Anemba & another v Republic (Criminal Appeal 117 of 2017)
[2023] KECA 339 (KLR) (17 March 2023) (Judgment)

Neutral citation: [2023] KECA 339 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 117 OF 2017

PO KIAGE, M NGUGI & F TUIYOTT, JJA

MARCH 17, 2023

BETWEEN

CHARLES AMBOKO ANEMBA ..... 1ST APPELLANT

ELISHA MAIYA OMULAMA ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kakamega (Sitati & Mrima, JJ.) dated 21st July, 2015 in HCCRA No. 52 of 2014)

JUDGMENT

1. Charles Amboko Anemba (1st appellant) and Elisha Maiya Omulama (2nd appellant) were arrested and arraigned before the Principal Magistrate's Court at Vihiga and jointly charged with robbery with violence contrary to section 296(2) of the *Penal Code*.

2. The crime they were charged with took place on the night of March 10, 2013. Robbers broke into the house of Isaac Kisiera, PW1, and Sellah Kisiera, PW2. The intruders initially attempted, albeit unsuccessfully, to gain entry into the house by trying to pry open one of the bedroom windows. The commotion caused by that unsuccessful attempt jolted PW1 and PW2 awake. As soon as they woke up and switched on the lights, their bedroom door was flung open and the robbers barged, in armed with pangas and rungus. They ordered PW1 to sit on the bed and threatened to shoot him if he failed to comply. One of them instructed PW2 not to scream nor look at them and that even if she did, she would not recognize them. They took PW1's phone, a Samsung, demanded his M-pesa PIN and transferred money therein to themselves. They further threatened PW1 that they would burn his vehicle and rape PW2 if he to reversed the mobile money transfers they made. They then made away with; one video deck and a remote control; Kshs 1500 from PW1's trouser; Kshs 500 from PW2's hand bag and her mobile phone; 5 packets of rice; 5 litres of cooking oil; 4 kgs of sugar; and a pineapple.

3. According to PW2, the ordeal took place within 30 minutes. In that time, both PW1 and PW2 were able to positively identify the appellants as the robbers. PW2 specifically stated that she had a good look at the appellants when they asked PW1, a pastor, to pray for them so that they could get honourable jobs. The 1st appellant had a scar on the left side of his shaved head while the 2nd appellant had visible scars on both hands. Once the appellants made away with their belongings, PW1 and PW2 called their neighbour, Philip Butala, PW3, who assisted them to contact Safaricom and they were able to block one of the transactions of Kshs 3,000. They also reported the matter to the police.

4. Inspector Mumo Shamalla, PW4, an officer attached to the Safaricom law enforcement office in Nairobi, provided official M-pesa transaction records that established that on the night of the crime, Kshs 3,000 was successfully transferred from a number registered to PW1 to a number registered to the 2nd appellant. Another transfer of Kshs 3,650 was made to a number registered to the 1st appellant. Later on, two identification parades were conducted by Inspector Judith Nyongesa, PW5, on the request of the investigating officer. PW1 positively identified the appellants in the separate parades.

5. At the close of the prosecution case, the trial Magistrate found that the prosecution had established a prima facie case against the appellants. Consequently, the appellants had a case to answer and were placed on their defence.

6. The 2nd appellant maintained his innocence and stated that he was arrested on April 5, 2013 and charged with robbery with violence. The 1st appellant had a similar claim save for mentioning that an identification parade was conducted before he was charged together with the 2nd appellant.

7. The then Acting Senior Principle Magistrate Grace Mmasi held that the prosecution had discharged its onus of proving its case beyond a reasonable doubt. She found both the appellants guilty as charged, convicted and sentenced them to death.

8. Distressed by the conviction and sentence meted against them by the trial court, the appellants appealed separately to the High Court but the appeals were consolidated.

9. Sitati and Mrima, JJ., considered the appeal and held that; the appellants were properly placed at the scene of the crime as PW1 and PW2 had ample time and adequate lighting to properly identify the appellants thus their identification was free from error; it was proved that they were armed and threatened to use actual violence on PW1 and PW2 in the event that they failed to co-operate; the parade was properly conducted; their defences did not cast any reasonable shadow of doubt upon the prosecution's evidence. On sentence, the learned Judge's held that the death penalty is permitted in the Constitution and is therefore not unconstitutional. They dismissed the appeal in its entirety.

10. Still dissatisfied, the appellants again filed separate appeals that were later consolidated. Their collective grounds were 10 and can be summarised, that the learned Judges erred by;

    a. Failing to find that the appellants were not properly identified.

    b. Failing to find that the case was not proved beyond a reasonable doubt.

    c. Failing to find that the appellants were not accorded a fair hearing.

    d. Affirming the sentence meted out by the subordinate court when the same was unconstitutional and excessive under the circumstances.

11. During the hearing of the appeal, learned Counsel Ms. Nyambeki appeared for the appellants while the learned Prosecution Counsel Ms. Vitsengwa appeared for the respondent.

12. Ms. Nyambeki contended that the appellants were not accorded a fair hearing as their rights under Article 50(2)(j) of the *Constitution* were violated. She explained that the appellants were not furnished with witness statements and exhibits and therefore could not adequately prepare their defence. She took issue with the identification parade being conducted with only one witness and drew guidance from the case of Abdala Bin Wendo v Republic [1953] 20 EACA 166 which illuminated on the dangers of a conviction based on the identification of a single witness. She argued that the prosecution also failed to invoke the doctrine of recent possession with regards to the stolen items. In support of that ground, she cited the case of *Erick Otieno Arum V Republic* [2006] eKLR where the police found the stolen property in the exclusive possession of the accused and the property was positively identified by the complainant.

13. Counsel also stated that the prosecution failed to establish the essential elements of robbery with violence beyond reasonable doubt. She finally argued that the mandatory nature of the death sentence rendered it unconstitutional. Placing reliance on the Supreme Court decision in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR (Muruatetu 1), she urged us to reduce it to a term sentence.

13. In opposition, Ms. Vitsengwa clarified that she intended to rely on the submissions dated May 12, 2022. She dismissed the claim that the appellants were never furnished with witness statements and exhibits the prosecution relied on during the pendency of the trial in contravention with Article 50(2)(j). She pointed out that when the appellants were given an opportunity to cross-examine the witnesses, they never raised this issue at any point during the trial thus revealing their claims as untrue.

14. On the doctrine of recent possession, she contended that the same cannot be applied in this instance as the appellants were arrested about 3 months after the robbery and none of the stolen items were recovered from them. The conviction was based on their identification and the M-pesa statements which proved that they had stolen money from PW1's mobile phone on the night of the crime. This evidence was not shaken by the defence. The conditions were conducive for a proper identification as held by the trial court and upheld by the High Court. Moreover, the record shows that the appellants signed the identification parade reports signalling their satisfaction with how the process was conducted.

15. Counsel next reasoned that the death penalty is constitutional and that Muruatetu 1 does not apply to cases of robbery with violence as was espoused by the Supreme Court in *Muruatetu & Another v Republic; Katiba Institute & 4 Others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions) (Muruatetu 2). In conclusion, she urged this Court to dismiss this appeal as it lacked merit.

16. We have considered the record and the submissions made by learned Counsel. As the second appellate court, our jurisdiction is limited to matters of law. This Court in *Boniface Kamande & 2 Others v Republic* [2010] eKLR expressed it as follows;

> "On a second appeal to the Court, which is what the appeals before us are, we are under legal duty to pay proper homage to the concurrent findings of facts by the two courts below and we would only be entitled to interfere if and only if, we were satisfied that there was no evidence at all upon which such findings were based or if there was evidence, that it was of such a nature that no reasonable tribunal could be expected to base any decision upon it."

17. The right to a fair hearing is an internationally recognized human right which, under our own basic law, is non-derogable. Article 50 of the Constitution, sets out its various elements. The counsel contends that sub-article (2)(j), which provides that an accused person has to be informed in advance

of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence was infringed. She accuses the trial court of overlooking this right as the appellants were never supplied with witness statements and exhibits that the prosecution relied on. She submits that this impeded the appellants from mounting an adequate defence to their detriment.

18. We have considered this argument. As the learned prosecution Counsel rightly pointed out, the record shows that the appellants were given a chance to cross-examine all the witnesses and they never, at any point, complained of non-provision of witness statements and exhibits. Further, a perusal of their separate appeals to the High Court reveals that neither of them raised that ground. All that is available is a plea to be furnished with certified proceedings, a charge sheet and the judgment to assist them in their appeal. We believe that the raising of this ground at this juncture is an afterthought not borne out by the record and it therefore fails.

19. The matter of identification was well-addressed by the trial court as well as the High Court. The former pointed out that circumstances were conducive for a positive identification of the appellants as the house was well lit and they were in close proximity to the witnesses for more than 30 minutes. That PW1 and PW2 were able to pick out the unique features in the appellants' physical appearance is demonstrative that they had time to examine the appellants during the ordeal.

20. The High Court added that the appellants were not hooded. PW1 and PW2 freely conversed with them during the robbery, giving them plenty of time to identify them. The learned Judges detailed the process of an identification parade and came to a proper conclusion that PW5 followed due procedure. She conducted two separate parades for each appellant and PW1 identified each of them by touching them on the shoulder. The learned Judges also noted that the appellants signed the parade report, indicating that they had consented to the parade and did not have any objections on how it was conducted.

21. The purpose of an identification parade is to test the correctness of a witness's identification of a suspect. See *John Mwangi Kamau v Republic* [2014] eKLR. We thus concur with the concurrent holdings of the courts below. The circumstances during the robbery were conducive for proper identification and the identification parade was properly conducted. Like them, we conclude that the identification was free from error and thus safe.

22. On whether or not the prosecution proved its case beyond a reasonable doubt, we recall the elements of robbery with violence as enumerated in Section 296(2) of the *Penal Code* which are, if the court is satisfied, the offender is;

    a) Armed with any dangerous or offensive weapon or instrument or if;

    b) In the company of more than one person or persons or if;

    c) immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person.

23. From the record, it is clear that the appellants being in each other's company were more than one person, they were armed with pangas and rungus and during the robbery, they threatened to use violence on PW1 if he failed to comply. Therefore, we have no difficulty endorsing as evidence-based the concurrent holdings that the prosecution proved its case beyond a reasonable doubt.

24. The argument by Counsel that the doctrine of recent possession was not applied is nether here nor there. As the Prosecution Counsel rightly put it, the appellants were arrested some few months after the robbery, none of the stolen items were recovered and hence that doctrine does not apply. The available evidence of stealing was the mobile transactions made on the same night from PW1's mobile number

to the appellant's mobile numbers. That evidence was sufficient to place the appellants at the scene of the crime.

25. Lastly, Counsel for the appellants contended that the mandatory nature of the death sentence imposed makes it unconstitutional in light of the Supreme Court's holding in Muruatetu 1. The Prosecution Counsel opposed this ground and fittingly pointed out that the Supreme Court in Muruatetu 2 was clear on the non-application of Muruatetu 1 to robbery with violence.

26. Given the express limitation pronounced by the apex Court, we are bound thereby notwithstanding our doubts on the proportionality of the sentence herein.

27. In the end, this appeal lacks merit and we dismiss it in its entirety in respect of both appellants.

Order accordingly.

DATED AND DELIVERED AT KISUMU THIS 17TH DAY OF MARCH, 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