Baraza v Republic (Criminal Appeal 378 of 2019)
[2023] KECA 349 (KLR) (31 March 2023) (Judgment)

Neutral citation: [2023] KECA 349 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 378 OF 2019

F SICHALE, LA ACHODE & WK KORIR, JJA

MARCH 31, 2023

BETWEEN

PROTUS WEKESA BARAZA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Bungoma (Hon. A. Aroni, J.) delivered and dated 30th March, 2017 In HC CR Appeal No. 90 of 2014)

JUDGMENT

1. Protus Wekesa Barasa (the appellant) is before us on a second appeal against the judgment of the High Court at Bungoma in Criminal Appeal No 90 of 2014. The appellant had at the Chief Magistrate's Court at Bungoma been charged in Criminal Case No 1625 of 2012 with two others for the offences of Robbery with Violence contrary to section 296(2) of the *Penal Code*. In particular, the appellant was faced with two counts. In the first count, it was stated that on July 14, 2012 in Bungoma Town within Bungoma County, the appellant jointly with his co-accused while armed with dangerous weapons robbed MM of cash and assorted household goods and in the process used actual violence on her. The particulars of the second count were similar to those of the first count save that the victim of the robbery was PAJ . The appellant and his co-accused were convicted and each one of them was sentenced to suffer death by the trial court. The appellant was aggrieved by the judgment of the trial court and he lodged an appeal before the high court. His appeal against both conviction and sentence was dismissed by the High Court prompting him to file the present appeal.

2. In his memorandum of appeal, the appellant challenges the decision of the first appellate court on the grounds that he was not supplied with documentary evidence prior to the commencement of his trial thereby breaching his right to fair trial; that the evidence tendered by the prosecution witnesses was marred with discrepancies and contradictions; that the first appellate court failed to independently

examine the evidence on record; that the offences were not proved beyond reasonable doubt; and, that the evidence of his identity was unreliable.

3. In summary, the prosecution's case was that on the night of July 14, 2012 the appellant alongside his co-accused violently robbed MM (PW1) and AJ (PW3). They took away their phones, money and other assorted household items and clothes. The incident took place at about 9.15 pm when the victims were in the house of MM watching news in the company of their children. The appellant and his co-accused are alleged to have entered the house of MM just as AJ had stepped out to her house to get food. Two of the robbers entered the house while the third man stood outside. While in the house, the robbers each handled their victims separately with one taking MM to her bedroom while the appellant is alleged to have remained with AJ in the sitting room. The appellant and his co-accused were said to have passed the stolen items over the fence. The appellant was later arrested in a bank in Bungoma and an identification parade conducted before he was arraigned in court.

4. This is a second appeal and our mandate under section 361(1) of the *Criminal Procedure Code* is limited to addressing matters of law only. In doing so, we are to pay homage to the findings of fact by the two courts below. However, if we are to interfere with the findings of fact, then it must only be if it is proved that such findings were not based on any evidence or if the findings so made are bad in law. In *Adan Muraguri Mungara v Republic* [2010] eKLR the said mandate was summarized 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."

5. When this matter came before us for virtual hearing, counsel for the parties indicated that they would rely on their already filed written submissions. The appellant's submissions were drawn and filed on February 28, 2022 by learned counsel Mr. Towett Titus. Counsel for the appellant submitted on all the grounds of appeal. On the issue of identity, counsel urged that the appellant was erroneously convicted in reliance on the evidence of a single witness. He submitted that the fact that both PW1 and PW3 failed to identify the appellant even in the identification parade was material in regard to the identification of the appellant. He further urged that there was no evidence to prove whether the said identification parade complied with the *Police Standing Orders*. Counsel referred the Court to the decisions in *Maitanyi v Republic* [1986] eKLR and *Francis Kariuki Njiru & 7 others v Republic* [2001] eKLR to buttress the importance of testing the evidence of identification by a single witness. Counsel's conclusion therefore was that the appellant was convicted on unsafe evidence of identity.

6. Mr Towett also took issue with the documentary evidence which he stated was contradictory and weak. Counsel submitted that the photographic evidence at pages 92 to 97 of the record of appeal offended sections 107, 163 and 165 of the *Evidence Act* due to the discrepancy between the date of the offence and the watermarked date on the photographs. Counsel further pointed out the discrepancies in the OB number and the P3 forms as well as the evidence of PW1 as to what she wore during the day of the crime. Counsel submitted that the trial court erred when it overlooked these discrepancies and admitted the evidence of PW1 and relied upon the same to convict the appellant. To buttress this line of argument, counsel relied on the decisions in *Ndung'u Kimani v Republic* [1979] KLR 282 and *Ndegwa v Republic* [1985] eKLR where it was warned that grave contradictions adversely affect the evidentiary value of a witness' evidence.

7. Counsel also submitted that the failure by the prosecution to supply the appellant with the identification parade documents, the investigations diary and the OB extract before the trial contravened article 50(2)(j) of the *Constitution*.

8. On the issue of sentence, counsel submitted that the death sentence imposed by the trial court and upheld by the first appellate court was harsh, excessive and illegal. He urged the court to allow the appeal, quash the conviction and set aside the sentence or order a sentence re-hearing in the high court.

9. Ms Ursulla Kimaru learned State Counsel for the respondent filed submissions dated December 21, 2022. On the issue as to whether the appellant was sufficiently identified, counsel submitted that PW1 identified the appellant with the help of light which was later switched off and also with the help of a torch that was being used by the robber who was the first to enter the house. Counsel reiterated that PW1 further identified the appellant on August 2, 2012 when the appellant fled away. Additionally, counsel submits that the appellant was also identified by PW3 as the one who remained with her in the sitting room as the lights were on and that the evidence of PW3 was corroborated by that of Florence Achieng (PW4) as to what the appellant wore on that day. It was therefore counsel's view that in the circumstances, there was no need for an identification parade with respect to the appellant as he was successfully identified at the scene of crime. To this end, counsel sought to rely on this Court's decision in *Andrea Nahashon Mwansha v Republic* [2016] eKLR to submit that where the circumstances prevailing during the commission of the offence were favourable for a positive identification, an identification parade was not necessary. Counsel further submitted that even though PW1 did not identify the appellant at the identification parade, the parade was not necessary and that the identification parade form was not relied upon by the prosecution.

10. On the appellant's assertion that the prosecution evidence was contradictory, counsel submitted that even though some of the photographic exhibits had watermarks indicating that they were taken on January 1, 2007 long before the crime was committed, there was nothing to indicate that the incident took place on January 1, 2007. Counsel further urged that the essence of the photographs was to show the injuries suffered by PW1 whereas the evidence as to when the injuries were suffered is contained in the P3 form and corroborated by the oral evidence of the witnesses. It was therefore counsel's submission that the purported contradiction was minor and cannot outweigh the corroborated evidence in regard to the date of the offence. Counsel also urged that contrary to the allegation of the appellant, there was no contradiction on the dress code of PW1 on the day of the offence.

11. Counsel denied the appellant's claim that he was denied a fair trial and submitted that the appellant was represented at the trial, was present during the trial and took part in the whole trial process. Additionally, counsel asserted that the appellant's advocate was issued with all the documentary evidence that the prosecution relied on during the trial. Counsel was of the view that if there was any breach as alleged, then the appellant could have raised the issue either during trial or before the first appellate court. To counsel, failure to do so meant that the issue is an afterthought on the part of the appellant.

12. The respondent finally submitted that the sentence meted by the trial court and confirmed by the first appellate court was legal and commensurate to the offence the appellant was charged with. Counsel urged this court not to interfere with the sentence as the same was legal. In conclusion, the respondent urged for the dismissal of this appeal in its entirety.

13. We have considered the record of appeal as well as the submissions by the parties. This is a second appeal and even though the appellant has raised 14 grounds of appeal, our mandate is limited to matters which were canvassed and arise out of the proceedings before the high court, and at most, before the trial court. As we have already stated, we are also limited to matters of law. That being the case, it is our

view that the issues for our determination are whether the appellant was sufficiently identified as one of the perpetrators of the crime; whether the prosecution's case was marred with contradictions going deep into the root of the case; and whether the sentence passed against the appellant was appropriate and legal.

14. One of the grounds of appeal is that the first appellate court failed to discharge its mandate of re-evaluating the evidence and reaching its independent conclusion. Before addressing the identified issues, it is therefore prudent to address the mandate of a first appellate court and the manner of the discharge of that mandate. This Court underscored the duty of the first appellate court in the case of *David Njuguna Wairimu v Republic* [2010] eKLR thus:

> "In *Okeno v R* [1972] EA. 32 the Court of Appeal for East Africa, laid down what the duty of the first appellate court is. Its duty is to analyse and re- evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."

15. We have carefully reviewed the judgment of Ali-Aroni, J. (as she then was). We wish to reiterate that even though there is not a specific yardstick on how the duty of the first appellate court should be discharged, what must be done is a succinct re-evaluation of the evidence as against the applicable principles and statutory provisions concerning the matter at hand before coming up with an independent decision. Upon review of the judgment of the first appellate court and the whole record, we are satisfied that the first appellate court discharged its mandate as was required of it. The Judge restated and reviewed the evidence, conducted her own independent analysis of the evidence and the law and came to her independent conclusion. She cannot therefore be faulted for failing to discharge her responsibility.

16. Just for the record, we wish to reiterate the ingredients of the offence of robbery with violence as were stated by this Court in *Johana Ndungu v Republic* [1996] eKLR that:

> "The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in section 296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:
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> (1) If the offender is armed with any dangerous or offensive weapon or instrument, or
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> (2) If he is in company with one or more other person or persons, or
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> (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."

17. From the record of appeal, it is not disputed that PW1 and PW3 were victims of robbery with violence. The assailants who were three in number were also armed with iron rods and pangas during the robbery. The assailants also caused injuries to PW1 and threatened to use violence against PW3.

These are factual findings of the two courts below and as they are consistent with the evidence that was adduced at the trial, we find no reason to disturb such findings. Even with that, the burden of proving that it was the person before court who committed the offence remained with the prosecution throughout the trial. The identity of the appellant as being among the assailants is the main contention in this appeal. The question is whether the appellant was satisfactorily identified during the robbery.

18. We do not find tenable the argument advanced by the respondent that since the identification parade form in respect to the appellant was not admitted as an exhibit then this Court should not concern itself with the evidence surrounding the identification parade. The attempt by the respondent to deny this Court access to the evidence surrounding the identification parade is without merit considering that the issue of the appellant's identification parade was canvassed during trial and formed part of the evidence on trial. In the same breadth, both parties had the opportunity to address or rebut the evidence surrounding the appellant's identification parade. We thus have the leeway to look into that evidence from the position of the law and make our finding on it.

19. This Court in the case of *Cleophas Otieno Wamunga v Republic* [1989] eKLR warned of the dangers of visual identification in the following words:

> " Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach evidence of visual identification was succinctly stated by Lord Widgery C.J, in the well known case of *R v Turnbull* [1976] 3 All E.R. 549 at page 552 where he said:
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> > " Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."
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> This need for caution was also reiterated by the Court of Appeal for Eastern Africa in the case of *Abdallah Bin Wendo v R* 20 EACA 166 at page 168 thus:
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> > " Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

20. The cited passage succinctly captures the law and we adopt the position expressed therein. The robbery in the present case occurred at night. From the record of the trial court, the appellant was the 3rd accused person. The evidence tendered was that during the robbery the appellant stayed in the sitting room with PW3 while the 2nd accused person went with PW1 to her bedroom. The evidence of PW1 was that she had seen the appellant earlier that evening and during the ordeal. She also testified that the

appellant entered the house first while beaming his handheld torch. PW1 further gave evidence on how she met the appellant on two occasions after the incident and that it was during the second meeting at the Bungoma Branch of Equity Bank that she had him arrested. On cross-examination, PW1 testified that during the robbery the appellant had a scarf covering his face and beamed his torch towards her. She also testified that she was not able to recognize the appellant in an identification parade. It was also the evidence of PW1 that the appellant entered the house, shone the torch light at her and immediately thereafter, the lights were switched off.

21. Another stream of evidence of relevance to the issue of the appellant's identity is that of PW3. This witness testified that the appellant remained with her in the sitting room during the ordeal and even lay on top of her in attempt to rape her. She also testified that it was her first time to see him and that there were no lights either outside or inside the house. She further testified that the appellant had a scarf on his head which fell at some point. However, she did not identify the appellant at the identification parade because she had received threats to her life. PW4 on her part stated that the appellant had a scarf but she was able to see his eyes, nose and mouth and that he had no weapon.

22. Even though the evidence of the identification parade for the appellant was not relied upon by the prosecution, the issue of the identification parade came up during the cross-examination of PW1 and PW3 and the witnesses said that they were not able to identify the appellant in that parade. PW3 attributed her failure to identify the appellant during the parade to alleged threats that she had received. However, she did not specify the source of the threats and even though the identification parade was carried out at a police station, she did not alert the police about the alleged threats. In view of the evidence on record, can we undoubtedly find the identity of the appellant to have been sufficiently proved? We unreservedly say no. Our view is borne of two key factors. First, despite PW1 testifying how she had met the appellant before, identified him at the scene and saw him subsequently and even led the police to arrest him at Equity Bank, Bungoma Branch; she failed to identify him in the identification parade that was held after his arrest. How then can she explain this failure to identify a person whom she purported to have known prior to his arrest? On the part of the evidence of PW3, we find irreconcilable the fact that she spent most the time during the ordeal with the appellant but failed to recognize him during the identification parade.

23. As can be deduced from the case of *Cleophas Otieno Wamunga* (*supra*), whenever a case against an appellant is dependent on the evidence of identification, courts must exercise caution and care to avoid a miscarriage of justice. The respondent has urged us to find that there was no need for the identification parades as the appellant had been positively identified prior to his arrest. In response to this submission, and without prejudice to what we have stated in the preceding paragraph, we wish point out that in assessing whether the identification during the commission of the offence is sufficient, the court ought to engage in a dual inquiry. The first inquiry relates to the light used for identification, namely, the source of light, the intensity of the light, duration within which the light was available and the time the ordeal took, as well as any other intervening factor. The second inquiry is as to whether the complainant offered an initial description of the assailant during the first report or to the first contact person after the incident. This second line of inquiry serves to ensure that the complainant indeed identified certain peculiar features of an accused during the incident thereby backing his or her evidence that the circumstances favoured a positive identification.

24. Adopting the two-pronged test as highlighted above, one cannot be faulted for concluding that the evidence of identification of the appellant during the robbery was wanting. We say so for the following reasons. First, the incident took place at night. Second, from the chronology of events, the appellant is alleged to have entered the house beaming a torch after which another person followed and switched off the lights. For most of the time during that ordeal, the main source of light was the torch which

PW1 acknowledges to have used to identify one of the appellant's co-accused (accused number 2 at the trial) and not the appellant. Third, the evidence of PW3 is that she did not see what the appellant was wearing on that day. It is also not disputed from the evidence of PW1 and PW3 that the appellant had covered his face with a scarf all through the time of the incident save for another assailant whose scarf fell and the torch light was beamed on his face.

25. In the absence of any evidence of initial description of the appellant, we reach the inevitable conclusion that the appellant was not sufficiently identified. The identity of the third robber during the incident remains a mystery and all that can be said is that he may have been or may not have been the appellant. However, even as we use the word "may", we are certain that the threshold of criminal culpability was not discharged by the prosecution with regard to the identity of the appellant as one of the robbers.

26. Before we let this matter to rest, we agree with the respondent's submission on when an identification parade is deemed necessary and the purpose of such a parade in criminal justice litigation. As submitted, an identification parade is necessary whenever a witness purports to identify an accused in extremely difficult conditions as was the situation in the case herein. The parade therefore serves to discard any doubt by offering a complainant a controlled and fair environment to pick up the alleged offender. However, where an accused person is arrested following identification in the streets by a witness, as was the case in regard to the arrest of the appellant, an identification parade will serve no useful purpose for that particular witness but may be useful for other witnesses. In short, whether or not to hold an identification parade will always be determined by the circumstances of the commission of the offence and the wisdom of the investigating officer.

27. In the circumstances, the conclusion we have come to is that the identification evidence upon which the appellant's conviction was based, has not been shown to have been free from the possibility of error. The end result is that there is no evidence upon which the conviction can be sustained.

28. Having made the finding above, we must then let this appeal rest at that. Addressing the other issues will only amount to an academic voyage.

29. Our conclusion therefore is that we allow the appeal, quash the conviction and set aside the death sentence. We order the appellant to be released from prison forthwith unless he is otherwise lawfully held.

DATED AND DELIVERED AT NAKURU THIS 31ST DAY OF MARCH, 2023

F. SICHALE

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR