Oremo & 3 others v Republic (Criminal Appeal 95 of 2018)
[2024] KECA 1586 (KLR) (8 November 2024) (Judgment)

Neutral citation: [2024] KECA 1586 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 95 OF 2018

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

NOVEMBER 8, 2024

BETWEEN

JOHN OMONDI OREMO ..... 1ST APPELLANT

ISSA ABDUL ODHIAMBO ..... 2ND APPELLANT

MAXWELL OCHIENG OLWA ..... 3RD APPELLANT

KEVIN OMONDI OYARE ..... 4TH APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kisumu (H. K. Chemitei & E. N. Maina JJ.) dated on 26th May 2015 in HCCRC 150 of 2011)

JUDGMENT

1. The appellants were among 9 (nine) persons who were charged in Kisumu Chief Magistrate's Court with two counts of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of Count I were that on the night of 28th day of November 2008 at Nubian estate in Kisumu East District within Nyanza Province, jointly with others not before court while armed with rungus and pangas, robbed Antipa Nyaniwa of one pistol S/No. A051xxx, cash Kshs.328,000/=, two mobile phones make Siemens SL55 S/No. IMEI 354-xxx-xxx - xxx-xxx and Nokia 3 11 0C S/No. IMEI 358-xxx-xxx-xxx-xxx and other personal effects all valued at Kshs.500.000/ and at or immediately before or immediately after the time of such robbery used actual violence to the said Antipas. The particulars of Count II were that on the same date, time and place, and under similar circumstances, they also violently robbed Violet Akinyi Odawa of one mobile phone make Samsung S/No. SG1HU 750-xxx-xxx-xxx-xxx-xxx, Kshs.5000/=, and a bag containing personal effects, all valued at Kshs.20,200/- and at or immediately before or immediately after the time of such robbery, used actual violence to the said Violet.

2. The 2nd appellant, Issa Abdul Odhiambo, was further charged in count III with the offence of possession of a firearm without a license contrary to section 4(2)(a) as read with section 4(3)(a) of the *Firearms Act*, that on the 28th day of February 2009 at Manyatta Arab estate in Kisumu East District within Nyanza Province, he was found with a firearm namely pistol make Ceska S/No. A051xxx without a firearm certificate. The appellants were convicted and sentenced to death on Count I and Il relating to robbery with violence contrary to section 296(2) of the Penal Code; whereas the 2nd appellant was to serve a further 8 years imprisonment for being in possession of the firearm. Two of their other co-accused were convicted and sentenced to serve 4 and 5 years imprisonment for the offence of handling stolen property contrary to section 322(1) of the Penal Code. Being aggrieved by their conviction and sentence, the appellants appealed to the High Court on the grounds that they were not properly identified; that the trial court failed to evaluate the evidence before it; and that the trial court failed to take into consideration the appellants' defence and submissions in arriving at its decision. The High Court, having reconsidered and evaluated the evidence on record, upheld the conviction and sentence, being satisfied that the conviction was safe, as it was based on sound evidence.

3. The appellants were further dissatisfied with the decision of the High Court and have filed a second appeal to this Court. We have carefully considered the record of appeal, submissions by counsel, the authorities cited and the law. This being a second appeal, this Court is mindful of its duty as a 2nd appellate court, that a 2nd appeal must only be confined to points of law and this Court will not interfere with concurrent findings of the two courts below unless based on no evidence. The test to be applied on a second appeal is whether there was any evidence on which the trial court could find as it did. See Karingo & 2 Others vs. Republic [1982] eKLR.

4. For purposes of placing matters in perspective, we revisit briefly the evidence before the trial court as set out by 22 (twenty-two) prosecution witnesses, and which evidence was subjected to a fresh analysis and re-evaluation by the High Court. Antipas Nyanjwa, PW1, a police officer stationed at CID headquarters Nairobi, had an official assignment; and he travelled from Nairobi to Kisumu on 28th November 2008, arriving at Kisumu airport at 7.00pm. His wife, Violet Akinyi Odawa, PW6, picked him up from the airport and they decided to stop for dinner in Kisumu town. They left the eating place at around 10.30 pm for their home in Nubian Estate and when they reached the gate, PW6 got out to open the gate with PW1 following to assist. Just as they were opening the gate, they were approached by a group of persons wearing jungle green police jackets. PW1 and PW6 were able to see them as the car's headlamps and the gate security lights were on.

5. The assailants, posing as police officers asked them some questions and turned as if to leave. PW1 then proceeded to open the gate and that was when he was cut on the head with a sharp object, and he fell down unconscious. PW6 screamed for help and was also hit on the back side of her head and she fell down. While on the ground the assailants ransacked their pockets, bags and their car. They took PW1's official pistol, make Ceska No. A051849, one magazine, 15 rounds of ammunition, Kshs.328,000/=, 2 mobile phones Siemens SL55 and Nokia 311C, PW1 also lost his wallet containing his national identity card, NHIF card, AAR Card, Voters Card, ATM Card Barclays, KCB ATM Card, Standard Chartered bank ATM Card, Bank of Baroda ATM Card, police driving permit, certificate of appointment, pistol holster; from the car, they took his bag, containing a Philips iron box, Kshs.300,000/=, a pair of jeans, T-Shirt, Desk diary, return Kenya Airways ticket to Nairobi. The total value of his stolen was over Kshs.500,000/=.

6. On 2nd March 2009, the DCIO Kisumu requested PW1 to report to his office in relation to the incident as some mobile phones that fitted his report had been recovered; some suspects were in police custody; and the DCIO wanted to see whether PW1 could identify the suspects of robbery. Subsequently, PW1

reported to the DCIO Kisumu; was shown two phones, make Nokia and Siemens, which he positively identified as those that were robbed off him. At an identification parade conducted at Railways Police Station, he was also able to identify the 2nd appellant saying that before the incident, he had a lengthy conversation with him, and noted the features, namely a scar on the nose, on the side of the nose, the upper cheek, and another scar on the forehead. He was also able to pick the 3rd appellant at a separate parade through his body physique, as he was short and stout, with a "mean face" and an enlarged nose.

7. On 20th May, 2009 PW1 identified the 1st appellant through his light complexion, scant beard, big ears and long face and also through his voice after PW1 requesting him to speak. PW1 was categorical that:

> " There was sufficient lighting at the scene where l was attacked and they also engaged me in a lengthy conversation before they attacked me."

On cross examination the witness confirmed that he never gave a description of his attackers, when he initially recorded his statement.

8. Meanwhile, Daniel Indiasi, PW2 was in his house when he heard noises outside. He peeped through his window and saw PW1's car. He rushed out and found PW1 and PW6 lying on the ground covered in blood and unconscious. He called John Ochieng Okello, PW7 and they took the couple to hospital, before they were eventually airlifted to Aga Khan hospital in Nairobi for specialized treatment. PW1 regained consciousness after 3 days.

9. Apparently, the commotion had also attracted the attention of John Okello Ochieng, PW7, who, upon peeping through the window of his house, saw a white car outside with lights on and 4(four) people. He noticed some movement and heard a loud groan, two of the people had jungle jackets, one had grey and the other blue jacket. He realized something was amiss; he alerted his immediate neighbour who worked at the police station and requested her to call the police. PW7 went back to the window; he saw one of the attackers open the boot and another open the driver's door and the other on the passenger side. After a short while, the attackers begun moving away; and he noticed PW6, whom he recognised as his neighbour's wife screaming for help, so he responded to the distress call. It was his evidence that the attackers were armed with iron bars, clubs etc; and there was sufficient security light and light from the neighbourhood. The injured pair were rushed to hospital, and a medical examination later confirmed that they had suffered injuries with PW1 needing surgical intervention, and his injuries were classified as grievous harm, whilst PW6 had suffered harm.

10. A manhunt for the gang begun in earnest, spanning Kisumu, Nairobi all the way to Mombasa. Corporal Chris Mbuaga Oguso, PW11, who was in the investigations team, testified that upon taking statements from PW1 and PW6, PW1 was categorical that he could identify his attackers because they talked for some time, the security lights, were on; and he described them as one being slender and tall and front teeth missing, tall, medium, built, beard with scar on the face, another was short hairy and built, tall medium, scanty beards (spouting) and another was medium built and bald headed. PW11 went to the mobile telephone service providers, namely, Safaricom and Zain offices in Kisumu; they were able to trace the stolen mobile phones using their IME; they also realized that the mobile phones were still in use, two in Kisumu and one in Mombasa. The Nokia 3110C which belonged to PW1 was being used by Kevin Odhiambo Oyare, PW22, who disclosed that he obtained said phone from his brother Kevin Omondi Oyare alias Templer, the 4th appellant, who upon interrogation eventually led the police to Issa Abdul Odhiambo the 2nd appellant and John Omondi, the 1st appellant.

11. At the time of John Omondi's arrest, he was riding a motorbike he had recently acquired, and in his house was recovered a 14 inch color Wega television, fluoride battery, tiger generator, a Sony radio, one inverter, one mobile phone and a receipt No. 19928 showing purchase of a cow. The receipts for the

aforementioned items were dated between 4th and 16th December 2008; and the Investigating Officers concluded that the items were purchases from proceeds of the robbery.

12. PW11 also testified as to how they earlier traced the SL 55 Siemen phone with its IMEi No. 35406000xxxxxxx to Steve Biko (who was the 6th Accused person) who also led them to Evans Opondo (5th Accused).

13. Corporal Nicholas Mutisya, PW15, who had joined the investigations team testified that on 28th February 2009, after arrest, the 2nd appellant took him to his home where he showed him where he hid a pistol with an empty magazine, buried in the backyard of his house; this recovery was done in the presence of the village elder, Mansood Abdul Muti, PW20, and PC Bildash Biwott PW8, who took photographs of the crime scene, which were certified and produced by Chief Inspector Stephen Kemboi, PW17.

14. The history of this firearm's movement before it was stolen, was narrated by Chief Inspector Uria Waweru, PW4 who informed the court that according to the Arms Movement Register, PW1 was issued with a firearm, make Ceska Pistol Calibre Serial No. A051xxx with 30 live ammunitions on 20th November, 2008; the recovered firearm was subjected to examination by Ag. Superintendent of police Lawrence Ndhiwa, PW9 the firearm examiner, who found that it was a Ceska pistol chambered for calibre 9X19mm and its magazine similar to the one issued to PW1. He produced his report, the pistol and empty magazine as exhibits at trial. Chief Inspector Stephen Birgen, PW19 also testified that he received a confession made by Maxwell Ochieng Olwa, the 3rd appellant who was in the company of his sister Phylis Adhiambo. The said confession placed Maxwell at the scene of crime and as one of the assailants and also named the other assailants. We reproduce that statement verbatim as follows:

> "On the 29th day of November, 2008 while with Waziri, Templer, Omondi Jaseme and Chief alias Tashe, we went to Arina Estate at around 23:00 hours at night and found somebody who was entering his gate and he was with one woman and we attacked them with pangas, during the attack, we robbed the said man of money, 33 mobile phones and a pistol. I hereby confess that I am the one who attacked Violet Akinyi and that I was assisted by Omondi Jaseme."

15. PW22, Kevin Odhiambo Oyare testified that in mid-December 2008 his brother Kevin Oyare (the 4th appellant) went to his shop, and he mentioned, to the latter about his phone having a battery problem; and requested for the Nokia black which the 4th appellant had. He used it for two days before he and the 4th appellant were arrested in connection to the said phone.

16. After the arrests, identification parades were conducted and the appellants were identified by the complainants. Cumulatively, in their respective defences, the appellants denied involvement in the robbery, insisting that the identification evidence was a sham which could not be relied on; as the initial report made by the complainants only stated that the attackers wore jungle jackets, but gave no physical description of the attackers; the 1st appellant pointed out that none of the stolen items were recovered from his house and that as a boda-boda operator, he was earning good money, enough to fetch him the kind of property police found inside his house; the 2nd appellant in his defence described how police searched his house but recovered nought, tortured him; then took him behind an abandoned homestead, dug out a plastic bag whose contents he did not know, then charged him. Further, that Section 46 of the Police Standing Orders was not complied with respect to the 2nd appellant's identification parade, as he was the only parade member who had a scar which made him unique and easy to identify. The 3rd appellant described how he was arrested while at the mortuary where he had gone to collect the body of his late father, taken to an open space behind some building,

tortured and ordered to produce the jungle jackets; he denied making any confession. The 4th appellant described how he was arrested while on the way to his home in Arab Manyattta estate, interrogated about a robbery, his photographs taken and he was beaten up.

17. The trial court, in its judgment, pointed out that proof of any one of the ingredients of robbery with violence, was sufficient to establish the offence under section 296(2) of the Penal Code. The High Court was satisfied that a robbery did take place as corroborated by the prosecution witnesses; that though the identification parades were conducted in accordance with the police standing orders, the fact that there was no description of the persons alleged to have committed the offence in the initial report, rendered the evidence of identification unsafe; however the,1st appellant could not explain how he obtained such a big sum of money to buy the items that were recovered from him, yet he was only a boda boda operator, thus bringing the doctrine of recent possession into application to determine the innocence or otherwise of the said appellants; that the 1st appellant was in recent possession of the stolen Nokia mobile phone, for which he gave no reasonable explanation; that the 2nd appellant was named by the 1stappellant who was found to be in possession of some of the stolen property, and his explanation that the police took him to the scene and forced him to dig out the pistol was properly rejected by the trial court as PW20 who was present during the digging, could have disclosed to the trial court if he witnessed him being coerced to sodig; that the confession was properly obtained as was determined by the trial court after a trial within a trial; and claims that the 3rd appellant had been tortured were an afterthought.

18. The learned judge in dismissing the appeals held that:

> "Though the identification evidence lacks in credibility due to the fact that there was no description of the appellants in the initial reports made by the complainant(sic). The 1st, appellant was found to be in possession of proceeds from the robbery and miserably failed to offer a reasonable explanation as to his possession of the suspected stolen property. The 1st appellant led the police to the 2nd appellant who admitted to being in possession of a stolen gun and led the police to where it was stashed. The pistol was confirmed to be the one stolen from PWI. The 4th appellant was found to have acquired several electronic goods, a motorbike and a cow shortly after the period of the robberies and he was not able to explain how he obtained such large sums of money to buy all those items seeing as he was only a boda boda operator. It is also' obvious that he bought the items in a rush as if eager to spend money... The 3rd appellant confessed to the offence and his allegations of coercion only appear to be an afterthought. Accordingly, the appeals are dismissed and the conviction and sentences upheld."

19. The appellants have raised several grounds of appeal relating to which for the avoidance of verbosity and imprecision, we shall cluster into the following:

    a. the learned judges erred in fact and in law in upholding the finding that the circumstances for identification were safe coupled with the results of the Identification Parade, despite the fact that in the initial report made by the complainants, there was no description of the people who attacked them.

    b. the mandatory nature of death Sentence visited upon the appellants is unconstitutional as such the matter should be considered for retrial.

20. As regards identification, the appellants submit that the identification parade was held approximately 3 (three) months after the robbery; the suspects were persons the complainants had never seen before; the

complainants had not given a description of their physical appearances at the initial time of reporting, so it was unsafe for the two courts below to put any premium on this form of identification. In support of this proposition, reference is made to the case of Paul Macharia Mwangi Alias Muhu vs. Republic [2013] eKLR where the Court stated that:

> " It will not do for a complainant to tell the police that he would know the assailant if he saw him. He must give physical description of the assailant. Where the circumstances permit, he must also state the clothes that the assailant wore at the material time of the robbery."

That this is further fortified by the holding in Republic vs. Kabogo s/o Wagutu 231 KLR 50, thus:

> "In every case in which there is a question as to the identity of the accused, the fact of their having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first by all the person or persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given."

This Court is in agreement with the High Court that the identification parade was not proper; and as a matter of fact, the conviction of the appellant was not based on identification but on the doctrine of recent possession.

21. On the issue of sentencing the appellants submit that the death sentence was manifestly excessive and that the courts below ought to have exercised discretion in sentencing and considered the circumstances of the appellant. It is argued that the death penalty is no longer mandatory and the trial court ought to consider the mitigating factors in each individual cases drawing from the Supreme Court decision in Francis Karioko Muruatetu and Another vs. Republic [2017] eKLR (now popularly referred to as Muruatetu 1) where the learned judges issued guiding principles for mitigating factors applicable in a re-hearing sentence. We are thus urged to adopt this approach and allow the appeal by interfering with the sentence.

22. The offence of robbery with violence is contained in sections 295 and 296(2) which provides for the sentence as death. The elements of the crime of robbery with violence were set out by the court of appeal in the Case of Oluoch vs. Republic [1958] KLR where the court stated that:

> " Robbery with violence is committed in any of the following circumstances:
>
> The offender is armed with any dangerous and offensive weapon or instrument; or
>
> The offender is in company with one or more person or persons; or
>
> At or immediately before or after the time of the robbery the offender wounds, beats, strikes, or uses other personal violence to any person..."

In the case of *Dima Denge Dima & Others vs. Republic Criminal appeal No. 300 of 2007* stated:

> " The elements of the offence under section 296(2) are three and they are to not be read conjunctively, but disjunctively. One element is sufficient to find an offence of robbery with violence."

23. From the testimony of PW1 and PW6, we agree with the High Court judges that an extremely violent robbery did indeed take place on the night in question. The question of identification is a dicey one as PW1 confirmed that he never gave a description of the attackers in the initial report, but he later recorded a further statement where he gave detailed physical descriptions of some of the attackers; and

this as echoed by PW11. Both the trial court and the High Court were hesitant to place weight on the opportunity for identification at the scene particularly due to the absence of initial description by the complainants; and the High Court also noted that the identification parade was conducted after the lapse of a significant period. The High Court thus stated:

> " Accordingly, we hold that though the identification parades were conducted in accordance with the police standing orders, the fact that there was no description of the persons alleged to have committed the offence in the initial report renders the evidence of identification unsafe and hence insufficient to sustain a conviction."

24. In upholding the convictions, the High Court considered that the stolen phones were tracked with the assistance of telephone services providers; leading to the apprehension of PW22 who later led PW11 to the 1st appellant, who did not offer an explanation of how he obtained the mobile phone; and from whose house were recovered several expensive items bought within days of each, a few days after the robbery and without a satisfactory explanation on the source of the windfall. Instead, the 1st appellant led the police to the second appellant who later led them to the 3rd appellant.

25. The 2nd appellant, after leading the police to the 3rd appellant also led the police to Mosque estate where he unearthed a pistol which was buried in the ground. PW20, the village elder of the area testified that he was present when the appellant unearthed the pistol and he witnessed everything that took place. The recovered pistol was examined and tested by PW9 a ballistics expert and he came to the conclusion that it marched the Ceska Pistol that been issued to PW1.

26. What we must now determine is whether the High Court was correct in upholding the conviction against the appellants based on the doctrine of recent possession.

This Court has summarized the essential elements on the doctrine of recent possession in Eric Otieno Arum vs. Republic KSM CA Criminal Appeal No. 85 of 2005 [2006] eKLR:

> " Before a court of law can rely on the doctrine of recent possession as a basis for conviction, the possession must be positively proved. There must be proof that first the property was found with the suspect, secondly that the property is positively the property of the complainant, and thirdly the property was stolen from the complainant..."

27. Once the primary facts are established, the appellant bears the evidential burden to provide a reasonable and/or plausible explanation for the possession. (See *Paul Mwita Robi vs. Republic Ksm Criminal Appeal No. 200 of 2008*). This Court agrees with the High Court Judges that the prosecution did establish the primary facts as set out in the Arum Case(supra) and further that the 1st appellant did not have a reason and/or plausible reason as to why they were in possession of the suspected property. We take note that apart from the unexplained source of money to suddenly acquire property of significant value within such a short period, there was also the evidence of PW11 that one of the stolen phones belonging to PW1 was traced to the 1st appellant who could not give a satisfactory explanation as to how he got to acquire it.

28. The 2nd appellant led the police to recovery of PW1's recently stolen official Ceska pistol and the 4th appellant was the link to one of the stolen phones traced to his brother in Mombasa; and which he was not able to explain how he came into possession of. The 3rd appellant confessed to the crime and stated who his accomplices were. That confession was subjected to a trial within a trial, and found to meet the threshold for admissibility. Indeed, the learned judges duly considered the law and legal principles applicable; and we detect no error on their part.

29. On the issue of sentence, having found that the elements of robbery with violence had been proved beyond reasonable doubt by the prosecution, the reference point would be the Penal Code which prescribes a death sentence for the offence of robbery with violence. The appellants submit that the sentence meted out was manifestly excessive and that the trial court and the High Court ought to have used discretion during sentencing. The question left for this court to now answer is whether there is any lawful reason to interfere with the sentence.

30. The appellants robbed the complainants of their property, and in the course of the robbery were armed with weapons which were used to injure them. As to the sentence meted out to the appellants, it is true that following the decision in Muruatetu I (supra), wherein the mandatory death sentence was declared unconstitutional, there appeared a temporary shift in the jurisprudence wave relating to mandatory minimum sentences. However, this position has been overtaken by events following the directions given by the Supreme Court on 6th July 2021 in the case of *Muruatetu & Another vs. Republic; Katiba Institute & 4 Others (Amicus Curiae) (Petition 15 & 16 of 2015*) [2021] KESC 31 (KLR) (6 July 2021) (Directions) (Muruatetu 2), the learned judges stated thus;

> " It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with *the Constitution*. It bears restating that it was a decision involving the two Petitioners who approached the Court for specific reliefs. The ultimate determination was confined to the issues presented by the Petitioners, and as framed by the Court.
>
> (15) To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under Section 40 (3), robbery with violence under Section 296 (2), and attempted robbery with violence under Section 297 (2) of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases.

Therefore, being cognizant of the above position from the apex court in the land, we find no justifiable ground to disturb the sentence of death imposed on the appellants by the trial court and confirmed by the 1st appellate court as the same is in line with the law. The death sentence in Count II will be held in abeyance.

31. In view of the foregoing, we are satisfied that the appeal is devoid of merit and we order that it be and is hereby dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 8TH DAY OF NOVEMBER, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR