Mwania v Republic (Criminal Appeal 79 of 2021)
[2023] KECA 755 (KLR) (22 June 2023) (Judgment)

Neutral citation: [2023] KECA 755 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 79 OF 2021

MSA MAKHANDIA, AK MURGOR & S OLE KANTAI, JJA

JUNE 22, 2023

BETWEEN

COSMAS NGEMU MWANIA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Makueni (Kariuki, J.) dated 21st August, 2017)inMakueni HCCRA No. 102 of 2017)

JUDGMENT

1. This is a second appeal from the judgment of Kariuki, J delivered on August 21, 2017 in Makueni HCCRA No 102 of 2017 in which the learned Judge upheld the trial court's conviction and sentence of death meted out on the appellant for the offence of robbery with violence Contrary to section 296 (2) of the *Penal Code*. Being a second appeal, this Court is alive to the fact that by dint of section 361 (1) of the *Criminal Procedure Code*, its jurisdiction is confined to consideration of matters of law only. Furthermore, we remind ourselves that we will normally not 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 reaching their findings. This much was restated by this Court in the case of *Alvan Gitonga Mwosa v Republic* [2015] eKLR.

2. With the above in mind, the case as presented before the trial court was that on February 22, 2014, at Mbalani village in Kithumani Sub-location in Nzau District within Makueni County, the appellant was said to have robbed Stephen Mutua Maweu KShs.4,200.00 and immediately before or after the time of such robbery wounded the said Stephen Mutua Maweu using a metal bar and a folk jembe.

3. The prosecution called six (6) witnesses to prove the case against the appellant. The complainant, PW1, Stephen Mutua Maweu, stated that on February 22, 2014 at 7.30 pm, while on his way home with a

sheep, he met the appellant with a dog who immediately hit him with a folk jembe on the head and both hands which broke. The appellant also hit him on the left leg with a metal bar breaking the leg. Further, the appellant pierced complainant's right leg with a metal bar and removed KShs.4,300.00 from his pockets and took off . He was able to recognize the appellant with the aid of the moonlight. He screamed for help after which he lost consciousness and on gaining consciousness, he found himself surrounded by twenty (20) people who took him to hospital. He reported the incident at Emali Police Station and was issued with a P3 form. The appellant was a person well known to the complainant as he was his cousin.

4. The evidence of PW2 Julius Masila Maweu, PW3 Joseph Mutunga Muma, and PW4 Denis Muli Masika was the same and all testified as to how they heard the screams from the complainant saying "Ngemu why are you killing me", which prompted them to rush to the scene only to find the complainant lying in a pool of blood. They rushed him to a dispensary and later took him to Emali Police Station. That the complainant told them that it was the appellant, a relative, who had assaulted him. PW5 Assistant Chief, Kithimani sub-location, Titus Mutungi Kavyu testified that on the material day, he was on his way from Kithingiru market at 7.30pm, when one, Gedion Nzioki Maundu, called asking him to go to Kithimani to witness the complainant dying after being attacked by the appellant. PW5 went to the dispensary where the complainant was being treated but he could not speak. They took him to Emali Police Station then Makindu Hospital. PW6, Dr. Josphine Mueni Maitha of Makindu Hospital stood in for Dr. Kariuki her colleague for purposes of producing P3 form. It disclosed injuries were inflicted on the head, hands and leg fractures which were assessed as grievous harm.

5. The appellant was put on his defence and elected to give unsworn statement and called no witness. He stated that on the material day at about 7.00pm, he went to a bar to watch news. He took alcohol up to 9.30 pm and went home where he was served with supper and slept. At 1.30 am, young men woke him up and told him that they had been sent by PW5. He was taken to PW5 and told that he had violently robbed the complainant. Police Officers from Emali Police Station came and took him away. He was later charged in court for an offence he knew nothing about.

6. The appellant was found guilty of the offence and sentenced to death by the trial court. Being dissatisfied by the decision of the trial court, the appellant filed an appeal to the High Court which after hearing dismissed it in its entirety.

7. The appellant being dissatisfied by the decision of the High Court again has lodged this second appeal on the grounds that the High Court erred in law by upholding the appellant's conviction and sentence on the strength of hearsay evidence; by failing to find that the prosecution during the trial failed to call two crucial witnesses (the investigating officer and appellant's wife) whose evidence was very crucial; in failing to find that the prosecution's case was displaced by the defence of alibi put forth by the appellant and finally, failed to exercise its discretion in sentencing.

8. The appeal proceeded by way of written submissions with limited oral highlighting. The appellant through his learned counsel, Mr. Asitiba, submitted that PW2, PW3 and PW4 all testified that they heard screams and went to the scene. They also testified that they did not find the appellant at the scene. There was no clear evidence or witness besides the complainant's evidence that placed the appellant at the crime scene. The only evidence that the trial and the High Courts invoked to uphold the conviction and sentence was therefore purely hearsay. Although all these witnesses talked of hearing the complainant say that it is the appellant who was assaulting him, none of the witnesses actually saw the appellant assault the complainant. There was no eye witness save for the complainant.

9. The appellant relied on the cases of *Maina wa Kinyatti v Republic* [1984] eKLR and *LK v Republic* [2020] eKLR to submit that the first appellate court upheld the trial court's conviction without considering that the appellant was convicted purely based on hearsay evidence. He also submitted that the first appellate court failed to find that the prosecution did not summon two crucial witnesses being the investigating officer and the appellant's wife to testify in court. Considering that at the time when the robbery was committed, the appellant claimed that he was home with his wife taking supper. The prosecution failed to displace the appellant's alibi defence by calling his wife to testify or even make a statement. The prosecution could not therefore, with absolute certainty prove that the appellant was not in his house and that he was at the scene of crime.

10. Relying on the cases of *Francis Mwangi Waniohi & Another v Republic* [2020] eKLR, *Isaiah Sawala Alias Shady v Republic* [2021] eKLR and *Bukenya & Others v Uganda* [1972] EA 549, Mr. Asitiba stated that failure to call an investigation officer did not help the court establish the truth. He further submitted that the investigating officer was the architect who puts together the pieces of evidence that can help the court arrive at a fair and just decision. It was therefore a mockery of justice that he was never availed without any reason whatsoever, to tender his evidence. Relying on the cases of *Paul Njoroge Ndungu v Republic* [2021] eKLR and *James Kariuki Wagana v Republic* [2018] eKLR, counsel assailed the High Court for failing to exercise its discretion in sentencing and went ahead to uphold the death sentence meted out by the trial court without considering that the level of violence unleashed on the complainant was not sufficiently serious to warrant such sentence.

11. In response, Mr. Okello from the Office of Director of Public Prosecutions submitted that the prosecution had proved its case beyond reasonable doubt and that the grounds of appeal were irrelevant and misplaced as their import was to call this Court to perform the duties of the High Court as the first appellate court. That the High Court analyzed and re-evaluated the evidence tendered in the trial court and made its own independent findings in upholding both the conviction and sentence of the trial court. It therefore follows that the appellant is calling upon this Court to re- evaluate the evidence on how he was arrested, identified and investigated, issues that the trial court adjudicated upon and again re-evaluated by the High Court. That in the grounds of appeal that the appellant had filed, there was no mention of an alibi. In any case, even if we were to consider that defence, it was submitted that from the record, it was alleged that the appellant was home for supper with his wife at 9.30pm. However, the offence took place between 7.00pm and 8.00pm. The appellant could have committed the offence before proceeding home.

12. On the issue of hearsay evidence, it was submitted that most of the witnesses who testified were all close relatives of the appellant, the proximity of where they lived and where the offence took place was hardly 200metres and it is clearly indicated that although the appellant was never found at the scene, he was heard by these witnesses. They were able to hear the complainant shout the name of the appellant as the one who was attacking him. On the issue of identification, counsel submitted that the identification was positive. During the day, the appellant was wearing a white t-shirt and it is the same white t-shirt he was found wearing when he attacked the complainant. Further and just before the attack on the complainant, he saw a dog that was notorious and was owned by the appellant. That during the confrontation, it was present and was eventually killed by the appellant as a way of suppressing or hiding evidence.

13. The first issue which we discern for our determination is whether the High Court erred in law by upholding the appellant's conviction and sentence on the strength of hearsay evidence. In this regard, the appellant has contended that the evidence tendered at trial, particularly with regard to his identification failed to meet the required threshold. The evidence adduced by the complainant was that the appellant was a person well known to him, being in fact a relative and living within the same locality

and he was at the time of the robbery able to see the appellant by virtue of the moonlight which lit the scene. They were in close proximity and being relatives we do not see how the complainant would have mistaken him for another person. This possibility is therefore remote. The complainant had even noticed the appellant who was still wearing the same white t-shirt he had seen with him during the day at the time of the attack and before the attack, he had seen the dog belonging to the appellant. Besides, he was even able to give the appellant's name in his first report to the police by name.

14. From the foregoing, it is evident that this was a case of recognition and not just mere identification. In the case of *Wanjohi & 2 Others v Republic* [1989] KLR 415, this Court held that:

> " Recognition is stronger than identification but an honest recognition may yet be mistaken."

> In addition, in the words of Lord Widgery, CJ. in R v Turnbull and Others [1976] 3 All ER. 549;

> " Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made...
>
> All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger."

> We entertain no such doubts as to the recognition of the appellant.

15. There was no hearsay evidence that was relied on by the trial court and confirmed by the High Court. The evidence of PW2, PW3 and PW4 was merely corroborative of the evidence of the complainant. These witnesses did not say that the complainant told them that he had been attacked by the appellant. Rather, their evidence was that they heard from their houses the complainant scream that the appellant was killing him before rushing to the scene. This cannot by any stroke of imagination be considered hearsay. In any case, the evidence of PW1 was sufficient to convict the appellant given that the trial court warned itself of the dangers of relying on the evidence of a single identifying witness by making reference to the case of Suleiman Kamau Nyambura v Republic [2015] eKLR. Nonetheless, it went on to find the evidence of the complainant credible and believable. Further, both courts below reached concurrent findings on the issue and, we therefore find no plausible reason to interfere with those findings.

16. The second issue regards failure by the prosecution to call some alleged crucial witnesses, specifically the investigating officer and appellant's wife. As per the appellant, their evidence would have shed more light on the case and failure to call them meant that the case was not properly investigated. The courts have over the years held that whereas it is important to call the investigation officer or arresting officers, failure to call them is not however fatal to the prosecution case but it depends on the circumstances of each case. In *Kiriungi v Republic* [2009] KLR 638, the court said:

> " ...the effect of failure to call police officers involved in a criminal trial, including the investigating officer, is not fatal to the prosecution unless the circumstances of each particular case so demonstrate. We have examined the circumstances of this case and we are satisfied that the evidence of the investigating officer and the arresting officer would not have been prejudicial to the prosecution case as it was established beyond doubt that the appellant was involved in the crime with which he was charged."

See also Haward Shikanga alias Kadogo & Another v Republic Criminal Appeal No 102 of 2007 and Reuben Gitonga Nderitu v Republic Criminal Appeal No 349 of 2007.

17. Although the investigating officer and the wife of the appellant were not called to testify and upon considering the totality of the evidence adduced in this case, we find the testimonies of the prosecution witnesses, in particular, PW1 and as corroborated by PW2, PW3 and PW4, was sufficient and proved that the appellant committed the offence. There were no gaps in the prosecution case that the evidence of the investigating officer would have tied up. As regards the appellant's wife, this was ideally a witness for the appellant. Nobody stopped him from calling her to back up his alibi defence. In our considered view therefore, no adverse inference can be drawn from the prosecution's failure to call these witness.

18. As to the issue of whether the appellant's defence of alibi was considered, we have perused the record and all through, the defence of the appellant was that he was at home by 9.00pm after reveling at a nearby bar, and afterwards, slept only to be woken up by youths in the middle of the night who arrested him. This defence was however advanced by the appellant when called to his defence and the two courts concurrently found that the same was an afterthought. In the case of *Karanja v Republic*, [1983] KLR 501 this Court held that:

> " The word 'alibi' is a Latin verb meaning 'elsewhere' or at another place. Therefore, where an accused person alleged he was at a place other than where the offence was committed at the time when the offence was committed and hence cannot be guilty, then it can be said the accused has set up an alibi. The appellant's story in this case did not amount to an alibi as it was mentioned in passing when giving evidence and furthermore, it was not raised at the earliest convenience, i.e. when he was initially charged".

19. The respondent objected to the appellant's reliance on the defence during the hearing of the appeal and stated that the same had not been raised in the grounds of the appeal. We do not buy that reasoning as among the grounds, there is a ground of the two courts not considering the defence of alibi. However, we agree with the respondent's reasoning that even if alibi was to be taken into consideration, the appellant testified that he was away from home until 9.00pm when he arrived and was given food. The offence in question happened between 7.30pm and 8:00pm. Therefore, leaving a doubt in the defence as the offence may have been committed within the time stated. Lastly, we note that it was raised in passing by the appellant in his defence, thereby giving the prosecution no time at all to check it out.

20. The sentence meted out on the appellant was legal. Indeed, it was the only sentence available and that is still the situation to date. We therefore, have no jurisdiction to interfere with the same. In the ultimate, the appeal wholly fails and is dismissed.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JUNE, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR