Gitau v Republic (Criminal Appeal 42 of 2020)
[2023] KECA 951 (KLR) (28 July 2023) (Judgment)

Neutral citation: [2023] KECA 951 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 42 OF 2020

AK MURGOR, S OLE KANTAI & PM GACHOKA, JJA

JULY 28, 2023

BETWEEN

JAMES NJUGUNA GITAU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Lesiit, J.) dated 15th May, 2015 in HC. CR. A. No. 329 of 2012)

JUDGMENT

1. The appellant, James Njuguna Gitau was charged before Kiambu Law Courts, Nairobi, with three counts. The first count was the offence of robbery with violence, contrary to section 296 (2) of the *Penal Code*. The particulars were that, on July 18, 2011 at [Particulars Withheld] village within Kiambu County, jointly with another not before the court and while armed with dangerous weapons namely panga and a piece of wood robbed AJV cash Kshs 100/- and immediately before or after the time of such robbery threatened to use actual violence against the said AJV.

2. The second count was robbery with violence, contrary to section 296 (2) of the *Penal Code*. The particulars were that, on July 18, 2011 at [Particulars Withheld] village within Kiambu County, the appellant jointly with another not before the court and while armed with dangerous weapons namely panga and a piece of wood robbed ZAC cash Kshs 36/- and immediately before or after the time of such robbery threatened to use actual violence against the said ZAC.

3. The third count was the offence of rape, contrary to section 3 (1) as read with section 3 (3) of the *Sexual Offences Act*, No 3 of 2006. The particulars were that, on July 18, 2011 at [Particulars Withheld] village within Kiambu County, the appellant unlawfully and intentionally committed an act which caused penetration with his genital organs (penis) into the genital organs (vagina) of AJV.

4. We find it imperative in summary form, to restate the prosecution case before the trial court as well as the appellant's defense.

   According to the complainant (PW1), they were from attending a birthday party for her sister's child on the night of July 17, 2011 to July 18, 2011 at about 2.00 am. She was walking ahead of the crowd with PW2 when two men appeared from the bushes and started speaking to them in a commanding tone, calling each other sergeant and corporal. The two men asked them why they were drunk and ordered them to sit down and they took their phones and money. They were then on ordered to stand and led to a bush. The appellant and his accomplice asked them whether they had ever been raped. She tried to resist, but the appellant put a panga on her, removed her clothes and raped her while the other man raped Z. The appellant and the other man then asked them whether they had electronics in the house and in a bid to trap the appellant, she responded in the affirmative. She took them to her sister's house and when the house was opened, she screamed and her sister and her husband woke up, meanwhile Z snatched the panga from the appellant and a torch from the other man and threw them away. The other man managed to run away, but the appellant was nabbed before he could escape and was taken to Karuri police station.

5. PW2, ZAC, was a niece to PW1. She stated that they were from a cousin's birthday and were heading home when she saw somebody emerge from the bush and later, a second one emerged from the bush. The two men asked them why they were drunk at night and talked to them in commanding voices like police officers, calling each other corporal and sergeant. She stated that one of them had a panga and the other had a rungu protruding from the pocket; that they pleaded with them not to rape them but they did not heed; that they were taken to the bush and raped; thereafter they proposed that they go to their house for the electronics ; that they went to PW1's niece's house and were trapped therein; that the appellant entered the house while the other man hesitated and remained outside; that PW1 hit the appellant with the torch while her uncle snatched the panga from him. He was beaten by members of the public and later taken to Karuri police station.

6. PW3 MW, who is a niece to PW1 narrated that on July 18, 2011 at about 3.00 am she heard somebody call her mother twice. She responded by opening the door and PW1, PW2 and the appellant entered the house. She stated that she was

   tense and as she turned to go back and sleep, they were ordered to sit down (not clear). PW1 held the appellant while PW2 snatched the panga from him. They then raised an alarm and members of the public came and when she went to open the door for them, she switched on the lights and managed to see the appellant very well.

7. PW 4, JW, testified that on July 18, 2011 at about 3.00 am he heard screams inside his house. On inquiry, he was told that somebody had come to steal from his house. The person was held and a panga had been snatched from him. Shortly after, neighbors came in large numbers and took him from the house to the road where he was beaten by the mob. Thereafter, he was taken to Karuri police station. He added that the lights were on and he was able to identify the appellant at the dock.

8. PW5 No 67241 Ag. IP Patrick Macharia stated that on July 18, 2011 at about 4.00 am he received a rape report by PW1 and PW2.They gave the narrative of what had transpired on that fateful night and that one of the men had escaped, while the appellant was brought to the station with a panga and a torch. He added that PW1 and PW2 were referred to Karuri Health Centre for first aid and thereafter referred to Nairobi Women Hospital for treatment.

9. PW6 Dr. Dennis Wambua Mwange, a clinical officer, stated that he examined PW2 on July 19, 2011. She reported that she had been physically and sexually assaulted at about 2.00 am on the same day.

According to him, PW2 was calm, had a small cut on her index finger, had generalized body aches, had normal external genitalia, was on her menses but had no lacerations or bruises on her vaginal wall or cervix. He gave a diagnosis of sexual assault and physical assault, gave PW2 PEP Hepatitis vaccine and urged her to undergo therapy.

10. When put to his defence, the appellant denied committing the offence and testified that on July 17, 2011 he went to the market at 10.00 am and thereafter returned home. He stated that PW1 was his lover and that morning he had called her at noon and they made love. They later left the house at 10.00 pm for a birthday party she had been invited to. They stayed there up to

11. 00 pm when alcoholic drinks got finished and later went to Mugumoini bar, where they stayed up to 1.00 am. They then decided to go to her house, which was nearer, where they found her sister and her child. At about 2.30 am he heard a knock on the door and PW1 told her that it sounded like her husband's sister. PW1 opened the door, the man entered, picked a bottle which had alcohol and hit him with it. Neighbors then heard the commotion and came to see what was happening. According to him, they all colluded to have him charged of rape and the villagers beat him and took him to the police where he was charged with the offences.

11. The trial magistrate found the ingredients of the offence to have been proved beyond reasonable doubt and convicted the appellant in count I and III. However, the trial magistrate found that count II had not been proved and he acquitted the appellant on that count. Consequently, the appellant was sentenced to life imprisonment on count 1 and 10 years on count III, but the latter was held in abeyance.

12. Aggrieved by the conviction and sentence, the appellant lodged a first appeal in the High Court, and in a judgment dated May 15, 2015, the High Court upheld both the conviction and sentence, precipitating this second appeal.

13. The appellant lodged a notice of appeal on July 6, 2015 and filed an undated memorandum of appeal containing 5 grounds and a supplementary memorandum of appeal dated February 28, 2021. We take the liberty to summarize the grounds as follows: that the first appellate court erred in law by failing to consider that he lacked legal representation hence suffered substantial injustice; in failing to consider his mitigation; in failing to assess the ingredients of robbery with violence; in issuing a harsh sentence; and failing to accord the appellant a fair hearing considering the rule against self-incrimination.

14. When the matter was called out for hearing, Prof. Nandwa appeared for the appellant and relied on his written submissions, which he highlighted briefly. On his part, the prosecution through Mr. Muriithi, relied on his written submissions dated March 1, 2023. We have considered the submissions.

15. This being a second appeal, the Court is restricted to addressing itself to matters of law only. The Court will also not normally interfere with concurrent findings of fact by the two courts below unless such findings are not based on evidence or they are based on a misapprehension of the evidence, or that the courts below acted on wrong principles in making the findings. Our mandate on a second appeal is confined to a consideration of matters of law by reason of Section 361 of the *Criminal Procedure Code*. This Court in *George Kamau Gatogo v Republic*, Civil Appeal No 21 of 2011 cited with approval the holding in *Kaingo v R* [1982] KLR 213 where the Court held that:

> "A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was evidence on which the trial court could find as it did (Reuben Karari C/o Karanja v R [1956] 17 EACA 146)."

16. We have revisited the record on our own and considered it in the light of the rival arguments set out in the submissions by the appellant and the response by the state. In our opinion, four issues arise for our consideration:

i. Whether the offences were proved to the required standard;

ii. Whether the trial court relied on circumstantial evidence;

iii. Whether the lack of legal representation caused injustice.

iv. Whether the sentence should be reviewed.

1. As to whether the offence of robbery with violence was proved to the required standard, the case of *Johana Ndungu v Republic* [1996] eKLR sets out the requirements thus;

> " Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in three sets of circumstances prescribed in section 296 (2) which we give below and any one of which if proved will constitute the offence under the sub- section:
>
> 1. If the offender is armed with any dangerous or offensive weapon or instrument, or
>
> 2. If he is in company with one or more other person or persons, or
>
> 3. If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person."

18. The Court is not required to look for the presence of all three ingredients, as proof of one of the ingredients would suffice to secure a conviction. In the case of *Dima Denge Dima & Others v Republic* [2013] eKLR 7, it was stated that:

> " ...The elements of the offence under Section 296
>
> (2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence."

19. The trial magistrate found the offence of robbery with violence to have been proved and held:

> " Turning to count I, the prosecution herein is relying on both the element of being armed and being in a gang.PW1 said the two men who attacked them were armed with the pangas. PW2 also said she was able to observe that a wooden object was protruding from the pocket of one of them. After accosting them they demanded money and phones. PW1 did not have a phone but had Kshs 100 which she said was taken by the appellant person. According to the evidence she parted with the money when she realized that they were being taken to the bush. The prosecution has therefore established elements of robbery with violence beyond reasonable doubt and this count must succeed."

20. The first appellate court in this regard held as follows:

> " Our re-evaluation of the evidence adduced by prosecution leads us to no other conclusion that indeed the prosecution established to the required standard of proof beyond any reasonable doubt that indeed the Appellant and his accomplice robbed the 1st complainant. The prosecution established that the Appellant, while in company of another, and while armed with a panga (which is a dangerous and offensive weapon within the meaning of Section 295 of the *Penal Code)*, threatened the 1st complainant with actual physical harm before robbing her of Kshs100/-. The ingredients to establish the charge of robbery with violence contrary to Section 296(2) of the *Penal Code* was proved".
>
> We are satisfied that the prosecution proved beyond reasonable doubt the elements of the offence, through the testimony of the witnesses that gave evidence.

21. We are equally satisfied that the conviction on the offence of rape was safe and based on cogent and credible evidence.

22. On circumstantial evidence, the appellant was of the view that the trial court and the first appellate court relied on circumstantial evidence. However, it is worth noting that the appellant's culpability was established from direct evidence and not circumstantial evidence. PW1 narrated the details of what transpired on the morning of 17th July, 2011 to 18th July, 2011. PW2 was present when the incident of rape and robbery with violence occurred. Both PW1 and PW2 saw the appellant, in the presence of another, wielding a rungu and a panga, taking money from PW1 and raping her. PW3 testified that she woke up and found the appellant in her house. PW4 woke up and found the appellant in his sitting room and shortly after, neighbors came and took him out on the road, where he was beaten. We are at a loss on what the appellant means to be circumstantial evidence as this is a case where the prosecution adduced direct evidence. In the premises, we find that this ground has no merit.

23. The appellant further submits that he was not accorded a fair trial as guaranteed under Article 50 (2) (c) (g) (h) of the *Constitution*. He submits that the court ought to have informed him of his right to legal representation. Article 50 (2) (c)

(g) (h) provides:

> " Every appellant person has the right to fair trial which includes the right:-
>
> (c) to have adequate time and facilities to prepare a defence.
>
> g. to choose, and be represented by an advocate and to be informed of this right promptly.
>
> h. to have an advocate assigned to the appellant person by the State and at state expense if substantial injustice would otherwise result and to be informed of this right promptly."

24. This Court in *David Njoroge Macharia v Republic* [2011] eKLR, held:

> " Under the new *Constitution*, state funded legal representation is a right in certain instances. Article 50 (1) provides that an appellant shall have an advocate assigned to him by the State and at state expense, if substantial injustice would otherwise result. Substantial injustice is not defined under the *Constitution*, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2 (6). Therefore, provisions of the

ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory.

We are of the considered view that in addition to situations where "substantial injustice would otherwise result", persons appellant of capital offences where the penalty is loss of life have the right to legal representation at state expense. We would not go so far as to suggest that every appellant person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re-trial where no such legal representation was provided. The reasons are that, firstly, the provisions of the new Constitution will not apply retroactively, and secondly every case must be decided on its own merit to determine if there was serious prejudice occasioned by reason of such omission."

25. From the record, it is evident that the appellant was given enough time and facility to prepare his defence. He contends that he was not informed of his right to legal representation. The provision states that appellant has the right to choose and to be represented by an advocate, thus the first step is for an appellant person to choose to be represented where upon the Court would promptly inform him of the right to legal representation. The appellant did not at any time elect to be represented by an advocate. The appellant was not in any way hindered or prevented from enjoying the right to be represented by an advocate. The right was not denied and as such his right to legal representation was not violated.

26. Finally, on the question of the sentence, the trial court imposed the mandatory death sentence having found the appellant guilty of the offence of robbery with violence. In this appeal, the appellant has urged us to review the sentence of death owing to the Supreme Court's decision in the *Francis Muruatetu v R* [2017] eKLR wherein the Court found the mandatory nature of death sentence as the minimum sentence to be unconstitutional.

27. We note that in *Muruatetu* case (*supra*), the Court clarified that, the decision applies to murder cases under section 203 as read with section 204 of the *Penal Code* only. It is our view that the recent trend in sentencing, where the courts have discretion in sentencing, is a step in the right direction. However, in this case we find that the sentence was commensurate to the charges against the appellant and we will therefore restrain ourselves and not interfere with the discretion of the trial judge.

28. Upon considering the record of appeal and the evidence that was adduced, the grounds of appeal and the submissions, it is clear that the two courts below arrived at the correct conclusion as to the culpability of the appellant and we are satisfied that this is a safe conviction.

29. Accordingly, it is our finding and we so hold that this appeal has no merit and it is hereby dismissed.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY, 2023.

A. K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR