Otana v Republic (Criminal Appeal 72 of 2016)
[2023] KECA 219 (KLR) (3 March 2023) (Judgment)

Neutral citation: [2023] KECA 219 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 72 OF 2016

PO KIAGE, HA OMONDI & F TUIYOTT, JJA

MARCH 3, 2023

BETWEEN

HENRY OTANA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kakamega Sitati, J. and Mwangi, J. dated 9th March 2016 in HCCR NO. 25 OF 2015)

JUDGMENT

1. This second appeal is against the judgment of the High Court of Kenya at Kakamega (Sitati, and Mwangi, JJ); dated March 9, 2016 upholding the conviction and sentence passed by the trial court in SPM Cr Case No 339 of 2013.

2. Henry Otana, the appellant, was charged before the Ag Senior Principal Magistrate, Vihiga with three offences namely: Count 1 robbery with violence contrary to section 295 as read with 296(2) of the *Penal Code*, particulars being that on March 28, 2013 in Vihiga County jointly with others not before the court while armed with dangerous weapons namely pangas he robbed EA of ten iron sheets valued at Kshs 8000 and immediately before such robbery used actual violence on the said EA.

3. Alternative to this was the offence of handling stolen goods contrary to section 32 (1) as read with section 322 (2) of the *Penal Code*. Particulars are that on March 29, 2013, other than in the course of stealing he dishonestly retained 10 iron sheets knowingly or having reasons to believe them to be stolen goods.

4. The 2nd charge was gang rape contrary to section 10 of the *Sexual Offences* Act, particulars of which were that the appellant in association with others not before the Court intentionally and unlawfully caused his genital organ to penetrate the vagina of EA without her consent.

5. The alternative charge to count 2 was indecent act with an adult contrary to section 11 (A) of the *Sexual Offences* Act, particulars being that the appellant on 28th March, 2013 together with others not before the court he intentionally and unlawfully caused his genital organ to make contact with the genital organ of EA.

6. The 3rd charge was assault causing actual bodily harm contrary to section 251 of the *Penal Code*, particulars being that on March 28, 2013 the appellant unlawfully assaulted Shavin Salenga occasioning him actual bodily harm.

7. The appellant was tried and convicted on all 3 counts. On count 1, he was sentenced to death, while on counts 2 and 3 he was sentenced to 10 years and 2 years respectively, which sentences were to be held in abeyance, in light of the death sentence.

8. The complainant described to the trial court how on the night of March 28, 2013 while sleeping in her house with her grandson, SS, PW5, she was attacked by the appellant and another whom she did not recognize; the attackers were armed with pangas and also carried torches which they flashed about, and this enabled her to see and recognize the appellant whom she had known since his childhood, and identified by the nick name, 'Susu'. The appellant and his accomplice took several turns in raping her; she eventually escaped to the home of PW3 the Assistant Chief Nora Nyangazi Omutema, whom she informed about the incident, and that she had recognized the appellant; PW5 was stabbed in the buttocks by the attackers; and 10 iron sheets were stolen. Medical evidence presented by the Clinical Officer, PW7 confirmed the sexual assault as well as the assault on PW5.

9. PW2, Arthur Omudha, a member of the community police confirmed that on March 28, March 20, 2013 at 1:20 pm, PW1 in the company of PW3, went to his house and informed him about the incident; together they took PW1 and her grandson to hospital. A report was made to the police, who eventually recovered the 10 iron sheets, from the appellant's house, in the presence of his brother Hosea; the iron sheets were identified by PW1 who produced a cash sale receipt for the iron sheets. The appellant was later arrested.

10. PW5 confirmed the incident, the use of torches by the appellant and his accomplice which enabled him to see them and know that they were armed with pangas, and which the appellant used to stab him on the left buttock, (treatment notes, and the P3 form were produced to confirm the injury). He escaped and upon return, realized that 10 iron sheets had been stolen, and which upon recovery, he was able to identify. He pointed out the appellant in the dock.

11. PW6, the area Assistant Chief told the trial court that the appellant's brother, Hosea, led them to a house, where they recovered the 10 iron sheets which the complainant identified. PW8, Cpl. Mohammed Suleiman, the investigating officer, was instrumental in recovering the 10 iron sheets and arrest of the appellant. He also pointed out the appellant in the dock as the person he arrested in connection to the offences.

12. The appellant's defence was that he spent the whole day at his house, and only left the next day to assist his aunt to plant, and that was when he was arrested. He accused the complainant of framing him up, just because he had refused to sell to her a parcel of land.

13. The appellant was aggrieved by the outcome, and appealed to the High Court raising various grounds which we summarize as:

> whether conditions were favourable for positive identification; whether the evidence proved the offences charged;

and whether there was non-compliance with the provisions of section 324 and 329 of the *Criminal Procedure Code*.

14. In the judgment delivered on March 9, 2016, the High Court of Kenya at Kakamega (Sitati, and Mwangi, JJ) dismissed the appeal and confirmed the appellant's conviction and sentence, pointing out that opportunity for identification was reliable and safe, as it was by recognition; the evidence satisfied the ingredients of robbery with violence as set out under section 296 (2) of the *Penal Code*; in the trial court, the appellant had not invoked the provisions of section 324 of the *Criminal Procedure Code*, and could therefore not clutch to it on appeal; and the trial court had complied with the provisions of section 329 of the *Criminal Procedure Code*, as he was allowed to tender his plea in mitigation.

15. Being dissatisfied with the outcome at the High Court, the appellant filed a memorandum of appeal dated May 16, 2022 which lists six (6) grounds of appeal, and which we agree with the respondent, can be condensed to: the unconstitutionality of the death sentence; both trial and the High Court disregarded the appellant's defence; both courts failed to note that an essential witness was not called by the prosecution to testify and the offences of robbery with violence, rape and assault were not sufficiently proved to the standard required.

16. Whilst relying on his written submissions, the appellant poses the question as to whether the prosecution adequately discharged the requisite evidential standard of proof with regard to the offences. He submits that he was framed up, and his arrest was a case of mistaken identity, arguing that even though the complainant claimed to have known him very well, she did not mention his name when she went to record her statement, nor did the investigating officer record his name in the first report.

17. In opposing the appeal, Mr Omwenga for the DPP submits that the PW1 positively identified the appellant as the assailant, with the aid of the torches which the intruders were flashing at each other; there was moonlight on that night, and PW1 had known the appellant very well since childhood referring to him by his nick name, 'Susu'; that the 10 iron sheets stolen during the robbery at PW1's house were recovered at the appellant's second home, confirming that the appellant had a hand in the incident. Counsel submitted that the clinical officer who examined the complainant confirmed that the complainant had been sexually molested and a P3 form was produced as exhibit. Consequently, we were urged not to disturb the decision.

18. We have carefully considered the record of appeal, submissions, the authorities cited and the law. This being a second appeal, this court is mindful of its duty as 2nd appellate conferred by section 361(1) (a) of the *Criminal Procedure Code*, which provides:

> 361 (1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section—
>
> (a) on a matter of fact, and severity of sentence is a matter of fact."

The jurisdiction of this court on a second appeal, has been re-stated in numerous judicial pronouncement.

19. For instance *Karani v Republic* [2010] eKLR stated that:

> " this is a second appeal. By dint of the provisions of Section 361 of the CPC 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 plain wrong in their decision, in which case such an omission or commission would be treated as a matter of law."

In the case of *Stephen M'Irungi& Another v Republic* [1982-88] 1 KAR p 360 where it was held:

> " Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed finding of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

We echo what this Court's position in *Samuel Warui Karimi v Republic* [2016] eKLR:

> " This is a second appeal and this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See Chemangong -vs- R, [1984] KLR 611."

20. The appellant maintained that he was framed up, and his arrest was a case of mistaken identity. He questions the scenario credited as providing opportunity for positive identification, arguing that it would have been foolhardy to flash torches making them identifiable to the complainant. He argues that the complainant did not give a narration or vivid explanation as to how she recognized him, and the identification was not free from error. He relies on the case of *Wamunga v Republic* (1989) KLR 4242 at 426 which held that where the only evidence against a defendant is evidence of recognition, the court ought to examine the prevailing circumstances to ensure the identification was free from possibility of error.

21. From the evidence presented, this was not a case of identification of a stranger but of recognition by one who had known the attacker since his childhood, and was her neighbour. The incident was not a hit and run situation where the victim would be said to have only had a fleeting glance of the attacker, and indeed, PW1 was consistent in recalling the events from the moment the incident begun, how the assailants got into the house, carried her outside, ordered her to lie down, when she declined, they beat her, threw her down, removed her clothes, and took turns in raping her three times each. She explained that when the appellant commenced the sexual act, his companion beamed his torch for him. We note that apart from the light from the torches, it was PW1 testified that on the night in question, there was moonlight which provided sufficient lighting for her to see, and recognize the appellant. The appellant did not deny that he goes by the nickname 'Susu", or that there was sufficient moonlight on that night.

22. This was therefore a case of positive recognition of a person known to the witness as opposed to identification of a stranger. In the case of *Anjononi & Others v Republic* [1976-80] 1 KLR 1566 it was stated:

> " Recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

23. We find nothing on record to suggest that PW1 was mistaken in the identity of her attacker, and the inescapable link, is the ultimate recovery of the items stolen from PW1. The recovery at the appellant's house was shortly after the robbery, bringing into play the doctrine of recent possession.

Accordingly, we find no error in the judgment of the two court's below as to the circumstances leading to identification, which adequately met the required standard of proof.

24. As regards the charge of gang rape, it is the appellant's contention that the court ought to have drawn from the provisions of section 36 (1) of the *Sexual Offences* Act, and ordered for DNA profiling to be carried out to establish whether he was the culprit. section 36 of The *Sexual Offences* Act provides that:

> '...where a person is charged with committing an offence under this Act, the court MAY (our emphasis) direct that an appropriate sample(s) be taken from the accused person...'

In support of this position, the appellant urges us to be guided by the case of *Benson Kipkurui Korir v Republic* [2021] eKLR. Which stated that:

> " .. DNA was not taken for purposes of matching with the spermatozoa found in the victim. This to my mind was a missed opportunity to deploy forensic evidence in the case."

The appellant further relies on section 48 of the *Evidence* Act provides *inter-alia*, that:

> " any scientific report or opinion is admissible in any criminal proceedings for the Court to form an opinion on such matters as to prove the existence or non-existence of the facts in issue contained in it. The scientific report though not conclusive provides *prima facie* evidence. On the disputed facts in the proceedings under adjudication by the Court."

25. On this limb, the DPP submits that all the ingredients of Gang Rape were established, and trial court satisfied itself that the victim was an adult; and a medical report was produced which confirmed the act of penetration. In the case of *Mark Oiruri Mose v R* (2013)eKLR this Court stated thus:

> " ...Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ..."

It therefore follows that medical evidence may not necessarily prove the presence of spermatozoa, alive to the fact that there may be penetration without ejaculation, and as long as there is evidence of penetration, even partial penetration, only on the surface, that ingredient of the offence is satisfied.

26. On the issue of consent, the DPP has referred us to provisions of sections 42-45 of the *Sexual Offences* Act which recognize that a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice; and coercive circumstances include use of force or threat of harm against the complainant. We think this to be a rather disingenuous argument by the appellant given that the evidence of PW1 demonstrates that the she never consented to the sexual activity with the assailants, infact when ordered to lie down, she declined, and was beaten and forcefully thrown to the ground. The attackers were armed with a panga and the victim thus she did not have the freedom and capacity to make the choice, and the two men took several turns at her.

27. As aptly pointed out by the DPP, the other limb is to whether there were joint assailants and if so if they had a common intention in the commission of the offence. The complainant and her grandchild narrated how the appellant and another person entered their house armed with weapons and how the

appellant and his accomplice raped the complainant in turns. Subject to identification, the appellant committed the offence in association with another person who is alleged to be unknown to the victim. The two had common intention. We find that the two courts below considered what constitutes the offence of gang rape, and cannot be faulted as failing to take relevant matters into consideration.

28. The appellant has alluded to the lack of a witness he considers crucial not being availed to testify, and mentions his brother Hosea, the person who opened his second home where the stolen iron sheets belonging to the complainant were found. The appellant seeks to rely on the celebrated case of *Bukenya & Others vs Uganda* [1972] EA 549.

29. The appellant submits that, where the prosecution fails to call material witnesses, the court may draw an adverse inference against the prosecution; that the court also had the option of summoning the witness mentioned; which the appellant argues is the approach the two courts should have adopted, and resolved the situation in his favour.

30. The DPP acknowledges the importance of calling all witnesses, but that it is within the discretion of the State to decide which witness to avail; that the key issue is whether failing to avail persons who have been mentioned in evidence would be prejudicial to the appellant. It is submitted that in the instant case, the appellant had the option of availing his brother Hosea as his witness to rebut what the prosecution claimed, and lack of his presentation before the trial court would not have changed the fact that the appellant raped and stole from the victim or affected the evidence tendered leading up to the appellant's conviction.

31. We agree with the respondent's submission that the failure by the prosecution to call that particular witness was in no way prejudicial to the appellant. The prosecution evidence tendered without him was not barely adequate but frim, consistent and cogent forming a basis for a safe conviction.

32. The two courts are also faulted on the death sentence that was meted out on the appellant as it offends the sanctity of life protected under article 26 of the *Constitution* of Kenya, and is contrary to the general rules of International Law and or Treaties and Conventions ratified by Kenya. The sentence is described as eroding the dignity of individuals, and it arbitrarily deprives an accused person of his inherent right to life and other fundamental rights and freedoms enshrined in articles 24, 26, 28 and 29 of the Constitution; and also deprives a court of the discretion and right to consider mitigating circumstances in which an offence was committed. I n support of these propositions, the appellant refers to the decision in *Francis Karioko Muruatetu & Another v Republic* [2015) eKLR (commonly referred to as Muruatetu 1).

33. The DPP, acknowledges the issue regarding constitutionality of mandatory sentences as was canvassed at the Supreme Court in the Muruatetu case (*supra*), but points out that, the decision does not apply to all other offences that prescribe mandatory or minimum sentences. In this regard, reference is made to the Supreme Court's directions in Petition no 15 and 16 (consolidated) of 2015 between *Francis Muruatetu & Another v The Republic* [2017] eKLR – Muruatetu where the Supreme Court issued directions in relation to *Muruatetu 1*.

> 'The Courts decision in Muruatetu case did not invalidate mandatory sentences or minimum sentences in the penal code, the Sexual offences Act or any other statute.'

34. Courts had previously held that the rational in *Muruatetu 1* was applicable and transferable to other cases with mandatory sentences. However, this position has since changed with the pronouncement of the Supreme Court in *Muruatetu 2*, which also gave a guideline that the decision in Muruatetu 1 is applicable only in sentences for the offence of murder section 203 and 204 of the *Penal Code*.

35. From the guidance given by the Supreme Court in the *Muruatetu 2* case, we see no reason to disturb the death sentence meted out on the appellant.

36. The upshot is that the appeal on both conviction and sentence is without merit and is hereby dismissed in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF MARCH, 2023.

P. O. KIAGE

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR