Okoth v Republic (Criminal Appeal 66 of 2017)
[2023] KECA 1009 (KLR) (28 July 2023) (Judgment)

Neutral citation: [2023] KECA 1009 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 66 OF 2017

MSA MAKHANDIA, S OLE KANTAI & PM GACHOKA, JJA

JULY 28, 2023

BETWEEN

BENSON OKOTH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Chepkwony & Ongeri, JJ) dated 29th April, 2020 in HC. CR. A. No. 159 of 2013)

JUDGMENT

1. Benson Okoth, the appellant herein comes before us by way of a second appeal, the first appeal having been dismissed by the High Court (Chepkwony & Ongeri, JJ), on 29th July 2015. The appellant was originally charged before Kikuyu Law Courts, Nairobi, with the offence of robbery with violence contrary to section 296(2) of the *Penal Code*. The particulars of the first count were that; on 21st November 2012 at Gikambura area in Kiambu County within Central region, jointly with another not before the court and while armed with dangerous weapons namely panga, robbed Joel Khamadi Njuguna of a motor vehicle registration number KBM 647Y make Toyota Fielder valued at Kshs 700,000/=, one Television set make SONY valued at Kshs 28,000/=, four Mobile phones make two Samsung and a Techno all valued Kshs 33,500/= and cash 3,000/= all valued at Kshs 764,500/=(Seven hundred and sixty four thousands, five hundred only) the property of Joel Khamadi Njuguna and immediately before and after the time of such robbery used actual violence to the said Joel Khamadi Njuguna.

2. In order to contextualize the appeal, we shall give a summary of the evidence that was adduced in the trial court. According to the complainant, Joel Njuguna (PW1) on 21st November 2012, at about 9.00 pm he was driving his motor vehicle, Toyota Fielder Registration number KBM 647Y. He got to his gate and hooted. The gate was opened by Regina Makena (PW3) the house help. As he entered his

compound, he heard Makena scream. 3 people entered the gate and ran towards the driver's side of his car.

3. One of the men asked him to start the engine, which he did.Another one of them pulled him out of the car and asked for his phone and money. He gave them his Samsung phone and Ksh. 200/-. One of them drove the car out of the compound and left the other 2 behind. The remaining 2 men asked PW1 to lie down and proceeded to frisk him. He then saw 2 other men coming out of his house with one carrying a Sony Television. There were screams all over and the men ran away. He went to the house and found no one hurt. He then ran out of the house and let loose his dog and proceeded to the gate where he found members of the public beating the robber, who had frisked him. They also heard screams not too far off. Some people went to see what was going on and found the public about to lynch one of the robbers, but PW1 stopped them. Police officers came and took him away.

4. PW2, Lydia Wanjiku is the wife of PW1. She stated that on 21st November 2012 at about 9.00 pm, she was at home with her children and their house help when they heard a car hoot at their gate. PW1 had called her to inform her to open the gate. She sent the house help but soon after, heard screams at the gate. They also started screaming and ran to the bedroom upstairs. 5 minutes later, the house help ran into the bedroom followed by 2 people who instructed them to lie down, one of whom had a panga. They demanded for money and phones and she gave them her Ideos phone. She did not have money. The robbers also went to another bedroom and took the house help's phone. They also made away with the Sony Television and her son's phone. She later went outside and found that a crowd had gathered, and 2 people were being beaten by the neighbours. The 2 people being lynched were the same ones she had seen in her house, as the house was well-lit. Police officers later came and picked them up.

5. PW3, Regina Makena, the house help narrated that on 21st November 2012, PW1 arrived home, she went to open the gate for him. On opening the gate, about 5 people entered the compound. She ran into the house screaming and they followed her, two of them entered the house and took the television and their phones. She saw their faces clearly. They fled after stealing.

6. PW4, James Mburu, the Chief Karai location, stated that on 22nd November 2012, he received a call from someone who told him, he had seen a hidden television. He went to the place and, retrieved the television. He took it to Kikuyu police station.

7. PW5, PC Julius Kaimenyi stated that on 21st November 2012, at about 1 am while on duty, he received a call from Gikambura police post and was informed that they had arrested 2 robbery suspects. They proceeded there and took the suspects into their custody. The suspects had been badly beaten. One of them later died.

8. PW6, IP Egauza Binyarera, the investigating officer, stated that on 22nd November 2012, he reported to work and found PW1 who had reported that he had been robbed. He recorded PW1's statement, together with PW2's and PW3. He stated that the stolen motor vehicle was recovered and he also found a torch and the slashers which had been used in the theft.

9. When put on his defence, the appellant, who until then was representing himself retained the services of an advocate, Mr. Momanyi. The advocate informed the court that the appellant had a mental disorder and had been undergoing treatment at his rural home; that he had suddenly disappeared from his home in November 2012; and that his relatives later traced him to Kamiti prison. Counsel applied to have the appellant referred to a hospital for treatment. Counsel noted that the appellant had not been represented by an advocate during the proceeding. He produced two letters, one from a chief and another from a hospital to buttress his argument that the appellant was mentally unstable. The letter from the chief east Kadiang'a location stated that the appellant had a mental disorder and was in

the habit of disappearing from home causing his relatives anguish as they tried to trace him. The letter from Okitta Nursing home only stated that the appellant had been treated at that facility.

10. The trial Magistrate, in a judgment dated 31st July 2018, found the charges were proved beyond reasonable doubt, convicted the appellant, and sentenced him to death. Aggrieved by the conviction and sentence, the appellant lodged a first appeal in the High Court, which was heard. In the judgment dated 29th July 2015, the Judges upheld both the conviction and sentence, thus precipitating this second appeal.

11. The undated memorandum of appeal contains the following grounds: that the learned Judges erred in law in confirming the conviction yet the testimonies tendered to establish the mode of arrest were riddled with doubts; in failing to take into account that the evidence contained material contradictions. That the two courts misapprehended the facts and applied wrong legal principles; by failing to evaluate the evidence of the subordinate court; by shifting the burden of proof to the appellant; in failing to consider his defence and submissions; and by failing to find that the prosecution did not prove its case beyond reasonable doubt.

12. The appellant also filed a supplementary memorandum of appeal with grounds that; his right to a fair trial was infringed by the trial court by failing to inquire about his mental capacity; that failure to conduct an identification parade caused a miscarriage of justice; that the charge sheet was fatally defective and bad in law for duplicity and the sentence imposed was harsh and excessive.

13. When the appeal was called out for hearing on the online platform, Ms Ndegwa appeared for the appellant and Ms Vitsengwa appeared for the State.

14. Ms Ndegwa relied on her written submissions which she highlighted briefly in 4 thematic areas. The first ground was the appellant's mental capacity. It was submitted that although the issue of mental capacity was raised at the defence stage, the trial court treated the issue casually and failed to follow the procedure set out in section 162 of the Criminal Procedure Code as no inquiry was conducted. It was further submitted that the learned Judges erred by holding that the issue of mental capacity was never raised in the trial court. The appellant cited the case of *Leonard Mwangemi Munyasia Vs Republic* [2015] eKLR and *Wambua Misili Vs Republic* [2020] eKLR on the procedure to be followed when the defence of mental instability is raised.

15. The second ground was on the identification of the appellant. It was submitted that the learned judges erred in holding that the appellant was arrested at the gate of the complainant's house contrary to the evidence that he was arrested at a neighbour's house and that none of the neighbours testified. It was submitted that the evidence on the arrest and identification of the appellant was contradictory and thus the ingredients of the offence were not proved beyond reasonable doubt. In support of this argument, the appellant cited the cases of *James Tinega Omwenga vs. Republic* [2014] eKLR and *Njoki vs. Republic*[2021] KECA 127.

16. The third ground was that the charge sheet was defective as the appellant was charged under section 295 as read with section 296(2) of the *Criminal Procedure Code* which has different ingredients for an offence. It was argued that it was impossible for the appellant to know which offence he was facing. The cases of *Joseph Njuguna Mwaura vs. Republic* [2013] eKLR and *Joseph Onyango Owour vs. Republic* [2010] eKLR were cited in support.

17. The final ground was that the death penalty imposed was harsh and excessive as the appellant was a young person and a first offender. The cases of *Francis Karioko Muruatetu vs. Republic* [2017] eKLR and *Isoe vs. Republic* Criminal Appeal No. 104 of 2019 were cited in support of this argument.

18. Ms Vitsengwa highlighted her written submissions dated 5th May 2021 and stated that the findings of fact by the trial court sufficiently supported the conviction of the appellant. On the identification of the appellant by one witness, she submits that from the account given by the witnesses, the appellant was arrested in close proximity to the scene of the offence, together with another they were accosted by members of the public outside PW1's compound after an alarm was raised; that the chain of events under the circumstances are of such a nature that, they were not broken and the only logical conclusion is that the appellant was one of those who had robbed the PW1 and his family.

19. She further submits that the first appellate court properly addressed itself on its duty to reevaluate the evidence and draw its own conclusions; upon doing so the court agreed with the findings of fact of the trial court; and that there was no miscarriage of justice in the manner in which the first appellate court discharged its mandate. On whether the sentence is excessive, she submits that the Supreme Court decision of *Francis Karioko Muruatetu & Another vs. Republic* (*supra*) is not a one fit solution to all appeals emanating from legislative sanctions in capital offences. On whether the ingredients of the offence were proved, she submits that the ingredients of the offence of robbery with violence were established and proved beyond reasonable doubt; that proof of any of the ingredients of the offence suffices to sustain a conviction as the appellant was in the company of others as per the evidence tendered by the prosecution witnesses PW1, PW2, and PW3.

20. Having duly considered the record, the appellant's grounds of appeal, and the rival submissions, we start by reminding ourselves that this being a second appeal this Court is restricted to addressing itself to matters of law only as provided in Section 361 of the *Criminal Procedure Code*. This Court will 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 the courts below acted on wrong principles in making the findings. See *Karingo vs. Republic* [1982] KLR 213.

21. In our view, the following issues arise for our consideration:

    i. Whether the offence was proved to the required standard.

    ii. Whether the 1st appellate court re-evaluated and re- analyzed the evidence as statutorily required.

    iii. Whether the charge sheet was defective.

    iv. Whether the trial court ignored or failed to consider the defence of mental incapacity; and

    v. Whether the sentence was excessive.

22. As to whether the offence of robbery with violence was proved to the required standard, the case of *Johana Ndungu vs Republic* [1996] eKLR sets out the ingredients of the offence thus:

> "(i) 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."

23. 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. (See *Dima Denge Dima & Others vs Republic* [2013] eKLR. We note that the trial magistrate found the offence of robbery with violence proved and held:

> " There is overwhelming evidence that the accused was a part of that group...
>
> In the instant case, the offender, the accused herein was in a group of men some of whom were armed...
>
> In the instant case, I am convinced beyond doubt that those circumstances have been met and am also convinced beyond reasonable doubt that the accused was one of the attackers who robbed the complainant and his family that night."

24. On the question of identification, the trial Magistrate held as follows:

> " The issue to be determined is whether the accused committed robbery with violence as alleged. There is direct evidence from pw2 and pw3 who positively identified the accused person as one of the men who were in their house that day and who robbed them. They stated that the lights were on and that they clearly saw the accused's face. PW2 later saw him after he had been accosted by members of the public soon after the robbery. They later both identified the accused in court as the man who entered their house in the company of others and robbed them. Though pw1 could not recognize his attackers, he confirmed that he was robbed of his car that day and that some suspects were accosted soon after the robbery, the accused being one of them.
>
> Two witnesses have positively identified the accused person as the man who with others not before court attacked them that night and robbed them. The witnesses told the court that they were in a group of about five men and armed with pangas. Indeed, the evidence of the investigation officer suggested that a slasher was among the items recovered from the car so soon after the robbery. From the evidence, it is clear that the men were in a group that was armed in a manner likely to suggest they would use violence and they robbed their victims while so armed and so grouped."

25. On the first element of whether the appellant and his accomplices were armed, the evidence of PW2 which was accepted by the two courts below was that when the robbers stormed the house, one of them was holding a sword. It does not matter whether it was the appellant or not who was brandishing the sword. The fact is that he was in the company of others and at least one of them was armed with a dangerous weapon, to wit a sword.

26. The appellant further submits that he was not positively identified at the scene of the crime. His identification in court was therefore dock identification which is of little probative value as the assailants were total strangers and the incident occurred at night and the arresting officers were not called as witnesses to testify.

27. The appellant's further argument is that the arresting officer was not called to testify, among other factors which we shall address shortly. There is no legal provision that the prosecution should call a

particular number of witnesses to prove its case. This is reiterated in section 143 of the *Evidence Act* which provides that:

> "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any act."

28. In the case of *Alex Lichua Lichodo vs. Republic* [2015] eKLR, this Court held:

> "13. On the subject of whether the prosecutor failed to call crucial witnesses, we do concur with the trial court and the 1st appellate court that the evidence of the complainant was sufficient and convincing and there was no need for the prosecution to call any more witnesses on the said issue."

29. Further, in *Julius Kalewa Mutunga vs Republic* [2006] eKLR this Court held:

> "...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

30. There was no need, therefore, to call the arresting officer. This was purely a prosecutorial decision. What matters is that the prosecution calls a number of witnesses that are sufficient to establish their case and they did so in the circumstances of this case, and we so find.

31. It is worth noting that it is not uncommon for the Court to rely on the evidence of a witness in deciphering the identity of an accused person. The appellant's argument is that an identification parade was not carried out which occasioned a miscarriage of justice. It is old hat that identification parades are not conducted in respect of people who are recognized but in respect of strangers, who witnesses claim that given a chance, they can be able to identify the perpetrator. It all boils down to the strength of the evidence of the identifying witness. In the case of *Roria vs. R* (1967) EA 584 it was stated:

> "A conviction resting entirely on identity invariably causes a degree of uneasiness... That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld, it is the duty of this court to satisfy itself in all circumstances, that it is safe to act on such identification."

32. In this appeal, the fact that PW2 and PW3 were the only witnesses who identified the appellant, did not make the evidence any less valuable to uphold a conviction. What is important is whether the evidence was tested in terms of the prevailing circumstances and whether PW2 and PW3 had the opportunity to see and later identify the appellant. We note that PW2 testified that the 2 people who were being beaten by neighbours outside, were the same ones who had robbed them in the house. She added that the house was well lit and she saw them properly. It is thus discernible that, she must have been able to have a clear look at the appellant, as the robbery took some time and it occurred in the house which was well lit. See *Nzaro Vs Republic* (1991)2 KAR 212.

33. As a result, we are satisfied just like the two courts below that the appellant was positively identified by PW2 and PW3 and there was no danger in the trial court relying on the evidence of the witnesses because the first time PW2 saw the appellant was in the house, which was well lit and later, while being beaten by the neighbours outside the gate.

34. In view of the foregoing, we are satisfied that the ingredients of the offence were proved to the required standard.

35. The second issue is about the re-evaluation and re-analysis of the evidence tendered in the trial court. It is alleged that the first appellate court did not properly analyze and scrutinize the lower court's evidence and findings of fact and law thus erred as a result. We note that the learned Judges analyzed and evaluated the evidence and found that the offence of robbery with violence and the identification of the appellant had been proved beyond reasonable doubt. Further, the learned Judges interrogated the prevailing circumstances at the time the incident occurred and found that the circumstances prevailing at the time of the robbery negated any possibility of mistaken identity of the appellant by PW2 and PW3. The Judges held:

> " We have also evaluated the evidence as this is the duty of the first appellate court. We are guided by the celebrated case of *Okeno vs. Republic* 1972 EA 32 where the Court of Appeal set out the duties of the first appellate court."

36. In the said case of *Okeno vs. Republic* [1972] EA 32, this Court outlined the duties of a first appellate court as follows:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

37. The High Court as the first appellate court reevaluated and reanalyzed the evidence adduced in the trial court. Therefore, we are satisfied that the first appellate court carried out its duty to reanalyze and reevaluate the evidence properly.

38. The third issue is whether the charge sheet was defective. We note that the issue of the defective charge sheet was comprehensively dealt with by the first appellate court. The appellants' argument before the High Court and before us is that he was charged with robbery with violence contrary to section 295 as read with section 296 (2) of the *Penal Code*, thus causing prejudice to the appellant. On that issue we note that the first appellate court held as follows:

> " 10. Finally, on the issue of defective charge sheet, we rely on the case of *Joseph Nguguna Mwaura & 2 Others vs Republic* (2013) eKLR. In that case the court states as follows:
>
> 1. It would not be correct to frame a charge for the offence of robbery with violence under section 295 and 296(2) as this would amount to a duplex charge.
>
> 2. However, we find that the defect is curable in that the same did not prejudice the Appellant or cause miscarriage of justice."

39. We are satisfied by the concurrent findings of the first appellate court on the culpability of the appellant and on the issue of the defective charge sheet. Whereas the two sections should not have been cited in the same charge sheet, the offence was clearly set out and the appellant fully participated in the proceedings and he has not demonstrated what prejudice he suffered. This is not the kind of defect that goes to the root of the charge that would be said to have caused a miscarriage of justice or violated the appellant's right to a fair trial.

40. The third ground for consideration is the defence of mental incapacity. The appellant argues that he raised the defence of mental incapacity which was not considered by the trial court and also not determined properly by the trial court. The defence of insanity is a statutory defence under the Penal Code. Section 11 of the *Penal Cod*e states as follows:

> " 11. Every person is presumed to be of sound mind and to have been of sound mind at any time he comes into question, until the contrary is proved."

41. It is thus clear from the above provisions of the *Penal Code* that every accused person is presumed to be sane at all times, whether before, during or after trial. However, that presumption is rebuttable, where there is evidence to prove that the person is insane. If such proof is availed, then the person is said to be of unsound mind, and in that event, section 12 of the *Penal Code* would apply to him or her. Section 12 of the *Penal Code* provides as follows:

> " A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission."

42. It is important we restate how the defence of mental incapacity was raised in the trial court. From the record the appellant actively participated in the trial and cross-examined the witnesses. He did not testify as to his alleged mental condition nor is it indicated in the record that the trial court noted any peculiar behavior by the appellant in the course of the proceedings that would have raised suspicion that he was suffering from mental infirmity. At the close of the prosecution case, the appellant was put on his defence but he exercised his right to remain silent. At that point, an advocate, Mr. Momanyi came on record for him and informed the court that the appellant had a mental condition, that he disappeared from his home in November 2012, and that his family only got to learn that he was in prison. He produced a letter from the chief East Kadiang'a location stating that the appellant had a habit of disappearing from home causing his relatives anguish and a letter from Okitta Nursing home dated 14th July 2013 stating that the appellant had been treated at that facility.

43. It is clear that the only evidence that was produced is a letter from the chief and a clinic. A letter from a chief who is not a medical expert and another letter from a clinic that does not state that it handles mental illness is of no probative value and thus the trial court cannot be faulted for disregarding those letters. From the above chronology, the appellant's mental status remains uncertain. Indeed, the trial court held that there was nothing before the court to suggest that the appellant was of a compromised mental condition. While the first appellate court held that there was no evidence that the appellant raised this issue before the trial court and that the documents which the appellant relied on were not adequate to prove the mental condition of the appellant.

44. Section 166 (1) of the *Criminal Procedure Code* provides:

> " 166(1). Where an act or omission is charged against a person as an offence and it is given in evidence on the trial of that person for that offence that he was insane so as not be responsible for the acts or omissions at the time when the act was done or the omission made, then if it appears to the court before which the person is tried that he did the act or made the omission charged but was insane at the time he did or made it, the court shall make a special finding to the effect that the accused was guilty of the act or omission charged but was insane when he did the act or made the omission."

45. To establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know what he was doing was wrong.

46. It cannot be said that the alleged illness which on the face of it was first raised by the appellant's lawyer after the prosecution had closed its case and could not therefore accord the trial court to invoke the provisions of section 162 of the *criminal procedure code*.

47. The trial court opined that he was of a sound mind and that at no point during the proceedings did he require a mental examination. Placing reliance on the defence would be tantamount to stretching the statutory defence provided in Section 12 of the *Penal Code* to unreasonable limits to conclude,

> 24. that the appellant was not in charge of his mental faculties at the point of commission of the offence. He cannot now be allowed to hide behind the convenient smokescreen of a vague mental illness.

48. The last ground of appeal is that the death sentence is harsh and excessive. The appellant throws his weight behind the case of Isoe vs Republic, (*supra*) which dealt with a conviction of robbery with violence and the court set aside the sentence of life imprisonment and substituted it with 25 years. The appellant also relies on the Muruatetu case (*supra*).

49. In considering the appropriate sentence, we note that each case has to be weighed in the light of its own peculiar circumstances. The Supreme Court has stated in M*uruatetu & Another vs Republic* (2021) KESC 31 (KLR) that the judgment applies to murder cases only. We are dealing with an appeal arising from the offence of robbery with violence. In the light of the foregoing we are not persuaded that we should interfere with the sentence that was imposed by the trial court.

50. The upshot of the foregoing is that the appeal has no merit and is dismissed in its entirety.

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

ASIKE-MAKHANDIA

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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