Mathuku v Republic (Criminal Appeal 80 of 2021) [2023] KECA 264 (KLR) (17 March 2023) (Judgment)

Neutral citation: [2023] KECA 264 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 80 OF 2021

MSA MAKHANDIA, GWN MACHARIA & WK KORIR, JJA

MARCH 17, 2023

BETWEEN

BONIFACE KIOKO MATHUKU .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya (Ongundi, J.) dated 30th January, 2019) in Makueni HCCRA No. 71 of 2014)

JUDGMENT

1. This appeal emanates from the judgment of the High Court at Makueni delivered on January 30, 2020 by Ongundi, J. in Criminal Appeal No 71 of 2019 where the appellant was charged with various counts in the trial court.

2. In count 1, he was charged with robbery with violence contrary to section 296(2) of the *Penal Code*. The particulars were that on February 12, 2015 at Kikumini area Kikumini Location in Makueni District within Makueni County, jointly with another not before court, being armed with dangerous weapons namely panga robbed Fred Musolo Kavoi of his motorcycle registration number KMDL 007V make Skygo valued at KShs. 85,000 and at the time of such robbery used actual violence on the said Fred Musolo Kavoi. He also faced an alternative charge of handling stolen property contrary to section 322(2) of the *Penal Code*.

3. The particulars being that on the same date, day and place otherwise than in the course of stealing dishonestly handled one motorcycle registration number KMDL 007V make Skygo valued at KShs. 85,000 knowing or having reasons to believe it to be stolen property.

4. In count 2, he was charged with causing grievous harm contrary to section 234 of the *Penal Code*. The particulars were that on the same day, place and time, jointly with another not before court unlawfully did grievous harm to Peter Mutinda.

5. In count 3, he was charged with the offence of being in possession of forged currency note contrary to section 369 of the *Penal Code*. The particulars were that on the same day, place and time, without lawful authority or excise had in his possession one thousand shillings forged note knowing it to be forged.

6. The appellant denied the charges, was tried, convicted and sentenced to 25 years' imprisonment in respect of first and second counts. He was however discharged unconditionally in respect of count three. Aggrieved by the conviction and sentence, the appellant preferred a first appeal to the High Court at Makueni. The same was heard by Ongundi, J. who, by a judgment delivered on January 30, 2020, upheld both the convictions and sentences, hence this second and perhaps last appeal.

7. During trial the prosecution called 6 witnesses. According to the evidence of PW1, Fred Musolo Kavoi the complainant in count 1, on February 12, 2015 at 7:30pm, he was heading home on his motor cycle and just outside his gate he saw one Titus Kaloki Kithuku ahead of him raising a machete to cut him. He blocked with his left hand and was cut on the palm. He jumped off the motor cycle and ran across the road. Suddenly, the appellant emerged from a drainage, started PW1's motorcycle and rode off with the said Titus Kaloki Kithuku. He knew both robbers as they were parents in the school where he was teaching. He raised alarm and neighbours responded and together they pursued the robbers. When they reached Ngosini East Market, they were informed that the motorcycle had been intercepted and a suspect arrested. At the scene, the suspect had been locked in a shop. When the police arrived and the door where the suspect had been locked was opened, PW1 immediately recognized the appellant as the suspect who had taken off with his motorcycle. The police took the appellant away together with Peter Mutinda who had been injured during the interception.

8. PW2, Hollings Mutuku Mutisya, the area Chief, was called by members of the community and informed that a motor cycle belonging to PW1 had been stolen and was headed in the direction of Kiambani market. He organized for a road block to be mounted. After a few minutes, a motorcycle emerged with a rider and a pillion passenger who tried to go past the road block but members of the public held on the motor cycle. The occupants jumped off the motor cycle and ran into the bush but were pursued by members of the public and the appellant was arrested. A member of the public, Peter Mutinda (PW3), was cut by the appellant in the process. Upon search, a wallet with KShs. 1,000 note, a panga, torch and a white cap were recovered from him. The members of the community started getting rowdy and angry, so he locked the appellant in a shop. Shortly, PW1 arrived and identified the motorcycle as his and the suspect as the one who had robbed him.

9. This testimony was corroborated by PW3, who was the complainant in count 2.

   Suffice to add that he was the one who got hold of the pillion passenger, the appellant, who in turn cut him on the face with a panga and he fell down. The police came and took the appellant away and he was taken to hospital where he had to undergo an operation on his left eye which he subsequently lost.

10. PW4, Dr. Nahashon Kagwe Mukisi, attached to Makueni County Referral Hospital examined PW1 and assessed his injury as "harm". He also examined PW3 and assessed the degree of injury as "grievous harm". PW5, Elizabeth Kitumbi Kioko was in her shop when she saw PW2 with some other men escorting a man towards his shop. PW2 requested her for a place to lock up the person. She allowed him in to the shop. The police later came and took them away together with PW3 who was bleeding.

11. PW6, CPL Esther Kingosi, the investigating officer of the case, on February 12, 2015 at around 7:40pm while on duty with PC Barsimei and PC Wachira, were directed by the Officer Commanding Police Station to go to Kiambani market where the area Chief had arrested a suspect who had stolen a motorcycle. They went to the scene and found the appellant tied up with a rope and was bleeding

from a head injury having been beaten by members of the public. PW1, soon arrived at the scene and identified the appellant as among those who had robbed him of his motorcycle. They took the appellant to Makueni Police Station and later to Makueni Referral Hospital together with PW3. PW1 provided a logbook proving that the recovered motorcycle belonged to him. He took the fake note recovered from the appellant's wallet to CID headquarters and received a report from forensic document examiner confirming that it was fake.

12. When placed on his defence, the appellant elected to give sworn testimony. He testified that on the material day he had gone about his errands and on his way home he went to a shop to buy credit worth Kshs. 100 and gave the shopkeeper a KShs. 1,000 note. The shopkeeper, PW5, left him to go and look for change and shortly after a crowd came into the shop baying for his blood accusing him of giving a fake Kshs. 1,000 note. The Area Chief came and whisked him into a shop and called the police who came and took him to hospital, and later, charged him. That PW1 was a person well known to him as he was having an affair with his deceased brother's wife and had warned him about it. PW1 had also tried to seduce his wife and was present when the crowd attacked him and took advantage of the situation to frame him. The trial court convicted the appellant on all three counts and sentenced him as already stated. Again and as already stated, his appeal to the High Court was unsuccessful.

13. The appellant filed a memorandum of appeal through Messrs Rashid & Rashid Advocates and raised seven grounds. That the learned Judge erred in law in; failing to find that the circumstantial evidence did not irresistibly point to the appellant so as to justify his conviction; relying on the doctrine of recent possession yet the appellant was not in possession of the stolen item; his identification was in extremely difficult circumstances; in disregarding the appellant's defence; failing to call vital witnesses without a satisfactory explanation; relying on contradictory prosecution evidence; and lastly, meting out an extremely harsh sentence.

14. The appeal was canvassed by way of written submissions. The appellant through Ms. Rashid, learned counsel, submitted that the evidence relied on by the prosecution witnesses was disjointed and coined to cast blame on the appellant. It was her submission that before relying on circumstantial evidence to convict an accused, the court must be satisfied that the circumstantial evidence meets the threshold set out in the case of *Abanga alias Onyango v Republic* Criminal Appeal No 32 of 1990 (UR).

15. To that end, the learned Judge erred by failing to critically scrutinize the circumstantial evidence tendered. That none of the members of the public involved in the arrest of the appellant, was summoned to testify. That the failure and or neglect by the prosecution to call those essential witnesses meant that had they been called, their evidence would have been adverse to the prosecution case. To buttress this point, she relied on the case of *Bukenya & others v Uganda* [1972] E.A.549 which is the locus classicus on the issue of failure to call crucial witnesses

16. Secondly, that the trial court and first appellate court erred in law by failing to scrutinize the ingredients of the doctrine of recent possession. There were several instances where glaring facts poked holes in the hypothesis advanced by the prosecution.

17. On identification, reliance was placed on the case of *Patrick Nabiswa v Republic* [1998] eKLR, for the proposition that; evidence of identification and or recognition in difficult circumstances should be approached with caution and circumspection that both courts failed in this task.

18. The respondent through Mr. Orinda, learned Prosecution Counsel, in response submitted that the prerequisite ingredients of the offence of robbery with violence were established and proved. That the appellant was found in possession of the stolen motor cycle and he never offered any reasonable explanation as to how he came by it. The only logical inference was that he must have been one of the robbers and his defence was therefore not credible. Further, that he had filed a notice to enhance

sentence from 25 years' imprisonment to death sentence dated November 14, 2022 since the sentence imposed was illegal. The sentence should have been death. That the prerequisite ingredients for an offence of robbery with violence under section 296(2) of the *Penal Code* were proved as per the evidence of PW1 and PW3. Proof of any one of the circumstances under the said section is sufficient prove of the commission of the offence. He relied on the case of *Johana Ndungu v Republic* [1996] eKLR for the proposition. That PW1 had testified that while he was riding his motor cycle, and just before he approached his house, he was attacked with a machete and cut on the palm of his hand by the robbers who thereafter took off with the motorcycle. The motor cycle was soon thereafter intercepted by PW2 and PW3 and the appellant was apprehended by members of the public. Medical evidence adduced showed the injuries inflicted on both PW1 and PW3. It is against this background that the respondent submitted that the ingredients of the offence were met.

19. It was the respondent's submission that the trial court, in convicting the appellant invoked the doctrine of recent possession. The appellant was found in possession of the stolen motor cycle two hours after it was robbed off PW1, and was arrested immediately thereafter. That the appellant did not offer any reasonable explanation as to the possession so soon after the robbery and therefore the only logical inference was that he was one of the robbers. That the trial court in analyzing the appellants defence did not find it credible since the witnesses had no reason to frame him up. While relying on the case of *Simon Kanui Mwendwa v Republic* [2020] eKLR,counsel submitted that the identification of the appellant was strongly corroborated by the application of the doctrine of recent possession.

20. It was his submission that the witnesses who testified were sufficient in proving the charge against the appellant in line with the provisions of section 143 of the *Evidence Act*. Lastly, he submitted that the appellant was sentenced to 25 years imprisonment in respect of count one which was illegal as the offence carried a mandatory death sentence upon conviction. Counsel urged us to correct the mistake by enhancing the same to death as per the notice he had filed and as provided in section 296 (2) of the *Penal Code*.

21. As was stated in *Karingo v Republic* [1982] KLR 214, a second appellate court will only deal with matters of law and as a general rule we will not interfere with the concurrent findings of the two courts below unless they are shown not to have been based on evidence or misapprehension of the same. See also *Chemagong v Republic*[1984] KLR 213.

22. We have examined the record, the grounds of appeal raised by the appellant and considered them in the light of the rival arguments set out above. In our view, four issues of law that arise for our determination are whether: the first appellate court discharged its mandate as required by law; the appellant's conviction on the doctrine of recent possession passed the test required; the case against the appellant was proved beyond reasonable doubt; and, whether the sentence imposed was harsh and excessive.

23. Before we delve into the issues framed, we wish to address the misconception by the appellant that he was convicted on the evidence of identification. The issue of identification was dealt with by the first appellate court thus:

> "In the instant case the Complainant (PW1) said he saw and recognized the attackers as parents in the school where he taught. He did not give their names to the police or any

relevant authority. The learned trial Magistrate in his judgment acknowledges that omission by the investigations when he said at page 4 lines 15-16 of his judgment as follows;

> "The issue of identification was not properly handled though." The reason why the recognition at the scene will not be relied on by this court is that the same was not properly handled by the investigators.
>
> The trial court made a similar finding. The only other evidence linking the appellant to this robbery is the recovery of the complainant's stolen motorcycle."

24. From the above, it is clear that the conviction of the appellant was not based on identification but was founded on the application of the doctrine of recent possession.

25. On re-evaluation of the evidence by the first appellate court, our perusal of the record reveals that the first appellate court took a correct approach in the discharge of its mandate, consistent with the duty of fresh and exhaustive re-analysis and re- evaluation of the entire evidence tendered in the trial court so as to reach its independent conclusions in terms of *Okeno v Republic* [1972] EA 32. We appreciate that there is no set formula for carrying out that special mandate. However, the record must demonstrate deference to this statutory requirement. We have no doubt that the 1st appellate court performed this task admirably and the appellant's submissions to the contrary have no basis at all.

26. Turning to the doctrine of recent possession, in the case of *Hassan v Republic* [2005] 2 KLR it was held inter alia, that:

> "Where an accused person is found in possession of recently stolen property in the absence of any reasonable explanation to account for this possession, a presumption of fact arises that he is either the thief or a receiver."

In *Isaac Ng'ang'a Kahiga & Another v Republic* [2006] eKLR, the ingredients for the application of the doctrine of recent possession were given inter alia, as follows:

> "...It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first, that; the property was found with the suspect, secondly, that; the property is positively the property of the complainant, thirdly, that the property was stolen from the complainant and lastly, that; the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."

On the application of the doctrine, the High Court stated thus:

> "The only other evidence linking the appellant to this robbery is the recovery of the Complainant's stolen motorcycle.
>
> PW1 produced all relevant documents (EXB 1a, b, 2 & 3) and proved being the owner of the motorbike (EXB 12). He explained how he was robbed of EXB12 and the attackers went away with it towards Nzosini market then to Kiambani direction.
>
> PW2 the area chief confirmed receiving the report of the robbery and together with villagers erected a road block on the Kiambani road. A motorbike carrying two people came to the road block, and was intercepted. The rider and passenger dropped and took off but one of them was arrested. This was also PW3's evidence. He was cut with a panga by one of those on the said motorbike. The said assailant was arrested by the mob. There is no reason why

PW2 and PW3 would lie against the appellant …….. The appellant and another were found in possession of a motorbike which had been robbed form PW1 in less than two (2) hours.”

27. Being concurrent finding of facts by the two courts below, we find no reason to differ with those findings. We are therefore satisfied as did the two courts below that the appellant while in the company of another was found in possession of a motor cycle hardly two hours after it was robbed from PW1, in respect of which no reasonable explanation was given by the appellant.

28. The allegation by the appellant that he was not found in possession of the motor cycle and that he was not at the scene but at PW5’s shop to buy airtime was rebutted by PW5 who was very categorical in her evidence as to how the appellant came to be in her shop. This was supported by the evidence of PW2. Considering the above in light of the threshold for the application of the doctrine of recent possession, we entertain no doubt in our minds that the doctrine of recent possession was properly invoked as additional evidence to place the appellant at the scene of the robbery.

29. As to whether the case against the appellant was proved beyond reasonable doubt,the case of *Johana Ndungu v Republic* (supra) sets out the requirements thus:

> “(i) Therefore, the existence of the afore described ingredients constituting robbery are pre-supposed in 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.
>
> 1. If the offender is armed with any dangerous or offensive weapon or instrument; or
>
> 2. If he is in company with one or more other person or 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.”

30. The Court is not required to look for the presence of all three ingredients. Proof of one of the ingredients, would suffice to secure a conviction. Both the trial court and High Court, found that PW1 was violently robbed after he was attacked, cut on the palm and his motorcycle taken. The appellant was soon thereafter found in possession of the stolen motorcycle. When the appellant was arrested at the road block, he also slashed PW3 and caused him injuries that were classified as grievous harm. Having established earlier that the doctrine of recent possession placed the appellant at the scene of the crime, it is obvious that therefore, the attacker was the appellant and it was demonstrated that during the time of the attack, he and an accomplice were all armed.

31. In conclusion, on assessment of the evidence, the High Court was satisfied that the ingredients for robbery with violence were properly proved and that the prosecution proved its case to the required standard. Likewise, we have come to the same conclusion. Similarly, the offences of grievous harm and possession of forged currency note were all proved. Small wonder, no serious submissions were made with regard to these offences.

32. The upshot of what we have said above is that there was sufficient evidence before the trial court as confirmed by the first appellate court on which to base a conviction on the charges preferred.

33. As to whether the sentence was proper, for the offence of robbery with violence, the punishment prescribed by section 296(2) of the *Penal Code* is death. The Supreme Court in *Francis Karioko Muruatetu & Another v Republic*, [2021] eKLR emphatically stated that the decision in Francis

Karioko Muruatetu & Another vs. Republic [supra] outlawing the mandatory nature of the death sentence was applicable in murder case only.

34. In this case the trial court sentenced the appellant to 25 years imprisonment on the first count. In so doing, the trial magistrate stated that the said sentence was "provided by law". It is clear that in so holding, the trial court fell into error and ended up imposing the illegal sentence. The prescribed sentence was death and no other.

35. The appellant was warned by this Court at the commencement of the hearing of the appeal of the dangers of prosecuting the appeal in the light of the notice to enhance sentence filed by the respondent. That there was every likelihood that should the appeal on conviction fail, we would enhance the sentence. The appellant having understood the effect and purport of the warning, nonetheless, elected to proceed with the appeal.

36. Having dismissed the appeal on conviction, we accede to the notice to enhance sentence filed by the respondent, and do so by setting aside the sentence of 25 years' imprisonment and substitute therefore with sentence of death in respect of count one. We nonetheless, uphold the sentences imposed in the other counts. Pending the execution of the sentence in count one, the other sentences will be held in abeyance.

37. This judgment is delivered pursuant to rule 34(3) of the *Court of Appeal Rules*, 2022 as Korir, J.A has declined to sign.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH, 2023.

ASIKE-MAKHANDIA

…………………………

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR