Oyano v Republic (Criminal Appeal 103 of 2017)
[2023] KECA 565 (KLR) (12 May 2023) (Judgment)

Neutral citation: [2023] KECA 565 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 103 OF 2017

PO KIAGE, F TUIYOTT & WK KORIR, JJA

MAY 12, 2023

BETWEEN

JOSEPH AMOYE OYANO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kakamega (R. N. Sitati, J.) dated 23rd March, 2017 in HCCRA No. 181 of 2012)

JUDGMENT

1 The appellant was charged with robbery with violence contrary to Section 296 (2) of the *Penal Code*. The particulars were that on 20th June 2011 at Khainga village, Musanda Location in Mumias District within Kakamega County, jointly with another not before court while being armed with dangerous weapons namely, pangas, he robbed Dickson Werimo Mutimba of his motor vehicle ignition keys, a mobile phone make Nokia E-71 valued at Ksh. 6000, a pair of shoes valued at Ksh. 1500, a loaf of bread valued at Kshs. 40, a wallet containing Kakamega Teachers Cooperative Society card, Automated Teller Machine cards from Equity and Cooperative Banks and cash Ksh. 300, all totalling Ksh. 15980 and immediately before the robbery, used actual violence by injuring the said Dickson Werimo Mutimba (the complainant).

2 He denied the charge leading to a trial in which the prosecution called 7 witnesses in support of its case.

3 The evidence that was led and which the trial court agreed with was that, on 20th June 2011 at 7.30pm, the complainant was attacked by the appellant. He had left his vehicle at a neighbour's house because the road leading to his home was muddy, and as he walked to his home through a cane plantation, the appellant, who was a person known to him for over 30 years having been born in the same village, emerged from the cane plantation, armed with a panga (machete) and a kiboko (cane). The complainant could identify him because there was moonlight. He asked him what he was up to but he

did not respond. Instead, he started whipping him on the back with the kiboko for about 20 minutes. The complainant tried to scream but he fell in a pool of mud. The appellant then pulled him and cut him on his head with the panga. The appellant proceeded to rob him of his ignition keys, a mobile phone, the shoes he was wearing and the bread he was carrying. When the appellant saw a crowd approaching, he fled together with another person who had accompanied him.

4 At the close of the prosecution's case, the trial Magistrate (H. Wandere, PM) found the appellant had a case to answer and placed him on his defence. The appellant gave a sworn statement and called one witness, his wife. He denied committing the offence, stating that the entire material night he was at his home with his wife.

5 The trial magistrate evaluated the evidence tendered before the court and found the appellant guilty as charged. She convicted then sentenced him to death as prescribed by law.

6 Aggrieved by the conviction and sentence, the appellant appealed to the High Court. The appeal was heard by R. N. Sitati who, by a judgment delivered on 23rd March, 2017 upheld the conviction and sentence and dismissed the appeal.

7 Further aggrieved, the appellant filed the instant 2nd appeal, on 2 grounds, complaining that the judge erred by;

a. Finding that the appellant was properly identified.

b. Passing a harsh and excessive sentence against the appellant.

8 During the hearing of the appeal, learned Counsel Ms. Imbaya appeared for the appellant while the respondent was represented by Mr. Okango, the learned Senior Principal Prosecution Counsel. Both parties had filed written submissions which they highlighted in brief.

9 Ms. Imbaya contested the identification of the appellant as the assailant, and while referring to various authorities, argued that the law is instructive that there is need to exercise utmost care before an accused is convicted on the evidence of a single witness. Counsel challenged the complainant's evidence that he identified the appellant using the moonlight contending that the prosecution witnesses did not describe the intensity of the moonlight so as to persuade the court that the circumstances prevailing at the time could not result in mistaken identity or that they were free from error. Counsel further submitted that the prosecution ought to have conducted an identification parade in accordance with the laid down procedure before concluding that the appellant was present at the scene of the crime.

10 Ms. Imbaya urged us to reconsider the sentence passed upon the appellant in light of the Supreme Court decision in *Francis Karioko Muruatetu & Another Vs. Republic & 4 Others* [2017] eKLR (Muruatetu 1). She asserted that in view of the Apex Court's holding in that decision that the mandatory nature of death sentences is unconstitutional, this Court should find that the sentence meted on the appellant is unconstitutional and excessive and order a resentencing.

11 Opposing the appeal, Mr. Okango submitted that on the question of identification, there was corroborated evidence that the moonlight enabled the complainant see the appellant and both courts below affirmed this fact. Moreover, counsel argued, no evidence was led in defence to show that there was no moonlight, and besides, the question of the intensity of the moonlight was being raised for the first time before this Court. Counsel asserted that this was a case of recognition and not identification of a stranger. Further, the appellant never denied the fact that he was known to the complainant. He also alluded to a land dispute between the complainant and his father, a fact that confirmed that they knew each other.

12 On sentence, Mr. Okango urged that the Supreme Court guided in *Muruatetu & Another vs. Republic; Katiba Institute & 4 Others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions) (Muruatetu 2) that its decision in (Muruatetu 1) does not apply to the offence of robbery with violence. In conclusion counsel urged that we should accept the concurrent findings of the two courts below and dismiss the appeal.

13 As this is a second appeal, our jurisdiction is confined to consideration of questions of law only by dint of section 361(1)(a) of the *Criminal Procedure Code*. Contrary to the appellant's assertions, we are satisfied that he was positively identified, his identification being one of recognition. We note that the complainant testified that he had known the appellant for over 30 years, a claim which was uncontroverted. As properly found by the two trial courts, the fact that there was moonlight on the material night was corroborated by other prosecution witnesses. We must respect the concurrent findings of the two courts below as we do not see a basis for our interference in this case.

14 On sentence, the Apex court was explicit that Muruatetu 1 does not apply to the offence of robbery with violence. The Court stated as follows;

> (15) To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under Section 40 (3), robbery with violence under Section 296 (2), and attempted robbery with violence under Section 297 (2) of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases."

15 Moreover, section 361(1) of the Criminal Procedure Code debars our consideration of the sentence in this second appeal in express terms;

> "(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; or
>
> b. against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence."

16 In the upshot, we find that this appeal is without merit and we dismiss it in entirety.

DATED AND DELIVERED AT KISUMU THIS 12TH DAY OF MAY, 2023.

P. O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR