Muhatia v Republic (Criminal Appeal 139 of 2017) [2023] KECA 160 (KLR) (17 February 2023) (Judgment)

Neutral citation: [2023] KECA 160 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 139 OF 2017

PO KIAGE, M NGUGI & F TUIYOTT, JJA

FEBRUARY 17, 2023

BETWEEN

KASIM JUMA MUHATIA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kakamega, (Onyancha & Lenaola, JJ.) dated 2nd February, 2012 in HCCRA NO. 57 OF 2009)

JUDGMENT

1. In this second appeal, we are urged to find that the 1st appellate court failed to subject the evidence led at trial to fresh scrutiny and re-evaluation and that had it done so, then it would have arrived at a conclusion that the identification by recognition relied upon by the prosecution was inconclusive and unreliable. Further, the 1st appellate court would have reached a conclusion that the ingredients of the offence of robbery with violence were not proved. The other ground of appeal is that the sentence meted out against the appellant is excessive in the circumstances given that the mandatory death penalty is outlawed.

2. On August 30, 2008 at about 1.00 am, Philip Likoli (PW1) a boda boda operator in Kakamega town was asleep at his house in Lubao, South Kabras when there was a sudden and violent entry into his house. The door to the house was hit and forced open. Three people made an entry. One of them had a torch and so he (PW1) was able to see one of the intruders. He was Kasim Juma Muhatia, the appellant. This was a man known to him. He knew him as a waiter in a hotel at Lubao who previously served him tea. On that night, the appellant was wearing a jacket and carried a panga. PW1 saw both the jacket and the panga. The appellant held PW1 by the collar. The two got involved in a physical struggle. One of the other three cut PW1 who bled and stained the jacket the appellant wore. The assailants took Kshs. 3,000.00 from PW1's shirt pocket.

3. PW1 screamed in distress and for help. There were responders, among them Charles Elimuli (PW2), who pursued the assailants. The evidence of both PW1 and PW2 is that although ,immediately after the incident, they visited the hotel where the accused would ordinarily stay overnight after work, they did not find him. On a second visit at about 5.30 am to 6.00am, they found the appellant at the hotel preparing a fire. It was their evidence that they found a panga and jacket left behind by the appellant at the scene as he tussled with PW1.

4. The appellant was arrested and taken to Kakamega Police Station where he was re-arrested by P.C. Kipkori Bii (PW3). PW3 also received the jacket and panga that had been recovered.

5. In his defence, the appellant denied the offence. In his short testimony, he told court about his arrest on the morning of Sunday, August 1, 2008.

6. In holding in favour of the prosecution, the trial court (Kimani Ngungu SPM) held as follows:

> " The complainant has demonstrated that he was attacked and robbed of property. He says he saw and recognized the accused when a torch was shone on the accused. PW2 also saw 2 other person who he did not recognize. The existence of torch light in both instances made identification circumstances favourable. I am satisfied the identification of the accused at the scene was devoid of mistake. There is no cote(sic) of evidence of a grudge or ill will between the accused and the witnesses that would possibly lead the 2 witnesses to have a common intention to harm the accused. I believe their evidence. The recovery of a bloody jacket which the complainant positively identifies also holsters the mesne's (sic) case."

7. The 1st appellate court endorsed those findings and upheld the conviction. The appellant persists in his attempt to upset the conviction and to set aside the sentence.

8. Mr. Lugano appearing for the appellant argues that the evidence of identification/recognition at night must be absolutely watertight to justify a conviction *Nzaro v Republic* [1991] KAR 212 and *Kiarie v Republic* [1984] KLR 739). Also cited to us is the famous decision of *R v Turnbull & others* [1976] 3 ALL ER 549. We are asked to find that identification by recognition was not proved because;

    a. The evidence by PW-1 and PW-2 who are brothers was never corroborated by another independent witness;

    b. PW-1 stated in his testimony that he knew the accused as he used to work at a hotel but never stated how often he used to visit the said hotel for service

    c. The alleged attack on PW-1 does not indicate the length of time he had with the accused to place him at the crime scene and to identify him positively;

9. As to why the ingredients of the offence of robbery with violence were not proved, counsel submits that the panga allegedly used during the commission of the offence was recovered at the appellant's place of work and not in his house and counsel poses the question whether it is unusual for a panga to be in a hotel.

10. On the question of sentence, it is submitted that the rationale in the decision of *Francis Karioko Muruatetu* [2017] eKLR (*Muruatetu (1)*) gives discretion to judicial officers to impose alternative sentences besides the death sentence on convicts of capital offences. We were asked to remit this matter to the High court for a rehearing on sentence.

11. At the hearing of the appeal, Patrick Okang'o, Senior Principal Prosecution counsel represented the respondent. It was his submission that there is no legal requirement that the evidence of witnesses

who are brothers must be corroborated by an independent witness. Counsel argues that there was unrebutted evidence that there was sufficient light from the two torches, one held by the attackers and another by PW2, that enabled the two brothers to identify and recognize the appellant.

12. As to the ingredients of the offence, Mr. Okang'o made the argument that the complainant was robbed by three people who assaulted him with a panga which was sufficient to constitute the offence.

13. On the applicability of the Supreme Court's decision in Muruatetu 1, this Court was referred to the following passage from *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR (*Muruatetu (2)*).

> " The decision of Muruatetu and these guidelines apply only in respect to sentence by murder under section 203 and 204 of the Penal Code."

14. The duty of a court sitting on a second appeal in a criminal matter is spelt out in section 361(1) of the *Criminal Procedure Cod*e. Of this duty this court in *Njoroge v Republic* [1982] KLR 388 stated as follows: -

> " On a second appeal, the Court of Appeal is only concerned with points of law. On such an appeal, the court was bound by the concurrent findings of fact made by the lower courts, unless those findings were shown not to be based on the evidence."

15. The first aspect of the appeal is a plea by the appellant that we depart from the concurrent findings of fact reached by the two courts below. The law is that we cannot do so unless it has been demonstrated that the findings of fact are based on no evidence or a deduction of the evidence on the basis of wrong principles of the law.

16. The robbery happened in the dead of night and was sudden. The entry of the assailants was menacing and hostile. These do not make for the most ideal circumstances for identification or recognition. And while there is evidence of recovery of a panga and a jacket apparently stained by the blood of the victim, those were recovered at the scene of the robbery and not with the appellant. Moreover, there was no forensic examination carried on the jacket to establish that the blood was that of the victim. Basically then, the only evidence linking the appellant to the crime was evidence of identification. For this reason, the warning sounded by this court in *Wamunga –vs- Republic* [1989] KLR 426 is one to be heeded:

> " 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 conviction."

17. Given that the circumstances at the time of the incident were not ideal for identification, the test as to whether the evidence is fool proof was set out in *R v Turnbull & others* (1976) 3 ALL ER 549 as follows:

> " .... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the accused before? How often, if only occasionally, had he any special reason for remembering the accused? How much time elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them as his actual appearance?. Recognition may be more reliable

than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

18. Regarding how PW1 was able to see the appellant he stated in examination in chief:

" They had a torch which shone light and I was able to see him. He had a jacket and a panga."

True, that evidence does not suggest the intensity or quality of the light and would otherwise be weak. It is however propped up by what he said in cross- examination,

" There was at torch with light on (sic) It is not you who had a torch. The torch lit the room."

19. Instead of the cross-examination demolishing that aspect of evidence it improved it. There lies an interrogation as to the intensity of the light- it lit the room. Something else strengthens the evidence. At some point, the appellant, who had held the complainant by his collar, was involved in a physical struggle and physical contact with him. This in our view gave PW1 an opportunity to identify the appellant, a person well known to him.

20. The evidence of PW1 finds support in that of PW2 who stated:

" I recall on August 31, 2008 at 1.00am, I was at home asleep. I had screams from the complainant. I came out. I had a torch. I shone it and I saw the accused herein and 2 others whom I did not recognize. I know him before (sic)

In re-examination, he adds,

" I shone torch. I saw the accused very well."

21. Again, there was no inquiry as to the quality and intensity of the light from PW2's torch. Yet the evidence of the witness was unshaken and consistent. It was also aligned to that of PW1.

22. We have been urged to disregard the evidence of these two witnesses because they are brothers. We see no reason to do so. There is no law that bars courts from admitting or believing evidence of blood relatives. In the nature of things, the only witnesses who could be available to testify on an attack at a home may be blood relatives. If their evidence was to be disregarded merely because of that relationship, then it may never be possible to prove an attack at a home. Corroborative evidence of relatives is to be tested in the usual manner as to credibility and consistency.

23. In the end, we cannot fault the following findings by the High Court:

" 10. We have no doubt that only one issue arises for our determination; that of identification, PW1 and PW2 both said that they were able to identify the appellant at the scene and we are inclined to agree with that evidence. We say so because firstly, the appellant and the witnesses were previously known to each other and that is why soon after the robbery, they went straight to his house but failed to get him.

On the second attempt, at 5.30 a.m. they found him and apprehended him.

Further, when PW1 and the appellant were struggling with each other, there is little doubt that they were close to each other and light from the torches held by the other robbers enabled him to clearly recognize the appellant.

11. Secondly, PW2 came minutes later and with his own torch light was able to recognize the appellant. His evidence was not challenged at all.

12. Thirdly, theappellant was known by PW1 and PW2 to be owner of the jacket that was abandoned at the scene and there is no doubt that although there were no distinguishing features on it, it was identified as belonging to him because he wore it regularly."

24. The essentials of the crime of robbery with violence are not only explicit from the provisions of section 296 (2) of the *Penal Code* but have been restated time without number by our courts. For instance, in *Oluoch v Republic* [1985] KLR 549 this court restated them to be:

"1. The offender is armed with any dangerous or offensive weapon or instrument, or

2. If he is in the company with one or more other persons, or

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

25. In the matter at hand, the appellant, in the company of two others, broke into the house of the complainant. They found the complainant there, they used force against him, assaulted him and caused him injury described as a bleeding traumatic wound on the forehead (see the P3 form). In the course of it, they robbed him. All the ingredients of the offence are present.

26. On the sentence, we have no doubt in our minds that the rationale in *Muruatetu 1* should apply to the sentence under section 296. Yet, we must pay heed to the following direction in *Muruatetu 2*.

"(14) 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 undersection 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."

We are not aware of the constitutional pronouncement contemplated by those directions on the sentence regarding section 296 (2). For now, in deference to the directions of the Apex Court, we decline the invitation to revisit the sentence.

27. In the result, the appeal on both conviction and sentence is dismissed.

Dated and Delivered at Kisumu this 17th day of February, 2023.

P.O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR