Kiragu v Republic (Criminal Appeal 14 of 2014)
[2023] KECA 620 (KLR) (26 May 2023) (Judgment)

Neutral citation: [2023] KECA 620 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 14 OF 2014

F SICHALE, LA ACHODE & WK KORIR, JJA

MAY 26, 2023

BETWEEN

STANLEY NJERU KIRAGU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgement of the High Court at Nakuru (Mabeya & Mshila JJ.) dated 11th day February, 2014 in Criminal Appeal No. 94 of 2011)

JUDGMENT

1. This is the second appeal of Stanley Njeru Kiragu (the appellant), against the conviction for the offence of robbery with violence contrary to section 296 (2) of the *Penal Code,* and the death sentence by the magistrate's court at Naivasha. The first was an unsuccessful appeal to the High Court at Nakuru (Mabeya and Mshila JJ) dated 11th February, 2014. We shall proceed to give a brief background of this case to put the matter into context.

2. It was alleged that on 2nd November, 2010 at the old Kijabe area in Mai Mahiu within Nakuru County, jointly with others not before court, the appellant robbed Peter Kago Kungu of one motor vehicle registration number KBJ 115 A Nissan Sunny Station Wagon valued at Kshs. 500,000/- and cash Kshs. 6,500/- the property of the said Peter Kago Kungu and at, or immediately before, or after the time of such robbery, used actual violence on the said Peter Kago Kungu.

3. The prosecution case was that on the material day, Peter Kago Kungu (PW3) a taxi driver, was hired at Githunguri by two people to take them to Mai-Mahiu IDP camp to pick a certain woman. He drove them in his motor vehicle registration number KBJ 115 A to the IDP camp where they found the appellant and he told them that the said woman had moved to Mai Mahiu. One of the two people, allegedly introduced as the husband of the woman they were looking for, asked the appellant to show them where his wife had gone.

4. On the way the said husband and the appellant alighted and came back with a fourth man who showed them a short cut to use. The complainant drove down the said shortcut for 4 kilometers, before the appellant who was sitting behind him suddenly put a rope around his neck and ordered him to stop. The man who was seated in the co-driver's seat ordered him to move to the backseat while he took control of the motor vehicle. As they drove along they came across a pickup parked in the middle of the road and PW3 screamed to attract the attention of the occupants of the pickup. As a result, the appellant removed the rope around his neck and PW3 jumped out of the vehicle through the window.

5. The occupants of the pickup and the people around shouted and chased after PW3's motor vehicle as his assailants drove off. They later abandoned the vehicle and fled on foot but the members of the public managed to arrest the appellant and recover the motor vehicle. PW3 identified the appellant as the man he picked at Mai-Mahiu IDP camp.

6. George Kahora Njau (PW2) was at his home in Kijabe on the material day, when he heard people shouting 'thief thief'. He went to the scene of the incident and found motor vehicle KBJ 115 A. He saw people running past the scene of the incident and followed them. They arrested the appellant and brought him back to where the motor vehicle was. They searched him and found a rope in his trouser pocket. PW3 identified him as one of those who had robbed him of his motor vehicle.

7. Martin Mwago Waithera, (PW4) was the one who referred the two men to PW3 because they were looking for a Station Wagon, and PW3 had such a taxi in Githuguri. The two men were unknown to him. He later went to the scene of the incident and found the appellant arrested and PW3's motor vehicle recovered.

8. Stanley Kilimo, (PW1) the investigating officer went to old Kijabe road and re-arrested the appellant on the instruction of the OCS and later charged him.

9. At the close of the prosecution case the appellant was put on his defence. In his unsworn statement, he stated that he was on his way home from Kijabe Hospital when he was arrested and charged for an offence he knew nothing about.

10. The Learned Magistrate, Honorable T.W.C. Wamae SPM (as she then was), considered the evidence before her, found that the appellant was one of the 3 persons that robbed the complainant of his motor vehicle. Consequently, she convicted him and sentenced him to death as prescribed by law.

11. The appellant was aggrieved by both the conviction and sentence and filed an appeal in the High Court. Upon considering the appeal before them the two Judges held that the conviction was safe and the sentence lawful. They dismissed the appeal and upheld both the conviction and sentence.

12. Unrelenting, the appellant filed this present appeal on grounds that can be summarized as follows:

    a. He was convicted on mistaken identity,

    b. The prosecution witnesses were not credible,

    c. He was convicted on the evidence of witnesses that were not called,

    d. The doctrine of recent possession was not proved against him,

    e. The offence of robbery with violence was not proved against him conclusively;

    f. The charge was not proved according to its gravity and the circumstances surrounding it. and

    g. The sentence was harsh and un-proportional when evaluated in the light of the circumstances the appellant was charged.

13. The appeal was canvassed by way of written submissions that were highlighted orally during the plenary in the virtual hearing. The appellant appeared in person, and filed his own written submissions while Prosecution Counsel Ms. Monica Mburu, represented the State and filed their submissions dated 8th December, 2022.

14. The appellant submitted that he was not arrested at the scene of the incident, but was arrested by members of the public some unknown distance away from the scene of the incident, before PW3 described him. Those members of the public who arrested him did not testify and there was no evidence on how he was identified. He urged that since PW3 did not identify the appellant prior to his arrest, the chain of events from the attack to the arrest was broken and doubt was created as to whether the appellant was among the gang which attacked PW3.

15. The appellant further argued that the prosecution witnesses were not credible and their evidence should not have been relied upon to convict him. His reasons were that the prosecution witnesses gave contradictory evidence on where the rope was found. Also, that PW2 was not truthful in testifying that the appellant was among those who alighted from the stolen vehicle when he did not see them alight from the vehicle.

16. It was also contended that the evidence of PW3 and PW2 on identification of the appellant did not reach the threshold of a positive identification, as stated in *Roria vs R* (1967) EA 583. That the identification of the appellant was dock identification, and as stated in *Gabriel Kamau Njoroge* (1982-1988) 1 KLR, P 134:

> "a dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by properly conducted identification parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification."

17. The appellant further submitted that the trial court held that the stolen property was in the possession of the appellant, yet he was brought to the scene after he was arrested and beaten up elsewhere. He urged that the prosecution failed to call crucial and competent witnesses in this matter such as at least one of the witnesses from the members of public who chased and arrested him.

18. The appellant also argued that the elements of the charge of robbery with violence were not proved against him, since only one attacker was arrested and PW3 did not testify that he was assaulted, wounded, beaten, stricken or handled in a manner that suggested actual violence was used against him when he was being robbed.

19. The appellant contended that his right to mitigate before being sentenced was violated contrary to section 216 and 329 of the *Criminal Procedure Code*. That the fact that section 296 (2) of the *Penal Code* did not give room for aggravating or mitigating circumstances to be considered, it violates his constitutional right to be sentenced to serve a prison term, or at least benefit from the least severe sentence as provided under Article 50(2)(p) of the *Constitution*.

20. On the sentence, the appellant submitted that the sentence meted upon him was harsh and unconstitutional. He relied on the High Court decision in *James Kariuki Wagana vs Republic* (2018) eKLR where it was observed that while the death penalty is maximum penalty for both murder and robbery with violence, the court has the discretion to impose any other penalty that it deems fit and just in the circumstances. That the death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder. That the Judge noted that while force had been used in the

case before him, it was not excessive force, nor did the appellant "unnecessarily injure the complainant during robbery" and he was not armed during the robbery.

21. In opposition, Ms. Monica Mburu urged on behalf of the State that the courts below did not err in placing reliance on the identification by the complainant. She relied on this court's decision in *Shadrack Shutani Omwaka v Republic* (2020) eKLR, where this Court in addressing issues of identification cited with approval the decision of the Supreme Court of Uganda in *Abdulla Nabulere and Another v Uganda* Cr. Appeal No. 9 of 1978 where it was held that:

> " .. familiarity of the assailant to the victim, other factors such as distance between them, the length of time had to observe and even the opportunity to hear the assailant are factors to look out for..."

22. Counsel asserted that in the instant case, identification was simpler there being no factors that hampered vision such as darkness. That the robbery happened in broad daylight, the complainant was approached by clients who turned out to be robbers at

12. 30 pm, and the complainant travelled with the appellant for 4 kilometers in the car before the appellant attacked him.

23. On failure to call any of the members of the public who participated in the appellant's arrest, counsel was of the view that although it was important to call them, the failure to call them was not fatal.

24. She urged that the offence of robbery contrary to section 296 (2) of the *Penal Code* was proved to the required standard by the prosecution. That the complainant testified that the appellant tried to strangle him with a rope and a rope was recovered in the appellant's possession when he was arrested and what makes the said rope dangerous/offensive is how it was used. Secondly, that one of the other two men took control of the vehicle, meaning that there were three men working in association with each other.

25. Counsel submitted that Article 26 (3) of {the *Constitution* provides that a person may be deprived of the right to life to 'the extent authorized by this Constitution or other written law'. That the law in this case is section 296 (2) of the *Penal Code* which provides that the punishment for robbery with violence is death. She urged that the death sentence imposed by the trial court and confirmed by the High Court is valid and constitutional contrary to the appellant's contention.

26. This being the second appeal, our duty is confined to interrogation of issues of law as provided for in section 361 of the *Criminal Procedure Code* and not interfere with matters of fact unless it is demonstrated that the courts below considered matters they ought not to have considered. This Court succinctly set this out in *Karani vs Republic* (2010) eKLR, as follows;

> " 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 of facts unless it is demonstrated that the trial court and the first appellant court considered matters they ought not to have consider or 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 treated as matters of law"

27. We have considered the grounds of appeal, the rival submissions, the authorities cited and the law. From our analysis the issues that arise for our determination are:

    a. Whether the appellant was properly identified;

b. If (a) is in affirmative whether the elements of robbery with violence were proved beyond reasonable doubt; and

c. Whether the sentence meted upon the appellant was unconstitutional.

28. The appellant was charged with the offence of robbery with violence contrary to Section 296 (2) of the *Penal Code* which provides as follows:

> " If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death"

29. The above elements were set out in this Court's decision in the case of *Oluoch vs Republic* [1985] KLR thus:

> " Robbery with violence is committed in any of the following circumstances:
>
> a. The offender is armed with any dangerous and offensive weapon or instrument; or
>
> b. The offender is in company with one or more person or persons; or
>
> c. At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person ....."

30. The first issue and which has a bearing on the other two is the identification of the appellant as one of the robbers. The appellant contended that this was a case of mistaken identity. That he was arrested away from the stolen vehicle, by members of the public who had not been given his description and the complainant identified him after he was arrested. Also, that none of the people who chased and arrested him was called as the prosecution's witness. Ms. Mburu on the other hand, stated that the identification by the complainant could not possibly be a mistake, since it occurred during the day and the appellant was seated close to the complainant in his vehicle during the incident.

31. The learned Judges had the following to say on the identification of the appellant as the perpetrator:

> " To our mind, there was no likelihood of there being an error. The members of the public were not looking for suspected robbers. They were chasing persons who had abandoned the robbed motor vehicle and caught up with one of them who happened to be the appellant. PW2 testified that he was among the members of the public who were running after the robbers. He qualifies to be an independent witness contrary to the appellant's complaint. We are satisfied on our part that the prosecution evidence on identification could not be faulted."

32. It is clear from the foregoing extract from the impugned judgment that the learned Judges relied on the evidence of PW2 as one of the people who chased and arrested the appellant. The evidence of PW2 is found on page 11 and 12 of the record as follows:

> " I heard screams of "thief thief". I went to the scene of shouting. I found a motor vehicle and some people running past the motor vehicle KBJ 115A saloon white which was on the road. I followed the people that were running. Accused was arrested by members of the public.

> The others ran-away. The accused was taken where the motor vehicle in question was..... Accused was later arrested by police. Owner of the motor vehicle said that the accused was one of the persons that robbed him of his motor vehicle"

33. From the evidence of PW2, it is clear that he did not see the appellant coming out of the subject vehicle. He followed the members of the public who were chasing the perpetrators who had come out of the vehicle in issue. As such, we disagree with the learned Judges as to the cogency of the evidence of PW2. We are of the view that PW2 was not in a position to assist in the identification of the perpetrators, having arrived on the scene after the suspects had fled.

34. Consequently, we are left with only the evidence of the complainant as the witness who identified the appellant as one of the perpetrators of the robbery. The complainant told the court that when the appellant boarded his car at Mai Mahiu IDP camp, he sat behind the complainant. 4 km down the road the appellant put a noose around his neck and ordered him to stop. The co-driver ordered the complainant to get into the back seat. The complainant later identified the appellant after the public arrested him and brought him back to the vehicle.

35. We assessed the record to establish whether the finding of the courts below on the identification of the appellant was safe. In *Cleophas Otieno Wamunga v Republic* [1989] eKLR the Court held that:

> " 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:
>
> > "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."

36. In the case before us the appellant was arrested after the perpetrators abandoned the subject vehicle and fled on foot. He was then brought to the complainant for identification after being roughed up by the members of the public. The missing link is the evidence of a witness who saw the appellant coming out of the stolen car and pursued him without losing sight of him till he was nabbed because, as we

observed above, PW2 was not that witness. This is important because the complainant did not specify how long he had the appellant in view at the pick-up point before he entered the car and sat at the back where the complainant could no longer see him.

37. In conclusion we find that the evidence created a doubt as to whether the appellant was one of the robbers, or he was a victim of mistaken identity. The identification of the appellant was therefore, not free from possibility of error and the benefit of that doubt ought to have gone to the appellant. This ground therefore succeeds.

38. Consequently, we will not go further to consider whether the elements of robbery with violence were proved beyond reasonable doubt, or whether the sentence meted upon the appellant was unconstitutional. Ultimately, we allow this appeal, quash the appellant's conviction and set the sentence aside. We order that the appellant be set at liberty forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF MAY, 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