Mburu v Republic (Criminal Appeal 13 of 2019)
[2024] KECA 1448 (KLR) (11 October 2024) (Judgment)

Neutral citation: [2024] KECA 1448 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 13 OF 2019

MA WARSAME, JM MATIVO & WK KORIR, JJA

OCTOBER 11, 2024

BETWEEN

JOHN NDERITU MBURU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Naivasha (Mwongo, J.) dated 20th December 2018 in HCCRA No. 29 of 2017)

JUDGMENT

1. John Nderitu Mburu (the appellant), has appealed against the judgment of the High Court (Mwongo, J.) delivered in Naivasha High Court Criminal Appeal No. 29 of 2017 on 20th December 2018 dismissing his appeal against conviction and sentence imposed upon him on 31st May 2017 in Naivasha Chief Magistrate's Court Criminal Case Number 1576 of 2015 upon being convicted for the offence of robbery with violence contrary to section 296 (2) of the Penal Code. He was initially charged alongside Francis Gathu Nyaga, and Paul Njenga Mburu with two counts of robbery with violence, but his conviction and sentence was in respect of one count only.

2. In Count 1, the allegation against him was that on 12th August 2015 at Kikopey trading center in Gilgil District within Nakuru County jointly with others before court armed with offensive weapons namely metal bars and Somali swords robbed Leah Jepkoech Tanui of a mobile phone Make Tecno N6 valued at Kshs. 2,000/- and cash Kshs.200/= all valued at Kshs.2,200/- and at the time of such robbery used actual violence against the said Leah Jepkoech Tanui.

3. In Count II it was claimed that on 30th January 2016 at Kikopey Trading Center, in Gilgil District within the Nakuru County jointly with others before court while armed with offensive weapon namely metal bars and Somali Swords robbed John Ngugi Mwaura Macharia of a mobile phone Make Itel

valued at Kshs.8,500/- and cash Kshs.20,000/= all valued at Kshs.28,500/- and at the time of such robbery, they wounded the said John Ngugi.

4. The evidence against him was that on 11th August 2015, the complainant John Ngugi Kuria (PW1), a boda boda operator at Kikopey, Gilgil closed his business and as he was walking home, he heard screams ahead, flashed his torch, and saw the appellant who was known to him holding a metal bar and a lady lying on the ground. He greeted the appellant but did not respond, instead, the appellant asked him whether he had come to rescue the woman. Before he could answer, he was hit with a metal bar on his neck and fell unconscious. He woke up in the Intensive Care Unit at Mediheal Hospital. He discovered he had lost his Mobile phone and some cash.

5. Peter Kairu Kuria's (PW3) testimony was that on the night in question, he received a telephone call from his brother one Ng'ang'a informing him that their brother, PW1 had been attacked and injured by robbers. He rushed to the scene where he found PW1 on the ground together with a lady who had also been mugged. The two were rushed to St. Mary's Hospital. After being treated and discharged, on their way back home, the woman identified one of her attackers at a well-lit petrol station who was wearing a faded black jacket since he was her customer, who is the appellant in this case. As a result, the appellant was arrested at his home and taken to the police station, and charged with the offence.

6. The appellant elected to give an unsworn defence in which he denied committing the offence. He stated that on 11th August 2015, he worked as a motorcyclist till 11:00 pm when he proceeded home but on his way home he met a customer whom ferried to his destination and later on he went home and slept only to be awoken at 3:00am by his neighbors who were armed with crude weapons and on opening the door he was attacked mercilessly and frog marched to a Mr. Gathu's house where a lady alleged that he and others had assaulted her, and later Mr. Gathu and himself were taken to the police station and subsequently charged with the said offences.

7. The trial court in its judgment delivered on 31st May 2017, was satisfied that the ingredients of the offence of robbery with violence in count II were established beyond reasonable doubt and convicted the appellant on said count and sentenced him to death.

8. The appellant appealed to the High Court at Naivasha against the conviction and sentence. The learned judge (Mwongo, J.) framed the following issues for determination: (a) whether the accused was properly identified; and, (b) whether the conviction based on uncorroborated evidence ignoring the appellant's defence was proper.

9. Addressing the issue whether the appellant was properly identified, the learned judge was satisfied that PW1 heard screams from a lady as he approached the crime scene and using his torchlight, he recognized the appellant who was known to him as a customer because he used to repair his motorbike, that he saw a lady lying on the ground, that PW1 greeted the appellant who responded by asking him whether he had come to rescue the lady and at this point, the appellant hit him with a metal bar rendering him unconscious. The learned judge was also satisfied that the appellant's identification was corroborated by PW3's evidence.

10. Addressing the appellant's argument that his conviction was based on uncorroborated evidence and his defence was ignored, the learned judge was emphatic that he was not convinced by the appellant's evidence and that the same did not dislodge the prosecution evidence.

11. Having found as herein above, in the impugned judgment dated 20th December 2018, the learned Judge upheld both the appellant's conviction and sentence, thus precipitating this second appeal. The appellant's grounds of appeal can be summed up as follows: (a) the learned judge failed to appreciate that the appellant was framed; (b) that the identification was not proper; (c) his defence was not

considered by the two courts below; (d) he was convicted on a defective charge; (e) the prosecution did not call critical witness; and, (f) the prosecution did not prove its case beyond reasonable doubt.

12. Hearing proceeded before us virtually on 3rd July 2024. Learned counsel Mr. Mongeri appeared for the appellant while learned counsel Mr. Omutelema appeared for the respondent. The appellant's counsel relied on the appellant's undated written submissions and the supplementary written submissions dated 3rd February 2024 which he briefly highlighted orally. The respondent's counsel also relied on his submissions filed on 12th April 2024 which he also briefly highlighted.

13. On behalf of the appellant, Mr. Mongeri submitted that the appellant's identification was not free from error. He contended that there were several inconsistencies such as PW1's failure to explain the distance between him and the appellant when he allegedly flashed the light, the intensity of the light, the number of people he saw at the scene, and the accomplices' behaviour despite the witness posing as courageous and calm in the encounter. Counsel also argued that the time PW1 was with the appellant at the scene was not stated, nor was first complainant's whereabouts explained and how often PW1 had previously met the appellant, and what did the appellant use to cut PW1 yet he only saw him with a metal bar.

14. In support of the foregoing submissions, counsel cited Wamunga vs. Republic (1989) KLR 426 where this Court stated 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 favorable and free from possibility of error before it can safely make it the basis for its conviction.

15. Maintaining that the charge sheet against the appellant was defective, the Mr. Mongeri submitted that the particulars of offence in count II stated that the complainant was robbed off Kshs.20,000/= and a mobile phone. However, PW1 in his evidence indicated that he was robbed of Kshs.5,300 and a mobile phone which was not indicated on the charge sheet. Counsel cited Peter Ngure Mwangi vs. Republic [2014] eKLR in support of the holding that a charge can also be defective if it is in variance with the evidence adduced in its support.

16. Addressing his assertion that the prosecution failed to call a critical witness, the appellant's counsel contended that one Leah Tanui was never called as a witness yet she is the one who identified the appellant at the petrol station, and she was the one who was initially assaulted by the appellant leading to the commission of the second robbery and indeed the trial court abdicated its duty when it failed to invoke section 150 of the *Evidence Act* and call such a critical witness. In support of this submission, the appellant's counsel cited Juma Ngondia vs. R (1982-88) KAR 454 where the court held that even though the prosecution has discretion whether to call or not call a witness, if it does not call vital witness, it runs the risk of court presuming that the evidence which is not produced would, if produced be unfavorable to the prosecution.

17. On the credibility of the prosecution evidence, the appellant contended that the investigating officer failed to visit the crime scene, nor did he visit the appellant's house to assess its proximity from the scene of crime in order to ascertain any nexus between the accused and the alleged crimes and or record statements from the appellant's neighbors and the attendants at the alleged petrol station in order to establish whether such facts exist.

18. Regarding the violation of the appellant's right to be heard, the appellant's counsel maintained that even though his appeal before the first appellate court was on both conviction and sentence, the High Court did not address the issue of the sentence thereby occasioning an injustice and grossly infringing on the appellant's constitutional rights. Also, counsel submitted that the first appellate court correctly noted that the appellant's defence was not considered at all by the trial court yet the defence was not

rebutted by the prosecution. Consequently, there was gross violation of the appellant's right to a fair trial.

19. Lastly, regarding the sentence meted, the appellant's counsel submitted that the circumstances of the offence did not warrant a death sentence since the appellant was a first offender. He cited the case of Daniel Kyalo Muema vs. R [2009] eKLR in support of the proposition that the death sentence is not mandatory, and that courts must be guided by mitigating circumstances of each case when imposing a sentence.

20. In opposition to the appeal, the respondent's counsel Mr. Omutelema submitted that all the ingredients of the offence of robbery with violence namely: a mobile phone worth Kshs.8,500/= and cash 5,300/- were stolen during the robbery; the appellant and his companions used violence against PW1 and injured him immediately before the robbery; the appellant was in the company of others during the robbery; and the appellant and his companions were armed with offensive weapons namely metal bars and swords.

21. Regarding the appellant's identification, Mr. Omutelema submitted that PW1 was emphatic that he used his torch to see the appellant who was well known to him as he used to repair his motorcycle. At the scene, PW1 greeted the appellant and the appellant asked him whether he had come to rescue the lady who was being attacked. PW1 heard the appellant tell his companions to finish him since he had recognized him. It was also PW2's evidence that the lady who was being attacked named the appellant as one of her attackers and that PW2's testimony was not challenged in cross-examination. Therefore, it was the respondent's case that the first appellate court correctly applied the principles on identification set in the case of Maitanyi vs. Republic [1986] eKLR.

22. Addressing the appellant's argument that he was convicted on uncorroborated evidence, Mr. Omutelema submitted that PW2 and PW3's evidence confirmed PW1's evidence that the appellant explained to the search party that he was not alone and they also confirmed that the appellant hailed from their village and repaired bicycles. He cited this Court's decision in Karanja & Another vs. Republic [1990] KLR in support of the proposition that corroboration of some material evidence particularly tending to implicate the accused is enough and while the nature of the corroboration will vary according to the particular circumstances of the offence charged, it is sufficient if it is merely circumstantial evidence implicating an accused person.

23. Addressing the appellant's complaint that his defence was not considered, Mr. Omutelema maintained that the appellant gave unsworn statement which was considered by the two courts below and rightly rejected. He maintained that the first appellate court found that the appellant's defence corroborated PW1's evidence and that of the other prosecution witnesses.

24. Regarding the appellant's conviction, Mr. Omutelema submitted that the trial court considered the appellant's mitigation and the circumstances of the case before sentencing him to death which was a mandatory sentence and argued that the aggravating circumstances justified a severe sentence. Mr. Omutelema also contended that the first appellate court did not consider the issue of the death sentence because it was not part of the appellant's grounds of appeal before the High Court.

25. This being a second appeal this Court's jurisdiction is limited by Section 361 of the Criminal Procedure Code which stipulates that a second appeal must be confined to points of law only. (See Chemogong vs. R [1984] KLR 611, Ogeto vs. R [2004] KLR 14 and Koingo vs. R (1982] KLR 213). As to what constitutes "matters of law" in relation to this court's jurisdiction as the second appellate court,

the Supreme Court in Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 3 Others [2014] eKLR characterized the three elements of the phrase "matters of law" thus:

> "(a) the technical element: involving the interpretation of a constitutional or statutory provision;
>
> b. the practical element: involving the application of *the Constitution* and the law to a set of facts or evidence on record; and
>
> c. the evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record."

26. We have carefully read the entire record, the parties' submissions and the authorities cited. This appeal shall turn on the following issues: (a) whether the offence of robbery with violence was proved to the required standard; (b) whether the appellant was positively identified; (c) whether the charge sheet was defective; (d) whether the failure to call a critical witness was fatal to the prosecution's case; (e) whether the appellant's right to a fair hearing was infringed, and, (f) whether there is any basis upon which we can interfere with the sentence.

27. On the issue whether the ingredients of robbery with violence were proved beyond reasonable doubt, this Court in Johana Ndungu vs. Republic [1996] eKLR listed the ingredients of the offence or robbery with violence as follows:

    i. If the offender is armed with any dangerous weapon or instrument; or

    ii. If he is in the company of one or more other person or persons, or;

    iii. If at or immediately after the time of the robbery, he wounds, beats, strikes or uses violence to any person.

28. Proof of any one of the above ingredients is enough to sustain a conviction under section 296 (2) of the Penal Code. (See Olouch vs Republic [1985] KLR 549).

29. This Court, on a second appeal, will not interfere with concurrent findings of fact of the two courts below unless it is satisfied that there was in fact no evidence at all to support the findings, or that the courts below wholly misunderstood the nature and effect of the evidence. This position was succinctly underscored by this Court in Adan Muraguri Mungara vs. Republic [2010] eKLR as follows:

> "As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere." See Aggrey Mbai Injaga vs. Republic [2014] eKLR and Kalameni vs. Republic [2003] eKLR.

30. PWI's evidence he was attacked and injured, that he was robbed of the items listed in the charge sheet and that the attacker whom he found attacking a lady was in the company of other persons and that they were armed. PW1 was brutally beaten with a metal rod and he lost consciousness only to wake regain his consciousness at ICU at a hospital. These are essentially matters of fact which were proved by evidence and there are concurrent findings of the two courts below. We have no reason to fault the two courts below. Accordingly, we find that the ingredients of the offence of robbery with violence were proved to the required standard.

31. The next critical issue is whether the appellant was properly identified as the offender and whether the identification was free from error. Identification of an accused in criminal cases is always a pivotal question and whenever it arises, the trial court has to satisfy itself that the suspect was positively identified. The rationale for this cautionary approach is that identification evidence should not be accepted unless it has been rigorously tested. This is because the fundamental aim of eyewitness identification evidence is to reliably convict the guilty and to protect the innocent.

32. The common law recognizes categories of identification evidence because the potential dangers of identification evidence differ between the categories. One is Positive Identification, which is evidence by a witness identifying a previously unknown person as someone he or she saw on a prior relevant occasion. Another category is Recognition Evidence, which is evidence from a witness that he or she recognizes a person or object as the person or object that he or she saw, heard or perceived on a relevant occasion.

33. In this case, we are dealing with recognition evidence. In Anjononi & Others vs. Republic [1980] KLR 57 this Court stated:

34. The court in the above case proceeded to lay down the applicable legal principles in the following words:

> " ...This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other..."

35. It is also important to mention that the robbery in question took place at night, therefore as was held by this Court in Nzaro vs. Republic [1992] 2 KAR 212, (Hancox CJ, Gachuhi and Cocker), the evidence of identification or recognition at night must be watertight to justify a conviction. (See also Kiarie vs. Republic [1984] KLR 739). PW1 testified that using his torchlight, he recognized the appellant who was known to him. He even greeted him, but he did not respond. Instead, the appellant asked him whether he had come to help the lady who was lying down. It was PW1's testimony that the appellant used to repair his motorcycle, and that they all hailed from the same locality. It was also PW1's evidence that it was the appellant who hit him with a metal bar and he even went ahead to ask his accomplices to finish him because he had recognized them. Accordingly, we are satisfied that PW1's evidence on identification was free from error.

36. Two other grounds urged by the appellant are that the charge sheet was defective and that the prosecution failed to call a crucial witness. However, we note that these two grounds were never raised in the appellant's undated petition of appeal and amended grounds of appeal in the High Court. Therefore, these two grounds are an afterthought. Counsel has freshly introduced these two grounds in this second appeal. This Court has stated times without number that its duty is to consider matters of law that arise from issues that were canvassed before the High Court. The Supreme Court addressing a similar situation in Charles Maina Gitonga vs. R (Petition 11 of 2017 [2020] KESC 61 (KLR) (23 January 2020), the court stated:

> " 34 ...It is in that regard not disputed that the question as to whether the Appellant's right to fair trial was infringed by failure to accord him legal representation at the expense of the state or by failure to inform him of the right to legal representation was raised for the first time at the Court of Appeal. We have also interrogated the record before us and confirmed that the issue was

neither raised at the Resident Magistrate's Court nor at the High Court. None of the Articles of *the Constitution* in the present appeal was also the subject of interpretation and application at the High Court.

33. This Court has in previous decisions emphasized the significance of respecting the hierarchy of the judicial system. For instance, in the Peter Oduor Ngoge v Francis Ole Kaparo & others [2012] eKLR we stated thus:

> "In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court."

35. We thus fault the Court of Appeal for entertaining the question of legal representation as one of the grounds of appeal despite acknowledging that it was never raised in the Courts below. To allow the Appellant ignore the normal hierarchy of courts would amount to abuse of the process of Court. We consequently lack jurisdiction to entertain this appeal pursuant to Article 163 (4) (a) of *the Constitution*."

37. The other ground urged by the appellant is that his defence was not considered, and therefore he was prejudiced. It is correct to state that when considering evaluating, it is imperative not to be selective in determining what evidence to consider. But what must be borne in mind, however, is that the conclusion which is reached (whether to convict or to acquit) must account for all the evidence. However, by requiring a trial court to consider all the evidence does not mean that the judgment of the trial court must also include a complete embodiment of all evidence led, as if it comprises a transcript of the proceedings. All it means is that the summary of the evidence led must indeed entail a complete embodiment of all the material evidence led. The best indication that a court has applied its mind in the proper manner is to be found in its reasons for the judgment including its reasons for the acceptance and the rejection of the respective witnesses.

38. In other words, this Court must consider whether the trial court considered all the evidence, weighed it suitably and correctly applied the law or legal principles to it in arriving at his judgment in respect of both the conviction and sentence. This exercise necessarily entails a close scrutiny of the evidence of each witness within the context of the totality of the evidence, and what the trial court's findings were in relation to such evidence. Stated differently, this court must consider the evidence led in the trial court, juxtapose it against the judgment by the trial court, and finally determine whether there is any basis for interfering with the said judgment.

39. This means that if a Court of Appeal is of the view that a particular fact is so material that it should have been dealt with in the judgment, but such fact is completely absent from the judgment or merely referred to without being dealt with when it should have, this will amount to a misdirection on the part of the trial court. The appeal court must then consider whether the said misdirection, viewed either on its own or cumulatively together with any other misdirection, is so material as to affect the judgment, in the sense that it justifies interference by the Court of Appeal. We have gone through the entire record. It is our considered view that this allegation is far from the truth. At paragraphs 38-41 of the High Court's judgment, the learned Judge considered the appellant's testimony and noted

that it was true that the trial magistrate did not analyze the appellant's evidence. However, the learned judge perused the appellant's evidence and observed and that the appellant never called witnesses to support his evidence, and his defence, essentially corroborated PW1, PW2 and PW3's evidence and the circumstances of his arrest. Therefore, we agree with the Mwongo J. that the defence tendered did not dislodge the concrete evidence adduced by the prosecution.

40. Regarding sentence, the appellant's mitigation was that he did not agree with the court's verdict. In sentencing the appellant the learned Magistrate stated that the death penalty was the mandatory penalty prescribed by the law. The Supreme Court in Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR declared the mandatory nature of the death sentence as provided for under section 204 of the Penal Code unconstitutional and issued orders for the establishment of a framework to deal with the sentence re-hearing of the applicable cases and lastly directed the legislative making bodies to enact legislation repealing sections that made provision for the death penalty. However, subsequently, the Supreme Court issued directions clarifying that the said decision only applies to murder cases. The appellant was convicted of the offence of robbery with violence. Regrettably, even though he was sentenced to suffer death, the Supreme Court decision clarifying the applicability of Francis Karioko Muruatetu & Another vs. Republic (supra) to other cases stated that the said decision does not apply to persons convicted of robbery with violence.

41. Arising from our analysis of the issues discussed above and the conclusions arrived at, this appeal fails on both conviction and sentence and it is hereby dismissed.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF OCTOBER, 2024.

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a copy of the original.

DEPUTY REGISTRAR.