Olela v Republic (Criminal Appeal 152 of 2017)
[2023] KECA 906 (KLR) (21 July 2023) (Judgment)

Neutral citation: [2023] KECA 906 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 152 OF 2017

PO KIAGE, M NGUGI & JM NGUGI, JJA

JULY 21, 2023

BETWEEN

SAMWEL ODHIAMBO OLELA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kisii (Makhandia & Sitati, JJ.) dated 24th February, 2011 in HCCRA No. 278B of 2006)

JUDGMENT

1. COS is a preacher with the [Particulars Withheld] Church. He resides in Kodera in the former Rachuonyo District in what is now Homa Bay County. On August 17, 2004, at about 8:30pm, he was at his house leading a devotion of family and friends. More than 12 people were present in his living room for the devotion. Some of his visitors were from out of the country.

2. Suddenly, both the front and back doors to his house were flung open. Two people burst in. It soon became obvious that the new entrants were not there for intercessory prayers. One had his face covered in a face mask and carried a gun; the other had no mask but was equally menacing. The first one – the one with the gun pointed it at Mr O and ordered him to lie on the ground. The same order was made to all the family members and visitors present. To win their total compliance, the assailant who had a gun, showed the group a live bullet. He asked Mr O to hand over the key to his motor vehicle which was parked outside. Mr O obeyed. The motor vehicle was a Peugeot 504 Registration No KAE 039S. The other assailant searched Mr O's pockets for money. He recovered Ksh 10,000 which he took. They similarly stripped the family and visitors of their watches, cameras and mobile phones as they lay on the ground as ordered.

3. The assailants also ransacked the house. They found a lap top computer and CD player. They carted off these equipment.

4. In a bedroom down the corridor, Mr O's niece, MA, slept. She awoke with a sense of foreboding only to see someone standing by the door to the bedroom. Another one was frenetically ransacking the room. One had a torch which he flashed to illuminate the room. MA unsuccessfully tried to snatch the torch. One of the assailants furiously slapped her on the back and led her outside the room and into the sitting room where the rest of the victims lay on the floor. While outside the bedroom, the assailant demanded to know where the money was kept and he led MA back to the room to recover the money. Once back in the bedroom, MA lifted the mattress to get the money but the assailant changed his demand mid-stream: now he wanted her to quickly undress. Some resistance on the part of MA elicited a death threat. Finding the threat credible,MA undressed and lay on the bed as commanded. The assailant proceeded to rape her. There was light coming from the living room; and MA had seen the man from when she first awoke to find him in her room to when he forced her into the living room, and then as he raped her. MA had a sufficiently long period to make out the man's physical features. She would later describe the man to the Police; and when an identification parade was held, she picked him out without any hesitation.

5. Meanwhile, before heading into the bedroom where MA was, the marauding duo made their way into the kitchen. There, they found CO and a minor, PO. CO is a nephew to Mr O (and sister to MA) while PO is Mr O's son. CO was playing the guitar when the duo barged into the kitchen. A lantern lamp provided light in the kitchen. The man with the pistol ordered CO and PO to lie on the ground. CO initially resisted and briefly struggled with the assailant. In the process, he had a good look at him. He would later tell the Court that he thought it was an elaborate prank. PO, his cousin, seeing the danger and futility of resistance, warned CO to comply. They both complied. They were, shortly afterwards, herded into the living room where they found that the rest of the family and guests were on the ground.

6. Both CO and PO had a good look at the assailants, especially the one who did not have a face mask on. They noted his physical features. PO had actually seen the man in the village before. They both described the assailant to the Police.Of particular note, they described him as clean shaven, with pimples on his face and a swelling on the back of his head. MA gave roughly the same description to the Police.

7. Afterwards, the intruders drove away in Mr O's car. The car was later recovered – but the other electronics stolen were not.

8. About two months after the incident, on October 6, 2004, Corporal David Osano of Oyugis Police Station received a tip off that one of the robbers was at Beer Belt Bar in Oyugis town. He went to the bar and found the alleged robber. He arrested him based on the descriptions of the victims and the tip off. The person arrested is the appellant in this case. Acting Inspector Stanley Cheruiyot was called upon to conduct an identification parade. Mr O; MA; CO; and PO each participated in the identification parade. Each of the latter three picked up the appellant, Samwel Odhiambo Olela, as one of the assailants who had attacked Mr O's homestead in the night of August 17, 2004 and as the person they had described to the Police. Mr O, as he had always maintained, could not identify the appellant.

9. This is how the appellant became the accused person in the trial before the Senior Resident Magistrate's Court at Oyugis. He was charged with two main counts, namely: robbery with violence contrary to Section 296(2) of the *Penal Code*; and rape contrary to Section 140 of the *Penal Code* (as it then stood). The particulars of count I were that on the 17th day of August, 2004, at *[Particulars Witheld]* village in *[Particulars witheld]* location in Rachuonyo District within Nyanza Province (as it was then known), the appellant, together with others not before the court, being armed with dangerous or offensive weapons, namely, pistols and pangas, robbed Christopher Sure of his motor vehicle KAE 0395 Peugeot 504 saloon, one laptop computer make Toshiba, one camera make digital, all valued at Kshs 654,000.

The particulars of count II were that on the same day and at the same place, the appellant had carnal knowledge of MA, without her consent.

10. The appellant pleaded not guilty to both counts and a full hearing followed. The narrative rehashed above is the evidence that emerged from the seven prosecution witnesses who testified at the trial. At the conclusion of the trial, the learned trial magistrate convicted the appellant of both counts respectively and sentenced him to death on count I but held the sentence on count II in abeyance.

11. The appellant was aggrieved by the decision of the lower court and filed an appeal against the conviction and sentence before the High Court.

12. The High Court (Makhandia, J (as he then was) and Sitati, J (now retired)) dismissed the appeal and upheld the conviction and sentence in a judgment dated February 24, 2011.

13. The appellant was again dissatisfied with the decision of the High Court and has lodged the present appeal. He has raised two (2) grounds in his Supplementary Memorandum of Appeal, which are that:

    1. The Learned Judges erred in law by convicting and sentencing the accused/appellant person on a case that did not meet the evidentiary threshold required in criminal cases.

    2. The Learned Judges erred in law by sentencing the accused/appellant person to a mandatory sentence contrary to the law.

14. The appeal was argued by way of both written submissions and oral highlighting by both parties. Indeed, the oral highlighting was done on two different occasions. This was because it came to our attention that the first counsel appointed to assist the appellant in the case – Mr Ogeto -- had, by the time the case was first argued before us, been appointed as counsel in the Office of the Director of Public Prosecution. Due to the obvious conflict of interest which this Court had become aware of, we directed the Honourable Deputy Registrar to appoint another counsel to take over the matter from Mr Ogeto. This is how Ms Olonyi became seized of the matter on behalf of the appellant.

15. Before us, Ms Olonyi contended that the prosecution failed to prove its case to the required evidentiary standard. She argued that for the offence of robbery with violence to be established the following elements have to be proved, namely: -

    a. Evidence of theft by the person charged.

    b. The person charged guilt is proved to that effect.

    c. The theft must be accompanied by a threat or use of a threat or actual violence to a person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained.

16. In this regard, counsel contended that neither the items that the complainant (PW1) claimed to have been stolen nor the weapons allegedly used during the robbery were recovered from the appellant and presented before the two lower courts as exhibits, despite the prosecution's claim that one of the stolen items, namely, motor vehicle KAE 0395 Peugeot 504 saloon, was recovered. For this proposition, counsel relied on the decisions in *Republic v David Ruo Nyambura & 4 Others* [2001] eKLR and *Anthony Mutua Nzuki v Republic* [2018] eKLR.

17. Secondly, counsel contended that the appellant was not properly identified or recognized. She argued that the source of light used to identify the appellant, being a lantern and pressure lamp, were artificial and not as certain as a natural source such as the sun. She further argued that the quality of the light as pertains its dimness or brightness was neither described nor interrogated as required by the law which

led to the two lower courts drawing assumptions and presumptions. She relied on this court's decision in *Mwaura v Republic* [1987] KLR 645 and *Paul Etole & Another v Republic*, Criminal Appeal No 24 of 2000.

18. Still on identification or recognition, counsel argued that PW6 had prior knowledge of the appellant in previous circumstances other than that of the crime scene in the present case and so it would be natural for him to pin blame on the appellant without any solid corroborative evidence such as forensic evidence (DNA) to support his allegations. She further argued that the circumstances under which PW2 and PW3 identified the appellant were traumatic (that is, under alleged threats of death via use of crude weapons) hence it was natural that they would not be capable of making a sober identification of the alleged perpetrator. In this regard, counsel echoed this court's decision in *Wamunga v Republic* [1989] KLR 424, wherein it was held that where the only evidence against a defendant is identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from any possibility of error before it can safely make it the basis of a conviction.

19. Thirdly, counsel argued that the appellant's alibi defence was ignored by the two lower courts. She contended that the appellant presented his wife as an alibi on the material day and she testified that she was with the appellant in the house but days later, the appellant was arrested when he went to collect his salary from a certain bar where he worked. Counsel contended that the prosecution failed to cross examine DW2 despite having a chance to; and her evidence was not controverted. In this regard, she relied on the decision in *Oketch Okare v Republic* [1965] EA, wherein the Privy Council held that in any litigation proceedings, courts or tribunals ought to consider the evidence of both parties as a whole, rather than just relying on one party as unilateral reliance on one party's evidentiary position would amount to an injustice.

20. Counsel also argued that the informer who alerted the Police about the whereabouts of the appellant that led to the appellant's arrest was an essential witness who needed to testify. Her position was that it was fatal for the conviction of the appellant that this informer was not called.

21. Lastly, regarding sentence, counsel contended that unlike before when courts were constrained by the mandatory sentence imposed by statute as regards capital offences, they now have discretion in sentencing convicted persons. In this regard, she relied on this court's decision in *William Okungu Kitty v Republic* [2018] eKLR, wherein while invoking and affirming the Supreme Court decision in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR, it was held that the said Supreme Court decision applies mutatis mutandis to section 296(2) and 297(2) of the *Penal Code*, hence the death sentence under the said sections are a discretionary maximum punishment, to the extent that the mandatory death sentence provided for under those sections are inconsistent with the *Constitution*.

22. Counsel urged that the appellant has been in custody since 2004 without bail and since his conviction in 2006; and that he has been remorseful and has been effectively rehabilitated to warrant his release and reintegration into the community. She therefore prayed that his conviction be quashed, set aside and he be set at liberty. She urged that should the appellant's conviction be upheld, then this Court should grant him a non-custodial sentence considering the duration that he has been in custody while being rehabilitated.

23. Opposing the appeal, Mr Okango reminded the Court of its role as a second appellate court, being, to deal with matters of law only. He rejected the appellant's counsel's assertion that the prosecution failed to prove its case to the required evidentiary standard. He argued that all the elements of the offence of robbery with violence were proved and the prosecution evidence was founded on the basis of identification and recognition.

24. The prosecution counsel argued that on the material day, PW1 was in the company of guests at his family home when the appellant, in the company of another person, ambushed them and stole all the items listed in the charge sheet while armed with a gun. He stated that while the same were not recovered, it did not mitigate the fact that they were not stolen.

25. Secondly, counsel contended that identification and recognition of the appellant was sufficient to warrant conviction. In this regard, he argued that the light emanating from the lantern and pressure lamp, in the sitting room and kitchen was bright as it enabled PW2 (MA) to see the appellant when he took her outside the bedroom and thereafter, she identified him at the identification parade. Counsel also argued that PW3 (CO) stated that he saw the appellant properly from where he lay down, using light that emanated from the pressure lamp in the kitchen and thereafter, he also identified the appellant at the identification parade. As such, there was sufficient light that enabled both PW2 and PW3 identify the appellant.

26. Counsel added that PW6 (PO) recognized the appellant whom he knew before the incident; that the appellant even used to greet Pascal by name. In this regard, he relied on this court's decision in *Anjononi v Republic* [1980] KLR wherein it was held that recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon personal knowledge of the assailant in some form or other.

27. Thirdly, counsel rejected the appellant's claim of alibi defence and argued that there was no proper alibi on record. He stated that the appellant did not give any alibi and instead, only gave a testimony on how he was arrested. According to counsel, the alleged alibi was given by DW2 (appellant's wife) and it was the expectation of the prosecution that her testimony was supposed to corroborate that of the appellant. Therefore, when DW2 testified that she was with the appellant on the material day, while the appellant himself did not give an account of his whereabouts on that particular day, the totality of the alleged alibi, if considered against the prosecution evidence, brings about a finding that there was no substantive alibi. In any event, counsel argued that even if the alleged alibi were true, the same is dislodged by the overwhelming evidence of identification and recognition by PW2, PW3 and PW6.

28. Fourthly, counsel argued that PW8 (Peter) who was the doctor that examined PW3, confirmed that penetration occurred as the hymen was breached and there was white blood stained discharge from the vaginal orifice.

29. Regarding the evidence of the Police informer, the prosecution counsel argued that our jurisprudence has been clear that they are not essential witnesses where their only role is to lead to the arrest of an accused person.

30. Lastly, as regards sentence, counsel noted that the appellant was convicted of the offence of robbery with violence and rape and while sentence on the former was meted out, sentence on the latter was held in abeyance and no actual sentence was meted out. He argued that the first appellate court inadvertently failed to take note of this fact and urged this court to take up the same as a point of law as the appellant ought to have been sentenced on both counts. Counsel submitted that the jurisprudence of Muruatetu 2 is categorical that the death penalty imposed on persons convicted of the offence of robbery with violence do not enjoy the discretion of sentencing pronounced which only applies to persons accused with the offence of murder.

31. As rightly stated by the respondent's counsel, this being a second appeal, our jurisdiction is indeed limited to a consideration of matters of law only by dint of section 361(1) of the *Criminal Procedure*

Code. It is only on rare occasions that we interfere with concurrent findings of fact by the two courts below. In *Samuel Warui Karimi v Republic* [2016] eKLR, it was held as follows:

> " This is a second appeal and this Court has stated many times before, it will not normally 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 making the findings. See *Chemangong v R*, [1984] KLR 611."

32. We have carefully considered the appeal, the rival submissions of the parties and the authorities cited in support of the opposing positions.

33. The offence of robbery with violence is contained in sections 295 and 296(2) of the *Penal Code* as follows:

> " 295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.
>
> 296 (2). If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

34. This Court, in *Oluoch v Republic* [1985] KLR, set out the elements of the offence of robbery with violence as follows:

> " Robbery with violence is committed in any of the following circumstances:
>
> a. The offender is armed with any dangerous and offensive weapon or instrument; or
>
> b. The offender is in company of one or more person or persons; or
>
> c. At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person ....."

35. Further, in *Dima Denge Dima & Others v Republic*, Criminal Appeal No 300 of 2007, it was held 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."

36. In the present case, as reiterated above, the witnesses gave vivid accounts of how the robbery unfolded; and these accounts remained unshaken on cross-examination. The appellant's counsel's curious argument that the evidentiary threshold for conviction for robbery with violence was not met here because neither the stolen items (with the exception of the motor vehicle) and the offensive weapons used in committing the robbery were not recovered deserves no more than short shrift: there is no such requirement in our jurisprudence. Like all other elements for the offence of robbery, what our

jurisprudence requires is that each element is proved beyond reasonable doubt. For this to happen, all relevant and credible evidence – including oral testimony – is admitted and can prove the offence if believed. There is no legal requirement that for a crime of robbery to be proved, the stolen items or offensive weapons be recovered and presented in Court.

37. We have also considered the circumstances under which identification and recognition was made. As noted by the first appellate court, given that the incident took place at night, care ought to be taken to ensure that the appellant was positively identified as the perpetrator of the offence in accordance with the guidelines set in various cases, among them *Republic v Turnbull* [1976] 3 ALL ER 549 and *Kiarie v Republic* [1984] KLR 739. In this regard, the record shows that PW2 (Millicent), PW3 (Cornel) and PW6 (Pascal) identified the appellant using light emanating from the lantern and pressure lamp, which were in the sitting room and kitchen. In addition, PW2 saw the appellant using the flashlight when she was in her bedroom. Save for the intruder who covered his face making his identification difficult, the appellant was positively identified by the three witnesses who also described the appellant's physical and facial features to the Police in first report and before the trial court. They testified that they used light from the lantern and pressure lamp to identify the appellant at the time of the incident. In addition, the witnesses also identified him at the identification parade. As a result, the trial court held that there was sufficient light that enabled identification of the appellant.

38. We agree with the first appellate court that even though the intensity of the lantern and pressure lamp was not interrogated by the trial court, there is evidence that speaks to the sufficiency of the light. The court was of the view that the fact that PWI, his family and guests were holding a devotion, the same could not have been undertaken in darkness or dim light; and it is via that light that the appellant was identified. In addition, the court also noted that PW2 gave a vivid description of the appellant which included a description of the clothes he wore, his appearance, including the fact that he had a small beard. We agree that for PW2 to have made such observations, she must have looked at the appellant very closely or keenly and for sufficient time, since they were in close proximity; and added that there was nothing on record to suggest that the appellant ever ordered her not to look at him; after all, he did not disguise himself. Moreover, during the identification parade which was carried out two months after the incident, PW2 had no difficulty picking out the appellant.

39. As for PW3 and PW6, the first appellate court noted that they were in the kitchen when the intruders ambushed them. PW3 was playing a guitar and saw the appellant in two different places, that is, when he was in the kitchen and when he was taken to the sitting room to join the rest of the guests and saw the appellant enter PW2's room. Further to this, PW3 stated that he struggled with the appellant in the kitchen for about five minutes, thus, he was in close proximity, and in the process, he was able to see him using light from the lantern, which was never put off. From the two encounters, PW3 was able to describe the appellant's physical and facial appearance to the police. He also described the clothes that the appellant wore, and that description tallied with that of PW2. Additionally, during the identification parade which was conducted two months after the incident, he easily picked out the appellant, which meant that his memory did not dissipate or fade.

40. PW6 also testified that he was in the kitchen with PW3 and he recognized the appellant as he had previously met him, greeted him and that the appellant even called him by name. In this regard, PW6's evidence was that of recognition as opposed to facial identification. Further, he even knew that the appellant had a small swelling at the back of his head, which evidence was confirmed by the trial court; and the appellant himself also confirmed that he had the swelling since June 2005. Indeed, as the first appellate court held there was no need for PW6 to participate in the police identification parade as he knew the appellant before the commission of the offence.

41. On the issue of the appellant's alibi defence, we note that it has been brought for the first time in this Court. It was, thus, not properly preserved for appellate argument before us. Suffice it to say that even if we were to consider it, it would be unavailing to the appellant. This is because the appellant did not raise the alibi at all in his defence at the trial court. In particular, in his testimony, he did not state that he was with DW2 on the material day. It was, therefore, wildly contradictory and incredible for DW2 to belatedly introduce the alibi defence by claiming that he was with the appellant on the night the offence was committed. Differently put, DW2's evidence that she was with the appellant on the material day did nothing to strengthen the evidence of the appellant as that fact was not specifically stated by the appellant in his testimony.

42. The same fate befalls the appellant's counsel's argument that the conviction was fatal because the informer who tipped the arresting officer was not called as a witness. First, this issue was not raised before the first appellate court; it is, thus, not properly preserved for appeal before us. Even if it were, it would not assist the appellant's case in the specific circumstances of this case. Our jurisprudence does not talismanically categorize each informer in a criminal case as an essential witness who must testify in the mode of *Bukenya v Uganda* [1972] EA 549.

    Instead, the rule is that owing to the important role informers play in detecting and combating crime in the criminal justice system and the impact of potential exposure, an informer's lid is only lifted if, in the circumstances of a particular case, the failure of the informer to testify would impede fair trial. Hence, in *Republic v Ahmad Abolfathi Mohammed & another* [2019] eKLR, the Supreme Court held, thus:

> "(81) Police said they acted on intelligence information. As the Court of Appeal observed in the case of *Joseph Otieno Juma v Republic*, [2011] eKLR, use of intelligence or informers' reports is standard and common practice. The Police are not obliged to declare their informers as that will hamper crime detection."

43. All considered, we have no reason to depart from the concurrent findings of the trial court and the first appellate court. We are convinced that the evidence of identification and recognition by multiple witnesses as corroborated by the evidence of first report was enough to secure the positive identification of the appellant. See *Terekali & Another v Republic* [1952] EA 259. We are satisfied that the same was free from any possibility of error and that the appellant's conviction for the offence of robbery with violence was safe.

44. It follows that the same is also true for the conviction for the offence of rape – where the only issue the appellant seemed to contest was identification. For the self-same reasons we found identification by PW2, the victim in the rape offence, safe and free from the possibility of error for to secure the conviction on robbery with violence, we find the conviction for the rape offence safe.

45. Turning to the death sentence imposed for the offence of robbery with violence, we note that the appellant relied on the holding of the Supreme Court in *Francis Muruatetu & Another vs Republic*(supra) in criticizing the lower court and the High Court for what he deems unconstitutional refusal to exercise discretion to impose a lesser sentence than the mandatory death sentence in the statute. We merely note that the Supreme Court subsequently provided guidelines currently referred to as Muruatetu 2, by which it limited the application of the holding of Muruatetu 1 to murder cases unless a challenge should be mounted in a proper manner and granted in respect of other mandatory sentences. We are unaware of such petition having been decided in respect of the offence of robbery with violence. In the premises, we defer to the Supreme Court's guidance and will therefore not interfere with the sentence imposed. In doing so, we note that the appellant did not raise the issue of the constitutionality of the death penalty for robbery with violence convicts at the High Court. We

cannot, therefore, consider the issue for the first time in this Court. See this Court's decision in *Cyrus Kavai Onzere v Republic* [2023] eKLR.

46. As regards the charge of rape, the respondent's counsel was of the view that the appellant ought to have been sentenced on both counts and has invited this court to consider sentencing the appellant on the second count. Counsel is right. The proper course would have been to sentence the appellant on both counts and then hold the sentence for rape in abeyance in view of the mandatory death sentence imposed for the conviction for robbery with violence. However, to the extent that the State did not cross- appeal, it would be improper to impose a new sentence on second appeal.

47. The upshot is that this appeal fails in its entirety and is dismissed.

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

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR