Shikuku v Republic (Criminal Appeal E044 of 2022)
[2024] KECA 711 (KLR) (21 June 2024) (Judgment)

Neutral citation: [2024] KECA 711 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL E044 OF 2022

F SICHALE, FA OCHIENG & WK KORIR, JJA

JUNE 21, 2024

BETWEEN

JULIUS KISUDI SHIKUKU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Eldoret (S.M. Githinji, J.) delivered and dated 11th October 2018inHCCRA No. 66 of 2016)

JUDGMENT

1. The appellant, Julius Kisudi Shikuku, was at the trial, charged, together with Alex Ingalia Shati, before the Chief Magistrate's Court at Eldoret with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the main count stated that on the 27th January 2014 along Sango-Mautuma road at Shipande area, within Lugari Sub-County of Kakamega County, the appellant and his co-accused jointly with others not before court while armed with a sword and rungus robbed Evans Guzira Kidagisa of motorcycle registration number KMCY XXXX,make Boxer 150, valued at Kshs. 93,000/- and immediately before the time of such robbery used actual violence on the complainant. Arising from the same incident, the duo faced an alternative count of handling stolen property contrary to Section 322(1) as read with Section 322 (2) of the *Penal Code*. The particulars of the charge being that on 12th February 2014 at Kiganjo Estate, Thika Sub-County within Kiambu County they dishonestly received and retained the motor cycle mentioned in the main count knowing it to be stolen property.

2. At the conclusion of the trial the appellant was found guilty in respect to the main count and sentenced to death. His co-accused was acquitted. The appellant's appeal to the High Court hit a brick wall on the issue of conviction but met partial success on the question of sentence as the death sentence was set aside and replaced with a prison sentence of 30 years. Undeterred, the appellant is now before us on a second appeal and through his amended grounds of appeal he faults the Judge of the first appellate

Court for abdicating his duty to reappraise the evidence afresh, erroneously applying the doctrine of recent possession and for upholding a harsh and inhumane sentence.

3. Evans Guzira Kidogisia (PW1) testified that he used a red motor cycle make Boxer registration number KMOY XXXX for boda boda business. The complainant stated that on 20th January 2014 at about 7.00 pm, while riding his motorcycle from Lugari to Milimani, he was waylaid by a group of people who had tied a wire across the road. He fell down after riding into the wire after which he was attacked with a club and a sword. No sooner had the attackers started assaulting him than a lorry approached. Through the use of the light from the lorry, he was able to identify the appellant as one of his attackers. The attackers nevertheless escaped from the scene with his motorcycle. At the scene, he recovered the sword which he surrendered to the police after seeking medical examination at Turbo Health Centre. He was later called to the Turbo Police Station where he identified the appellant in an identification parade.

4. Japhred Walondo Abraham (PW2) was stood down at the request of the prosecution after the appellant had just started to cross- examine him. He was never recalled to the witness stand. As his evidence was never tested through cross-examination, we will not consider it.

5. Timothy Seroney (PW3) on his part testified that on 12th February 2014 while stationed at Makongeni Police Station, Thika, he was tipped by an informant that there were people selling a motorcycle. He proceeded to Kiganjo Estate alongside PC Ondieki and PC Lemin where they apprehended the appellant and his co-accused who had a motorcycle registration number KMOY XXXX a red Boxer which they intended to sell. He took them to the Police Station and handed them over to the Deputy OCS of Makongeni Police Station.

6. Police Constable Michael Cherutich (PW4) testified that on 14th February 2014, he was instructed by the DCIO to proceed to Makongeni Police Station and bring the appellant and his co- accused to Lumakanda Police Station. He proceeded as instructed and collected the appellant and his co-accused as well as a motorcycle make Boxer registration number KMOY XXXX .

7. Denis Ekiso (PW5) testified that he was a clinical officer attached to Mautoma Sub-County Hospital and that on 22nd December 2014, he filled out a P3 form for PW1. He observed that the complainant's clothes were blood-stained and his blue jacket and cap were torn and also blood-stained. He further observed that the complainant had a cut wound on the right forehead with pain on the chest, the 7th and 9th ribs and the back. He assessed the degree of injury as harm and filled a P3 form which he produced as an exhibit.

8. Inspector of Police George Mutwiri who testified as PW6 told the Court that on 20th February 2014, he conducted an identification parade at the request of PW4. His evidence was that he complied with the rules for conducting identification parades and PW1 successfully identified the appellant who stood between the 8th and 9th members of the parade.

9. Corporal John Okello (PW7) on his part narrated how he conducted his investigations. Generally, his evidence aligned with that of PW3, PW4, PW5 and PW6. He also testified that he received a motorcycle KMOY XXX Boxer model red in colour from PW4. He produced several exhibits including a sword, the complainant's helmet and jacket, the wire used to trap the complainant, the sale agreement, a receipt for the purchase of the motorcycle and a copy of the record for the motorcycle from Kenya Revenue Authority (KRA) as exhibits.

10. In his defence, the appellant denied being at the scene of crime stating that on 27th January 2014 he was at his place of work at Thika. He stated that on the day of his arrest, he was at his house when he was invited to Kiganjo Centre by his friend David Wafula and upon reaching their meeting point, he was

arrested. Further, that he was transferred to Lumakanda Police Station where he was tricked to attend an identification parade in which he was the only one with a reflector jacket. He additionally stated that in the parade he stood between 3rd and 4th members of the parade and not the 8th and 9th members as testified by PW6. He denied knowing his co-accused.

11. We do not find it necessary to regurgitate the lengthy defence of the appellant's co-accused.

12. Upon considering the evidence, T. W. Cherere, Chief Magistrate (as she then was) dismissed the evidence in respect to the identification parade as well as the evidence of identification of the appellant during the commission of the offence. She, however, relied on the doctrine of recent possession and found the appellant guilty of the offence. The appellant's conviction was affirmed by the High Court.

13. This appeal came up for hearing via the Court's virtual platform on 6th December 2023. The appellant was virtually present from Kamiti Maximum Prison and was represented by learned counsel Mr. Kipkosgei. Mr. Kakoi appeared for the respondent. The advocates for the parties had filed written submissions and they sought to wholly rely on them.

14. In his undated submissions, counsel for the appellant addressed every ground of appeal raised in the amended memorandum of appeal. In a nutshell, counsel submitted that from the evidence on record, the appellant was never identified hence the evidence of identification is unconscionable. Counsel also submitted that there was no evidence linking the appellant to the offence. Counsel relied on the case of *Abdallah Bin Wendo & Another v. R*. [1953] 20 EACA 166 to urge that the evidence of a single witness ought to be treated with the greatest care. According to counsel, both the trial Court and the first appellate Court ought to have found that the evidence of PW1 linking the appellant to the offence was insufficient in the circumstances of this case. Counsel maintained that the evidence on record did not attain the threshold of beyond reasonable doubt, hence the appellant's conviction should be set aside. Finally, counsel argued that the learned Judge failed to comply with section 169(1) of the *Criminal Procedure Code* by not giving reasons for the dismissal of the appellant's defence.

15. Counsel for the respondent on the other hand relied on the submissions dated 24th November 2023 through which he addressed four issues. Counsel started by pointing out the limited jurisdiction of this Court on a second appeal. It was counsel's submission that the trial Court and the first appellate Court correctly applied the doctrine of recent possession to the facts of this case. Counsel submitted that the evidence on record sufficiently established all the elements of the offence of robbery with violence. Counsel asserted that although the first amendment to the charge sheet stated that the offence occurred on 27th February 2014, the date of the commission of the offence was changed to read 27th January 2014 in the amendment of 12th February 2016. In this regard, counsel submitted that the variance between the evidence and the initial charge was not in any way prejudicial to the appellant. Regarding the sentence, counsel submitted that the sentence passed by the first appellate Court is legal and should be upheld. In the end, counsel urged us to dismiss the appeal in its entirety.

16. This being a second appeal, we exercise our mandate within the borders of section 361(a) of the *Criminal Procedure Code*. Under the said provision, we are bound to render ourselves only on matters of law. Alive to this narrow mandate, we have considered the record of appeal, the grounds of appeal, the submissions by both parties and the cited authorities. Considering the record of appeal and the submissions presented to this Court, we find that this appeal will be laid to rest once we determine the question as to whether the doctrine of recent possession was correctly applied to the facts of the case. If we find the conviction to be sound, we will address the appellant's invitation to us to interfere with his sentence.

17. Was the doctrine of recent possession properly invoked in finding the appellant guilty? With regard to the doctrine of recent possession, we borrow from the Canadian Supreme Court in *Republic v Kowkyk* [1988] 2 SCR 59 cited by the Court in *David Mugo Kimunge v Republic* [2015] eKLR thus:

> "Upon proof of the unexplained possession of recently stolen property, the trier of fact may –but not must- draw an inference of guilt of theft or of offences incidental thereto. Where the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be for the trier of fact upon a consideration of all the circumstances to decide which, if either, inference should be drawn. In all recent possession cases the inference of guilt is permissive, not mandatory, and when an explanation is offered which might reasonably be true, even though the trier of fact is not satisfied of its truth, the doctrine will not apply."

18. The doctrine of recent possession was invoked in respect of the motorcycle KMOY XXX make Boxer, red in colour. The evidence on record is clear that the appellant was arrested in possession of a red Boxer motorcycle. From the evidence of PW1, PW3 and PW4, the motorcycle, although still a red Boxer had the number plate KMOY XXXX . PW7 on the other hand referred to the motorcycle as being a red Boxer with registration number KMOY XXXN. This begs the question as to whether the stolen item was properly identified and its ownership ascertained.

19. Five pieces of evidence serve to clear the doubts surrounding the identity of the stolen and recovered motorcycle. First, the learned magistrate who viewed the motorcycle when it was presented in Court indicated in her judgment that the motorbike which was produced as Exhibit 3 was registration number KMCY XXXX. Second, is the letter dated 19th March 2014 by the DCIO, Lugari to the Manager of KRA at Eldoret requesting information about the motorcycle. In the letter, the DCIO gave the chassis number of the motorcycle as MD2A2XXXXXXXXXX and the engine number as PFZWCHXXXXX. Third, is the reply from KRA indicating the records of the motorcycle as stated in the DCIO's letter. In the said letter, the number plate of the motorcycle is indicated as KMCY XXXX registered in the name of Mars Logistics Limited. Fourth, was the sale agreement between PW1 and Nildeep Ltd. In that agreement, the motorcycle chassis number was MD2A2XXXXXXXXX and the engine number was PFZWCHXXXXX. Fifth, is the charge sheet in which the particulars of the charge describe the motorcycle as KMCY XXXX. From the highlighted evidence, we have no doubt in our minds that the stolen and later recovered motorcycle was KMCY XXXX and not KMOY XXXX or KMOY XXXN. In our view, the registrations KMOY XXXX and KMOY XXXN appear to have arisen from a typing error in the court proceedings. The appellant therefore knew all along that the stolen motorcycle was registration number KMCY XXXX and the discrepancies in the evidence as regards the registration number cannot be said to have be prejudicial to him.

20. When faced with such discrepancies, the Court in *Michael Saa Wambua & Another v Republic* [2017] eKLR provided an antidote as follows:

> "With regard to the alleged inconsistencies and contradictions in the prosecution evidence, the position in law is that, existence of these do not per se vitiate the prosecution's case. See the case of *Njuki & 4 Others versus Republic* [2002] 1KLR 771, where the Court stated clearly that where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies."

21. We further find that the ownership of the motorcycle was also proved through the documents produced by PW1. In light the foregoing analysis, we find that the trial Court and the first appellate Court properly invoked and correctly applied the doctrine of recent possession to the appellant's

case. The appellant's conviction is therefore safe. This conclusion disposes, by way of dismissal, the appellant's argument that the Judge of the first appellate Court did not discharge his duty of reappraising the evidence in order to reach his own independent conclusion. Our analysis of the judgment shows that the learned Judge carefully considered the evidence adduced at the trial before upholding the appellant's conviction. The summary of it all is that we find the appeal on conviction to be without merit and we dismiss it.

22. Having dismissed the appeal against conviction, we turn to the question as to whether the appellant has made out a case to warrant our interference with the sentence. Ordinarily, the severity of a sentence is considered a matter of fact that does not fall for the determination of this Court on a second appeal - see section 361(1)(a) of the Criminal Procedure Code. In respect to the present appeal, we observe that although among the appellant's grievances was that his mitigation was not considered resulting in the imposition of a harsh and excessive sentence, the appellant did not elucidate in his submissions the reasons for faulting the Judge on this particular ground. Be that as it may, we have reviewed the record and we note that whereas the trial Court sentenced the appellant to suffer death, the first appellate Court vacated the sentence and instead imposed upon the appellant a sentence of 30 years in prison. In *Bernard Kimani Gacheru v Republic* [2002] eKLR the limited circumstances under which an appellate court can interfere with sentence were highlighted as follows:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

23. In the appeal before us we do not understand the appellant to complain about the review of his sentence by the first appellate Court from the death penalty to a determinate prison sentence. In reviewing the appellant's sentence, the learned Judge took into consideration the fact that the appellant was a first offender who had sought leniency and had lost his mother during the trial. There is nothing on record to show that the learned Judge overlooked some material factor, or considered some wrong material, or acted on a wrong principle of law. Therefore, no basis has been laid for faulting him. In the circumstances, we therefore do not find merit in the appeal against sentence and the appeal against sentence is therefore dismissed.

24. The upshot is that the appellant's appeal lacks merit and is dismissed in its entirety.

DATED AND DELIVERED AT NAKURU THIS 21ST DAY OF JUNE, 2024

F. SICHALE

JUDGE OF APPEAL

.....

F. OCHIENG

JUDGE OF APPEAL

.....

W. KORIR

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR