Mbaya v Republic (Criminal Appeal 183 of 2017)
[2024] KECA 1251 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1251 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 183 OF 2017

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

SEPTEMBER 20, 2024

BETWEEN

MOSES GITHINJI MBAYA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgement of the High Court of Kenya at Nanyuki (M. Kasango, J.) dated 8th November, 2017inHCRA No. 110 of 2016)

JUDGMENT

1. Moses Githinji Mbaya (Moses), the appellant, together with another was charged before the Nanyuki Chief Magistrate's Court with two counts of robbery with violence contrary to section 296(2) of the Penal Code. On count one, it was alleged that on 4th December 2015 at Daki Bar, Timau Township, Buuri District in Meru County within the Republic of Kenya with others not before court, being armed with dangerous weapons namely a knife and metal objects, they robbed Aron Kinoti of property namely 72 bottles of assorted spirit beer valued at Kshs.6,550.00 the property of Caroline Makena and at the time of such robbery used actual violence to the said Aron Kinoti.

2. On Count two, it was alleged that on 4th December 2015 at Daki Bar, Timau Township, Buuri District in Meru County within the Republic of Kenya with others not before court, being armed with dangerous weapons namely a knife and metal objects, they robbed Aron Kinoti property namely 72 bottles of assorted spirit beer valued at Kshs 6,550.00 the property of Caroline Makena and at the time of such robbery used actual violence to the said Aron Kinoti and James Mugambi.

3. The appellant and his co-accused pleaded not guilty to the charge.

   At the hearing before the trial court, five (5) witnesses testified for the prosecution. In their defence, Moses testified on oath and called no witnesses and his co-accused testified without taking oath and called no witnesses. The trial magistrate upon considering the evidence before him, found the appellant

and his co-accused guilty on both counts, convicted them and sentenced each of them to death on the 1st count while the sentence to the second count was held in abeyance.

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.

5. Being further aggrieved, Moses, moved to this Court on appeal against both conviction and sentence. The appeal was initially premised on the self-generated memorandum of appeal which the appellant's counsel later amended and filed a supplementary memorandum of appeal dated 12th October 2023. Learned counsel faulted the High Court for, inter alia, affirming the decision of the trial court when the charge of robbery with violence had not been proved beyond any reasonable doubt; affirming the decision of the trial court when there was doubt in the prosecution case which ought to have been resolved in favour of the appellant; not finding and holding that the appellant's right to fair trial was violated as he was not informed of his rights to choose and be represented by an advocate as enshrined under Article 50(2)(5)(8) of *the Constitution* and neither was he assigned an advocate when substantial injustice resulted by this failure and that the mandatory nature of the death sentence is unconstitutional and constitutes a violation of the right to a fair trial.

6. In order to place this appeal in context, we give a summary of the evidence adduced before the trial court. Aron Kinoti (PW1) was employed as a bar attendant by Caroline Makena Mutwiri at her bar known as Daki Bar in Timau Town. He testified that on the material date at night he was asleep in a room next to the bar with James Ngumbo Mugambi when he heard some commotion inside the bar and he went to check. Outside the bar he saw two people who included Charles Ngorua Benjamin, who was the 2nd accused person at the trial court and whom he referred to as 'sikwekwe'. He stated that the two run away and he got into the bar.

7. He testified that inside the bar they found Moses who was armed with a knife and that he attacked and injured James Ngumbo Mugambi before they subdued him and took him to the police station. He stated that the thieves had gained entry by removing pieces of timber from the wall and that inside the bar they found beer bottles on the floor tied using a t-shirt and also recovered a black jacket belonging to Charles Ngorua Benjamin.

8. Caroline Makena (PW2) testified that on the material night she was called by a neighbour who informed her that her employees, PW1 and PW3 had been attacked and were calling for help and that she called some neighbours to go to their rescue. The witness stated that the following day she noted that the thieves had gained entry by removing pieces of timber from the wall and she found beer and spirits missing from the counter which had been broken into. She stated that PW1 and PW3 informed her that they had identified 'sikwekwe' as one of the suspects who had run away but they managed to arrest Moses and took him to the police station, where he was subsequently charged with the offences stated earlier.

9. James Mugambi (PW3) an employee of PW2 who was with PW1 on the night in question repeated PW1's evidence almost verbatim. The matter was later reported to the police station and investigations commenced. In the meantime, PW1 and PW3 who claimed to have been injured during the incident went to the hospital where they received treatment for some swellings and bruises. Kennedy Kiprop (PW4) a clinical officer produced in court the P3 Forms in respect of both witnesses confirming that both witnesses had sustained some injuries, which were classified as "harm". The injuries were said to have been caused by a blunt object.

10. In his sworn statement of defence, the appellant denied committing the offence, and explained that on the material night he was at Baki Bar when he quarrelled and fought with PW1 and PW3 over a lady by the name Mwendwa. He stated that he was injured during the said fight and that he was being framed for the offence to forestall his making an assault complaint against the two witnesses.

11. In support of the appeal, the appellant filed written submissions dated 12th October 2023 which were highlighted by learned counsel, Mr. Wahome Gikonyo during the plenary hearing. On the guilt of the appellant, it was submitted that the prosecution evidence was riddled with inconsistences. An example of the inconsistencies and contradictions given by Mr. Wahome was that PW1 informed the court that on rushing to the scene they found the appellant armed with a panga; but that the same witness told the court that the appellant had hit them with a piece of wood. It was submitted that based on this the question which begs is if the appellant was armed with a panga why did he use a timber instead? Counsel also questioned why the panga and timber were not produced in court.

12. Other inconsistencies were cited, particularly in regard to the time the offence is said to have been committed vis a vis the time the appellant was said to have been drinking at the same bar when he and another were said to have fought over a woman. The Court was urged to note that the investigating officer told the court that the appellant was not arrested with any stolen property and that the "report was initially booked as assault and burglary".

13. It was submitted that the said inconsistencies created doubt on the charge of robbery with violence and gave credence to the appellant's defence that what was there was a fight. Further, that if indeed what was there was robbery nothing would have been easier than PW1 and PW3 reporting so in their first report to the police. But that what was reported was assault. It was submitted that PW5 did not tell the court what evidence he collected to make him charge the appellant with robbery with violence and that it is trite law that the evidence for a charge of robbery with violence must be water tight as it is a very serious charge.

14. It was submitted that where the evidence is inconsistent, as it is in this case, the High Court should have held otherwise and given the appellant the benefit of doubt and hence it is not safe to uphold the conviction against the appellant on this kind of evidence.

15. On the ground that the rights of the appellant enshrined under Article 50(2)(G) and (H) being violated, it was submitted that the appellant acted in person in the subordinate court and at the High Court, it was submitted that the lower court did not promptly and even during the entire trial inform the appellant of his rights to choose an advocate which was contrary to Article 50(2)(g) which requires that he be informed of this right promptly and to have an advocate assigned by the state at the state expense. Reliance was placed in Republic v Chengo & 2 others (Petition 5 of 2015)[2017] KESC 15 (KLR) (26 May 2017).

16. On the mandatory nature of the death sentence being declared unconstitutional and a violation of the right to a fair trial, it was submitted that under Article 25(c) of *the Constitution* the right to a fair trial shall not be limited and that any law that limits the exercise of judicial discretion in sentencing limits the right to a fair trial. It was submitted further, that that the appellant has been behind bars since 4th December 2015 and that he was sentenced to death. We were urged to set aside the judgement and sentence of the trial court or in the alternative to find the sentence unconstitutional and reduce it to the period the appellant served in custody and has served in prison already.

17. On her part, Ms. Nandwa, learned counsel for the respondent, opposed the appeal. She submitted that there were no contradictions in the prosecution evidence as alleged by the appellant. She told the Court that PW1 and PW3 testified that the persons who entered into PW2's bar and robbed them were the

appellant and his co-accused who were previously known to them and were armed with dangerous weapons, that a dagger was recovered from the appellant. It was submitted that the appellants also used actual violence against both PW1 and PW3. It was submitted that PW2's bar was closed at the time of the robbery and the appellant and another made an opening on the wall by digging and removing some pieces of timber to gain entry into the bar.

18. On identification of the appellant, it was submitted that the appellant was recognized by both PW1 and PW2 and was known to them previously. And that there was electricity both inside and outside the bar.

19. In regard to the sentence, it was submitted that the appellant was sentenced to suffer death and that the sentence was well within the law. We were urged to dismiss the appeal and to uphold both the conviction and the sentence.

20. This being a second appeal, the jurisdiction of this Court, as circumscribed 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 v Republic[1984] KLR 61.

21. We have considered the appeal, the rival submissions of the parties and the law, particularly as espoused in the authorities cited in support of the opposing positions. In our view, all the issues raised herein can be compacted to one issue, whether the evidence on record was sufficient to support a conviction for the offence of robbery. Were the ingredients of robbery with violence as provided under section296(2) of the Penal Code proved?

22. In Johana Ndungu v Republic [1996] eKLR this Court broke down the offence of Robbery with violence as follows:

> " In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with section 295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre- supposed in the three sets of circumstances prescribed in section 296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section: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, or3.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."
>
> See also Oluoch v Republic [1958] KLR.

23. According to PW1 and PW3 when they went outside after hearing the noise in the bar, they saw 2 people outside. Among them was 'Sikwekwe', the appellant's co-accused in the trial court. Those two ran away. It was not clear what they were doing outside and what their relationship with appellant was. The appellant was found in the bar alone. There being no community of purpose established between the appellant and the two people found outside the bar, the two courts below ought not to have concluded that the three of them were together. The prosecution needed to demonstrate that the three were together and were driven by a common purpose.

24. On whether the appellant was armed with a dangerous weapon, as pointed out by learned counsel for the appellant, there was confusion and inconsistency as to what the appellant was armed with. Was he armed with a knife, a panga or a piece of timber?

25. One of the ingredients of robbery with violence is being armed with a dangerous weapon. Although the evidence adduced was to the effect that the appellant was taken to the police station along with the knife or "dagger" the same was not produced before the court as exhibit. From the P3 form produced in court as exhibit, none of the witnesses had suffered any cut wounds during the incident. The weapon used to inflict the injuries found on the witnesses were said to have been caused by a "blunt object". We agree with Mr. Wahome that these inconsistencies went to the root of the case and they ought to have been resolved in favour of the appellant.

26. There is no doubt that the appellant was overpowered by PW1 and PW3 at the scene and taken to the police station. Both witnesses were also found to have suffered minor injuries from the incident. It is also worth of note that the matter was originally reported and booked as an "assault". It was not clear how and why it was aggravated to robbery with violence. In our considered view, even if all the circumstances of the case as narrated were true, the offence that was disclosed, other than the original assault charge was bar breaking and attempted theft.

27. Our conclusion is that the appellant's conviction for robbery was unsafe as it was not supported by the evidence adduced in court. Had the first appellate court properly re-analyzed the evidence adduced before the trial court, its conclusion would have been different. For the foregoing reasons, we find the appeal merited. We allow the same and order that the conviction of the appellant on both charges of robbery with violence be and is hereby quashed and the death sentence set aside. We order that the appellant shall be set at liberty forthwith, unless he is otherwise lawfully held.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2024.

W. KARANJA

JUDGE OF APPEAL

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L. KIMARU

JUDGE OF APPEAL

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A.O. MUCHELULE

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR