Kobia v Republic (Criminal Appeal 56 of 2017)
[2024] KECA 1089 (KLR) (21 August 2024) (Judgment)

Neutral citation: [2024] KECA 1089 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 56 OF 2017

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

AUGUST 21, 2024

BETWEEN

ISAAC MEME KOBIA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an Appeal from the Judgement of the High Court of Kenya at Nanyuki (M. Kasango, J.) dated 31st May, 2016 in HCRA No. 56 of 2017)

JUDGMENT

1. Isaac Meme Kobia (Isaac), the appellant, together with another were charged before the Nanyuki Chief Magistrate's Court with the offence of robbery with violence contrary to section 296(2) of the Penal Code. It was alleged that on 2nd February 2011 at Nanyuki Township of Laikipia County within the Republic of Kenya jointly with others not before court, while armed with dangerous weapons namely Patchet rifle serial number KR 12775, they robbed Isaac Kariuki Ngare a motor vehicle registration KAR 033K Toyota Corolla Salon, Mobile phone make Nokia 2600C all valued at Kshs.368,000 and at the time of such robbery killed Isaac Kariuki Ngare.

2. They were in the alternative charged with handling stolen goods contrary to section 322(2) of the Penal Code. It was alleged that on 2nd February, 2011 in Meru Town within Meru County, in the Republic of Kenya jointly with others not before court, otherwise than in course of stealing, they dishonestly received or retained a motor vehicle registration KAR 033K Toyota Sprinter white in colour knowing or having reason to believe it to be a stolen good.

3. The appellant and his co-accused pleaded not guilty to the charge. At the hearing before the trial court, twelve (12) witnesses testified for the prosecution. In their defence, Isaac and his co-accused testified on oath and called no witnesses. The trial magistrate upon considering the evidence before her, found the

appellant and his co-accused guilty on the main charge, convicted them and sentenced each of them to death.

4. Being aggrieved by the decision of the trial court the appellant and his co-accused appealed to the High Court challenging both conviction and sentence. Upon considering the appeal, the High Court (M. Kasango, J.) dismissed the appeal and upheld both conviction and sentence. Being further aggrieved, the appellants, moved to this Court on appeal against both conviction and sentence. However, before the appeal could be heard Luka Muriuki Mbobua, the 2nd appellant through his letter dated 9th September, 2020 stated that he wished to withdraw his appeal and this Court through its order of 17th September, 2020 marked the appeal as withdrawn and dismissed under Rule 68(1) of the Court of Appeal Rules.

5. The appeal before this Court was initially premised on the self-generated memorandum of appeal of the appellant which the appellant's counsel later amended and filed a supplementary memorandum of appeal in which counsel faulted the High Court for, inter alia, failing to test with the greatest care the evidence of the single identifying witness (complainant) or warn herself of the danger of relying on such evidence after careful testing of the same; in relying on the evidence adduced by the prosecution to convict the appellant while the said evidence was marred by contradictions which should have been resolved in favour of the appellant and failing to find that the ingredients of murder were not proved to the required standard of beyond reasonable doubt.

6. In order to place this appeal in context, we give a summary of the evidence adduced before the trial court. Isaac Kariuki Ngare (deceased) was employed to drive a taxi KAR 033K which was owned by Isaiah Macharia Nderitu. He used to park that taxi at a place called Nyakio in Nanyuki Town. On 2nd February, 2011 at about 7.00am he was approached by a person who was rolling a car wheel, and after a short conversation, the wheel was loaded into the boot of the motor vehicle and the person with the wheel boarded the motor vehicle and sat on the front passenger seat. That was the last time the deceased was seen alive. Isaiah the owner of the motor vehicle got concerned when on that day at 5.00pm he was unable to reach the deceased. He contacted the chairman of the taxi drivers the following day. Following the search that was mounted by about 100 taxi drivers from Nanyuki. The motor vehicle was found in Meru at a place called Gakoromone Market. The two appellants and two others who escaped were found in possession of the motor vehicle.

7. Silvanus Waweru (PW4) was said to be the sole eye-witness in the case. He was the one who saw the deceased being hired by a person who was rolling a car tyre and they left together in the taxi to an unknown destination. The witness stated that he was able to see that the person sat next to the deceased and also noted the way the person was dressed. He stated that the person "was wearing a brown jacket, blue jeans, Safari boots and a cap like the one Oginga Odinga wears", and that he learnt the following day that the deceased had not been seen alive again.

8. Nahason Kimani (PW2) told the court that he was a taxi driver. On the material day he was called by his colleague and told that Kahembe who used to operate KAR 033K as a taxi had gone missing. He stated, further, that they organized themselves to search for him and his motor vehicle. They received information that the motor vehicle had gone towards Meru and that its number plate had been replaced with one for KAP 125P. They further received information that the vehicle had been seen at Gakoromone near the market. They rushed there and saw the vehicle but it disappeared. It came back and entered a petrol station. It was carrying 4 people amongst them the appellant. The police came to the scene and arrested the appellant and another person. It was said that the appellant was driving the motor vehicle. The witness said he saw the appellant clearly.

9. Isaiah Macharia Nderitu, PW5, was the owner of the stolen taxi. Having been unable to reach the deceased on the date in question, he called the chairman of the taxi operators who with others formed a team that went to Meru following a tip off. They started looking for the stolen vehicle. They waited at Gakoromone petrol station and after a short while the vehicle appeared and entered the petrol station. He identified it as his. He stated that a machine gun and one magazine were recovered from the back seat. The original number plate had been covered by a black cello tape.

10. No. 50910 Cpl. Peter Ndei Kanyi, PW8 together with CIP Benjamin Gitonga were part of the investigations team which recovered the body of the deceased which was decomposing. Another team led by Cpl. Gideon Mbuthu laid an ambush at a petrol station near the bus stage where they expected the stolen motor vehicle to pass. Shortly after, the vehicle was driven there for fueling. One corporal Moracha challenged it to stop but it sped towards the main stage. The same was nonetheless blocked by another vehicle and it therefore, stopped. The appellants were arrested as they tried to open the doors. Luka Muriuki was carrying a rifle while the appellant was carrying a magazine and was the one driving the motor vehicle.

11. In his sworn statement of defence, the appellant denied committing the offence, and explained that he was leaving his place of work and on reaching the stage he met a hawker selling fruits on a wheel barrow. He decided to buy the fruits. That he suddenly heard a loud sound and people started running from the stage and he also decided to start running since he did not know if it was Al Shabab. He testified that he ran into other people and fell down and lost consciousness and from there he found himself in a police cell at 8.00p.m.

12. He testified that the following day 5th, February, 2011 the officers took him to the CID Meru where he was interrogated and he was taken to court on 7th February, 2011 where he was joined in a case with a person whom he did not know before then. That later he was taken for a parade after a witness had seen him in court and that one person picked him out in the parade.

13. In support of the appeal, the appellant filed written submissions dated 2nd June 2023 which were highlighted by learned counsel, Ms. Grace N. Maina. On the guilt of the appellant it was submitted that PW 1 and PW 4 being the people who saw the deceased last were best placed to identify the person who was talking with him and who could be the likely perpetrator of the crime, however, they gave contradictory evidence. Further, that the evidence of PW 2, 3, 4, 5, 9 and 11 who witnessed the arrest of the appellant was contradictory and should be resolved in favour of the appellant.

14. On the identification of suspects, it was submitted that only PW 4 was able to identify the appellant but he contradicted himself when he said he never saw the person talking with the deceased and later said he saw him enter the vehicle and it is on this basis that he identified the appellant at an I.D. parade. Further it was submitted that the appellant was not satisfied with how the parade was conducted since the said witness had seen him in court on 7th February, 2011 and the parade was conducted on 8th February, 2011. Counsel submitted that it is trite law that where court relies on the evidence of a single identifying witness, it ought to caution itself and that this was not done and as such the conviction was unsafe and ought to be set aside. We were urged to allow the appeal.

15. Mr. Naulikha, learned counsel for the respondent, opposed the appeal. He submitted that there were no contradictions in the prosecution evidence as alleged by the appellant. He told the Court that the appellant had also been identified by PW5, PW6 and PW7. He reiterated that the doctrine of recent possession had been properly applied; that the appellant had been placed at the scene both in Nanyuki and in Meru where he was found in possession of the stole motor vehicle. Counsel added that the prosecution had proved its case through direct evidence which was consistent, admissible and reliable. He urged us to dismiss the appeal.

16. This being a second appeal, the jurisdiction of this Court, as specified under section 361(1) of the Criminal Procedure Code is limited to matters of law only. This Court will also not interfere with concurrent findings of fact by the two courts below except in very rare circumstances as elucidated in Chamagong -vs- Republic [1984] KLR 61.

17. We have considered the record before us in its entirety and we discern three main issues that fall for our determination. These are, first, whether the appellant was positively identified as having participated in the robbery; second, whether some of the stolen items were recovered from the appellant; and third, whether the doctrine of recent possession can be applied to the circumstances that were before the trial court. With regard to the appeal against sentence, there is the issue whether it is within this Court's jurisdiction to intervene, and if so, whether the death sentence imposed upon the appellant as lawful.

18. As to whether the appellant was properly identified, PW4 was the single identifying witness. In Mailanyi -vs- Republic [1986] KLR 198, the Court laid the following principles in regard to the evidence of identification by a single identifying witness:

    i. although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult;

    ii. when testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light, available conditions and whether the witness was able to make a true impression and description;

    iii. the court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made; and

    iv. failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.

19. On identification of the appellant, PW4 testified that he identified the appellant when he approached the deceased and they left in the car the deceased was driving. He said that he was able to see him clearly; that the appellant sat next to the deceased in the taxi that he also noted the way the appellant was dressed. He told the court that he later identified the appellant at the police station as the one who had gone to the deceased's car, talked to the deceased and boarded the deceased's vehicle and sat at the co-driver's seat. We note that the incident PW4 described happened in broad daylight.

20. The two courts below were alive to the fact that PW4 was a single identifying witness and appropriately addressed his evidence. On our part, we are satisfied that PW4 was clear on the identity of the appellant as he saw him clearly, in broad daylight, as he negotiated the taxi fare with the deceased. The circumstances as enumerated by PW4 were appropriate for a positive identification, and this was consistent with his picking out the appellant at the identification parade. The 2 two courts below considered this evidence with circumspection and were satisfied that the same was credible and could be relied on to convict.

21. The other evidence against the appellant was that he was found in the deceased's motor vehicle when it was recovered in Meru, hence the application of the doctrine of recent possession applied by the two courts below. The doctrine of recent possession is a principle that allows a court to draw an inference of guilt where the accused is found in possession of recently stolen property and is not able to provide a satisfactory explanation for his possession.

22. In Erick Otieno Arum -vs- Republic [2006] eKLR, this Court stated as follows on the application of the doctrine of recent possession:

> "In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. In order to prove possession, there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses."

23. The evidence adduced before the trial court and endorsed by the High Court was that the appellant was the one driving the motor vehicle registration No. KAR 033K which had been stolen from the deceased in Nanyuki and recovered in Meru after it was trailed there. From the evidence of PW9, the appellant and his co-accused before the trial court were arrested as they tried to open the car doors in a bid to escape after they were ambushed by members of public and their motor vehicle blocked and prevented from driving off. Further evidence was that the appellant was carrying a magazine and was the one driving the motor vehicle.

24. The learned Judge upheld the conviction of the appellant based on the doctrine of recent possession as she noted that no reasonable explanation was given to account for the appellant's possession of that motor vehicle which had been stolen from the deceased the previous day. The appellant was unable to give a plausible explanation as to how these items came into his possession. We hold the view that the evidence was consistent and well corroborated. We find no sufficient basis for us to depart from the concurrent findings of fact by the two courts below in regard to how the stolen motor vehicle was recovered from the appellant. We find that the appellant's conviction was properly founded in law and we cannot interfere with it. The appeal on conviction is hereby dismissed.

25. Lastly, on the issue of sentence, as stated under section 361(1)(a) of the Criminal Procedure Code, this Court's jurisdiction on second appeal is limited to issues of law, and severity of sentence is excluded from the Court's jurisdiction as it is identified as an issue of fact.

26. Section 296(2) of the Penal Code prescribes the death penalty as the mandatory sentence for the offence of robbery with violence. The appellant herein was sentenced to death by the trial court which had the power to impose that sentence. Since the Supreme Court decision in Francis Karioko Muruatetu & Another -vs- Republic [2017] eKLR (Muruatetu1) which declared unconstitutional the mandatory nature of the death sentence provided under section 204 of the Penal Code for the offence of murder, the issue of the constitutionality of the mandatory death sentence for the offence of robbery with violence under section 296(2) of the Penal Code has remained a matter of debate.

27. The Supreme Court intervened by giving guidance in terms of it directions in Francis Karioko Muruatetu & Another -vs- Republic; Katiba Institute & 5 others (Amicus Curiae) (2021) eKLR (Muruatetu 2); that (Muruatetu 1) is not applicable to the offence of robbery with violence, and that the sentence of death provided under section 296(2) of the Penal Code remains a lawful sentence until an appropriate petition on the constitutionality of that sentence, in regard to that offence, is heard by the High Court and escalated to the Court of Appeal and eventually to the Supreme Court as the apex Court in the land. The Supreme Court reiterated this position in it's recent decision in Republic -vs-

Joshua Gichuki Mwangi and others Petition No. E018 of 2023. For this reason, the sentence imposed on the appellant is lawful and we have no jurisdiction to interfere with the same.

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 NYERI THIS 21ST DAY OF AUGUST 2024.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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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