Longole & another v Republic (Criminal Appeal 5 of 2016)
[2024] KECA 483 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KECA 483 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 5 OF 2016

FA OCHIENG, LA ACHODE & WK KORIR, JJA

MAY 9, 2024

BETWEEN

AMOS LONGOLE ..... 1ST APPELLANT

PATRICK KIPKOECH LELGO ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Judgment of the High Court of Kenya at Nakuru (Maureen Odero, A.K Ndungu) dated 29th January, 2016) in HCCRA No 227 Of 2014 & 88 Of 2015 (Consolidated))

JUDGMENT

1. Amos Longole and Patrick Kipkoech Lelgo, the 1st and 2nd appellants respectively, were charged with robbery with violence contrary to Section 296 (2) as read with Section 295 of the Penal Code. The particulars of the charge were that on the 9th of November 2011, at Londiani Township in Kipkelion District within Rift Valley Province, jointly being armed with dangerous weapons namely pangas, they robbed Simon Kipkurui Keter of Ksh 200/- and a Nokia mobile phone valued at Ksh 2,500 and at or immediately after the time of such robbery wounded the said Simon Kipkurui Keter.

2. The two appellants pleaded not guilty to the charge on 14th November, 2011 in the Senior Resident Magistrate's court at Molo and the matter proceeded to full trial. The Prosecution called a total of four (4) witnesses to prove their case while the appellants continued with their denial of the charge in their defence.

3. We set out a summary of the case that was before the trial court to bring this appeal into context. The fateful day began early on the morning of 9th November 2011, for the complainant Simon Keter PW1. By 6:00am he was walking in Londiani town on his way to a job interview, when two machete wielding

men emerged from a thicket and pounced on him. One of the men whom he later identified as the 1st appellant cut him on the head, arm and leg, while the second appellant held him from behind. Simon raised an alarm as he fell to the ground in pain. The robbers frisked him and took Kshs 200/- and a mobile phone from him before they fled.

4. Simon's distress calls attracted the attention of Eric Serem PW2 and Daniel Kimutai Too PW3, who were workers on duty at Lolsit Academy located next to the scene of the attack. The two workers rushed to the scene. According to PW2, he saw the robbers from a distance of 20 meters away, before they rose up from the ground where they were struggling with the victim and fled. PW3 also confirmed that he saw the appellants before they fled into a maize plantation.

5. PW2 and PW3 escorted Simon to hospital where he was treated and referred to Kericho Hospital for further treatment. While Simon was admitted in hospital, PW2 and PW3 traced the assailants and led to their arrest since they were persons known to them. Phillip Rotich, PW4 a Clinical Officer filled the P3 form in regard to Simon. None of the stolen property was recovered.

6. Both appellants were placed on their defence at the close of the prosecution case. The 1st appellant testified without oath and stated that a day after the alleged incident, he was walking past a hospital when a group of men accosted him. They questioned him seeking to know his place of abode, then they arrested him and handed him over to the police.

7. The second appellant testified on oath and narrated how he was arrested by a group of men who wanted to know whether he was from a place called Kahurura. They released him only to re-arrest him again. He called one Sarah Chemeli, DW3 as his witness to confirm that he was not amongst the robbers, and that she had found him at his home when she went there to fetch water on the morning in question.

8. At the end of the trial, Hon H. M. Nyaga, Senior Resident Magistrate (as he then was), found both appellants guilty and sentenced them to 25 years imprisonment. Being dissatisfied with the judgment of the trial court the appellants filed respective appeals before the High Court. A multiple bench of M.A. Odero and A.K. Ndung'u JJ, considered the consolidated appeals and dismissed them. They confirmed the convictions of both appellants and enhanced the sentence from 25 years imprisonment to death.

9. Undaunted by the failure of their appeal at the High Court, the appellants filed the instant appeal to the Court of Appeal. They assail the judgment of the High court on allegations that the appellate judges erred in law and fact by failing to note:

    i. That the charge was defective.

    ii. That the identification of the appellants by PW1, PW2 and PW3 was made under unclear and unfavorable conditions.

    iii. That,the reason for the enhancement of sentence was not explained.

    iv. That,the sentence of death imposed on the appellant is arbitrarily deprivative of life in breach of Articles 71(1), 70 (a),77 and 26 (3) of *the constitution* among other provisions.

10. The matter was disposed of by way of written submissions. The appellants filed their written submissions in person. They urged the first and second grounds together stating that the appellants' identification was not positive. They cited the case of Abdullah bin Wendo vs Republic (1953) 20 EACA 166, where the court pronounced itself on the need to test the evidence of identification. They pointed out that the offence occurred at 6:00am in the morning, yet no identification parade was held. That from the evidence of PW1, he was ambushed by his attackers and was thus taken by surprise.

That he was immediately cut on the head causing him to bleed and as such, it was safe to presume that he was not only in a state of shock but he was also in excruciating pain. Further that the robbers were with the appellant for a short time and they were wearing black hats. In view of the foregoing they urge, that the circumstances in which the robbery happened was not favourable for identification.

11. In the third ground the appellants submit that their defence was not considered. The 2nd appellant states that he told the trial court that he was at home on 9th October 2011 having woken up at 6:00am and that he only met the 1st appellant at the police station. He pointed out that DW3 his neighbor testified that on the material day she went to fetch water in his home at 6:00am and found him at home making tea.

12. The appellants contend that the trial court readily accepted the evidence of PW2 and PW3 that the 2nd appellant was arrested on 10th November 2011, which he does not dispute, but rejected the evidence of DW3 which fully corroborated the 2nd appellant's defence. That this was evidence of bias on the part of the court contrary to Article 50(1) of *the Constitution*. They argue that the trial court stated that DW3 did not specify when she arrived or left the 2nd appellant's home, yet her testimony was very clear that she arrived at 6:00am and found the 2nd appellant making tea. That she filled six (6) jerry cans with water which she could not have carried away at the same time.

13. The appellants urge that the 2nd appellant could not have been in two places at the same time. That is, robbing PW1 at 6:00am next to the school and at the same time making tea at home. That the prosecution failed to rebut this evidence as provided under Section 309 of the *Evidence Act*.

14. On the fourth ground the appellants urge that it is trite and mandatory that a notice, or warning of enhancement of sentence must be given to an appellant. The appellant is thereby given an opportunity or choice to submit on the illegality of the sentence, or to withdraw the appeal under Section 364 (2) of the Criminal Procedure Code. They aver that the appellants in the instant appeal were not warned of the possibility of enhancement of the sentence.

15. The appellants cite the case of George Morara Achoki v Republic [2014] eKLR in which the Court of Appeal held:

> " ...an appellant must be informed at the earliest opportunity, at the commencement of the hearing of his appeal, that there is a real danger that should the appeal be heard and fail a lesser sentence could be enhanced by the High Court in terms of the said Section 354 of the Criminal Procedure Code."

16. They contend that even the sentence of twenty-five (25) years imprisonment was manifestly excessive in comparison to the value of the items stolen. They refer to the case of Dennis Okembo Manani v Republic [2022] eKLR, where the appellant was sentenced to fifteen (15) years imprisonment for robbing one LG mobile phone valued at kshs. 19,999/-. One pair of shoes valued at Kshs. 5,500/= and cash to totaling 10,600/= all totaling Kshs. 36,099.

17. The respondent's submissions dated 14th April 2023 were filed by learned counsel M/S Esther Torosi, Senior Prosecution Counsel. Counsel submits that their case succeeded in the trial court on the charge of robbery with violence as provided under Section 296 (2) of the Penal Code, because the prosecution proved that:

    a. There was theft of some property;

    b. The accused was not the owner of the property;

c. The offender was armed with dangerous or offensive weapon or instrument, was in company with one other person and used actual violence;

d. The accused took part in the commission of the offence.

18. On whether there was theft of Property which counsel submits that PW1's testimony was that he was walking alone on 9th November 2011 at around 6:00am. He was going for a job interview at a Chinese Company. Suddenly he was ambushed by the two appellants herein who emerged from a thicket. That the 1st appellant was carrying a machete with which he cut him, while the 2nd appellant held him from behind. He fell down in pain. The men took Ksh 200/- and a mobile phone Nokia 1208 valued at Ksh 2500/- from him. The appellants did not claim ownership of the property that was stolen from PW1, hence the first ingredient was proved to the satisfaction of the trial court.

19. Counsel submits that PW2 confirmed having seen two attackers fleeing from the scene where he found PW1 lying on the ground injured. He had been cut with a sharp object. PW1 was therefore, assaulted and injured by two people during a robbery in which he lost his mobile phone and cash. That PW4 Philip Rotich, a clinical officer attached to Londiani Hospital, confirmed that PW1 had a deep cut wound on the scalp and face and cut wounds on the right hand and left knee. That the injuries were likely inflicted by a sharp object such as a machete.

20. Counsel states that the 1st appellate court concluded that PW1 was attacked and robbed by the two appellants herein, who were armed with a machete and a club which are dangerous weapons. Hence there was clear evidence on use of violence against the complainant. That therefore, the 1st appellate court evaluated the evidence and came to the right conclusion that the elements of the offence were satisfied.

21. On identification counsel submits that both appellants faced the first count jointly. That Section 20 of the Penal Code indicates that common intention does not only arise where there is a pre-arranged plan or joint enterprise. She referred to the case of Dracaku s/o Afia vs R [1963] E.A. 363 to urge that common intention can develop in the course of the commission of an offence.

22. Counsel urged that according to PW1, the incident happened at 6.00am and there was enough light by which he saw the robbers well. That PW1 gave a clear and graphic description of the role which each appellant played in the incident which lasted for about 7 minutes, as he pleaded with the robbers not to kill him. That the 1st appellant wore a woolen hat but his face was bare and the witness noted that he had a scar on his forehead near his eyebrows. That the assailants spoke to him as they were attacking him and told him to hand over money and the phone.

23. Counsel submits that PW2 and PW3 responded to PW1's cries for help and arrived at the scene which was only 20 metres outside the school where they worked. That they saw the appellants fleeing from the scene and PW2 who knew them very well later described the 1st appellant by his long dreadlocked hair. That PW3 also knew both attackers by appearance as he used to see them in Londiani town. Counsel asserts that failure to conduct an identification parade was not fatal to the prosecution case, since both PW2 and PW3 knew the appellants before the incident. Further that the identification of the two appellants by the three prosecution witnesses was clear, positive and reliable.

24. On the issue of the enhancement of sentence, counsel contends that the appellants were represented by advocates in the first appeal. That they chose to proceed with the appeal and did not raise any objection despite notice of enhancement of sentence having been given to them. Therefore, that the sentence was proper and legal, hence this ground ought to be dismissed.

25. This is a second appeal. By dint of the provision of Section 361(1) of the Criminal Procedure Code therefore, we are enjoined to consider only matters of law. We cannot interfere with decision of the superior court on matters of fact 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. We may also interfere where, looking at the evidence as a whole, the decisions were plainly wrong, in which case such omission or commission would be treated as a matter of law (see the decision of this Court in Karani v R (2010) 1 KLR 73).

26. We have considered the grounds of appeal, the rival submissions and the law. The first ground that the appellants raised was that the charge was defective. The appellants do not elaborate on the alleged defects in the charge, nor do they submit on this ground. Counsel for the respondent is also silent on this ground. We will therefore, not delve in to it.

27. The two appellants were charged, tried and convicted for the offence of robbery with violence contrary to Section 296 (2) as read with Section 295 of the Penal Code. The ingredients for the offence are satisfied if:

    a. The offender is armed with any dangerous or offensive weapon or instrument or,

    b. The offender is in the company of one or more other person or persons or,

    c. At or immediately after the time of the robbery the offender wounds, beats, strikes or uses any other violence to any person.

    (See the Court of Appeal decision in John Kariuki Gikonyo vs Republic [2019] eKLR).

28. In the record before us there are several undisputed facts. It is not in dispute that the attack against PW1 involved two assailants and that the two assailants were armed with a panga (machete), which is a dangerous weapon. This was the evidence of PW1, PW2 and PW3 respectively. It is also not in dispute that the assailants used the machete to assault and injure PW1 during the robbery. PW4, Phillip Rotich a Clinical Officer attached to Londiani Hospital confirmed that PW1 had deep cut wounds on the scalp and face, a cut wound on the right hand and another on the left knee. In his opinion the injuries were inflicted by a sharp object such as a machete. He produced a P3 form to that effect in evidence. Lastly, it is not in dispute that the appellants took PW1's mobile phone worth Ksh 2500/- and ksh200/- in cash during the attack.

29. From the undisputed facts set out above we are satisfied that the ingredients of the offence of robbery with violence contrary to Section 296 (2) as read with Section 295 of the Penal Code were proved.

30. We turn now to examine the evidence with regard to the identification of the perpetrator(s) which forms the appellant's second ground. The appellants argue that the identification of the appellants by the three identifying witnesses was made under unclear and unfavorable conditions. That an identification parade should have been held to ensure that the identification was positive. In rebuttal the respondent asserts that failure to conduct an identification parade was not fatal to the prosecution case, since both PW2 and PW3 knew the appellants before the incident. Further, that the identification of the two appellants by the three prosecution witnesses was clear, positive and reliable.

31. PW2 and PW3 were the first to arrive at the scene upon hearing PW1's cry for help. According to the two witnesses the scene of the attack was located 20 metres outside the school where they worked. They arrived on the scene before the assailants fled. The time was 6:00am and therefore there was daylight.

PW2 said he was able to see the assailants at the scene. He described the weapons the two men carried as well as the clothes they were wearing and went further to state as follows:

> " The robbers were close to me. They turned to face us before they fled. "

32. To intimate that he knew the two appellants well, PW2 explained as follows:

> " Accused 2's father works at Londiani College. His brothers are even students in the school that I was working in "
>
> Just as PW2 did, PW3 also stated that he saw the appellants well. He was able to give a clear description of the clothes the two men wore. He told the court that he knew both appellants by appearance as persons he used to see in Londiani town.

33.. It is evident therefore, that this was not a case where the witnesses caught fleeting glimpses of the two appellants. Both men had ample time and opportunity to see and identify the assailants well and they were persons known to them before that day. This therefore, is not mere visual identification but a case of identification by way of recognition.

34. This Court in Rotich Kipsongo v Republic [2008] eKLR dealt with evidence of identification by recognition and held that:

> " This Court had occasion to deal with the issue of identification by recognition in several cases, one of them being Kenga Chea Thoya Vs Republic Criminal Appeal No. 375 Of2006 (Unreported) where it said,
>
> "On our own re-evaluation of the evidence, we find this to be a straight forward case in which the appellant was recognized by the witness (PW 1) who knew him. This was clearly a case of recognition rather than identification and as it has been observed severally by this Court, recognition is more satisfactory more assuring and more reliable than identification of a stranger – see Anjononi v Republic[1980] KLR 59."

35. In the said case of Anjononi v Republic [1980] KLR, on which the Court relied in Rotich Kipsongo (supra) the Court stated that:

> " 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."

36. We take note of the fact that no identification parade was conducted. However, in view of the fact that both PW2 and PW3 knew the appellants before this incident, such an identification parade would have, in the circumstances, been superfluous. The failure by police to conduct an identification parade was therefore not fatal in this case. We are satisfied as were the two courts below that the identification of the two appellants by the three prosecution witnesses was clear, positive and reliable.

37. On the third ground the appellants submit that the court failed to explain the reason for the enhancement of the sentence from the original 25 years imprisonment to the death sentence. That they were not warned of the possibility of enhancement of the sentence. On the other hand, counsel contends on behalf of the respondent that the appellants were represented by advocates in the first appeal. That they chose to proceed with the appeal and did not raise any objection despite notice of enhancement of sentence having been given to them.

38. This Court in J.J.W. v Republic [2013] eKLR held as follows on enhancement of a sentence:

> " It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 354(3)(ii) and (iii) of the Criminal Procedure Code. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal."

39. During the first appeal the learned judges, while enhancing the sentence from 25 years imprisonment to death, had this to say;

> "Before the hearing of the appeal the Director of Public Prosecutions did on 3/10/2015 file a Notice of Enhancement of Sentence in line with section 354(ii) of the Criminal Procedure Code. This notice was brought to the attention of the appellants who nevertheless opted to proceed with their appeal. Mr. Obutu advocate argued the appeal on behalf of the 1st Appellant while Mr. Kipkoech represented the 2nd Appellant. Ms Nyakira learned counsel acting for the DPP opposed the appeal. The matter was heard before a two Judge Bench of the High Court in Nakuru."

40. In view of the observation of the first appellate court as captured above, it is evident that the Director of Public Prosecutions did file a Notice of Enhancement of Sentence on 3rd October 2015, as required under Section 354 (3) (ii) of the Criminal Procedure Code. It is also clear that the notice was brought to the attention of the appellants before the hearing of the appeal commenced, and it is not lost on us that the appellants had legal representation. The appellants nevertheless chose to exercise their right of appeal despite the Notice of Enhancement of Sentence. We therefore, find no basis to fault the superior court on the manner in which the enhancement of the sentence was done.

41. Lastly, the appellants argue that the sentence of death imposed upon them is "arbitrarily deprivative of life" in breach of Articles 71(1), 70 (a), 77 and 26 (3) of *the Constitution*. They contend that even the sentence of twenty-five (25) years imprisonment imposed by the trial court was manifestly excessive in comparison to the value of the items stolen. In rebuttal counsel for the respondent asserts that the sentence is proper and legal, hence this ground ought to be dismissed.

42. The record indicates that the superior court was labouring under the handicap of the mandatory nature of the death sentence when it imposed it. This can be seen from the court's pronouncement set out below where it states that:

> " The learned trial magistrate sentenced each appellant to 25 years imprisonment. Section 296(2) of the Penal Code provides for a death sentence upon conviction. The death sentence is a mandatory sentence and a court would have no discretion in the matter. We therefore set aside the 25-year term imposed by the trial court as unlawful. We enhance the sentence to

that provided for in law and impose upon each appellant a sentence of death in accordance with the law."

The superior court cannot be faulted for its holding since that was the prevailing jurisprudence of the day.

43. The current jurisprudence on sentencing can be gleaned from the decision in Joshua Gichuki *Mwangi v Republic Criminal Appeal No. 84 of 2015*, where this Court considered the unconstitutional nature of mandatory minimum sentences and observed that:

> " We emphasise that this Court is alive to the fact that some accused persons are obviously deserving of no less than the minimum sentences as provided for in the SOA due to the heinous nature of the crimes committed. And they will continue to be appropriately punished as was pronounced in Athanus Lijodi v Republic[2021] eKLR;
>
> "on the issue of sentence, we reiterate that the life sentence imposed by the trial magistrate and affirmed by the High Court is not unconstitutional and can still be meted out in deserving cases Muruatetu's case (Supra) notwithstanding. This Court has on many occasions invoked the Muruatetu decision to reduce sentences that were hitherto deemed as minimum sentences, (see for instance Evans Wanjala Wanyonyi v Republic [2019] e KLR. Having said that however, we must hasten to add that this Court will uphold a sentence prescribed by the *Sexual Offences Act* if upon proper exercise of sentencing discretion and consideration of the facts of each case, such sentence is deserved or merited"

44. In S v Toms 1990 (2) SA 802 (A) at 806 (h) – 807 (b), the South African Court of Appeal (Corbett, CJ) held that:

> " The infliction of punishment is a matter for the discretion of the trial court. Mandatory sentences reduce the court's normal sentencing function to the level of a rubberstamp. The imposition of mandatory sentences by the Legislature has always been considered an undesirable intrusion upon the sentencing function of the Court. A provision which reduces the Court to a mere rubberstamp, is wholly repugnant"

45. We are alive to the fact that the death penalty as provided for under Section 296 (2) of the Penal Code is not unconstitutional per se and will be meted out on deserving cases. It is its mandatory nature that is undesirable. We are of the considered view that in the circumstances of this case, the sentence of 25 years imprisonment imposed by the trial court was appropriate. In the premise this appeal is allowed on sentence only.

46. Accordingly, it is hereby ordered that:

i. Each appellant's conviction be and is hereby upheld.

The death sentence is hereby set aside and the original sentence of 25 years imprisonment is reinstated.

iii. The sentences shall run from the time of incarceration.

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

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR