M'Ibaya v Republic (Criminal Appeal 44 of 2017)
[2024] KECA 1295 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1295 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 44 OF 2017

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

SEPTEMBER 20, 2024

BETWEEN

JULIUS KATHIA M'IBAYA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Meru (M.J. Anyara Emukule and W. Ouko, JJ.) dated 4th July 2018 in HCCRA No. 20 of 2006)

JUDGMENT

1. In the Principal Magistrate's Court at Maua, the appellant, Julius Kathia M'Ibaya, was charged with robbery with violence contrary to section 296(2) of the *Penal Code*. The particulars were that at about 6.30pm on 14th August 2004 at Kathanya Village in Kabachi Location in Meru North District of the Eastern Province, while armed with a dangerous weapon namely a knife, the appellant robbed Martin M'Ruaki (PW1) of Kshs 200.00 and at or immediately before or immediately after such robbery, wounded PW1. Following trial, he was convicted and sentenced to death. He challenged both the conviction and sentence on appeal to the High Court (M.J. Anyara Emukule, J. and W. Ouko, J.). The court upheld the conviction and the sentence.

2. This is a second appeal. Our mandate under section 361(1) of the *Criminal Procedure Code* is to consider matters of law only. We will not interfere with the concurrent findings of fact arrived at by the two courts below unless it is shown that the findings were not based on evidence or were based on a misapprehension of the evidence or that it is apparent that no reasonable court could have reached that conclusion. (See *M'Riungu v Republic* [1983]KLR 455).

3. According to the record, PW1 was going to a canteen from his house at about 6.00pm. He was carrying miraa in his armpits. He met the appellant whom he knew. The appellant asked him for miraa. PW1 thought that the appellant wanted to buy the miraa. He gave it to him and asked to be paid Kshs 200.00.

Instead, the appellant produced a knife from his waist and ordered PW1 to raise up his hands. PW1 obeyed, but he was stabbed on the right hand. The knife went through the hand and cut him below the armpit. At that point Michael Kaesa Mwenda (PW2) showed up. The appellant ran away with both the money and miraa. PW2 found PW1 bleeding and took him to Maua Methodist Hospital where he was stitched and treated. His P3 Form was later completed by clinical officer Catherine Mankura (PW3) of Nyambene District Hospital. The injuries were a stab wound on the right posterior chest and two wounds on right upper arm. It was assessed that degree of injury that PW1 suffered was harm. The day after the attack the appellant was arrested at Kabachi Chief's Camp and was eventually charged.

4. In defence the appellant gave unsworn statement denying the charge. He stated that he was arrested for drinking traditional liquor. He was asked by police to produce a bribe of Kshs 1,000.00 in order to be released. When he could not raise the money, he was charged with the offence he knew nothing about.

5. This is the evidence that the trial court considered and convicted him on. On appeal, the learned Judges after reviewing the evidence, found that the appellant had been convicted on overwhelming evidence; that the incident was between 6.00pm and 6.30pm; the appellant was known to both PW1 and PW2; and that he had attacked and injured PW1 from whom he took Kshs 200.00 and miraa. The medical evidence by PW3 had confirmed the injuries that PW1 had suffered.

6. In his appeal to the High Court, the appellant raised the issue that there was variance between the chargesheet and the evidence; that whereas the charge sheet indicated that what was taken from him was only the Kshs 200.00, PW1's evidence was that he had taken both the money and the miraa; that this variance made the charge fatally defective requiring his release. The learned Judges, while relying on this Court's decision in *Morris Muthiani Sammy v Republic*, Criminal Appeal No 14 of 2006 and section 214(2) of the *Criminal Procedure Code*, found that the variance was not material.

7. The other ground of appeal to the High Court was in regard to the appellant's defence which he claimed had not been considered by the trial court. The High Court found that the trial court had considered the defence which had been correctly dismissed, as there was clear evidence that the appellant had attacked PW1 whose property he had taken, in an incident that he had stabbed and injured PW1; and that PW2 had found PW1 at the scene bleeding and the appellant had run away from the scene on seeing him. It was found that the attack had been during the day and that the appellant was known to both PW1 and PW2.

8. Before us, similar grounds were raised. Basically, that the High Court had erred by upholding the conviction when the appellant's guilt had not been proved beyond reasonable doubt and that his defence had been improperly rejected. Learned counsel Ms. Ndiangui prosecuted the appeal on the appellant's behalf, whereas learned counsel for the State asked us to dismiss the appeal as being unmerited.

9. We have no hesitation in accepting the findings by the learned Judges, as it is clear that this was an incident that happened during the day in which the appellant attacked PW1, injured him and took his miraa and Ksh.200.00. PW2 came to the scene and found the appellant in struggle with PW1. PW1 was bleeding. The appellant took off on seeing PW2. The appellant was known to both PW1 and PW2. The injury to PW1 was confirmed by medical evidence.

10. We only wish to reiterate that, in any trial there are bound to be discrepancies, an appellate court in considering such discrepancies. should be guided by section 382 of the *Criminal Procedure Code* to determine whether the discrepancies were so fundamental as to cause prejudice to the appellant or they were inconsequential to the conviction and sentence.

11. In all, we find that the appellant's conviction was based on safe evidence.

12. On sentence, the punishment for robbery with violence under section 296(2) of the *Penal Code* is death. The sentence meted out to the appellant was therefore lawful and we cannot interfere with it.

13. Consequently, the appeal lacks merits and is dismissed in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 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