Mudavadi v Republic (Criminal Appeal 195 of 2017)
[2024] KECA 467 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KECA 467 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 195 OF 2017

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

MAY 9, 2024

BETWEEN

JARED MUDAVADI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgement of the High Court of Kenya at Kakamega by (D.S. Majanja, J) dated 13th October 2017 in Criminal Appeal No. 153 of 2014)

JUDGMENT

1. The appellant, Jared Mudavadi (Jared), was jointly charged with two others, before the Senior Principal Magistrate Court at Vihiga, with two counts of the offence of Robbery with violence contrary to Section 296(2) of the Penal Code. According to the charge sheet, Jared, who is named as the 1st accused, also faced an alternative charge of Handling stolen goods contrary to Section 322(1) of the Penal Code, in that, otherwise than in the course of stealing he dishonestly retained a Sonitec radio, knowing or having reason to believe that the same was stolen.

2. Following the trial in which three witnesses testified for the prosecution, and the appellant and his two co-accused gave unsworn evidence in their defence, the appellant and his two co- accused were all convicted on the first count by the trial court, and each sentenced to death on that count. The trio were however all acquitted of the second count.

3. Being dissatisfied with the decision of the trial magistrate, the appellant and his co accused, each appealed to the High Court against both conviction and sentence. In his petition of appeal, the appellant raised several grounds. These included the trial court, relying on identification evidence when the conditions were not conducive to a positive identification; convicting on the evidence of a single witness; relying on the doctrine of recent possession without the required standard having been met; failing to address contradictions in the evidence of prosecution witnesses; failing to appreciate the

appellant's defence; failing to note that some essential witnesses were not called to testify, and the sentence imposed upon him being harsh and excessive.

4. The High Court upon hearing the appeals, dismissed the appeals of the appellant and one of his co-accused and affirmed their conviction and sentence, but allowed the appeal of the other co- accused and acquitted him.

5. In a nutshell, the facts as per the concurrent findings of the two lower courts were that Charles Chogo Amaya (Charles), who was the complainant in the first count, operates a shop and lives in a house at the back of the shop. On the material night he was in his house with his neighbour Sella Adhiambo Otieno (Sella) who was the complainant in the second count. They were watching TV, when two individuals armed with pangas and machetes entered the house, and ordered Charles and Sella to hand over their mobile phones.

6. The two intruders who were evidently robbers, were soon joined by others. The robbers, who were at least six in total, took a Samsung phone belonging to Charles, two other phones that were in the house charging, and a phone belonging to Sella. Two of the robbers then took Charles to his bedroom where they demanded money from him threatening to kill him if he made any noise. Charles handed to the robbers Kshs. 5,500, which was his shop's earnings for the day. The robbers proceeded to search the bedroom and took a Sony radio and a Sonitec radio belonging to Charles. They tied up Charles and pushed him onto the bed, as the other assailants ransacked the shop, and carted away some assorted goods in gunny bags. Meanwhile Sella who had remained with one of the assailants, was also taken to the room where Charles was, tied up and kept on a bed before the robbers left.

7. Charles and Sella struggled and managed to untie themselves after the robbers left. They went to Mbale Police Station where they reported the robbery. Police officers' later visited the scene, where, a jembe which Charles said did not belong to him, was recovered outside the house. The next day Charles and police officers went to the appellant's house, and after searching the house, the appellant was arrested following the recovery of a Sonitec radio which Charles identified as one of his radio which was stolen during the robbery.

8. The appellant who was dissatisfied with the judgment of the High Court, lodged the present appeal, and filed a memorandum of appeal dated 13th October, 2023 in which he raised two grounds. First, faulting the learned judge for failing to evaluate the evidence tendered; and secondly, faulting the learned Judge for relying on identification that was not reliable due to the difficult conditions in which the identification was made.

9. In written submissions dated 13th August, 2023, filed on behalf of the appellant through his advocate Anyango Ida Rayner, it is submitted for the appellant that the prosecution failed to prove their case beyond reasonable doubt; and that the learned judge did not evaluate the evidence on record. For instance, the Judge paid no attention to the fact that no inventory of the exhibits recovered from the appellants' house was taken (as none was produced), as such the source of the Sonitec radio was unknown. In addition, only Charles was able to testify on where the radio was recovered as there was no other witness in this respect. It was submitted that Cpl Kabaye, the investigating officer, relied on the information that the radio was recovered from the appellant's house, but since the officer who allegedly recovered the radio from the appellant's house was not called as a witness, the investigating officer's evidence on the recovery ought to have been disregarded as hearsay. The appellant's counsel cited this Court's decision in Kinyatti vs Republic Cr. Appeal No. 60 of 1983(CA) in support of this proposition.

10. Regarding the evidence of identification, Ms. Anyango submitted that although the appellant was said to be known to Charles who allegedly recognized him and even lead police officers to the appellant's

home, the High Court failed to consider that on cross-examination, Charles contradicted himself as he stated that he knew the appellant as a common face but was not aware of where the appellant lived. Counsel urged that considering that the appellant's conviction was pegged on the evidence of a single identifying witness, the court ought to have been cautious, as visual identification can sometimes be mistaken and may cause a miscarriage of justice. Counsel cited Andrea Nahashon Mwarisha vs Republic (2016) eKLR in which the court cited with approval Kiilu & Another vs Republic (2005) eKLR.

11. Ms. Busienei, the learned Senior Prosecuting Counsel who appeared for the Director of Public Prosecutions, opposed the appeal. She submitted that all the ingredients of the offence of robbery were proved as the evidence of Charles indicated that the appellant and other assailants all numbering at least six entered his house; and that three of the assailants were armed with machetes and pangas, and threatened to cut Charles if he screamed.

12. On identification, Ms Busienei argued that although the incident took place at 10:00 pm, both Charles and Sella confirmed that when the robbers entered the house, the electric lights were on and the robbers had not concealed their faces; that Charles identified the 1st appellant as the person who first entered the house and described him to the police; that Charles knew where the man resided and took the police to the man's house where his Sonitec radio was recovered. In addition, both Charles and Sella described the second appellant as a person with a blind eye, thus this appellant was identified through recognition.

13. On the issue of sentence, Ms Busienei submitted that Section 296(2) of the Penal Code prescribes the death penalty as the sentence for the crime of robbery with violence, and that the death penalty is lawful and is still applicable as a discretionary maximum punishment. Counsel relied on the directions in *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015*) [2021] KESC 31 (KLR) (6 July 2021) (Directions). (herein Muruatetu II).

14. Finally, Ms. Busienei submitted that the trial court exercised its discretion as it had the opportunity to hear the mitigation of the appellants and in applying its discretion, was convinced that the death penalty was the most appropriate under the circumstances before it. She, therefore, urged the Court to dismiss the appeal.

15. This being a second appeal this Court's jurisdiction under Section 361(1)(a) of the Criminal Procedure Code is limited to issues of law only. As was stated by this Court in Karingo vs Republic (1982) KLR 21:

> "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 the second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari s/o Karanja vs R (1956)17 EACA 146."

16. We have considered the appeal, the contending submissions and the law. We discern three main issues in this appeal. These are, whether the High Court as a first appellate court, properly discharged its duty of considering and re-evaluating the evidence that was adduced before the trial court before coming to its own conclusion; whether the learned Judge properly addressed the evidence of identification and came to the correct conclusion in finding that the appellant's identification was free from error; and whether the trial court properly exercised its discretion in sentencing the appellant to death. All these issues are issues of law, and therefore our jurisdiction is well grounded.

17. The High Court, being the first appellate court addressing the appellant's appeal, it was imperative that it fulfils its obligation as clearly set out in Okeno vs Republic [1972] EA 32 as follows:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

18. An examination of the judgment of the High Court reveals that the learned Judge, reconsidered and re-evaluated the evidence, but there were some flaws. For instance, the learned judge failed to address a confusion which was apparent in the judgment of the trial magistrate. As stated earlier the charge sheet referred to the appellant as the 1st accused, followed by a 2nd accused one Joseph Kinambet Owiti and a 3rd accused namely Hudson Kadagaya. In his judgment the trial magistrate reversed the order and referred to Hudson Kadagaya as 1st accused and the appellant as the 3rd accused. This was not correct as the appellant was the one alleged to have been found in possession of a Sonitec radio, and the one charged with the alternative charge of Handling stolen goods contrary to Section 322(1) as read with 322(2) of the Penal Code. In addition, the appellant testified in his defence as the 1st accused (referred to by name and as DW1), whilst Hudson Kidagaya testified as 3rd accused (again referred to by name and as DW3).

19. In his submissions before the High Court, Hudson Kidagaya raised the issue of the confusion, submitting that he was erroneously convicted based on evidence touching on the 1st accused who was the appellant herein. The learned Judge did not address this confusion, but concentrated on the evidence implicating the appellant and his colleagues in the commission of the offence which, in his opinion, was the evidence of identification. The Judge proceeded to analyse evidence in this regard referring to the appellants as DW1, DW2, and DW3, which is how they were referred to in the proceedings. This means that the error made by the trial magistrate resulting in the confusion in his judgment did not affect the analysis by the learned Judge.

20. Contrary to the appellant's contention that the High Court did not reconsider and revaluate the evidence, the High Court did so. The following extract of the judgment reflects the focus by the learned Judge on the evidence of identification, the legal principles applied and the analysis:

> }"14. ..... Before acting on such evidence the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by witness to observe the accused so as to be able to identify him (See Maitanyi vs Republic [1986] KLR 198 and R vs Turn bull [1967] 3 ALL ER 549
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> .....
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> 16. It is against these principles that the evidence before the trial court must be examined. Both PW1 and PW2 testified that when the assailants came into the house, the electric lights were on. Pw1 told the court that he saw the assailants vividly. Thereafter, they took him to bedroom where the lights were also on and it is only after they had finished their felonious acts that

they switched off the lights. PW2 told the court that the assailants switched off the lights after about 10 minutes. She testified that that the room where PW1 had been taken, the lights were not switched off. In cross examination by DW1, PW1 estimated that the assailants were in the house for about an hour, while PW2 estimated the time was about half an hour.

17. In my view, given the nature of the electric lighting in the confined space of the rooms where the assailants were with PW1 and PW2, taken together with the time they interacted, provided circumstances for positive identification of the assailants. PW1 identified DW1 as the person who first entered the house and also went with him to the bedroom. In addition to clearly identifying him, PW1 told the court that DW 1 was familiar to him and that he knew where he resided and in fact took police to his residence where PW1 ‘s Sonitec radio was recovered

16. The case against DW1 was not merely one of identification of a stranger but one of recognition of a person clearly known. This is confirmed by the fact that on the very next day, PW1 took the police to his home where he was arrested. His fate was sealed when DW 1’s Sonitec radio was recovered in his house. From the record, PW1’s testimony was firm and was not even shaken in cross-examination. I am therefore satisfied that DW 1’s conviction was safe on the basis of the testimony of PW 1.

21. The learned Judge addressed and analysed the issue of identification at length as he recognised that it was the critical issue in the appellant’s conviction. However, with respect, we note that the learned Judge misdirected himself on the evidence. Contrary to what the learned Judge stated in the above cited extracts of the judgment, the record of proceedings reveal that Charles was clear in his evidence in cross examination that he did not know where the appellant was staying, though he knew where the co-accused whom he described as blind in one eye was staying. Secondly, Charles did not take the police to the house of the appellant. He simply accompanied the police to the house. Unfortunately, the arresting officer who was with Charles did not testify, and, therefore, there is no evidence as to how the police were able to identify the appellant’s house.

22. Be that as it may, the evidence on record also shows that both Charles and Sella were able to see the appellant and his colleagues with the aid of the electric light which was on in the house. The incident took almost one hour and therefore the two witnesses had sufficient time to observe the robbers. The appellant was a familiar face to Charles who described him to the police. He did not however know his name. The evidence of recognition of the appellant was, therefore, not proof, and it would have been desirable for Charles to have confirmed it through an identification parade. However, given the fact that Charles was present during the appellant’s arrest an identification parade would not have been useful as the appellant was exposed during the arrest.

23. Notwithstanding the misdirection by the learned Judge regarding the evidence of identification, Charles was clear in his evidence that he recovered his Sonitec radio from the appellant’s house. This was one of the items that had just been stolen from him during the robbery. Although none of the police officers who were with Charles was called to testify on the recovery of the radio, the two lower court’s believed and accepted Charles’ evidence that the radio was recovered from the house of the appellant, and we have no reason to depart from this concurrent finding of fact. In his defence the appellant denied that the radio was recovered from his house, but this defence was properly rejected given the evidence of Charles. Any doubts regarding the identification of the appellant by Charles, was resolved by the recovery of the recently stolen radio, as this nailed the appellant who was not able to offer any reasonable explanation for his possession, leading to the inescapable conclusion that he was one of the persons who robbed Charles.

24. In Johana Ndungu vs Republic [1996] eKLR the Court set out the ingredients of the offence of Robbery with violence as follows thus;

> "...ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s.296(2) which we give below and any one of which if proved will constitute the offence under the sub- Section:
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> 1. If the offender is armed with any dangerous or offensive weapon or instrument, or
> 2. If he is in company with one or more other person or persons, or
> 3. If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person
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> Analysing the first set of circumstances the essential ingredient, apart from the ingredients including the
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> use or threat to use actual violence constituting the offence of robbery, is the fact of the offender at the time of robbery being armed with a dangerous or offensive weapon. No other fact is needed to be proved. Thus if the facts show that at the time of commission of the offence of robbery as defined in
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> S.295 of the Penal Code, the offender was armed in the manner afore-described then he is guilty of the offence under sub-Section (2) and it is mandatory for the court to so convict him.
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> n the same manner in the second set of circumstances if it is shown and accepted by court that at the time of robbery the offender is in company with one or more person or persons then the offence under sub-Section (2) is proved and a conviction thereunder must follow. The court is not required to look for the presence of either of the other two set of circumstances.
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> With regard to the third set of circumstances if there is no mention of the offender being armed or being in company with others. The court is not required to look for the presence of either of these two ingredients. If the court finds that at or immediately before or immediately after the time of robbery the offender wounds, beats strikes or uses any other violence to any person (may be a watchman and not necessarily the complainant or victim of theft) then it must find the offence under sub-Section (2) proved and convict accordingly."

25. As stated in the cited case, the Court is not required to look for the presence of all three set of circumstances. Proof of one set is sufficient to secure a conviction. In the case at hand, there was clear evidence that Charles was robbed by a gang of at least 6 people who were armed with pangas and machetes, and who threatened to use violence on Charles and Sella during the robbery. The recovery from the appellant's house of the Sonitec radio, an item identified as having been stolen during the robbery, led to the irresistible conclusion that the appellant was one of the persons who robbed Charles. Consequently, we are satisfied that the appeal on conviction lacks merit as notwithstanding the mistake made by the learned judge in his analysis of the evidence, there was sufficient evidence in proof of the charge against the appellant, and the conviction was therefore proper.

26. On the question of the sentence, under Section 296(2) of the Penal Code the penalty prescribed for the offence of robbery with violence is death. The trial court imposed the death sentence having found the appellant guilty of the offence of robbery with violence. This being a second appeal our jurisdiction

under Section 361(1) of the Criminal Procedure Code is limited to matters of law only and severity of sentence is under that provision categorised as a matter of fact. In Muruatetu Francis Karioko & another vs Republic Petition No 15 &16(Consolidated) [2017] eKLR (Muruatetu I), the Supreme Court held that the mandatory nature of the death penalty provided under Section 204 for the offence of murder is unconstitutional. In Muruatetu II (supra) the Supreme Court clarified that the death penalty still remains legal as a discretionary maximum sentence, and that the decision in Muruatetu I, does not affect the mandatory death penalty provided for other penal offences such as treason or robbery with violence. Therefore, the death penalty still remains a lawful sentence for such offences.

27. Thus, we have no basis for interfering with the lawful sentence that was imposed upon the appellant by the trial court exercising its discretion, and upheld by the first appellate court. Consequently, the appeal against sentence also lacks merit.

28. The upshot of the above is that we uphold the appellant's conviction and sentence and dismiss the appeal in its entirety.

DATED AND DELIVERED AT KISUMU THIS 9TH 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

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR