Ocholla v Republic (Criminal Appeal 31 of 2017)
[2023] KECA 966 (KLR) (21 July 2023) (Judgment)

Neutral citation: [2023] KECA 966 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 31 OF 2017

PO KIAGE, M NGUGI & F TUIYOTT, JJA

JULY 21, 2023

BETWEEN

AUGUSTINO NETTO OCHOLLA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kisumu (Maina & Chemitei, JJ.) dated 1st March, 2016 in HCCRA NO. 44, 45 & 47 of 2013 (Consolidated))

JUDGMENT

1. The appellant, Augustino Netto Ocholla was charged and tried, jointly with others, by the Principal Magistrate's Court at Bondo on three counts of robbery with violence contrary to section 296(2) of the *Penal Code*. The first count was that on the December 8, 2012 at Kanyadet sub-location in Siaya County of Nyanza Province, jointly with others not before court, being armed with dangerous or offensive weapons namely pangas, rungus and metal rods, they robbed Dennis Otieno Ndeda Ksh 400, a belt and a wallet, all valued at Ksh 700, and at the time or immediately after such robbery wounded him.

2. In count two, on the same day and in the same place, it was alleged that while so armed, they robbed Edwin Onyango of Ksh 1700 and at the time or immediately after such robbery wounded him.

3. In count three, the particulars were that on the same day and place and while so armed they robbed Erick Ochieng Obiero of Ksh 430 and at the time or immediately after such robbery wounded him.

4. The appellant denied the offence prompting a trial in which the prosecution tendered evidence through 6 witnesses to prove its case.

5. It was adduced in evidence that on the material day at 8.30pm, PW1, the complainant, was on his way home when he was approached by two people who he identified by lightning. He claimed that

he particularly recognised one of the persons as the appellant because he was wearing a white top and he had seen him earlier in the day. PW1 testified that one of the persons got hold of him and took his wallet which had Ksh 200 and, as he struggled to see who the person was, the appellant cut him on the head with a panga. PW1 testified that he attempted to run away but he was bleeding profusely and so he slept beside the road until the following day when a certain lady rescued him and informed his parents. He claimed that he was taken to hospital and while there, the appellant and his co-accused visited him seeking to know whether he recognised the person who beat him. PW5, the investigating officer, testified that on December 9, 2012 two persons reported at Akala Police Station that they had been attacked and robbed. The appellant was identified as one of the assailants. PW6, a clinical officer, gave evidence on the injuries that the complainants, PW1, PW2, and PW3 suffered. PW1 sustained cut wounds on the head which had already been stitched and which he concluded had been caused by a sharp object. PW2 sustained a cut on his mouth which was diagnosed to have been effected by a blunt object, and PW3 had multiple deep cuts on his head which were caused by a sharp object.

6. When put to their defence, the appellant and his co-accused gave sworn evidence denying the offence but did not call any witness.

7. At the end of the trial, the magistrate (MM Nafula, SRM) found the appellant and his co-accused guilty and sentenced them to death.

8. Aggrieved by that decision, the appellant and his co-accused appealed to the High Court against both conviction and sentence. The learned judges (Chemitei and Maina, JJ) upheld the conviction and sentence in respect of the appellant but quashed the conviction of his co-accused and set aside their sentence.

9. That determination provoked the instant appeal in which the appellant complains that;

    a. The High Court failed to re-analyse, re-evaluate and re- assess the evidence on record so as to arrive at its own conclusion.

    b. The evidence on identification was weak and insufficient.

    c. The prosecution evidence had serious contradictions which ought to have been resolved in favour of the appellant.

    d. The judgement of the High Court was not based on sound evidence and was against the weight of the evidence on record.

    e. The sentence meted out was manifestly harsh and excessive in the circumstances of the case and the mitigating factors on record.

10. During the hearing, learned counsel Mr Onsongo appeared for the appellant while Mr Okango, the learned Senior Principal Prosecution Counsel appeared for the respondent. Counsel for the parties highlighted their written submissions.

11. Submitting on identification, Mr Onsongo contended that the source of light was not sufficient to have created enough illumination for the witnesses, and in particular for PW1, to identify the appellant. Counsel disputed PW1's assertion that he identified the appellant using lightning arguing that, lightning does not choose who to illuminate and who not to illuminate because it is not a directional light. As such, counsel pressed, if the lightning, illuminated the appellant, it must have also dazzled the eyes of the witness and so it was not possible that one could use lightning to identify somebody when both of them are affected by the same light. Mr Onsongo dismissed PW1's contention that he recognized the appellant because he had seen him earlier in the day wearing a white top. To

counsel, that characterization was not sufficient to recognize a person since many people wear white T-shirts every day hence PW1 might as well have seen anyone else.

12. Mr Onsongo faulted the prosecution for failing to call some crucial witnesses like the lady who allegedly rescued PW1 from the roadside, and PW1's parents who would have verified his claim that the appellant visited him in hospital and allegedly told them that he was the one who had assaulted and robbed him.

13. Next, Mr Onsongo asserted that the contradictions in the prosecution evidence raised doubt as to whether PW1 was actually robbed. While PW1 stated in his testimony that he had been robbed of a wallet that contained Ksh 200, PW5, the investigating officer testified that PW1 told him that he had been robbed of Ksh 400 and a belt. Further, while the P3 form indicated that PW1 was medically examined on January 18, 2013 and the injuries were a day old then, PW6, the clinical officer testified that PW1 was examined on January 23, 2013 when the injuries were the same a day old.

14. In conclusion Mr Onsongo urged this Court to quash the conviction because the prosecution did not prove its case beyond reasonable doubt. If not, he urged us to interfere with the sentence as there were no aggravating factors that attracted the maximum sentence.

15. In reply, Mr Okango opposed the appeal maintaining that the appellant was properly identified by the complainant through recognition, as he had seen him earlier during the day. He contended that the witnesses alleged to be crucial and whose evidence ought to have been taken were not key witnesses because they never witnessed the robbery. Regarding the alleged inconsistencies in the prosecution evidence, Mr Okango submitted that the said contradictions were too remote and, taken holistically, they would not be fatal to the prosecution case. On sentence, counsel urged that this being a case of robbery with violence and in accordance with the jurisprudence in *Francis Karioko Muruatetu & Another vs Republic; Katiba Institute & 5 Others (Amicus Curiae) [2021] eKLR (Muruatetu 2)*, this Court cannot interfere with the sentence imposed. He thus urged us to uphold the conviction and sentence of the appellant.

16. We sought Mr Okango's opinion on the sufficiency or safety of lightning as a basis for identification. Counsel candidly admitted that the use of lightning for identification was a conundrum. He however, proceeded to point out that the way the record was captured, it was not quite clear what the source of the light was, considering that in his examination in chief, the complainant merely stated that there was light but never disclosed its source. It is at cross-examination stage that he alluded to the source of light as lightning, as did the rest of the complainants. Counsel contended that where the lightning is quite intense, and the person to be identified is known to the person identifying him, then he can be recognized. We also probed Mr Okango on why the complainant reported the incident to the police three days later and he opined that the delay in reporting was not inordinate.

17. This being a second appeal our jurisdiction is limited to consideration of matters of law only by dint of section 361(1)(a) of the *Criminal Procedure Code*.

18. The appellant's main complaints are the failure of the High Court to re-analyse and re-evaluate the evidence on record; insufficiency of the evidence on identification; inconsistencies in the prosecution's case; and the severity of the sentence meted out against him.

19. We note that in affirming the appellant's conviction, the learned judges were emphatic that the identification of the appellant was by way of recognition and free from error. They reasoned;

> 'Having found that there was robbery with violence meted out against this complainant the next issued (sic) for determination is that of identification. According to Dennis Otieno Ndeda he was accosted by two people who approached him from the front. There was

lightning and he could see them well. He did not identify the person who hit him first but he recognised the person he was with as the Augustine Netto Ocholla the 3rdappellant in this case. He testified that he had seen him during the day and that it was him who cut him on the head with a panga. It was dark but there was lightning and although the witness did not state how long the flashes of lightning lasted we were satisfied that this being evidence of recognition it was safe and free from error more so given that when the complainant first reported the matter to the police he gave them the description of the appellant, his name and the colour of the T- shirt he was wearing during the attack.'

20. Seemingly the learned judges were satisfied with the evidence of the complainant on how he recognised the appellant. But what was the basis of that recognition? In evidence the complainant simply stated, '...I could recognise the 1st accused person because he was putting on a white top. I had seen him during the day.' On cross-examination by the appellant, the complainant asserted, 'I used the light from the lighting (sic) to recognise you. I know you pretty well, that is why I recognised you.' To begin with, and as intimated by the learned prosecution counsel, it appears like there might have been an error of spelling in the proceedings as typed because, according to the record, the complainant never mentioned the term 'lightning,' although the context compellingly suggests it. The term, however, later emerges in the evidence of the other complainants. All allegedly identified the appellant with the aid of lightning. We have taken the trouble to painstakingly try to decipher the spectacularly bad and hardly legible handwriting of the trial magistrates, and we are satisfied that the word used by PW1 in cross-examination was 'lightning,' not 'lighting' as typed.

21. We are not convinced that the appellant's identification by lightning was safe in the circumstances. We think, with respect, that the learned judges ought to have approached with great caution and circumspection, and keenly tested the reliability of the identification evidence to establish whether the conditions at the time favoured correct identification, free from the possibility of error. We are not persuaded that the transient flash or flashes of blinding lightning, without more, lent assurance that the witnesses could not have been mistaken.

22. We further associate ourselves with the holding of this Court in the oft-cited decision of *Cleophas Otieno Wamunga vs Republic [1989] eKLR*, where the learned judges stated thus;

> 'Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach evidence of visual identification was succinctly stated by Lord Widgery CJ, in the well- known case of R v Turnbull [1976] 3 All ER 549 at page 552 where he said:
>
> > Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.'

23. This need for caution was also reiterated by the Court of Appeal for Eastern Africa in the case of *Abdallah Bin Wendo v R 20 EACA 166 at page 168* thus:

> 'Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring correct identification were difficult. In such

circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.'

24. Moreover, we very much doubt that recognition of the appellant by the mere fact of the complainant having seen him earlier in the day in a white top was sufficient. This Court in *Peter Musau Mwanzia Vs Republic [2008] eKLR* distinctly set out the parameters for relying on the evidence of recognition;

> 'We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident.'

25. Bearing all these principles in mind, we have no difficulty arriving at the conclusion that the identification of the appellant was not free from error and that, in consequence, his conviction was far from safe.

26. In the result, we allow the appellant's appeal, quash the conviction and set aside the sentence. We order his immediate release unless he be otherwise lawfully held.

Order accordingly.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF JULY,2023.

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR