Muchiri v Republic (Criminal Appeal 114 of 2020)
[2023] KECA 865 (KLR) (7 July 2023) (Judgment)

Neutral citation: [2023] KECA 865 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 114 OF 2020

MSA MAKHANDIA, AK MURGOR & GWN MACHARIA, JJA

JULY 7, 2023

BETWEEN

LEONARD KAMAU MUCHIRI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the Judgment of the High Court at Machakos (P. Nyamweya, J.) delivered on 11th September 2017 in Criminal Appeal No. 5 of 2016.)

JUDGMENT

1. The appellant, Leonard Kamau Muchiri, together with three others, were charged with the offences of Robbery with Violence, Defilement and Rape. In respect of the appellant, he faced charges of Robbery with Violence contrary to section 296(2) of the *Penal Code* in counts I and IV and rape contrary sections 3(1) (a) and (c) and (3) of the *Sexual Offences Act* in count II whose particulars are as under:

> Count I: That on June 21, 2012 in Athi River District within Machakos County jointly with others not before court, being armed with axes, pangas and torches robbed EWM of her mobile phone make Nokia 2700 valued at Kshs 9,000/- and cash Kshs 20,000/- all valued at Kshs 29,000/- and at or immediately after the time of such robbery injured the said EWM.
>
> Count II: That on the same day, date and place, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of EWM by use of force or threats.
>
> Count IV: That on June 21, 2012 in Athi River District within Machakos County jointly with others not before court, being armed with axes, pangas and torches robbed KOO of three mobile phones make Nokia 5210, Samsung and Orange, one television set make Sony Wega valued at Kshs 8,500/-, a DVD player make Sony valued at Kshs 5,500/-, cash Kshs

14,500/-/-, wallet with all his documents all valued at Kshs 29,500 and at or immediately after the time of such robbery injured SK, wife of KOO.

2. The appellant denied the charges but nonetheless was tried, convicted and sentenced to suffer death in Count 1 and 10 years imprisonment in Count II, the sentences were to run concurrently. The court did not pronounce itself on count IV.

3. Dissatisfied with the judgment of the trial court, the appellant lodged an appeal before the High Court. In its judgment, the High Court, (P. Nyamweya, J.), quashed the conviction in Count IV and upheld both the conviction and sentence in counts I and II. The appellant is now before us on a second appeal.

4. In summary, the prosecution's case against the appellant was that, on June 20, 2012, the appellant together with others broke into PW2's (EWM and the complainant in Counts 1 and II) house who, at the material time, was at home with her child, PW1. Upon entry, the robbers asked for money and mobile phones. PW2 gave them cash Kshs 20,000/- and a mobile phone worth Kshs 9,000/-. The appellant then pulled her from the bedroom and took her outside, ordered her to spread her leso and lie on it. He proceeded to rape her. She could hear PW1 screaming as she was being defiled by another assailant, but she could not rescue her as she too was undergoing the same ordeal. The appellant then took her back into the house and told her to lock the door and the robbers left. Neighbours came and she told them what had transpired, and the two were taken to Nairobi Women's Hospital where they were treated. She was later examined at Kangundo District Hospital. On 24th she was called to the police station where she identified the appellant in an identification parade. It was her evidence that she was able to identify the robbers as the security lights were on, they did not wear any masks and had bright torches which they turn on each other, thus enabling her to clearly see them.

5. It was also alleged that on the same night, the appellant together with others broke into the house of PW3, SK and PW4, KOO. The two testified that on the material night, they heard the bedroom window being tapped and immediately thereafter, an axe was used to cut it. Two people came into the house and stole a television, mobile phones and money. PW3 testified that the appellant was among the robbers while PW4 stated that he did not identify any of the robbers.

6. PW5, PC Hosea Koech, attached to KBC Joska Police Station testified that on June 20, 2012, he received a call of a robbery case and while driving to the scene, he and other officers met with PW1 and PW2 on their way to hospital. They proceeded to the scene and found neighbors gathered. Later, he was informed that the appellant had been arrested. PW6, Dr. Kevin Mwagure of Kangundo District Hospital, testified on behalf of his colleague, Dr. Muoki, who examined PW1 and confirmed that she had been defiled.

7. PW7, CIP James Momanyi based at KBC Police Station in Kangundo while in the company of his colleagues, arrested the appellant on June 26, 2012. He stated that there had been previous reports of the appellant's involvement with robbery and rape cases. PW8, IP Anthony Waithaka of Kangundo Police Station conducted two identification parades on June 24, 2012 where the appellant's co-accused and the appellant were the suspects respectively. In the first parade, the appellant's co-accused was identified by PW1 and PW3 while in the second parade, the appellant was positively identified by PW2 and PW3. According to PW1, PW2 and PW3, they saw the appellant holding an axe, and were aided in the identification by security lights. PW2 added that it was the appellant who defiled her daughter, PW1, a minor aged 11 years.

8. PW9, Paul Ngema Wakaba testified that his cousin, one Peter Ngun'gu Wanyiri gave him Kshs 2000/- on June 21, 2012 and asked him to buy him a mobile phone if he found one on sale. He was approached by his friend, one Raphael Oluoch who was selling a Nokia 2700, and after consultation with his

cousin, he bought the phone for Kshs 2000/- on 8th October 2012. He was later arrested in connection with the mobile phone but released after recording a statement. PW10, PC Simon Wanjohi Muchiri of CID Kagundo together with his colleague investigated the records of the mobile phone. They confirmed that PW9 had bought it for his cousin from one Raphael Odipo who had bought it from a man he could not identify. They charged Peter Nd'ung'u Wanyiri and Raphael Odipo with the offence of handling suspected stolen property. PW11, CIP Johnson Milimi also of CID Kangundo was the investigating officer. His evidence was that the appellant and his co-accused were linked to the offences due to their connection with the stolen mobile phone.

9. The Appellant filed his memorandum of appeal raising 9 grounds which he amended in his submissions to 5, stating that: he was not positively identified; the manner in which the identification parade was conducted was flawed as it did not pass the muster test of its admissibility; the mode of his arrest was unjustified owing to the inconclusive evidence that linked him to the commission of the offence; the prosecution's case was laced with inconsistencies and contradictions; and that his defence was not considered.

10. When the appeal came up for hearing before us through a virtual platform on the December 14, 2022, Mr. Swaka, learned counsel for the appellant and Ms. Ngalyuka, learned prosecution counsel for the respondent relied on their written submissions dated December 13, 2022 and December 8, 2022 respectively.

11. The appellant submitted that he was not positively identified as the perpetrator of the alleged offences; and that the two courts below failed in their duty of ascertaining the quality, distance and surrounding circumstances which would have enabled a positive identification. He relied on the cases of *Wamunga v R* (1989) KLR 424, *Duncan Muchui v R* [2013] eKLR, *Kura Charo Ndombo v R* (2003) eKLR and *Gabriel Kamau Njoroge v Republic* [1987] eKLR in emphasizing the need for a trial court to carefully examine the circumstances of identification and the fact that dock identification, if relied on is worthless.

12. It was submitted that the identification parade did not follow the laid down procedure set out under section 46 of the Police Standing Orders. The trial court found the process to be flawed and it was thus prejudicial for the High Court to turn around and hold that the appellant was properly identified in the impugned parade. Further, that crucial witnesses were not called. In this regard, the appellant only pointed at the doctor who first attended to the complainants at Nairobi Women Hospital. To him, the failure to call this doctor meant that there was no evidence that linked him to the offence of rape. It was also his submission that the trial was conducted in an unfair manner as he was not afforded legal representation. Finally, that the sentence meted out was unconstitutional and should be set aside.

13. On the part the respondent, it was submitted that the offence of robbery with violence was proved beyond reasonable doubt. In this regard, reliance was placed on the case of *Daniel Gichimu Githinji & another v R* [2018] eKLR which sets out the ingredients of the offence of robbery with violence. It was posited that conditions for a positive identification of the appellant were conducive, and the identification parade was conducted in accordance with the rules. Further, there was a concurrent finding of fact by the two courts below as regards the appellant's identification which this Court should not disturb. In any case, the first appellate court properly carried out its statutory duty of re-appraising and re-evaluating the evidence and arrived at its own conclusion that the appellant's conviction was safe and the sentence was merited, and as such, the instant appeal was unmerited and ought to be dismissed.

14. This being a second appeal, our mandate under section 361(1)(a) of the *Criminal Procedure Code* is limited to consideration of issues of law only. This position has been reiterated by this Court in many of

its decisions including in *Adan Muraguri Mungara v Republic* [2010] eKLR where the Court stated that:

> "As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this court to interfere."

15. Upon our consideration of the record of appeal, submissions and the list of authorities by both parties, we arrive at the conclusion that the issues of law arising for determination are whether the appellant was positively identified and whether we should uphold the sentence meted out.

16. What we have to grapple with in the circumstances of the case is whether the conditions for a positive identification were conducive. In the case of *Maitanyi v Republic* [1986] eKLR, this Court addressed the issue of identification at night as follows:

> "It must be emphasized that what is being tested is primarily the impression received by the single witness at the time of the incident. Of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and it position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into."

17. We are also alive to the fact that identification at night and especially in difficult circumstances must be tested with the greatest care (*R v Turnbull* [1976]3 All ER, 549. The identification must also be cogent so as to leave no room for mistaken identity. See *Nzaro v Republic* [1991] KAR 212. As enunciated in *Maitanyi v Republic* (*supra*), a court must be keen to evaluate the nature of the available lighting; the time that the lighting was available; the strength of the light; the distance the suspect was from the victim and whether there may be anything likely to obscure good view of the suspect, so as to arrive at a conclusion that the circumstances of a positive identification were prevailing.

18. The testimonies of PW1 and PW2 were that the incident happened at night, there was solar lighting and they could clearly see the appellant who was holding an axe. The robbers had flash lights with them that they used to shine on each other's faces as they searched for money. Indeed, they (robbers) took a considerable amount of time before they broke into the house, which in our view was sufficient for PW2 and PW3 to identify them. PW2 was categorical and methodical as to what happened; that the appellant took her outside where he proceeded to rape her. There was moon light and the security lighting was sufficient to enable positive identification. Later, she was called to the police station where she identified the appellant as her assailant in an identification parade that was carried out by PW8.

19. From our perusal of the record, we are satisfied that the High Court properly re-evaluated the evidence and was not in error in its finding that the identification was safe. The detailed description by PW2 of what the appellant wore was proof that PW2 positively identified the appellant. The ample time taken by the appellant during the incident, including raping her during the robbery, coupled by the lighting that was available, is conclusive that it was adequate for positive and error-free identification.

20. The appellant submitted that the learned Judge erred in holding that he was positively identified in the identification parade yet the trial court had held that the parade was flawed. This is a submission not borne from the record. We have appraised ourselves with the judgment of the High Court. At no point did the learned Judge make reference to the fact that the identification of the appellant was through an identification parade. Just as we have held, the learned Judge too found that the appellant was positively identified with the aid of the conducive prevailing circumstances at the time.

21. The foregoing aside, we have evaluated the evidence of PW8 who was the parade officer. We find no fault in the manner in which the parade was conducted. The parade was only intended to add weight to the fact that PW2 properly identified the appellant during the robbery. The appellant on his part consented to participate in the parade and indicated on the parade form that he had no objection to the manner the parade was conducted. Furthermore, apart from making a sweeping statement that the parade was flawed, he did not state in what manner it was flawed. We accordingly dismiss this ground for want of merit.

22. On the whole, we find and hold that the appellant was positively identified and was amongst the robbers who attacked PW2.

23. As to whether the offences of robbery with violence and rape were proved, we find that the two courts below arrived at a concurrent finding of fact that indeed the elements of the offences were sufficiently established. The ingredients for the offence of robbery with violence were set out in the case of *Johanna Ndung'u v Republic* [1996] eKLR as follows:

> "……Therefore, the existence of the afore described ingredients constituting robbery are presupposed in the 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 subsection:
>
> 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."

It is a settled principle that a proof of any one of the above ingredients is sufficient to sustain a conviction as was held in *Oluoch v Republic* [1985] KLR 549.

24. We have set out above the evidence of PW2 as well as that of PW1. It shows that the complainants were attacked in their home by the appellant who was armed with an axe in the company of others and proceeded to rape PW2 which we consider to be actual violence that was meted out against her.

25. We are thus satisfied that the appellant is guilty of the offence of robbery with violence as charged.

26. As regards the offence of rape, under section 3(1) of the Sexual Offence Act, the elements of the offence are set out as follows:

A person commits the offence termed rape if-

a. He or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;

b. The other person does not consent to the penetration; or

c. The consent is obtained by force or by means of threat or intimidation of any kind.

27. In the case of *R v Oyier* [1985] KLR, 353, also referred to by the High Court, this Court outlined the ingredients of the offence of rape as follows:

a. The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.

b. To prove the mental element required in rape, the prosecution has to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.

c. Where a woman yields through fear of death, or through duress, it is rape and it is not an excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact.

28. There is no doubt from the evidence of PW2 that she did not consent to have sexual intercourse with the appellant. In fact, the appellant forced himself unto her after forcing her onto the ground by use of threat of violence. She yielded so that she could not be harmed. Again, we find that the offence of rape was also proved beyond reasonable doubt.

29. Having held that the appellant's identification was proper, we move on to the other issues raised by him. There is the contention that his defence was not considered by the two courts below. We disagree with the appellant on this issue. All that a court must do is to consider the cumulative evidence in a case, identify that which is believable, and measure it against the ingredients of the offence as set out in the charge. We find that the trial court and the first appellate court gave due consideration to his defence and cannot be faulted for finding that the appellant's defence did not shake the cogent evidence that had been tendered by the prosecution.

30. The appellant also raised the ground that the prosecution's case was laced with inconsistencies. He did not specifically point out the specific inconsistences. As regards inconsistencies, this Court in the case of *Phillip Nzaka Watu v Republic* [2016] eKLR stated thus:

> "...when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

31. We have had the advantage of going through the record and have not identified any material contradictions that went to the root of the prosecution's case. This ground also fails.

32. The appellant also faulted the admissibility of the Medical Examination Report commonly referred to as the P3 form, submitting that it was not adduced by its maker. It is factual that the P3 form was adduced by PW6 on behalf of his colleague, Dr. Muoki who filled it. In his evidence, PW8 was categorical that he not only knew Dr. Muoki, but he had worked with him at Kangundo District Hospital. Additionally, both schooled together in University for over 5 year. PW8 stated that he knew the handwriting of Dr. Muoki. All these characteristics made PW8 legally qualified to adduce the P3 form on behalf of Dr. Muoki. On this, section 77 (1) and (2) of the *Evidence Act* provides that:

    1. In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

    2. The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

33. The appellant challenges the sentence as meted by the trial court and upheld by the first appellate court, on grounds that the Supreme Court held, *inter alia*, in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR, that

    "The mandatory nature of the death sentence as provided for under section 204 of the *Penal Code* is hereby declared unconstitutional ..."

34. The apex court did subsequently provide guidelines currently referred to as the *Muruatetu 2*, by which it limited the application of that holding to murder cases. In principle, the trial court and the High Court cannot be faulted for handing down the death sentence; it is a lawful sentence. In the premises, we defer to the first appellate court's finding and find no reason to interfere with the sentence imposed.

35. In conclusion, we find that this appeal lacks merit and we dismiss it in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY, 2023.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR