018] eKLR and *George Onyango Kesera & Another v Republic* [2019] eKLR in

support of the proposition that the death penalty is a discretionary maximum sentence. According to counsel, had the trial Court considered the circumstances of the case it would have imposed a more lenient sentence. Counsel consequently urged the Court to allow the appeal.

11. In urging this Court to dismiss the appeal on conviction, Ms Torosi through the submissions dated 27th November 2023 relied on the case of *John Kariuki Gikonyo v Republic* [2019] eKLR in support of the argument that the offence of robbery with violence has three elements and the prosecution is only required to prove one of the elements for a conviction to ensue. Counsel submitted that the prosecution proved that the appellant was involved in the commission of the offence. Counsel additionally relied on the doctrine of common intention as enacted under section 21 of the *Penal Code* and asserted that the appellant was linked to his co- perpetrators. Still pursuing her argument that the appellant had common intention with the other robbers, counsel cited the case of *Uganda v. Hussein Hassan Agade & 12 others*, Criminal Session Case No. 0001 of 2010 as providing the ingredients of the principle of common intention and submitted that the prosecution had proved that the appellant and the other robbers had common intention, either before or in the course of the events, to prosecute an unlawful purpose. In rebuttal of the appeal against sentence, counsel stated that the death sentence is legal and the appellant was accorded an opportunity to mitigate prior to the sentencing. According to counsel, the circumstances of this case demanded no lesser sentence than that which the trial Court meted upon the appellant. Consequently, counsel urged us to dismiss the appeal in its entirety.

12. As this is a second appeal, we are required by section 361(1)(a) of the *Criminal Procedure Code* to only consider issues of law. We are also to approach with deference the concurrent findings of fact by the trial Court and the first appellate Court except where such conclusions are not supported by the evidence. The said legal position has been aptly articulated by the Court in many of its decisions and it suffices to recall the words of the Court in *Adan Muraguri Mungara v Republic* [2010] eKLR that:

> " Adan is now before us on his second and final appeal which may only be urged on issues of law (section 361 Criminal Procedure Code). As this Court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere."

13. Upon considering the record of appeal, the submissions by counsel and the authorities cited, we find that the determination of the questions as to whether the appellant was linked to the offence and whether the death sentence was appropriate in the circumstances of the case will put this appeal to rest.

14. The offence with which the appellant was charged is legislated under section 296(2) of the *Penal Code* as follows:

> "If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

15. Therefore, for a conviction for the offence of robbery with violence to ensue, the prosecution must prove that during the commission of the theft, the accused person was armed with a dangerous weapon; or was in the company of another person (or other persons); or immediately before, during or after the commission of the robbery had used actual violence against the victim or any other person. It should be recalled that these ingredients are disjunctive and the proof of any of the three ingredients is sufficient

to sustain a conviction under section 296(2) of the *Penal Code*. Thus, in *Dima Denge Dima & others v Republic* [2013] eKLR it was held that:

> " The elements of the offence under Section 296
>
> (2) are, however, three in number and they are to be read not conjunctively, but disjunctively. One element is enough to found a conviction."

16. In this case, the evidence from both the prosecution and the defence tally on the occurrence of a theft by more than one person. A dangerous weapon being a pistol was spotted by PW1 in the possession of one of the robbers. Perhaps just to rehash that evidence, PW1 and the appellant were both at the scene that fateful night. They both testified that the robbers who were armed accosted PW1 and forced him to the ground. PW1 and the appellant both confirmed the theft of PW2's property. Indeed, the appellant claimed to have taken a forced ride on PW2's stolen motor vehicle. To our minds, therefore, the circumstances and the evidence on record clearly portrays a scenario depicting the ingredients of the offence of robbery with violence.

17. Having confirmed the occurrence of the offence, the unanswered question remains as to whether or not the appellant was linked to the offence. The first appellate Court relied on section 20(1)(b) and (c)of the *Penal Code* to infer that the appellant was a principal offender. We agree with the findings of the learned Judges for the following reasons. The appellant was employed as a watchman by PW2. On the material day, he misled PW4 to leave the premises earlier than usual by informing him that his (PW4's) child was unwell. The appellant later stood unmoved and watched as the other robbers accosted PW1. He is also implicated when he goes to secure the car keys from PW1 before disappearing with the robbers. Further, his story in defence is also not convincing. If the appellant was held against his will by the robbers, we do not understand why he did not make a report on the spot to the police officers who allegedly organized a lift for him at Mlolongo.

18. The appellant also submitted that the evidence of PW1 was not corroborated. We do not find merit on this argument as the evidence of PW1, PW4 and the appellant himself placed the appellant at the scene of crime. Additionally, during the robbery, the only witnesses present were PW1 and the appellant. Even so, the two courts below have considered the competing evidence of both sides and concluded that the evidence of PW1 was believable. We find no reason to fault that conclusion. In the result, we do not find any merit in the appellant's appeal against conviction.

19. The other key issue raised by the appellant is with respect to the death sentence. According to counsel for the appellant, the death sentence under section 296(2) of the *Penal Code* is the discretionary maximum sentence and had the appellant's mitigation been taken into consideration, the maximum sentence would not have been imposed. Ordinarily, the question of severity of sentence is a matter of fact that does not fall for consideration by this Court on a second appeal - see section 361(1)(a) of the *Criminal Procedure Code*. For the Court to indulge in the question of sentence, the same must be mainly on the ground of its legality. In this case, we agree with the finding of the High Court that the appellant was accorded an opportunity to mitigate and a legal issue does not arise along those lines. However, we have also reviewed the sentencing proceedings and note that despite the Court considering the appellant's mitigation, the Court proceeded to hand down the death sentence in its mandatory nature.

20. The appellant was sentenced in 2010. As at that time the jurisprudence was such that courts did not exercise discretion when dealing with mandatory statutory sentences. It was in the same vein that the High Court upheld the death penalty. This appeal coming up for hearing at a time when the Court is

in favour of imposition of sentences appropriate to the circumstances of each case, we are inclined to consider the appellant's challenge to the sentence.

21. In this appeal, the victims were not injured during the commission of the offence. It was also on record that the appellant was a first offender. However, on the other hand, the appellant breached the trust his employer had bestowed on him when he aided in robbing the property he was employed to guard. Further, the lost items were never recovered and were of substantive value. Additionally, a dangerous weapon that could have easily resulted in fatalities, had it been deployed, was in the possession of the robbers. Balancing the aggravating and the mitigating factors, we, nevertheless, arrive at the conclusion that the death sentence was not warranted in the circumstances of this case. In deciding on the appropriate custodial sentence, we note that the appellant was charged in July 2009 and sentenced in October 2010 hence he was in pre-sentence custody for about 1 year and 3 months. By virtue of the proviso to section 333(2) of the *Criminal Procedure Code*, the period in which the appellant was in pre-sentence detention ought to be taken into account in imposing the sentence.

22. In the end, the appeal against conviction is without merit and is hereby dismissed. The appeal against the sentence partially succeeds. The death sentence is hereby set aside and substituted with a sentence of 30 years in prison to run from 17th July 2009 when the appellant was first presented before the trial Court.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY, 2024

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR