Mwangi & another v Republic (Criminal Appeal 12 of 2021)
[2023] KECA 822 (KLR) (7 July 2023) (Judgment)

Neutral citation: [2023] KECA 822 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 12 OF 2021

MSA MAKHANDIA, AK MURGOR & S OLE KANTAI, JJA

JULY 7, 2023

BETWEEN

JUSTIN LAUZI MWANGI ..... 1ST APPELLANT

KELVIN WACHIRA KAMAU ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi (Ngenye-Macharia, J.) dated 22nd October, 2015 in HC. CR. A. 10 of 2014 as consolidated with HC. CR. A. 15 of 2014))

JUDGMENT

1. The appellants Justin Lauzi Mwangi and Kelvin Wachira Kamau were charged at the Chief Magistrates Court at Makadara with the offence of robbery with violence contrary to Section 296 (2) of the *Penal Code*. The particulars were that on July 26, 2011 while armed with a knife, they robbed one MWK of Kshs 1000, a mobile phone make M-620 and a speaker, and that during the commission of the robbery they threatened to use actual violence on the said MWK.

2. The 1st appellant was charged in count II with the offence of gang rape contrary to Section 10 of the *Sexual Offences Act* against MWK the particulars being that on the same day and place, he in association with the 2nd appellant unlawfully caused his penis to penetrate the vagina of MWK. The second count carried an alternative charge of indecent act with an adult contrary to Section 11(6) of the said Act. The 2nd appellant was charged in count III with the offence of gang rape, contrary to Section 10 of the said Act particulars being that on the same day and place he in association with the 1st appellant unlawfully caused his penis to penetrate the vagina of MWK. The alternative charge of indecent act with an adult was related to the main charge.

3. During trial the prosecution called 4 witnesses while the appellants gave unsworn statements and did not call any witness. At the end of the trial, the Court delivered a judgment on December5, 2013 in which it found the appellants guilty of the offence of robbery with violence and sentenced them to death. The appellants were both acquitted on the charges of gang rape and the alternative charges to the same.

4. The appellants filed appeals to the High Court of Kenya at Nairobi which were consolidated at the hearing. The High Court gave Judgment on October 22, 2015 where it dismissed the consolidated appeals.

5. The appellants were dissatisfied with those findings and filed this appeal. Our mandate on second appeal is limited by Section 361 (1) (a) *Criminal Procedure Code* to consider issues of law only as was stated by this Court in *Peter Ngure Mwangi v Republic* [2014] eKLR:

> "This being a second appeal, our mandate is as set out in Section 361(1) of the Criminal Procedure Code namely to deal with issues of law."

6. We shall revisit the record to see what case was made before the trial Court and if the two lower courts exercised their mandates appropriately.

7. PW1 was MWK. She told the court that at around 3 p.m. on July 26, 2011 she met the 1st appellant, who told her that he was called "Brother Mark" and asked her for directions to a place she did not know. A second man, the 2nd appellant appeared and joined the conversation saying that he knew the 1st appellant as a prophet. The 1st appellant then made some correct statements regarding family, saying that her mother had died in 2009 and that she had 3 siblings, which statements led her to believe that the 1st appellant was a true prophet, and she led them to her home to cleanse it. At the house she was asked to put various items on the table to be prayed for. She noted that in the course of prayer, the 2nd appellant picked the items and started to move away with them, which roused her suspicions. She tried to make an excuse of going to the shops in order to leave but the 1st appellant grabbed her and put a knife to her throat and threatened her.

8. The 2nd appellant held the knife while the 1st appellant took off her clothes and they raped her in turn, then took her things and fled. MWK reported the matter to police and also gave a print out of her mobile phone statement as she had made a deposit to a phone number, 07.....82 (number concealed), before the prayers. She told the Court that she had spoken to the appellants for 1½ hours before taking them to her house, where they spent 45 minutes. MWK and the police would later use trickery to lure the appellants to their arrest using the same mobile number she had sent money to. She did not recover any of her stolen items.

9. PC Paul Adawo (PW2) attached to Buruburu Police Station, tracked the phone number used in connection with the offence and MWK assisted them to apprehend the appellants.

10. Corporal Grace Wambui (PW3) the Investigating Officer received a report on July 27, 2011. She took MWK's statement and they tracked the phone number that had received money from MWK and they deceived the appellants to come and collect some money at a certain location, where they were arrested.

11. Dr Zephania Kamau (PW4) stated that he examined MWK who had been attended at Medicins Sans Frontiers at Mathare and noted MWK's genitalia was normal and there was no discharge.

12. The trial court found that a *prima facie* case had been made against the appellants who upon being placed on their defence gave unsworn statements. The 1st appellant stated that MWK was her girlfriend,

and that she asked him to meet at Mutindwa only for her to have him arrested and charges proffered against him for something he knew nothing about.

13. The 2nd appellant also denied committing the offence stating that he had travelled from his work place in Mombasa after losing his job. On arrival in Nairobi he accompanied the 1st appellant to Buruburu where he was surprised to be arrested.

14. The appellants were convicted and their first appeal dismissed.

15. The appellants are now before us in this second appeal with 2 grounds of appeal as summarized in the submissions dated March 6, 2023 filed by counsel for the appellants M/S Asitiba and Associates Advocates. The grounds of appeal are to the effect that the trial and the High Courts erred in law in failing to warn themselves of the danger of relying on the evidence of a single witness and relying on uncorroborated evidence to convict and uphold the same on appeal. Secondly, that the Judge erred in law and fact by failing to exercise his discretion in sentencing. We find that the 2 grounds of appeal raise issues of law calling for our determination.

16. The appellants' counsel submits that there was no violence used and that no direct evidence placed the appellants at the scene; that MWK's evidence was uncorroborated and that the defence that MWK was a girlfriend to the 1st appellant was never considered to its logical conclusion. The appellants also submit that the trial court should have exercised discretion to impose a custodial sentence instead of sentencing them to death. They pray that this Court be persuaded to quash their conviction and set aside the sentence. Alternatively, the appellants ask for re-sentencing with the preference that they be released on time served.

17. The Office of the Director of Public Prosecutions (ODPP) filed written submissions dated March 7, 2023 in opposition to the appeal submitted that the evidence was sufficient to support the charge and conviction of the appellants. It was also submitted that the 1st appellant never denied the phone number that led to his arrest and thus it was urged that we dismiss this appeal in its entirety.

18. We have considered the record, the submissions made and the law.

19. On the first issue relating to whether the two courts below were wrong not to warn themselves of the danger of relying on the evidence of a single witness and relying on uncorroborated evidence the prosecution case was that MWK met the two appellants who persuaded her that they were prophets. The 1st appellant correctly stated events relating to MWK's family and she readily agreed to take them to her house to be prayed for. She led them to her house and placed some cash and other items on the table to be prayed for and it is in that process that she noted that the 2nd appellant had picked the money and other items and was leaving the house. She did not raise any alarm and according to her evidence she informed the appellants that she wanted to go out to buy sodas and bring them to the house. That was when the 1st appellant produced a knife and threatened her and they proceeded to rape her in turns after which they left the house after stealing some items. In her own words:

> "…. They ran away. I tried following them downstairs in vain …"

20. This means that the house was located on an upper floor; MWK did not raise any alarm where in her testimony there were many other houses in the block of houses where her own house was on the upper floor.

21. According to MWK she had been with the appellants for a number of hours. She did not give any description of the attackers when she reported the incident to the police.

22. The High Court found on first appeal:

> "This court is of the view that although there is no evidence to suggest that the complainant recorded the description of her assailants in the first report that she made to the police, there is no doubt in our mind that the complainant related with the Appellants in close proximity and for a long period of time to enable her to be certain as to the identity of the Appellants when the appellants were arrested on 10th August 2011 in the absence of a physical description made to the police in the first report, their subsequent identification by the complainant is doubtful. In the above cited case of Maitanyi, the Court of Appeal required the court relying on the sole evidence of identification to warn itself of the danger of relying on such evidence in the absence of other corroborating evidence, before convicting the accused."

23. The High Court on first appeal cited the case of *Maitanyi v Republic* (1986) 1 KLR 198 where this Court stated at page 200 on the issue of relying on uncorroborated evidence of a single witness:

> Although the lower courts did not refer to the well-known authorities Abdulla Bin Wendo & Another vs Reg (1953) 20 EACA 166 followed in Roria vs Rep (1967) EA 583, it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition:-
>
> > "Subject to 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 a 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. In the instant case MWK did not give any description of her attackers to the police. She did not raise any alarm. There was the allegation by the 1st appellant that she was his girlfriend. This allegation was made during trial but was not investigated at all. It was MWK's evidence that the 1st appellant on the material day correctly stated the date when her mother died and the number of siblings MWK had. There was also evidence that MWK was in telephone conversation with the 1st appellant and we think that it was necessary for the police to carry out proper investigations to establish whether there was a relationship gone sour between the 1st appellant and MWK.

25. The fact that there was telephone conversation between the two which finally led to the 1st appellant freely going to Buruburu to the rendezvous he had agreed with MWK should have led to the suspicion that the two knew each other quite well. Also, the fact that she testified that she freely led the appellants to her house was something that should have been investigated to establish the true motive why she did that.

26. The police witness testified that she used the same phone data to trap the appellants. No evidence of such data was produced in the case and it was not possible in law in those circumstances to link the

two mobile phones used by Kioko and the 1st appellant to communicate. Section 4 of the *Evidence Act* is to the following effect:

> 48 (1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger or other impressions.
>
> 2. Such persons are called experts."

27. This Court in the case of *Mutonyi & Another v Republic* [1982] eKLR held:

> "Expert evidence is evidence given by a person skilled and experienced in some professional or special sphere of knowledge of the conclusions he has reached on the basis of his knowledge, from facts reported to him or discovered by him by tests, measurements and the like.
>
> Section 48 of the *Evidence Act* (Cap 80) provides that where, inter alia, the court has to form an opinion upon a point "of science or art, or as to identity or genuineness of handwriting or finger or other impressions", opinions on that point are admissible if made by persons "specially skilled" in such matters.
>
> So, an expert witness who hopes to carry weight in a court of law, must, before giving his expert opinion:
>
> 1. Establish by evidence that he is specially skilled in his science or art.
> 2. Instruct the court in the criteria of his science or art, so that the court may itself test the accuracy of his opinion and also form its own independent opinion by applying these criteria to the facts proved.
> 3. Give evidence of the facts on which may be facts ascertained by him or facts reported to him by another witness.
>
> Judged by this standard, the expert evidence was most unsatisfactory."

28. Without any evidence from an expert from the mobile telephone provider on communication between MWK and the 1st appellant, the High Court and the trial court should not have relied on any evidence regarding communication between the two.

29. There was also the disturbing aspect of the case where it was alleged that MWK was treated at Medicins Sans Frontiers but no evidence was called from the facility and there was no explanation from the prosecution why no witness was called in that regard.

30. We agree with counsel for the appellants that convicting the appellants in those circumstances where the Courts relied on the uncorroborated evidence of one single witness (MWK) which left many unanswered questions was wrong. The conviction was not safe at all. We allow the appeal by quashing the conviction and setting aside the sentence. The appellants shall be set at liberty forthwith unless otherwise lawfully held.

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

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

A.K. MURGOR

.....

JUDGE OF APPEAL

S. OLE KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR