Kiburi & another v Republic (Criminal Appeal 7 of 2017)
[2023] KECA 1050 (KLR) (24 August 2023) (Judgment)

Neutral citation: [2023] KECA 1050 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 7 OF 2017

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

AUGUST 24, 2023

BETWEEN

GIDEON KIMATHI KIBURI ..... 1ST APPELLANT

MARIIRA THAITUMU ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against conviction and sentencing the High Court at Meru (K.W. Kiarie, J) dated 20th December 2016 in Criminal Appeal No. 41 of 2015)

JUDGMENT

1. The appellants, Gideon Kimathi Kiburi and Mariira Thaitumu, were jointly convicted by the Senior Principal Magistrate's Court at Maua of robbery with violence contrary to section 296(2) of the *Penal Code*. They had been charged along with two others who were acquitted of the charge. The particulars of the offence were that, on November 11, 2010 at Nceme Sublocation in Igembe District within Meru County, jointly with others not before the court, while armed with dangerous weapons namely pangas, robbed Timothy Kimanthi Njuki (PW 1) of one solar panel, one solar battery, one electric inverter, 40 meters of electric cable, 3 electric switches, two bulbs and cash Kshs 8,600 all valued at Kshs 26,600 and during the time of such robbery used personal violence to the said Timothy Kimanthi Njuki (PW 1). Each appellant was sentenced to suffer death.

2. The appellants were aggrieved by the conviction and sentence and appealed to the High Court at Meru. The appeal was heard by the learned Judge (KW Kiarie, J) who on December 20, 2016 found it unmerited and dismissed it.

3. This is a second appeal in which the appellant is challenging the conviction and sentence. We are aware that our mandate under section 361 of the *Criminal Procedure Code* confines us to the consideration

of only matters of law. This court has reiterated this position in many of its decisions. For instance, in *Karingo -v- R* [1982] eKLR 213, at page 219 it was stated as follows:-

> " A second appeal must be confined to points of law and this court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari c/o Karanja - vs- R (1956) 17 EACA 146)."

4. The record shows that the prosecution called five witnesses in effort to prove its case against the appellants. These were: the complainant (PW 1), Sabera Kaimuri Mbiti (PW 2), Assistant Chief Regina Nkirote Kimani (PW 3), AP Sergeant Stanley Nkinja (PW 4) and PC Peter Muthama (PW 5). The evidence was that at about 5.00pm or 5.30pm PW 1 and PW 2 alighted from a matatu at Mware stage. They had come from Maua. They began to walk towards home. PW 1 was carrying the items in question.

   A short distance from the stage they met a group of 6 men who had *pangas*. The appellants were among them. PW 1 knew them as they were from his sublocation. These men surrounded PW 1, after ordering him to stop. They took the property he was carrying. It was his bag that contained the invertor, cables, charger, switches and bulbs. They frisked him and got Kshs 8,600 cash in a wallet which they took. PW 1 escaped from them and met a village elder who referred them to the area assistant chief (PW 3) who mobilised for the arrest of the attackers.

5. The evidence of PW 1 was that he knew two of the attackers whose names he gave to PW 3 and to police, and they were arrested but nothing was recovered. The two were the appellants. PW 2 stated that she recognised three of the attackers who included the appellants. Her evidence was that the appellants were well known to her as they came from the same sublocation. Unlike PW 1, PW 2 did not give the attackers names to PW 3 or police for their arrest.

6. Each appellant gave sworn evidence in defence and denied that he robbed PW 1, or that he was in the attack. Each stated that he was elsewhere at the time of the alleged attack. Each admitted that he was known to PW 1 before the attack, but claimed that PW 1 had framed him. The first appellant stated that he had been framed because PW 1 used to eat and sleep in his hotel, but that –

   > " when I refused him from sleeping in my hotel anymore he framed me "

   As for the second appellant, his defence was that:-

   > " In July 2010 the complainant started complaining that I was denying him water "

   and that is where their grudge begun.

7. The appellants did not call witnesses.

8. This is the evidence on which the trial court convicted and sentenced the appellants. The High Court reconsidered and re- evaluated the evidence and returned the verdict that the appellants had been convicted on overwhelming evidence, and that the sentence was lawful.

9. The grounds on which the appellants came before this court were that the High Court had erred by allowing the conviction on contradictory and hearsay evidence; that they had been convicted when the evidence regarding their identification and/or recognition was marred with errors; that the burden of proof had been shifted to them; and that each had raised a plausible and formidable defence which had not been considered as required by section 169 of the *Criminal Procedure Code*.

10. The appellants were represented by learned counsel Ms Mutegi who filed written submissions in support of the appeal, and also orally argued the appeal. The learned counsel addressed this court on the grounds. She submitted that, after the appellants were arrested the investigating officer ought to have carried out an identification parade to confirm that indeed PW 1 had been attacked and robbed by them. When there was no such parade conducted, it was submitted, all that was left was dock identification which was worthless. Learned counsel referred the court to the decisions in *Hassan Abdallah Mohammed -v- Republic* [2017]eKLR, *Wamunga -v- Republic* [1989]KLR 424, *Maitanyi -v- Republic* [1986]KLR 198, *James Karani M'Ikombo -v- Republic* [2004]eKLR and *Martin Oduor Lango & 2 others -v- Republic* [2014]eKLR, and submitted that it was imperative for the two lower courts to assure themselves that the circumstances for proper identification existed; that identification parade was necessary in the circumstances; and that even honest witnesses could be mistaken in matters identification and recognition. The second complaint by counsel was that the High Court had failed to reconsider and re-evaluate the evidence by the trial court; that had that been done, it would have been found that the ingredients of the offence had not been established, as no theft had been proved and fact of pangas in the attack had not been proved. Thirdly, that where the defence of alibi had been raised by the appellants, the burden to prove it was always on the prosecution but that in this case it had been shifted to them (*Victor Mwendwa Mulinge -v- Republic* [2014]eKLR).

11. Lastly, the learned counsel submitted that it was wrong for the punishment of death to be imposed in the case, when such penalty should always be reserved for the highest and most heinous levels of robbery with violence. Counsel referred the court to the High Court decision in *James Kariuki Wagana -v- Republic* [2018]eKLR.

12. Learned counsel for the State Ms Nandwa opposed the appeal and asked us to uphold the decision of the High Court as the conviction was based on safe evidence and the sentence meted out to the appellants was lawful. On the conviction, learned counsel submitted that this was a case of recognition as both PW 1 and PW 2 knew the appellants well before the incident which was in the day at 5.30pm. Referring to the decision in *Waylan Abdullah -v- The State*, Criminal Case No 134 of 2021 [2022] ZASCA, she submitted that there had been accurate recognition. On the question of the ingredients of the offence, learned counsel submitted, on the basis of this court's decision in *Johana Ndungu -v- Republic* [1996]eKLR, that the prosecution had proved that the attackers in this case were 6 in number, were armed with *pangas* and that had in the incident forcefully taken PW 1's items. Regarding the appellants' defence that they had not been in the attack, and that they were elsewhere at the time, it was submitted that both the trial court and the High Court had considered the evidence of the prosecution witnesses and the appellants' defence, and had believed the prosecution's version that the appellants were at the scene and had robbed PW 1 in the incident. The claims that the defence was not considered or that the burden of proof had been shifted to the defence were discounted.

13. Regarding sentence, learned counsel referred to the decision in *Bernard Kimani Gacheru -v- Republic* [2002]eKLR in which it had been reiterated that sentence rests with the discretion of the trial court, and has to depend on the facts of each case. That:

> "On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, any one of the matters already stated is shown to exist."

14. We have carefully considered the judgment by the High Court, the appeal and the grounds on which it is based, and the rival submissions. It is not in dispute that the stolen items were not recovered. We consider that the important question was whether the appellants were the persons who robbed PW 1 of the items in question. The trial court was enjoined to examine carefully the evidence before it and be satisfied that, given the circumstances, the appellants were correctly identified to be the assailants. The facts were that the incident was during the day, at about 5.30pm, and that the appellants were known to PW 1 and PW 2. From the prosecution witnesses' evidence and the defence evidence, it was common ground that the appellants were from the same sublocation as PW 1 and PW2, and were known to the witnesses. This is why the appellants could claim that they had each a previous incident with the witnesses and that the case was a frame-up. It follows that the two courts were dealing with a case of recognition. In such circumstances, an identification parade was not required. This court in *James Murigu Karumba -v- Republic* [2016]eKLR observed as follows:-

> " 15. Lastly, the three identifying witnesses did admit that they knew the appellants prior to the incident. Consequently, this was a case of recognition as opposed to identification of a stranger. Therefore, there was no need for the identification parades and the identification evidence therein was of no probative value."

15. The trial court dealt with the issue of identification and stated that PW 1 and PW 2 knew the appellants before the attack, that the appellants were two of the six attackers; and that the incident was during the day, and, therefore, the circumstances were favourable for positive recognition. The court concluded as follows:-

> " It should be noted that the said robbery occurred in broad daylight. Therefore, the prevailing circumstances were conducive for positive identification. I have no doubt that accused 2 Gideon Kimathi and accused 4 Muriira Thaitumu were positively identified by the complainant as part of the gang which robbed him."

16. The High Court reviewed that evidence and stated as follows:-

> " The complainant testified that the two appellants were people known to him earlier. This has come out also from the defence.....The complainant's evidence was supported by that of Sabera (PW 2). The latter witnessed the robbery. In my view, there was ample evidence on record which the learned magistrate based his conviction. The incident was promptly reported to the area assistant chief and the names of the two appellants given"

17. The appellants complained that they had each raised a formidable defence that had not been considered. The trial court according to the record considered the defence evidence and stated as follows:-

> " Therefore, their defence was false and made-up story."

The 2nd appellant had claimed that there was a grudge between him and PW 1, and that the 1st appellant claimed that he was in his hotel at the time the offence was committed at 5.30 pm. The trial court discounted the defence. The record shows that the High Court reviewed the evidence before the trial court. Not only did it find that the 2nd appellant's defence of grudge had been considered and correctly found to be false, it further found that the trial court had considered all the evidence and correctly

found that the prosecution had called ample and sufficient evidence upon which it had convicted the appellants.

18. There was no claim before the High Court or in the grounds of appeal to this court that the ingredients of the offence of robbery with violence had not been established, and neither was there a complaint in the High Court or in the grounds before us that the sentence meted out was either excessive or illegal. We cannot, therefore, deal with these complaints which only came out in the written submissions by the appellants' counsel. Equally, the claims in the grounds that the appellants had been convicted on contradictory or hearsay evidence, or that the two courts had shifted the burden of proof to the appellants remained unsubstantiated, and were, therefore, without basis.

19. The upshot of the foregoing is that the appeal lacks merits, as the appellants were convicted on overwhelming evidence and the sentence meted out was lawful. The appeal is dismissed.

DATED AND DELIVERED AT NYERI THIS 24TH DAY OF AUGUST 2023

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR