Ekwam v Republic (Criminal Appeal 60 of 2019)
[2024] KECA 1098 (KLR) (21 August 2024) (Judgment)

Neutral citation: [2024] KECA 1098 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 60 OF 2019

W KARANJA, J MOHAMMED & AO MUCHELULE, JJA

AUGUST 21, 2024

BETWEEN

SIMON EKWAM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Meru (R.V.P. Wendoh, J and J.A. Makau, J.) dated 24th September, 2015 in HCCRA NO. 20 of 2014)

JUDGMENT

1. This is a second appeal by the appellant, Simon Ekwam, against conviction and sentence for the offence of robbery with violence contrary to section 296(2) of the Penal Code. The charge against him before the Chief Magistrate ,Isiolo stated that on 12th June 2012 at around 7:30pm at Kiwanjani area in Isiolo County of the Eastern province jointly with others not before court being armed with a dangerous weapon namely a knife robbed Ayanae Alemu of his wallet containing cash money Kshs.70,000, his national identity card and a safaricom line all valued at Kshs.70,050 and immediately before or immediately after or at the time of such robbery injured Ayanae Alemu by stabbing him with the said knife on the head and his left hand.

2. The appellant denied the charge and the matter proceeded to full trial. He was found guilty and was convicted and sentenced to death.

3. Dissatisfied with both conviction and sentence, the appellant appealed to the High Court sitting at Meru. In its judgment dated 24th September 2015, the High Court (R.V.P. Wendoh, J. and J.A.Makau, J.) dismissed his appeal and upheld both the conviction and sentence.

4. The appellant has now filed the present appeal before this Court. He raises seven grounds of appeal in the Memorandum of Appeal namely that: the learned appellate Judge erred in matters of law by

failing to note that the key witnesses were not called; the learned appellate Judge erred in matters of law by failing to note that the ingredients of robbery were not proved; the learned appellate Judge erred in matters of law by failing to note that the prosecution case was with a lot of contradictions and inconsistencies; the learned appellate Judge erred in matters of law by failing to note that the prosecution did not prove their case to the required standard of prove beyond reasonable doubts; the learned appellate Judge erred in matters of law by failing to analyze the evidence adduced before court and come up with his own conclusion; the learned appellate Judge erred in matters of law by failing to note that the appellant's defense was not considered.

5. Briefly, the facts before the trial court were that the complainant (PW1) Francis Ayanae Alemu (Francis) on 12th June 2012 sold his three bulls to (PW3) Lawrence Ewoi, at Kshs.75,000. He gave his wife Kshs 3,000 to buy food for their children, used Kshs.2,000 and remained with Kshs.70.000. That at 6.00pm he approached the appellant, as they came from the same area to take him home on his boda boda which is reddish in color, that Simon told him it was not time to go home and he went away.

6. That at 7.00pm Simon returned to the Miraa market with a different motorcycle which he had swopped with Geoffrey Aruku (PW5). According to PW5 Simon had pleaded with him to swop the motor cycles as Simons motorcycle had no headlights and he needed to take a customer somewhere. PW5 agreed but asked the appellant to return the motor cycle the following day with a payment of Ksh.300.

7. Francis boarded the motorcycle Simon had come with in the presence of John Ekiru (PW2) and they started their journey home. and Simon rode towards Kiwanja Ya Ndege instead of Kawibi Garba direction where they were supposed to go and that when he asked why he answered that he had been called on phone by his friend and wanted to go there first and then go home. Francis trusted the appellant, as he knew him well before and did not think much about the detour. Unfortunately, the appellant rode to a place which was quite dark and he is said to have switched off the motorcycle lights and started riding at a very low speed and that as they were negotiating a corner, Simon was held by about three people who were armed with knives.

8. Francis stated that he was cut on the forehead with a panga and stabbed on the hand and was robbed of his money, a wallet, identity card, his mobile phone and receipts. He stated that after the robbery he did not know what happened to Simon and his motorcycle as he did not find them at the scene. He stated that he proceeded to a medical clinic at Isiolo Township whereby his friend a watchman, PW4 Esunyan Lochuchu called his family. He stated that he was treated at the clinic and one Lomale took him to the police station at Isiolo and thereafter at Isiolo District Hospital where he was treated and discharged. According to the P3 form produced in court as exhibit by Karaiyu Jillo (PW8) a senior clinical officer at Isiolo Hospital, Francis had deep cut wounds on the forehead, left upper hand, injury to the left knee and chest.

9. Francis stated that the following day members of the public gathered at his home and Simon was arrested. He testified that Simon knew that he was going to sell his cows as he found him on the way and informed him that he had sold his cattle to Lawrence.

10. Lawrence Ewoi (PW3) testified that on 12th June 2012 at 9.00am at Chumvi area he purchased three bulls from Francis at Kshs.75,000 and that the following morning he saw people gathered and heard that Francis had been attacked. That he went to Francis's house and found that he had injuries on his head and legs.

11. When placed on his defence, the appellant testified on oath and called no witnesses. He admitted having been hired by the complainant to drop him home on the evening in question. He said that they rode

together but they were attacked by unknown people somewhere along the way. He denied having diverted from the known route as claimed by the complainant.

He admitted that the complainant was injured in the course of the robbery, but he himself escaped unhurt. He said he also reported to the police that he had been robbed but the police refused to record his complaint. He denied having robbed the complainant.

12. In his appeal before the High Court, the appellant alleged that his conviction was based on circumstantial evidence.

13. The High Court, however, found no merit in the appeal. It found that the case against the appellant was proved beyond reasonable doubt; and that the case was one based on recognition, not visual identification. The High Court noted the evidence of the complainant that he had known the appellant for a long time; and that he had given the name of the attackers including the appellant to PW2, PW5, PW6, PW7 and PW9. That he had been given the motorbike to use by PW5 whom he had promised Kshs.300 on return of the motorcycle at 7.00am the following morning. It was clear that it was the appellant who rode the motorcycle to Kiwanja ya Ndege where the attack arose.

14. After reconsidering the evidence presented before the trial court, the High Court dismissed the appeal on conviction and sentence, prompting this appeal.

15. At the hearing of the appeal before this Court, learned counsel Mr. Wamache, appeared for the appellant while Ms. Nandwa, learned Prosecution Counsel appeared for the respondent. They both relied on their written submissions which they had filed earlier. For the appellant, it is contended in the submissions that the appellant was dissatisfied with both the trial court and the High Court as they relied on the evidence of a single witness. Counsel's submissions and authorities were mainly on the issue of basing a conviction on the basis of a single witness. Reliance was placed on Peter's -vs- Sunday Post (1958) EA 424. Counsel also relied on this Court's decision in Joseph Labo Ole Torokae -vs- R; Nairobi Criminal Appeal No 708 of 1986 (Unreported) where the Court held:

> "We accept the recognition and identification are quite different concepts but this alone cannot absolve a trial court from the need to warn itself of the dangers of identification by a single witness to believe quite genuinely that he had been attacked by someone he knew well and yet still be mistaken. So, the possibility of error is still there whether it be a case of recognition or identification."

16. It was submitted that there was grave suspicion that the appellant might well have committed the offence for which he was charged but as has been held by this Court before, suspicion alone cannot be relied on to found a conviction.

17. In her response on behalf of the State, Ms. Nandwa, submitted that the prosecution proved the elements of robbery with violence as PW1 testified that after the appellant diverted their route and took him to a place where there was a long fence and after negotiating a corner, they were attacked by three people armed with knives. That PW1 was cut on the forehead with a panga and another person stabbed him on the hand and in addition his Kshs.70,000 wallet, identification card, mobile phone and receipts were stolen. Further that PW3 did prove that he bought three bulls from PW1 at a price of Kshs.75,000.

18. It was submitted that through the evidence of PW1 it can be seen that the appellant did not act alone but together other people. And that the doctrine of common intention which was explained in Dickson Mwangi Munene & Anor -vs- R. [2014] eKLR by this Court is applicable in the instant case.

Counsel further relied on the case of Stephen Ariga & Anor -vs- R. [2018] eKLR on the ingredients of common intention.

19. With regards to the issue of identification, learned counsel submitted that the conditions for identification were favorable as PW1's who was the appellant's neighbor knew him as a bodaboda operator and had known him since he was a child, a position which was confirmed by the appellant during his sworn defence. Also that PW2 corroborated PW1's evidence by stating that on 12th June 2012 at 6.00pm he was at Sokoni Stage when he saw the appellant being asked by PW1 to carry him on the motorcycle KMCV 751Y. Reliance was placed on Mamush Hibro Faja -vs- R. [2019]eKLR on the issue of identification and recognition.

20. With regards to single witness evidence it was submitted that PW1 was the only eye witness and he testified that he had known the appellant since childhood a position confirmed by the appellant. It was submitted that there was enough light for PW1 to see and recognize the appellant, who he knew very well before that date.

21. On sentence it was submitted that the death sentence imposed was appropriate in the circumstance as the crude weapons in the hands of the appellant injured PW1 seriously. Reliance was further placed on the High Court case of Stanley Kipkurui Maritim -vs- R. [2022]eKLR for the proposition that death sentence is still lawful in Kenya. We were urged to dismiss the appeal and to uphold both the conviction and the sentence.

22. This is a second appeal and the Court is therefore, by dint of section 361(1) Criminal Procedure Code, confined to a consideration of issues of law. See Karani -vs- R. [2010] 1 KLR 73.

23. PW1's evidence that he was at the time of the attack and robbery on the motorbike that the appellant was riding was admitted by the appellant in his sworn defence. This is important because the appellant raised the issue of identification as a ground of appeal and claimed that the learned Judges had failed to re-evaluate the evidence, as they were supposed to do on first appeal. We find that the question of identification/recognition did not arise. The only question was whether the appellant was working in cahoots with the robbers. But since this was a question of fact which was not an issue before the first appellate court, we cannot deal with it.

24. It was material that it was the appellant who rode PW 1 to the scene where he was attacked and robbed. PW 1 had asked to be taken home, but the appellant deviated from the usual route amidst PW1's protests. It was clear that the appellant delivered PW 1 to the robbers.

25. We find that there is no merit in the appellant's claim that he was not properly identified and/or recognized, or that the first appellate court had not properly reevaluated the evidence upon which he had been convicted. There was sufficient and overwhelming evidence upon which he was convicted by the trial court, and the first appellate court cannot be blamed for agreeing with the conviction.

26. The appellant has challenged the death sentence imposed on him by the trial court. However, no submissions were made in regard to the same. We hold the view that it would be remiss of us not to consider the issue of sentence when it is clear to us that gross injustice would be occasioned if we left the sentence the way it is. The trial court, while noting the mitigation offered on behalf of the appellant, stated that it had no discretion in sentencing the accused. It therefore imposed the death penalty which was then deemed as the mandatory sentence for the offence.

27. The appellant was a first offender and indicated that he was remorseful for his actions, we note that the complainant suffered injuries that were not fatal. The appellant and the others not before court did, however, assault the complainant which from the evidence appears entirely unprovoked and premeditated. The appellant also lost his Ksh.70,000 which was not a small amount given his

circumstances. We note further, that the appellant has been incarcerated for the last 12 years, and it is our view that he has paid his debt to society.

28. We find the appeal against sentence merited. We accordingly set aside the sentence of death imposed on the appellant by the trial court and order that the sentence is reduced to the term already served. Accordingly, we order that the appellant be set at liberty unless he is otherwise lawfully held.

DATED AND DELIVERED AT NYERI THIS 21ST DAY OF AUGUST 2024.

W. KARANJA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR