Imbwaka v Republic (Criminal Appeal 51 of 2019)
[2024] KECA 1451 (KLR) (18 October 2024) (Judgment)

Neutral citation: [2024] KECA 1451 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 51 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

OCTOBER 18, 2024

BETWEEN

CHRISANDUS AMUNZU IMBWAKA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Bungoma (S.N. Riechi J) dated 22nd February, 2019 in HCCRA No. 3 of 2018)

JUDGMENT

1. On 21st March, 2017, the appellant was charged before the Magistrate's Court at Bungoma, with three counts of robbery with violence, contrary to Section 296(2) of the Penal Code, and one count of gang rape contrary to Section 10 of the *Sexual Offences Act*, as well as a fifth count of gang defilement contrary to Section 10 of the *Sexual Offences Act*. He pleaded not guilty to the three counts of robbery with violence, but did not take any plea on the gang rape and gang defilement, as the magistrate noted that those counts were defective.

2. The hearing of the appellant's case commenced on 31st July, 2017.

   On 29th November, 2017, after six prosecution witnesses had testified, the prosecution substituted an amended charge sheet, in which the appellant was charged with six counts. The six counts included the three counts for robbery with violence, that the appellant had pleaded not guilty to, a fourth count of robbery with violence, a fifth count of gang rape, and a sixth count of gang defilement. The appellant pleaded not guilty to all the six counts. The court then proceeded to take the evidence of the remaining three witnesses and upon being put on his defence, the appellant gave a sworn statement.

3. In his judgment the trial magistrate, upon considering the evidence, found the appellant guilty of the first three counts of robbery with violence and found the appellant not guilty of the fourth count of robbery with violence as well as the fifth count of gang rape. The trial court made no finding on the

sixth count of gang defilement. The trial magistrate sentenced the appellant to life imprisonment on each of the first, second and third counts of robbery with violence and ordered that the sentences to run concurrently.

4. On appeal to the High Court against conviction and sentence, the learned Judge of the High Court, dismissed the appeal in its entirety, and confirmed the appellant's conviction and sentence as per the judgment of the trial court.

5. It is in light of the above background that the appellant is now before us with a second appeal. The appellant initially premised his appeal on his self-generated memorandum of appeal, in which he faulted the learned judge for failing to find: that Article 50(2)(c) and (j) of *the Constitution* were not complied with; that he was convicted on a defective charge sheet; that recent possession was not proved; that his defence of alibi was wrongly rejected; and that the trial court relied on his identification, at an identification parade which was not properly done, and that the court failed to consider his mitigation.

6. The appellant also filed supplementary grounds of appeal dated 14th September, 2023, in which he faulted the trial magistrate for sentencing him to life imprisonment contrary to *the Constitution*; for relying on the doctrine of recent possession without appropriate evidence; and for relying on voice identification at an identification parade which was conducted contrary to the Force Standing Order. The appellant's counsel later filed a supplementary memorandum of appeal dated 3rd October, 2023, which is indicated as raising three issues but from which we discern only one issue in regard to sentence, where it is contended that the sentence imposed upon the appellant was harsh, and seeking to rely on Article 165(3)(a) & (b); 159(2)(a) & (b); and 22(4) of *the Constitution*.

7. In his written submissions dated 15th September, 2023, filed in support of his supplementary record of appeal, the appellant submitted that his constitutional right under Article 50(2) was violated, because he was not supplied with witness statements despite requesting for the same. He cited Albanus Mwasia Mutua vs. Republic Criminal Appeal No. 120 of 2004 Nairobi [2006] eKLR; Thomas Patrick Gilbert Cholmondeley vs Republic, [2018] eKLR; maintaining that there was a serious miscarriage of justice.

8. On the doctrine of recent possession, the appellant submitted that the law places an obligation upon the prosecution to prove each and every element of the offence beyond reasonable doubt. He pointed out that the complainant did not identify the phone that was allegedly stolen, nor did the prosecution produce any printout from Safaricom to clarify who was using the phone, that was produced in evidence. He maintained that there were, therefore, coexisting circumstances pointing to other people having used the phone. The appellant submitted that the serial number of the mobile phone that was allegedly recovered by the witnesses, was different from that listed on the charge sheet, and that the prosecution deliberately failed to call PC Musamani and PC Shihali who recovered the phone as witnesses. In this regard, the appellant relied on Bukenya & others vs. Uganda, [1972] EA 549; and Republic v. Silas Magongo Onzere alias Fredrick Namema, [2017] eKLR. He argued that it was essential for the prosecution to prove that he received and retained the goods, but there was no such proof.

9. On identification, the appellant submitted that the circumstances were difficult, and although the witnesses purported to have seen the attackers for a long period, it was unlikely that they could remember his appearances and voice, nine months after the robbery. This was supported by the fact that the witnesses did not give any reason why they could identify the accused person if they saw him again, nor did they give any description of the attackers. The appellant referred to Wamunga vs Republic, [1989] eKLR 426; Nzoro vs. Republic, 1991 eKLR 212; and Kiarie vs. Republic, [1984] eKLR; arguing that the evidence of identification/recognition at night must be absolutely watertight to justify a conviction. Also relied on was Charles Matianyi vs. Republic, [1986] 1KLR 198; for the

proposition that the court must exercise caution and circumspection before convicting on the evidence of identification, especially where the evidence is that of a few identifying witnesses. In addition, the appellant contended that the identification parade was not done in accordance with the Police Force Standing Order.

10. Further, the appellant maintained that although the trial magistrate declared count 4 and 5 as defective, the charge sheet was never amended to remove these counts from the charge sheet. He cited Joseph Ndungu Kagiri vs Republic, [2016] eKLR, urging that the Court had the obligation to ensure that his right to fair trial was protected. The appellant faulted the learned Judge for failing to analyze or consider his defence of alibi. He cited Karanja vs Republic, [1993] KLR 501, for the proposition that the burden of proving the falsity of the appellant's defence of alibi was on the prosecution. He contended that the prosecution did not discharge this burden as no evidence was called to disprove any grudge between the appellant and the DCIO nor did the prosecution seek leave to call further evidence to disprove the alibi.

11. In regard to the sentence, the appellant relied on Julius Kitsao *Manyeso vs. Republic, Criminal Appeal No. 12 of 2021*, maintaining that the sentence of life imprisonment was unconstitutional, as it contravened Article 27 and 28 of *the Constitution*. In addition, that under international law, life imprisonment was degrading and inhuman punishment.

12. Learned counsel, Mr. Ariho Ngundu, who appeared for the appellant also filed written submissions, but we do not find it necessary to rehash those submissions as they mainly mirror the comprehensive submissions that were filed by the appellant in person.

13. During the hearing of the appeal, the respondent was represented by Ms. Mwaniki from the office of the DPP. Ms. Mwaniki relied on written submissions that were filed by Mr. Shabola Ahindukha, a principal prosecution counsel in the office of the Director of Public Prosecution. The focus of the respondent's submissions was the sentence of life imprisonment that was imposed upon the appellant. It was conceded that there was a typographical error on the charge sheet, which indicated that the appellant was charged with robbery with violence under Section 296(1) of the Penal Code when the offence was actually robbery with violence under Section 296(2) of the Penal Code. The respondent argued that there was no prejudice caused to the appellant, as the particulars of the charge, and the evidence which was adduced against him, showed clearly that the charge was under Section 296(2) of the Penal Code. Counsel argued that the error was curable under Section 382 of the Criminal Procedure Code.

14. We wish to commence our analysis with the last issue regarding the alleged defective charge sheet. First, we find the appellant's contention regarding the defect on the original charge sheet relating to the rape and defilement charges of no substance, as the original charge sheet was substituted by an amended charge sheet. Upon perusal of the amended charge sheet, we do note that the charges in the three counts of robbery with violence in the amended charge sheet, of which the appellant was convicted, were all similar, all being charges of robbery with violence contrary to Section 295 as read with Section 296(1) of the Penal Code. This means that there was a defect in the amended charge sheet as Section 296(1) of the Penal Code, provides the punishment for the felony of robbery which is simple robbery as opposed to robbery with violence. The appellant having been charged with robbery with violence, the charge ought to have stated the section as Section 295 as read with Section 296(2) of the Penal Code, which is the section that provides the punishment for the offence of robbery with violence. To this extent, the appellant is correct that the charge sheet was defective.

15. Notwithstanding that defect, the particulars of the charge on each of the three counts indicated that the appellant "jointly with others" robbed each of the complainants in the three counts, and that at the time of the robbery they were "armed with different types of weapons". In count one, it was alleged

that they were armed with an axe and a rungu and also to have used actual violence on RNW (R); and in count two, they were alleged to have been armed with crude weapons namely axes and rungus and to have used actual violence on LKS (S) at the time of the robbery, and to have occasioned him actual bodily harm; and in count three they were alleged to have used a crude weapon namely a metal rod and to have threatened to use actual violence on Benson Wafula Sabuni (Benson).

16. The above particulars show that although Section 296(1) of the Penal Code was not the correct penal section for the offence of robbery with violence, the appellant did not suffer any prejudice as the particulars of the charge were clear that the offence was one of robbery with violence, all the elements of the offence of robbery with violence having been stated.

17. Section 382 of the Criminal Procedure Code which deals with error or omission in a charge or proceedings states as follows:

> "Subject to the provisions herein before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

18. It is evident that the appellant did not suffer any prejudice, nor was there any failure of justice, as it was clear to him that he was facing the charge of robbery with violence, and, therefore, the penal section was 296(2). For this reason, we reject the ground of appeal regarding the charge having been defective.

19. The appellant has raised a ground of appeal before us, that his constitutional right under Article 50(2) was violated, because he was not supplied with witness statements despite requesting for the same. The proceedings of the trial court, reveal that the appellant applied for copies of witness statements on 17th July, 2017 and the trial court made an order for the same to be supplied to him. The appellant did not thereafter complain about not having been supplied with the witness statements. To the contrary, he proceeded with the hearing on the next date, and effectively cross examined all the witnesses during the hearing.

20. The appellant only first raised this complaint in passing, in his submissions before the High Court, during the hearing of his appeal, when he claimed that he was neither supplied with witness statements nor was he accorded an advocate at the State expense. However, the appellant not having raised the issue of violation of his rights under Article 50(2) of *the Constitution* in his grounds of appeal, the learned Judge of the High Court had no jurisdiction to address this complaint. We find that this ground of appeal fails not only because it has no substance, but also because it was not properly raised before the High Court.

21. This being a second appeal, the jurisdiction of this Court as specified under Section 361 of the Criminal Procedure Code is limited to matters of law only. As was stated by this Court in Chemagong - vs- Republic, [1984] KLR 611:

> "A court on Appeal will not normally interfere with the finding of fact by the trial court, whether in a civil or criminal case, unless it is based on no evidence or on a misapprehension

of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding he did."

22. We have considered the record of appeal, the submissions by the respective parties and the law. The two lower courts made concurrent findings that on the material night there were a spate of robberies in Bukembe market area, in which the four complainants were robbed. Bearing in mind this Court's jurisdiction as afore-stated, and having disposed of the procedural issues that were raised by the appellant, the main issues of law that remain for our determination is whether the appellant was positively identified as having participated in the spate of robberies that took place on the material night; whether the doctrine of recent possession was properly applied and whether the sentence that was imposed on the appellant was proper or whether there is justification for this Court to intervene.

23. As per the concurrent findings of the two lower courts, the complainants in the three counts, that is, R, S and Benson who are all residents of Bukembe within Bungoma County, were each in their respective houses on the night of 13th and 14th August, 2016. R was the first to be attacked, when she opened her door, after her nephew, one M, called out to her saying he had arrested a suspect. Apparently, the appellant and four other people were waiting outside and they pushed their way into the house, held R and demanded money. They took some money and various things from her house. R noticed that the people were armed with pangas and axes. She was able to see them as they had torches which they were using and they stayed in her house for about one and a half hours. They then took her to several houses in the neighbourhood using her to make the neighbours to open the door.

24. Amongst the neighbours who opened their doors were RMM (R), her husband S. The appellant and his colleagues entered the couples house, threatened to kill R and hit Liden's leg with an iron bar injuring him. R claimed that she was robbed of Kshs. 300,000/- and was also sexually assaulted. Her husband was also robbed of a Techno Mobile Phone and Kshs. 6,000/-. Benson was another neighbor who opened his door in response to an alarm from R. The robbers, who claimed to be police officers, entered his house and told him to lie down. As he hesitated, he was hit with a metal bar on the head. His house was then ransacked and he was robbed of Kshs. 2,000/-. After a while the robbers left and the police were called. Simiyu and Benson, who were injured, were taken to hospital.

25. Corporal Irine Kimiyu (Cpl Kimiyu), who was the investigating officer, visited the scene and interrogated the witnesses. She later traced mobile phone IM No. 3574075243xxxx which was in use, and traced the phone to the appellant. Cpl Kimiyu subsequently arrested the appellant at the Eldoret Law Courts, where upon being searched, the mobile phone was recovered from him. The mobile phone was later produced in court as an exhibit. An identification parade presided over by Inspector Abdillahi Maalim, the Deputy OCS Bungoma Police station, was held at the Police station, during which R, R and S were able to identify the appellant as having been among the robbers who attacked them.

26. It is apparent that the appellant was convicted on evidence of identification and recent possession of a mobile phone identified as having been stolen during the robbery. In Cleophas Otieno Wamunga -vs- Republic, [1989] eKLR, which was relied upon by the appellant, this Court rendered itself on the issue of identification as follows:

> "It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error, before it can safely make it the basis of a conviction."

27. In Paul Etole and Rueben Ombima -vs- Republic, [2001] KECA 285 (KLR), the Court of Appeal cautioned thus on the evidence of visual identification:

> " Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific witnesses which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.
>
> All these matters go to the quality of the identification evidence. When the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened: But the poorer the quality, the greater the danger."

28. According to the prosecution evidence, the appellant was identified by R, R and B, who were all able to pick him out during the identification parade. In addressing the evidence of identification, the learned Judge stated as follows:

> " The court in evaluating the evidence of identification in robbery cases must satisfy itself that there existed conducive circumstances for visual identification. These circumstances would include the source of light, its intensity, the period of exposure, whether it is identification of a stranger or recognition of a person known and the position of the accused in respect to the identifying witness. In this appeal, the period within which the identifying witnesses stayed with the robbers was long, over one hour; there is evidence that the appellant was seen by each of the three witnesses with the help of electric lights in the various homes they robbed that night. The intensity of electric light was high, period of exposure long; finally, all these witnesses identified the appellant at the identification parade both on voice identification and visual identification."

29. From the above extract of the judgment, it is clear that the learned Judge properly directed himself on the evidence of identification. Rose testified that she stayed with the robbers for one and a half hours in her house, before she took the assailants to other houses where they robbed her neigbours. She explained that during the period the robbers were in her house, she was able to see them as they were using torches. She stated that she was able to see the robbers much better when she took them to the house of a neigbour Ben, where there was electric lighting. The robbers spoke to her and even spoke to each other in her presence. R was able to pick the appellant as one of the persons who robbed her, during the identification parade. She was able to identify him by voice recognition and visual identification.

30. Rael was another witness who identified the appellant during the identification parade. She testified that she was able to see the appellant when the robbers went to her house. The house had electric light but at some stage one of the robbers who she identified as the appellant, hit the electric bulb in the sitting room with an axe breaking it into pieces. However, Rael maintained that she saw two of the robbers clearly before the bulb was broken. Later the two robbers took her to the bedroom where the light was still on. She was able to see them clearly and heard their voices, as they spoke to her during the robbery, demanding money. One even threatened to rape her, but was unable to do so because she

was having her monthly period, and was bleeding heavily. She described the appellant as short, black and having a hoarse voice, and the other person as tall and having a gap on his upper teeth. She recalled that the tall man was referred to as "commander", while the appellant was referred to as "corporal."

31. R's husband, S, was also similarly able to see the robbers when they entered their house. He identified the appellant as the person who hit the electric bulb in the sitting room with an axe, and also hit his leg with an axe. He also described the appellant's voice as hoarse and was able to identify him visually and through voice recognition during the identification parade.

32. Inspector Abdillahi Maalim the Deputy OCS Bungoma Police station who carried out the identification parade, testified that the parade was done in accordance with the Police Force Standing Orders. He corroborated the evidence of Rose, Rael and Simiyu, that the three witnesses were each able to identify the appellant at the identification parade.

33. On our part, we are satisfied from the evidence that was before the trial court that the parade was properly carried out, and that R, R and S, saw the robbers in circumstances that were favourable for positive identification. Notwithstanding the period of about 8 months between the date of the robberies and the identification parade, the three witnesses, positively identified the appellant through visual appearance and voice recognition, as one of the robbers, and their evidence of identification was safe to rely on. The evidence of these witnesses completely negated the appellant's alibi.

34. As regards the evidence of recent recovery of the mobile phone from the appellant, 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. In Erick Otieno Arum v Republic [2006] eKLR, this Court stated the circumstances under which the doctrine may be applied as follows:

> " 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.

35. From the evidence of the investigation officer Cpl Irine Kimiyu, a mobile phone was recovered from the appellant during his arrest. This was the phone she had used to track the appellant through its IMEI Number. However, the IMEI number which Cpl Kimiyu used to track the phone was No. 3574075243xxxx, but the phone she recovered from the appellant which she produced in the trial court was Serial No 35740705243xxxx and IMEI No 35740705243xxx. It is apparent that the IMEI Nos were not the same. Of greater significance is the fact that Rose, who was said to be the owner of the Techno phone which was recovered from the appellant, did not positively identify the mobile phone. She never stated that she informed the police the serial number or IMEI number of her mobile phones which were stolen, so it is not clear where Cpl Kimiyu got the serial or IMEI numbers of the phone which she tracked.

36. As regards the recovered mobile phone, all R stated is that it was similar to her techno mobile phone which was stolen during the robbery, but the casing was different. Rose did not produce any receipt for the mobile phone nor did she identify the phone using the IMEI number or Serial numbers, nor were any records produced from Safaricom, to link R with the recovered phone. We, therefore, find that the mobile phone produced in court was not positively proved to have been stolen from R during the robbery. For this reason, we find that the learned Judge did not properly interrogate the

evidence of recent possession, and was wrong in applying the doctrine of recent possession, as the proper circumstances for applying the doctrine were not established.

37. Notwithstanding our finding on the doctrine of recent possession, we are satisfied that the evidence of identification by R, R and S was sufficient to nail the appellant on the robbery charges, and his conviction was, therefore, safe.

38. Coming to the issue of sentence, the appellant was convicted by the trial magistrate, on the three robbery with violence charges of which he was sentenced to concurrent sentences of life imprisonment, and this sentence was upheld by the learned Judge. As mentioned earlier in this judgment under section 296(2) of the Penal Code, the punishment for the offence of robbery with violence is death. It is a mandatory sentence and as was recently stated by the Supreme Court in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023*) [2024] KESC 34 (KLR); the trial court had no discretion to impose a sentence other than the mandatory sentence that is provided by the statute. That is to say that the sentence that was imposed by the trial court was illegal, and the learned Judge erred in failing to rectify this infraction. We would have been inclined to set aside the life sentence and impose the mandatory death sentence, but we are constrained by the fact that the respondent did not apply for enhancement of the sentence, nor was the appellant warned of the possibility of such consequence.

39. For all the afore stated reasons we uphold the appellant's conviction and sentence, and dismiss this appeal in its entirety.

DATED AND DELIVERED AT KISUMU THIS 18TH DAY OF OCTOBER, 2024.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR