Mwenda & another v Republic (Criminal Appeal 6 of 2017)
[2024] KECA 1373 (KLR) (4 October 2024) (Judgment)

Neutral citation: [2024] KECA 1373 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 6 OF 2017

J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA

OCTOBER 4, 2024

BETWEEN

LAWRENCE MURIITHI MWENDA ..... 1ST APPELLANT

WILSON MURIUKI MWORIA ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Judgment of the High Court at Meru (Kiarie W. Kiarie, J.) Dated 19th December, 2016 in H.C.CR. A. No. 82 of 2014 (Consolidated with H.C.CR. A. No. 81 of 2014)

JUDGMENT

Background

1. Lawrence Muriithi Mwenda and Wilson Muriuki Mworia (the 1st and 2nd appellants, respectively) were charged with an offence of robbery with violence contrary to Section 296(2) of the Penal Code before the Chief Magistrate's Court at Meru.

2. The particulars of the offence were that on 17th March, 2012 at Mbirikene One Village in Mbirikene location in Imenti North District within Meru County, the appellants jointly robbed Jackson Mugambi Silas of cash Kshs.8,600/= and Nokia model N82Y valued at Kshs.4,200/= all valued at Kshs.12,800/= and immediately before the time of such robbery they threatened to use actual violence against Jackson Mugambi Silas.The prosecution called four (4) witnesses in support of its case.

3. Briefly, the facts before the trial court were that the complainant, Jackson Mugambi, (PW1), testified that the two appellants are his neighbours and that they went to the same primary school. It was his testimony that on 17th March, 2012 at around 7.00pm he left his home to go to the stage. On the way there, he met the appellants who asked him to stop. That the 1st appellant held his two hands at his

back. The 2nd appellant who was armed with a panga removed items from his pockets and he took away Kshs.8,600/= and a Nokia N82Y valued at Kshs.4,200/=. PW1 produced a receipt dated 4th February, 2010 for the Nokia phone.

4. PWl testified further that when the two appellants heard passers-by approaching they ran away into nearby shrubs. PW1 reported to Kiorimba AP's Camp where he was referred to Giaki Police Station. PW l testified that he knew both appellants as the 1st appellant was his neighbour from the same village and that he went to the same primary school with the 2nd appellant. PW1 testified that he had seen the appellants earlier the same day and that although the incident took place at around 7.00pm, visibility was still clear as night was just approaching. PW1 further testified that the 2nd appellant threatened to cut him using the panga if he screamed. PW1 later led the police to arrest the appellants.

5. Pius Muregwa (PW2), testified that on 17th March, 2012 at around 7.00pm he was coming from Murika market on his way home when he saw the complainant (PWl) and the two appellants. The 1st appellant was holding the complainant while the 2nd appellant was standing by holding a panga.

6. PW2 testified further that as he approached where the 3 men (the complainant and the 2 appellants) were, the two appellants ran from the scene into nearby shrubs. It was PW2's testimony PWl informed him that the appellants had robbed him of Kshs.8,600 and a cell phone. PW2 testified that he advised PWl to report to the police. PW2 testified that he was able to identify the appellants well as they were both his neighbours. Further, that on the material day, PW2 was 6 meters away from the appellants when they ran away upon seeing him.

7. Godfrey Kiraithe (PW3), testified that he operated a shop near a road to a place called Mukira. That on the material day at 7.00pm he was at his shop near the road when he heard some commotion. He went to the road and saw two men running. One of them was running towards him. One of them was holding a panga and the other was holding something in his hand. It was his evidence that visibility was clear. He went to where PWl and PW2 were. PWl told him that he had been robbed by the two men. PW3 identified the two men who were running to be the appellants. PW3 testified that he knew the two appellants well as they grew up in the same neighbourhood.

8. PC Charles Waweru No. 76834 (PW4) was the Investigating Officer of the case. He testified that on 24th March, 2012 he was at Giaki Police station when PW1 reported that he was robbed by the appellants. He testified further that PWl recorded a statement that he was robbed on 17th March, 2012. PW4 testified that he booked the report and recorded statements from the witnesses and visited the scene. It was his testimony that he was given a receipt of a Nokia phone which was alleged to have been robbed from PW1. Subsequently, the appellants were arrested with the help of PW1 who positively identified them during the arrest.

9. It was PW4's further testimony that the complainant (PW1) reported the matter later as he had been trying to resolve the dispute with the appellants' parents.

10. At the conclusion of the prosecution case, the trial court found that the appellants had a case to answer and they were put on their defence. The appellants gave sworn evidence and called two witnesses.

11. The 1st appellant (DW1) testified that on the material day he went to visit one Patrick at 8.00am. That he had attended a circumcision ceremony at the home of one Elias where he stayed until 9.00pm. That the complainant and the witnesses framed him in this case as the complainant had been circumcised in hospital while he was circumcised traditionally. His evidence was that the complainant was circumcised in hospital unlike him who was circumcised traditionally and due to that they were not in good terms.

12. The 2nd appellant (DW2) in his evidence testified that on 17th March, 2012 he went to his farm in the morning hours. Later at 2.00pm he attended a circumcision ceremony at the home of one Elias. At around 3.00pm he was at a junction where he had briefly talked to the complainant. He was in the company of the 1st appellant. It was his evidence that at 6.00pm he went to his home and remained there the entire evening. Like the 1st appellant, the 2nd appellant testified that the charges against him were as a result of differences over circumcision. It was his testimony that he was framed. He confirmed knowing the complainant having attended the same primary school with him.

13. DW3 was one Elias Bundi who was named as the host of the circumcision ceremony. He testified that on the material day he hosted a circumcision ceremony at his home. At 4.00pm they left with those who had been circumcised to a place known as stage where they stayed until 8.30 pm. It was his evidence that the 2nd appellant left the place called stage at 6.00pm. That at 7.00pm he and others were in the company of the 1st appellant. On cross examination, DW3 testified that the two appellants arrived at his homestead at 12 noon. That the 1st appellant left his home at 2.00pm and returned later at 9.00pm. DW3 denied the evidence that the 2nd appellant went to his home at 2.00pm.

14. Alex Thuranira Mworia (DW4) testified that on the material day he went to attend to a circumcision ceremony at the home of Elias Bundi. He arrived at the ceremony at 2.00pm and he and others left the homestead of Bundi at 3.00pm and went to a certain junction on the road. While at the junction, the complainant passed by and had a talk with the 2nd appellant. In cross examination, DW4 stated that he did not know when the 1st appellant left the home of Elias Bundi.

15. Following the trial, the trial court found both appellants guilty of the offence of robbery with violence and sentenced them to death.

16. Dissatisfied by the conviction and sentence, the appellants filed an appeal to the High Court at Meru. The High Court, (Kiarie W. Kiarie,J.) found that there was overwhelming evidence against both appellants and dismissed the appeal on both conviction and sentence.

17. Undeterred, the appellants filed an appeal to this Court in which they raised the following grounds of appeal in their memorandum of appeal to wit: that the learned Judge of the High Court erred in law in failing to find that the occurrence of the robbery was doubtful as PWl did not make the report to the police promptly; by failing to note that the appellants were not positively identified; and by failing to note that the prosecution's case was full of contradictions.

Submissions by Counsel

18. At the hearing of the appeal, the appellants were represented by learned counsel, Mrs. Mutegi of Mutegi Mugambi & Co. Advocates, who relied on her written submissions dated 17th July, 2023. Counsel's submissions centered on three (3) issues namely whether the appellants were positively identified and/or recognized; whether the ingredients of the offence of robbery with violence were satisfied; and whether the appellants' alibi defences were sufficiently rebutted by the prosecution. Counsel submitted that the appellants were not properly identified by the complainant as no identification parade was carried out to identify them at the police station noting that the attack was allegedly committed by two men and the 2nd appellant's defence was that he had attended circumcision ceremony on the material day and time. Counsel submitted that mere pointing out of the appellants at the dock did not waive the need for an identification parade. That the absence of an identification parade made the evidence of visual identification of the appellants unreliable.

19. Counsel relied on the decision of James Karani M'Ikombo v Republic [2014] eKLR in support of the proposition that dock identification evidence is almost worthless and that failure of the witness to give

a description of the assailant to the police raises doubt as to whether the identification of the appellant was free from error and could form a basis for conviction.

20. Counsel submitted that the elements required to prove the offence of robbery with violence were clearly set out by this Court in the decision of Oluoch v Republic [1985] KLR.

21. Counsel submitted that there was misdirection by the 1st appellate court in holding that the prosecution had met the ingredients of the offence of robbery with violence yet there was no mention that the complainant (PW1) was in any way grievously harmed by the panga

during the attack and there was no evidence to show that the alleged theft took place.

22. Counsel further submitted that there was no justification for rejection of the appellants' alibi defence since the prosecution had not made any effort to call evidence in its rebuttal. Reliance was put in the case of Victor Mwenda Mulinge vs Republic [2014] eKLR. Counsel further submitted on the sentences meted on the appellants and relied upon the case of James Kariuki Wagana vs Republic [2018] eKLR particularly the observation by Prof. Ngugi, J. (as he then was) that although penalty for death is the maximum, the court has discretion impose any other penalty that it deems fit and just in the circumstances.

23. Ms. Nandwa, learned counsel for the State opposed the appeal and relied on her written submissions. Counsel relied on this Court's decision of Joseph Njuguna Mwaura & 2 Others v Republic [2013] eKLR on the ingredients of the offence of robbery with violence under Section 296(2) of the Penal Code that: either the offender is armed with a dangerous weapon, is in the company of others or he uses any personal violence to any person. Counsel further submitted that proof of any of the above ingredients is enough proof of the offence beyond reasonable doubt. Counsel further submitted that the evidence of PW1, PW2 and PW3 was that the 2nd appellant was armed with a panga which is an offensive weapon. Further that the evidence presented was that the 1st appellant threatened to cut PW1 with the panga as noted in the proceedings.

24. As regards identification of the appellants, counsel submitted that there was positive identification by PW1, PW2 and PW3. Counsel further submitted that the appellants were well known to PW1. The evidence of PW1 was that the 1st appellant was his neighbour and that he attended the same primary school with the 2nd appellant. PW2 and PW3 were eye witnesses to the incident. PW3 testified that he identified the appellants as he grew up with them and attended the same primary school. Ms. Nandwa submitted that the identification of the appellants was by recognition and relied on the decision of Mamush Hibro Faja v Republic [2019] eKLR where this Court stated that:

> " We are therefore minded of crucial questions that we must consider while looking at PW1's testimony. These include, whether the appellant was known to the witness, the nature and frequency of their interaction; the lighting conditions including the intensity and brightness of the mobile phone torch; the position of the witnesses and the appellant at the time the lights was being shone and the witness description of the

25. Counsel further submitted that the offence took place at 7.00pm when there was visibility for purposes of identification of the appellants. As to the defence of alibi, counsel submitted that the same did not create doubt in the prosecution's case as the ingredients of robbery with violence were proved and identification of the appellants by the prosecution's witnesses was positive.

26. Counsel urged this Court to confirm the conviction and uphold the sentence.

Determination

27. This is a second appeal and as such we are limited to consideration of matters of law only. Accordingly, we are generally bound by concurrent findings of fact by the two courts below, departingtherefrom only in the rarest of cases where they are not based on any evidence or proceed from a misapprehension of the evidence or are plainly untenable. See Karingo v Republic [1982] KLR 219 and Section 361 of the Criminal Procedure Code.

28. We have carefully perused the record, considered the impugned judgment, submissions by counsel, the authorities cited and the law.

    We discern the main issues for determination to be: whether the offence of robbery with violence was proved beyond reasonable doubt against the appellants; whether the appellants were properly identified; whether the appellants' defence of alibi was sufficient to dislodge the prosecution case; and whether this Court should interfere with the sentence meted by the trial court and upheld by the 1st appellate court.

29. Section 296(2) of the Penal Code provides as follows:

> " If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

30. Further, in Oluoch v Republic [1985] KLR the law outlines the three circumstances which need to be proved in order to sustain a conviction for an offence of robbery with violence in the following terms:

> " The offender is armed with any dangerous or offensive weapon or instrument; the offender is in the company of one or more person or persons; or at or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person." [Emphasis supplied.]

31. From the evidence on the record as regards the ingredients of the offence of robbery with violence, the 2nd appellant was armed with a dangerous and offensive weapon namely a panga and during the attack, it was the evidence of PW1 (the complainant) that the 2nd appellant threatened to cut him with the panga if he screamed. That the 1st and 2nd appellants were together when they attacked PW1 as testified by PW1 and as confirmed by the testimony of PW2 and PW3. Lastly, PW 1 lost his items to the appellants.

32. As regards identification, PW1 testified that he knew both the 1st and 2nd appellants well before the incident. PW1's testimony was that he attended the same primary school with the 2nd appellant while the 1st appellant was his neighbour. According to PW1, visibility was still clear as the night was just approaching. Further, the evidence of PW2 and PW3 was that they saw the two appellants very clearly during the incident. Both the appellants admitted knowing the complainant. It was DW2's testimony that while in the company of the 1st appellant and others, they met PW1 at a junction at 3.00pm. The 2nd appellant (DW2) specifically stated that while at the junction he asked PW1 (the complainant) to give him miraa. DW3's evidence was that he invited the appellants to attend a circumcision ceremony and that the 2nd appellant (DW2) left DW3's home at 2.00pm and came back at 9.00pm. From the evidence of the defence particularly DW3 who was the host of the ceremony, the appellants were not at

the circumcision ceremony at the time of the robbery incident. In the case of Reuben Taabu Anjononi & 2 Others v R [1980] KLR, this Court held that:

> "...recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or another."

33. Further, in the case of Githinji v Republic [1970] EA 231, High Court comprising Mwenda CJ (as he then was) and Simpson J (as he then was) quoted with approval in Fredrick Ajode Ajode v Republic [2004] eKLR stated inter alia:-

> " Once a witness knows who the suspect is an identification parade is valueless."

34. In Martin Oduor Lango & 2 others v Republic [2014] eKLR the Court held that as the witnesses indicated that they had recognized the assailants as people they had known, it was pointless to hold an identification parade. It was also held in Patrick Muriuki Kinyua v Republic [2015] eKLR that evidence of an identification parade is of no probative value in instances where appellants were well known to the complainants.

35. The appellants came from the same village with the prosecution witnesses, and attended the same primary school. PW2 was an independent witness who had no relation to the complainant. His testimony supported the evidence of recognition of the complainant and he specifically stated that he saw the appellants robbing the complainant at a distance of about 6 meters and when he asked them what they were doing the appellants ran away. There was no evidence of the existence of a grudge between the appellants and PW2 to warrant such evidence. The alleged difference on circumcision between the appellants and the complainant did not justify the alleged framing of the charges.

36. From the record all the ingredients of the offence of robbery with violence were present. From the evidence of the complainant (PW1),PW2 and PW3, the 2nd appellant was armed with a panga while the 1st appellant threatened to cut the complainant if he screamed. The assailants were two (the two appellants) and the 2nd appellant held a panga, the 1st appellant threatened to cut the complainant if he screamed.

37. We therefore find that the 1st appellate court did not err in upholding the appellant's conviction and that there is no basis to interfere with the findings of the 1st appellate court on the conviction of the appellants for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code.

38. On sentence, it is common ground that the complainant did not sustain serious injuries and that the value of the items taken was about Kshs.12,800/=. In the circumstances, we are of the view that death sentence in this case was manifestly excessive.

39. Accordingly, we dismiss the appeal against conviction and allow the appeal against sentence. From the record, the appellants have been incarcerated for about 12 years. We set aside the death sentence imposed on the appellants and substitute therefor with a sentence of thirty (30) years' imprisonment from 2nd April, 2012, the date when the appellants were first arraigned in court.

40. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF OCTOBER, 2024.

JAMILA MOHAMMED

JUDGE OF APPEAL

.....

L. KIMARU

JUDGE OF APPEAL

.....

A. O. MUCHELULE

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR