**Warue v Republic (Criminal Appeal 108 of 2020)
[2023] KECA 632 (KLR) (26 May 2023) (Judgment)**

Neutral citation: [2023] KECA 632 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 108 OF 2020

MSA MAKHANDIA, AK MURGOR & GWN MACHARIA, JJA

MAY 26, 2023

BETWEEN

JEREMIAH NYAGAH WARUE .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Mbogholi & Achode, JJ.) dated 6th May, 2014 in Nairobi H.C.CR. Appeal No. 331 of 2011)

JUDGMENT

1. Jeremiah Nyagah Warue, "the appellant", has preferred this second and perhaps last appeal challenging his conviction and sentence on two counts of robbery with violence. Our role as the second appellate court was succinctly set out in *Karani v R* [2010] 1 KLR 73 wherein this Court expressed itself 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 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."

2. To ascribe to the aforesaid jurisdiction, it is necessary that we set out albeit in brief the evidence availed before the two courts below.

3. The appellant faced two counts of robbery with violence contrary to section 296 (2) of the *Penal Code*. It was alleged that on 7th July 2009, at Mwihoko in Nairobi, the appellant jointly with others not before

court, while armed with dangerous weapons, namely, pieces of wood, they robbed Japheth Mutuku Kimathi and Monicah Kimala of one mobile phone, cash Kshs 800.00, a wallet and ATM card all valued at Kshs 5,200.00 and at or immediately before or immediately after the time of such robbery, threatened to use personal violence to the two victims.

4. PW1, Japheth Mutuku Kimathi, and the complainant in count one testified that on the fateful night, robbers jumped over the perimeter fence into his compound. They then forced the window to his bedroom open and demanded that he opens the door for them. He switched on the light on his phone, which was bright enough and recognized the appellant among the robbers who immediately demanded for the phone which he gave out. They then sprinkled petrol into the room through the window and threatened to set the house ablaze if he did not comply with the order to open the door.

5. Upon entering the house, they demanded Kshs100,000.00 from him or else they would have his head. Whilst in the house, PW1 again recognized the appellant out of the three intruders as he had previously employed him as a worker during the construction of the house. He recognized him by the light from the appellant's own torch, which brightened the whole room because of the plastered walls. In his report to the police the following day, he stated that he had identified one of the robbers as a man who had previously done some construction work for him. Two days later, he arrested the appellant and handed him over to the police.

6. According to PW2, Monica Kimala, the wife to PW1, and the complainant in count two, three robbers entered their house with torches and each had a stick. They demanded for Kshs100,000.00 or else they would behead PW1. One of them escorted PW1 into the bedroom while another dragged PW2 from the bedroom to the sitting room, and ordered her to undress. She shouted "Jesus" whereupon the robber hit her on the head and thigh with a stick. PW1 forced his way into the sitting room and fought the would-be rapist giving her a chance to escape to the neighbours. She confirmed recognizing the appellant among the robbers as well.

7. PW3, Ann Muvai Bosire, a sister-in-law to PW1, testified that while asleep on the said night in the complainants' house she heard PW1 being ordered to open the door, then later heard her sister, PW2 shouting from the sitting room. When she opened the bedroom door, she was ordered back by a man who had stood by PW2. The man lit the torch and directed to his face which made her recognize the same as the appellant. On his part, PW4, Stephen Mutua who was also in the house on the material day, witnessed the incident but did not identify any of the robbers.

8. PW5, Cpl Charles Odhiambo stated that on July 9, 2009, he was asked to go to Mwihoko Camp to collect a suspect. He proceeded thereat and was handed a suspect who turned out to be the appellant. He was also handed a club and a jerrican that had petrol. He prepared an exhibit memo and referred it to the Government Chemist with the contents of the jerrican for confirmation if the same was petrol. The Government Chemist, Mr. W.K Monyoki prepared and signed the report and thereafter, handed it over to the witness who in turn tendered it evidence.

9. PW6, APC Lukinga Charles was based at Mwihoko AP Post Githurai, and was at the station when he was told by Sgt. Wahome and Deputy APC Philip Okwemba, that a suspect had been arrested by members of the public in relation to an offence that had been reported at the Police Post. They proceeded to where the suspect was and re-arrested and escorted him to the Police Post. They booked him and notified regular police. PW7, Dr. Zephania Kamau examined PW2 who had been assaulted by the robbers and assessed the degree of the injury as harm.

10. The appellant gave sworn testimony in his own defence and denied any involvement in the robbery. He told the trial court that when he met PW1 on the day that he was arrested, PW1 wanted him to point out the people who had robbed him. Suddenly, PW1 shouted and members of the public arrested him.

11. Upon consideration of the entire evidence availed, the trial court found the appellant guilty, convicted and sentenced him to life imprisonment.

12. Dissatisfied with the judgment of the trial court, the appellant appealed to the High Court, which appeal was dismissed. Still dissatisfied, the appellant has proffered this second appeal on seven grounds that: there was a breach of his constitutional rights, and in particular, the right to a fair trial as enshrined in Article 50(2)(j); the High Court erred in law by failing to observe that the prosecution had not discharged the standard of proof required in criminal cases; failed to consider the inconsistencies in prosecution evidence; crucial witnesses were not availed; and lastly, that the first appellate court failed to observe that the Government Analyst Report was not tendered in evidence by the maker but by a police officer contrary to section 77 as read with section 48 of the *Evidence Act*.

13. The appeal was canvassed by way of written submissions with limited oral highlights. Ms. Rashid, learned counsel appeared for the appellant while Mr. Omondi, learned prosecution counsel represented the respondent.

14. On the issue of breach of constitutional rights, it was submitted that the appellant had requested to be issued with witness statements and Police Occurrence Book (OB) on three occasions in the trial court but was never supplied. However, the High Court glossed over this gross violation of the appellant's constitutional right. She relied on the case of *Thomas Patrick Gilbert Cholmondeley v Republic* [2008] eKLR for the proposition that the prosecution is now under a duty to provide an accused person with the prosecution evidence, and to do so in advance of the trial. The fact that the accused was able to cross-examine the prosecution witnesses did not take away this constitutional right, counsel submitted.

15. As to the standard of proof, the appellant's submission was that the two courts below failed to make a finding that the appellant may have been a victim of circumstances. That he was arrested on mere suspicion which is not sufficient to found a conviction. Further, that the two courts below falsely equated the alleged running away of the appellant from PW1 and PW2 as a manifestation of his guilt.

16. The appellant pointed out several inconsistencies and contradictions in the evidence of both PW1 and PW2. The appellant thus submitted that based on the foregoing, the prosecution failed to build a credible case against him beyond reasonable doubt. He relied on the case of *Ndungu Kimanyi v Republic* [1979] KLR 283, for the proposition that witnesses in a criminal case upon whose evidence is proposed to be relied on should not create an impression in the mind of the trial court that they are not reliable.

17. The appellant further submitted that heavy reliance was placed on the testimonies of PW1, PW2, PW3 and PW4 all of whom are members of the same family. No independent witnesses were availed to testify and the possibility of mistaken identity could thus not be ruled out. That the prosecution never conducted a police identification parade for the complainants to identify the appellant as one of those who robbed them. That his identification was thus, dock identification which was of little probative value. The appellant adverted to the case of *Ajode v Republic* [2004] eKLR where this Court stated that dock identification is generally worthless and a court should not place much reliance on it unless it has been preceded by a properly conducted police identification parade.

18. On crucial witnesses not being called, it was submitted that the prosecution's express and willful failure to avail crucial witnesses prejudiced the appellant's case. That the failure was an indication that those witnesses would have given evidence that would have exonerated the appellant. One such witness was the appellant's mother who had claimed that the appellant was not at home on the material day. Then, there was a Mr. Monyoki who prepared the Government Chemist Report. Lastly, on the ground that the first appellate court failed to note that the Government Chemist Report was tendered in evidence

by a police officer, PW5, contrary to section 77 as read with section 48 of the *Evidence Act*, it was submitted that the failure to call Mr. Monyoki who was the maker of the document dealt a serious blow to the prosecution's case.

19. In opposing the appeal, the respondent submitted that the issue for determination was whether the appellant was positively identified as one of the robbers. That PW1 testified that, he recognized the appellant out of the three robbers by the light emanating from his own cell phone and from the torch of the appellant which brightened the room. That it was also important to note that when PW1 reported the incident to the police station the following day, he told the police that he had recognized the appellant among the robbers. Further, it should also be noted that PW1 was the one who caused the arrest of the appellant two days after the robbery. That similarly, PW2 and PW3 positively recognized the appellant among the robbers. That the appellant spent a considerable period of time with PW2 as he was guarding her and even attempted to rape her. All the three witnesses had no doubts in their minds that the person they recognized was the appellant. The appellant confirmed that he was well known to each of these witnesses and had at some time in the past, worked for PW1 when he was putting up a septic tank for his house. Thus, this was a case of recognition as opposed to identification of a stranger and the prevailing circumstances gave no room for mistaken recognition.

20. The issues of law that accrue for our determination are whether: the appellant's constitutional rights were violated; there was proper identification and or recognition of the appellant; the offences of robbery with violence were proved against the appellant; failure to call crucial witnesses prejudiced the appellant's case; and, whether the production of the Government Chemist Report by a different person other than the maker occasioned injustice to the appellant.

21. On the first ground, the appellant maintained that he was not supplied with witness statements and the OB though he had requested for the same. Accordingly, he was unable to adequately prepare his defence. Article 50 of *the Constitution* provides for the right to a fair hearing, which includes a right for the accused to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence. If this demand is not met, then the accused would not have been accorded a fair trial. This was succinctly put in the case of *Thomas Patrick Gilbert Cholmondeley v Republic* [supra] thus:

> "We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under section 77 of our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial, all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items."

22. The record shows that the appellant made a request to be supplied with copies of witness statements and OB, long before the commencement of the hearing of the case in the trial court. Indeed, an order was made to that effect. Thereafter, the case came up for mention several times until when the hearing commenced. It is however not clear on the record whether the appellant's request was met. However, considering that the appellant was represented by counsel, a Mr. Ndegwa in the proceedings, it is difficult to imagine that he would have agreed to the commencement of the hearing of the case without having received the documents requested. It is thus safe to conclude that by the time the hearing commenced, the appellant was in possession of the documents and that is why he was rearing to go despite there having been no such indication in the record. If he was not ready for want of the OB and witness statements, nothing would have stopped him from demanding and insisting on the same before the commencement of the trial. Indeed, from the robust cross examination of the witnesses, it is quite evident that the appellant was conversant with the contents of the witness statements and the OB.

23. On whether the offence was proved, we would refer to the ingredients for the offence that were set out in *Johanna Ndung'u vs Republic* [1996] eKLR as follows:

    a. if the offender is armed with any dangerous or offensive weapon or instrument, or;

    b. if he is in the company with one or more other person or persons, or;

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

    Proof of any one of the above ingredients is enough to sustain a conviction. See Oluoch v Republic [1985] KLR 549. The evidence tendered in proof of the ingredients of the offence must however be cogent and consistent save for such minor flaws as are curable under section 382 of the Criminal Procedure Code. The evidence on record show that more than one person was involved in the robbery, in fact they were three, they were all armed with crude weapons, with which they unleashed violence on PW1 and PW2, if the evidence of PW7 is anything to go by. Thus, the above ingredients of the offence were met. In any event, the two courts below reached concurrent findings on the issue and we have no reason to depart from the same.

24. Was the appellant one of the robbers? The prosecution led evidence that showed that the appellant was a person known to PW1, PW2, PW3 and PW4 as he had been previously hired by PW1 to construct a septic tank for his house. When the robbers struck, PW1 used his phone light so that he could be able to get the key and open the house. It is through the phone light and the appellant's torchlight that he was able to recognize the appellant among the attackers whilst outside and inside the house. Similarly, PW2 PW3 and PW4 also recognized the appellant during the robbery through his powerful torchlight which he would occasionally turn on himself. Indeed, the appellant admitted to the fact that he was well known to these witnesses. The court in the case of *Leonard Kipkemoi v Republic* [2018] eKLR while dealing with the issue of recognition stated that:

    > "The factors to be considered with respect to recognition as set out in R. v Turnbull & Others (1976) 3 ALL ER 549 must always be borne in mind when a court is dealing with the question of identification. The court in that case stated as follows:
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    > > ". Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

25. During the attack, the appellant had not disguised himself hence exposing his face at all times. There was light in the room provided by the appellant's own torch which he occasionally turned on himself. Further, the appellant spent a considerable period of time with the witnesses, and in particular PW2, as he even attempted to rape her and was therefore in close proximity. The possibility of mistaken recognition is too remote in the circumstances. It is also not in dispute that PW1 arrested the appellant himself and that in his first report to the police he mentioned the name of the appellant. During the of arrest of the appellant, he attempted to run away but was pursued by the complainants with the assistance of the members of the public and subdued. Clearly, the act of the appellant running away upon seeing the complainants' approach him, was a manifestation of his guilty mind.

26. This being a case of recognition as opposed to identification of a stranger, conducting a police identification parade demanded by the appellant would have been superfluous. Further, the fact that most witnesses were members of the family is neither here nor there. It does not make their evidence

incredible. There was therefore no error of recognition of the appellant and we agree with the finding of the two courts below on the issue.

27. There was also the issue of crucial witnesses not being availed. It requires no gainsaying that the prosecution has a duty to make available all necessary witnesses for the purposes of proving its case. This duty does not shift even where such witnesses may tender evidence that will undermine the prosecution's narrative, and that failure to do so mandates the court to draw adverse inference. The principles to consider in determining the issue of crucial witnesses were dealt with in the leading case of *Bukenya & Others v Uganda* [1972] EA 549 where it was held:

> " The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution...
>
> The prosecution's burden in regard to witnesses is to call witnesses who are sufficient to establish a fact. However, it is not necessary to call all the people who know something about the case. The issue is whether those called are sufficient to aid the court establish the truth, whether the evidence is favourable to the prosecution or not."

28. We need not however, overemphasize the fact that while it is desirable that evidence of relevant witnesses should always be tendered, we nonetheless think that where the evidence availed proves the prosecution case to the required standard, the absence of such other evidence would not, as a rule, be fatal to the conviction of the accused. All must depend on the circumstances of each case and the weight of the evidence presented. We say so being aware that under section 143 of *Evidence Act*, no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.

29. In this case, we are satisfied just like the two courts below that the evidence led by the prosecution was sufficient to found a conviction. The witnesses alluded to by the appellant would not have added anything new to the prosecution case. In any event, nothing stopped the appellant from calling them as defence witnesses.

30. On the tendering of the Government Chemist Report by PW5 as opposed to the maker, a Mr. Monyoki, we note that the appellant neither objected in the trial court to the tendering in evidence by PW5 of the report nor did he raise the issue with the first appellate court. Ideally therefore, we have no basis upon which we can interrogate the issue. Besides, the provisions of sections 33 and 77 give a leeway for the production of public documents by a non-maker, if the maker cannot be found or whose attendance cannot be procured without occasioning delay or expense which in the circumstances, appears unreasonable. This is what happened here!

31. Considering the circumstances of this case, we are satisfied just like the two courts below, that the production of the report by PW5 on behalf of Mr. Monyoki, was not prejudicial to the appellant at all.

32. In our view therefore, the first appellate court properly came to the conclusion that the conviction and sentence of the appellant was merited. Accordingly, we find the appeal devoid of merit and is dismissed in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MAY, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A. K. MURGOR

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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