Watuku v Republic (Criminal Appeal 78 of 2022)
[2023] KECA 309 (KLR) (17 March 2023) (Judgment)

Neutral citation: [2023] KECA 309 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL 78 OF 2022

SG KAIRU, JW LESSIT & GV ODUNGA, JJA

MARCH 17, 2023

BETWEEN

EDWARD KAGUATHI WATUKU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgement of High Court, Voi delivered by Mativo, J on 19th January 2022. in Criminal Appeal Case No. 8 of 2020 originally Voi Chief Magistrate's Criminal Case No. 426 of 2018)

JUDGMENT

1. This is a second appeal by the Appellant and is against the judgment of High Court, Voi (Mativo, J as he then was) delivered on 19th January 2022. The Appellant had been charged with three others before Voi Chief Magistrate's Court with Robbery with violence contrary to Section 296 (2) of the *Penal Code*. He was convicted of the offence and sentenced to life imprisonment.

2. His appeal before the High Court sitting in Voi was dismissed as against the conviction. The appeal on the sentence was

   allowed in part, and the sentence reduced from life imprisonment to 10 years imprisonment.

3. Being a second appeal, our mandate is limited to appeal on matters of law by dint of Rue 361 of the Criminal Procedure Code, and as set in several decisions of this Court, including *Chemangong vs. Republic* [1984] KLR611. To quote *Karani vs. R* [2010] 1 KLR 73 this Court held:

   > " This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to

consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

Background

4. The Appellant was jointly charged with three others with robbery with violence under Section 296(2) of the Penal Code. It was alleged that the Appellant and his co-accused, while

   armed with dangerous weapons namely knives and pangas, robbed Jeremiah Sikuku Mwaniki of a motor vehicle Isuzu Lorry FRR Registration no. KBU 869M, 500 bags of rice, one techno mobile phone, wallet, 2 national identity cards and Kshs. 20,300/-. The offences were committed along Mombasa

   – Nairobi high way within Taita – Taveta County on 3rd April 2018.

5. The prosecution case was that on the 3rd April 2018, PW2 Jeremiah Sikuku Mwaniki was driving his employer's Isuzu Lorry reg. no. KBU 869M along Mombasa- Nairobi Highway. His employer was PW3, Joseph Mutuku Ndavi. He was accompanied by the turn-boy PW4, Daniel Karimi, who was sleeping on the bed inside the driver's cabin. A Pro box vehicle blocked his lorry forcing him to stop, at around 2200hours, along Mombasa- Nairobi Highway at Miasenyi, within Taita Taveta County. He was set upon and attacked by 3 people, among them the appellant whom he later identified at an ID parade and who took over and drove the lorry to secluded area where he and PW4 were abandoned.

6. At the same time PW1 John Kiragu, a Car Hire Operator hired out his vehicle Toyota NZE registration no. KBV 149V to the

   appellant on 27the February 2018 at the rate of 2500/- per day. The appellant paid for only one week. PW1, using car- tracking system tracked the vehicle in Voi Police Station. He was to learn from police that it had been used in a robbery, and had been arrested with four occupants who included the appellant.

7. The appellant denied the charges and, in his defence, said that at the material time he was keeping his brother in law company at Mariakani sub-county hospital where he had taken him after his brother-in-law's wife called him about it. That after staying with him for 4 days he left him on 5th April 2018 in the vehicle he hired from PW1. He carried paying passengers including PW6 who confirmed as much in his evidence for the prosecution. The appellant was arrested with his many passengers and driven to Voi Police station where he was later charged.

8. The learned trial Magistrate found that the prosecution case was proved beyond any reasonable doubt. The learned trial Magistrate found that the Appellant was positively identified by PW2 and that the circumstances of identification were conducive for correct identification. The Court sentenced the Appellant to life imprisonment.

9. Aggrieved by the conviction and sentence, the Appellant lodged his appeal before the High Court. The grounds of appeal before High Court challenged the conviction on the basis of visual identification made under difficult circumstances, and reliance on an identification parade conducted in breach of Chapter 46 of the Forces Standing Order; for convicting the appellant yet crucial witnesses were not called; a defective charge; and, failure to give the appellant a chance to be heard before sentencing.

10. The High Court, made a detailed re-examination and re- analysis of the evidence adduced before the Magistrate's Court, and of the judgement of learned trial Magistrate. Concerning the issue whether the appellant was sufficiently identified as the offender, the learned Judge found that the evidence of

identification by PW2 was safe as PW2 had sufficient time to see the appellant with the headlamps of the vehicle he used to block his lorry as the appellant walked to take over the driving of the lorry. Further that PW2 had a good chance to see the appellant with light from headlamps of passing vehicles, as he struggled with the attackers for a while before he and PW4 were tied up and left in the bush. The learned Judge observed that the identification by PW2 was direct evidence, and noted that PW2 was also able to identify the Appellant at the ID parade. He also noted the recovery of PW2's identity card and driving licence from the NZE vehicle the Appellant had hired from PW1 The learned High Court Judge considered that these facts were not mere coincidences. and found that in the totality of the prosecution evidence, the identification of the Appellant was safe.

11. Regarding the identification parade, the learned Judge opined that the Appellant signed the parade forms signifying he was satisfied with the process of identification.

12. As for the complaint that some crucial witnesses were not called, the leaned judge citing Section 143 of the *Evidence Act* found that no particular number of witnesses were required for proof of any fact, further that an adverse inference could only arise if evidence is given requiring an answer. The learned judge found that the circumstances of the case did not show the alleged uncalled witness (es) could have added value to the case.

13. In regards to the complaint that the appellant was denied a fair trial the learned judge found that a careful evaluation of the entire trial record leaves no doubt that the trial was conducted properly in accordance with the law and all the legal and procedural safeguards were observed.

14. Concerning the sentence, the learned judge noted that the Appellant was sentenced to life imprisonment as opposed to the death penalty provided by the law. He stated that: "This is in line with the Supreme Court Case in Muratetue case. However, considering the sentencing policy and guidelines, it is my view that life sentence is harsh". The learned Judge proceeded and substituted the life sentence with 10 years' imprisonment, and directed that in computing that period, the period the Appellant was in police custody pending trial be considered.

15. The appellant was dissatisfied with the judgment of the High Court and so filed this appeal. In the amended grounds of appeal filed by Mutua and Ngumbau & Associates dated 12th October 2022, two grounds of appeal are raised as follows:

    i) That the learned first appellate Judge erred in law by failing to re-analyse and re-evaluate the evidence on record exhaustively as is required.

    ii) The learned first appellate Judge erred in law by finding that the offence with which the appellant was charged with was proved to the required standard of proof.

16. The appeal was heard on the virtual platform on the 18th October 2022. At the hearing, learned counsel Mr. Ngumbau Mutua represented the Appellant, while the Senior Principal Prosecution Counsel, Ms. Mutua was present for the Respondent. The Appellant was also present virtually from Prison. Mr. Mutua relied on the submissions he filed dated 14th October 2022. Ms. Mutua relied on the State's written submissions dated 14th October 2022.

17. We have considered this appeal, the written submissions filed by counsel. We have also subjected the evidence adduced before the trial Court to a fresh analysis and evaluation, and have considered the judgments of both Courts below. We think that what falls for our determination is whether the learned Judge of the High Court properly analysed and evaluated the evidence before the Court, and whether he

misdirected himself in any way as to reach the wrong conclusion of his analyses.

18. As we started by saying, the mandate of a second appellate court is restricted only to matters of law. If it is shown that the first appellate Court failed in its duty, the second appellate Court may interfere with its finding. A failure to properly analyse evidence is a point of law, even though it entails an examination of matters of fact. On this point we are guided by this Court's decision in *Adan Muraguri Mungara v R* CA Cr App No 347 of 2007 where it was held thus:

> " As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by 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."

19. The Appellant's counsel has urged that the learned Judge of the High Court did not properly address his mind on the issue of identification, both by PW2 and also the ID parade and the rest of the evidence. Regarding identification by PW2, Mr. Mutua urged that learned Judge did not adhere to the test in *Maitanyi v Rep.* [1986] KLR 198 and *Wamunga v Rep*. [1989] KLR 404. In particular, no inquiry was made as to the nature and the intensity of the light at the scene that enabled identification. Further that the Judge failed to consider that the Probox that blocked PW2 stood away from the light and so PW2 could not have seen.

20. The learned trial Magistrate examined the evidence of PW2, and restated the law that governs identification, quoting several cases including those relied on by the Appellant. The learned trial Magistrate delivered herself thus:

> " As for the lighting conditions, PW2 stated that he relied on the light from emitted by the passing vehicles and the light from the headlights of his vehicle. He also told the court the cabin lights of his vehicle lights up once the driver's door is opened. I therefore find that the lighting conditions were favourable for a positive identification as for the distance between PW2 and his assailant, PW2 told the court that the 1st accused [Appellant] came and stood next to the door and asked for his driver's licence, that the 1st accused got in the vehicle and shoved him onto the bed... that he could see the 1st accused clearly and even saw him struggle with the gear... PW2 told the court that the 1st accused
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> commandeered the vehicle the vehicle from Maisenye to Maungu and so he was therefore with the 1st accused for a long period of time before he was taken and tied up in the sisal plantation. In the circumstances ... I find that the prevailing circumstances were conducive for a positive identification and that the 1st accused was positively identified."

21. The learned Judge of the High Court on his part observed as follows as regards the evidence of identification:

> " This evidence is not to be viewed in isolation. There is on record the evidence of PW1 who testified that the appellant hired the car from him, a fact that the appellant confirmed. PW2's wallet containing his driving wallet and identity card were found in the same car when it was intercepted by police near Sultan Hamud. I am satisfied that the identification evidence was free from error and that it was sufficiently corroborated."

22. As regards the ID parade, Mr. Mutua urged that when PW6 arrested the Appellant and others in the Toyota NZE, a jungle jacket remained unclaimed by the passengers in the vehicle. It was his

submissions that the ID parade officer, PW10, should have used a similar jacket in the parades, since PW2 and PW4 both said that the robbers were using jungle jackets.

Furthermore, PW10 admitted using same members of the parade in the parades against the Appellant and his co- accused.

23. The learned trial Magistrate found that the Appellant signed the parade forms and did not raise any issue regarding the conduct of the ID parade, and concluded that the issue raised by the Appellant in court was an afterthought. As for the learned Judge of the High Court, he summed up his finding as follows:

> " The Appellant is shown in the identification parade form as having to have signed to signify that he was satisfied with the manner in which the process was conducted...In any event, the evidence is to be considered together with the rest of the prosecution evidence. In that regard the testimony of PW2 who identified him at the parade. This was a victim of the robbery and he explained that he saw the appellant with the help of his vehicle headlights when they blocked the lorry... His identity card and driving licence were recovered in the vehicle the appellant had hired."

24. We noted that the issue of use of police jungle jacket at the ID parade, and the use of same members of the parade for the parades conducted by PW10 was not an issue raised before the first appellate Court. We must however note that the first ID parade conducted by PW10 was in respect of the Appellant,

so that he suffered no prejudice even if same members were used in respect of the ID parades of his co-accused.

25. Regarding the issue of the ownership of the identity card and driving licence found in the Toyota NZE, we note that it is the learned Judge of the High Court who stated that they belonged to PW2. There was no such evidence. The learned trial Magistrate was clear that the two exhibits belonged to the Appellant. The basis of conviction by the trial Magistrate had nothing to do with the recovery of the two exhibits. She based the conviction on the identification of the Appellant by PW2, both at the scene during the incident, and in his ability to identify him at the ID parade.

26. We are satisfied that the evidence of identification in this case was carefully considered by the two Courts below and found to be correct, positive and free from error. We are in agreement with this finding. We find that in thecircumstances, no prejudice was suffered by the Appellant because of the finding by the High Court that the recovered identity card and driving licence belonged to PW2.

27. We have considered this appeal and find that the two Courts below subjected the evidence, the facts and the law to a thorough examination analyses and tests, and came to the correct conclusion that the prosecution proved its case against the Appellant beyond any reasonable doubt. Subject to the issue of the Appellant's recovered exhibits mentioned herein above, we agree with the analyses and conclusions reached and find no reason to depart from their concurrent findings of fact and law.

28. The result is that we find no merit in this appeal. We confirm the conviction and the sentence imposed by the High Court, and dismiss the appeal accordingly.

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

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEA

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

Signed

DEPUTY REGISTRAR