



REPUBLIC OF KENYA



KENYA LAW
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**Kariuki v Republic (Criminal Appeal 45 of 2021)
[2023] KECA 1096 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KECA 1096 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 45 OF 2021
MSA MAKHANDIA, AK MURGOR & S OLE KANTAI, JJA
SEPTEMBER 22, 2023**

BETWEEN

PATRICK NDUNGU KARIUKI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Mbogholi & Achode, JJ.) dated 8th July 2014) in Nairobi HCCA No. 208 of 2011)

JUDGMENT

1. This is a second appeal arising from the decision of Mbogholi and Achode, JJ. (as they were then). Our mandate in such an appeal has been enunciated in a long line of cases decided by the Court. See for instance *Adan Muraguri Mungara v Republic* [2010] eKLR and *David Njoroge Macharia v Republic* [2011] eKLR where inter alia, it was held that on a second appeal, the Court confines itself to matters of law only, and where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of the trial court and resist the temptation to treat findings of fact as law, and, should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.
2. The brief facts leading to this appeal are that the appellant Patrick Ndungu Kariuki was charged with two offences in the Chief Magistrate's court at Kiambu in Criminal Case No. 1797 of 2010. In count I, he was charged with the offence of robbery with violence contrary to section 296 (2) of the *Penal Code*. The particulars being that on 22nd December, 2009 at a village in Kasarani Nairobi while armed with a dangerous weapon namely a knife, robbed MNG of cash Kshs. 3,150.00, a pair of socks and a handbag all valued at Kshs. 3,510.00 and at or immediately before or after the time of the robbery used actual violence to the said M N G.



3. In count II, he was charged with the offence of rape contrary to sections 3 (1) and (3) of the *Sexual Offences Act*. The particulars were that on the same date and place as in count I, he intentionally and unlawfully had carnal knowledge of the complainant without her consent. In the alternative to count II, he was charged with the offence of indecent act with an adult contrary to section 11 (6) of the *Sexual Offences Act* aforesaid. The particulars were that on the same date and place as in the main count, he intentionally and unlawfully committed an indecent act upon the same complainant by touching her private parts.
4. The appellant denied the offences and after a full trial, he was convicted on the main counts and sentenced to death in respect of count I, and ten years imprisonment in respect of count II. The sentence in respect of count II was ordered to be held in abeyance pending the execution of the sentence in count 1.
5. Aggrieved by the said conviction and sentence, the appellant lodged an appeal in the High Court and after its consideration, the first appellate court dismissed the appeal and upheld the judgment of the trial court.

Aggrieved by the said decision, the appellant is now before this Court on second and perhaps last appeal.
6. From the record, the evidence adduced before the trial court was that, the complainant PW1 who is a businesswoman left for home from Muthurwa market where she was carrying out business with her husband PW3. The time was 8 p.m. and when she alighted at Maziwa stage, she saw someone who appeared drunk, staggering and falling. This person ordered her to go to where he was. She got scared and started running towards her home but the person pursued her. She started screaming but the person caught up with her and held her by the neck. The person produced a knife and threatened to kill her if she continued screaming and she immediately stopped. She was able to see him clearly and realized he was a person well known to her. She recognized him courtesy of the lights from motor vehicles passing by, but did not want him to know for fear that he might harm her.
7. This person pulled her into a nearby maize plantation and demanded money and her cellphone from her. She told him she had no money because she had come from the hospital and had only Kshs.150.00, which she gave him. He then demanded to have sex with her and she told him that she was HIV positive. The assailant disputed this and said he knew her and her husband very well and that she was not sick. He tried to pull down her pants but she resisted forcing him to tear them, raped her and upon her complaining that she was tired, the person got off her. This did not deter the person from proceeding to assault her, as after chatting with the complainant for a short time, he raped her once again claiming that he was not satisfied with the initial act.
8. It was her evidence that all this happened while the appellant was telling her that he had always wanted to have sex with her and he always felt the urge wherever he saw her. He then snatched her purse which had Kshs. 3,000.00 a pair of socks, CD, a blouse and her identity card and ran away. The complainant pursued him but gave up after he crossed the river.
9. The complainant then went to her auntie's house and informed her of the incident whereupon she was given a phone and called her husband who came. She took him to the scene where they picked up the torn pant she had left behind and went to Nairobi Women Hospital where she was treated. At about 5.00a.m the following day, they made a report at Kiamumbi police station. The complainant informed the police officers that she knew her assailant. Later, she led the police officers to the arrest of the appellant at a construction site. This evidence was corroborated by the evidence of PW2, Edward Gitonga Kariuki. He recalled that on the material night he heard a scream about 30 metres from his



house and though he did not get out to check, he visited his farm in the morning and found a disturbed scene. Later a woman came and told him that she had been raped at the scene and this made him record a statement at Kiamumbi police station. The husband to the complainant testified as PW3 and also corroborated the evidence of PW1 in material particulars. It was his evidence that he had received a call from the complainant at 10.00p.m. who told him that she had been robbed and raped by a person well known to them.

10. PW1 told him that it was the appellant who had raped her and that she had recognized him with the help of the lights from vehicles passing by and also recognized him by his voice. The appellant was his friend as they used to share drinks and would bump into each other almost daily when going to work with his wife and had known him for about 10 years. He then took his wife to Nairobi Women Hospital where she was treated and discharged, and then proceeded to Kiamumbi Police Station where they made a report. P.C. (W) Mercy Tikoi PW6, received the report from the complainant and recorded the details as narrated to her by the complainant. She was later informed that the appellant had been seen at a construction site at Githurai. Together with her colleagues and the complainant they arrested the appellant and subsequently charged him with the offences.
11. The complainant was examined by the late Dr. Muhombe of Nairobi Women Hospital who prepared her report. Having passed on at the time of the trial, the report was tendered in evidence by Dr. David Thuo who testified as PW5. The report revealed that the complainant had a mild discharge when a vaginal swab was taken, and urinalysis revealed that she had fair amount spermatozoa. The diagnosis was that of sexual assault. PW4 was Dr. Zephaniah Kamau a police surgeon who examined the complainant and filled the P3 form. He examined PW1 who had come with allegations of being raped. That she had bruises on her left knee and the right labia majora was scratched. He was also presented with a torn pant. The approximate age of injury was five days, a blunt object was probably used and degree of injuries were assessed as harm.
12. The trial court found the prosecution had made a case against the appellant and was put on his defence. In his unsworn statement of defence, the appellant denied the offence and said he was a mason. That while on duty at a construction site some people came and asked him for a plan for the house they were constructing. He told them that the plan was with the owner. These people told him to call the owner and when he hesitated they arrested him and took him to Kiamumbi police station and was subsequently charged. He was remanded in custody for one year, before being discharged under section 87(a) of the *Criminal Procedure Code* but was again re-arrested and taken to the same police station and arraigned in court on instant charges.
13. The High Court in upholding the decision of the trial court had this to say and we quote verbatim:

“It is true that the learned trial magistrate relied on the evidence of PW1 alone as the basis for the conviction. The learned trial magistrate warned herself of the danger of relying on such evidence. She was persuaded that the evidence was sufficient upon which to base the conviction. She had known the appellant before. The appellant was her husband’s friend and she had seen them smoking together. She was subjected to searching cross-examination by the appellant. She remained firm in that regard. Soon after the incident she gave his name as Ndungu to the police in the first report. She also gave his name in her statement.

After the appellant raped the complainant first, they sat and chatted. This must have been at close proximity. She said she recognized him by appearance and voice. This was not a case of mistaken identity. The evidence of the husband and that of the doctor, fortified that identification. Upon being examined by the doctor, evidence of sexual assault was



detected. It is instructive that the appellant did not cross-examine Doctor Thuo when he gave evidence.

There is evidence that the appellant was armed with a knife with which he threatened to kill the complainant if she continued screaming. He did not challenge the evidence that the complainant was robbed of the property set out in the charge sheet. It is not the number of witnesses that proves a charge but the weight of the evidence adduced. We have not identified any miscarriage of justice in the proceedings before the learned trial magistrate. His defence was addressed by the learned trial magistrate.

The fact that it was not specifically overruled does not mean that it was not considered. Even if it had been considered beyond what the learned trial magistrate said, it would not have made any difference considering the weight of the prosecution case. The ingredients of the offence of robbery

with violence were satisfied and we have arrived at the same conclusion as the learned trial magistrate that the offence was proved beyond any reasonable doubt.

On the offence of rape, there is evidence of force manifested in the tearing of the complainant's pants which showed lack of consent and the medical evidence that proved penetration. That also was proved. We are satisfied that the conviction was well founded and the sentences were lawful. This appeal is dismissed.”

14. Aggrieved by the decision of the High Court, the appellant filed a memorandum of appeal and supplementary memorandum of appeal with the main complaints being that; the High Court erred in law and in fact by finding that the prosecution had proved the ingredients of the main counts preferred; and, by failing to find that the sentences meted out on him were too harsh and excessive in the circumstances. The appellant sought to have the appeal allowed and the convictions and sentences imposed on him set aside.
15. The appeal proceeded by way of written submissions with limited oral highlighting. It was the appellant's submission that the offence of robbery with violence was not proved beyond reasonable doubt, as the respondent failed to adduce compelling evidence to establish the essential ingredients of the offence. That the testimony of the complainant was that the appellant brandished a knife and threatened to kill her if she did not stop screaming. It was her further testimony that the appellant proceeded to rape her and at some point, she pleaded with him to stop which he did and sat beside her and began chatting. That at no point did she mention that the appellant used any violence on her. In any case, it was highly unlikely that violence was visited upon her given that the appellant's interaction with her appears to have been cordial enough to the extent that they chatted while seated side by side. Further, it was submitted that there was no corroboration whatsoever from the respondent that the appellant was armed. That in the absence of proof of the fact of being armed with a dangerous weapon and using the same on the complainant meant that the requisite ingredients of robbery with violence were not proved beyond reasonable doubt as stated in the case of *Republic v Ismail Hussein Ibrahim* [2018] eKLR. Surprisingly, the appellant limited his submissions on the conviction and sentence on the offence of robbery with violence only and said nothing regarding the offence of rape. We shall therefore not consider this aspect in this appeal.
16. On the second issue, the appellant submitted that though he inadvertently failed to mitigate, the respondent confirmed that he did not have any previous criminal record and he was therefore a first-time offender. He relied on the cases of *Paul Njoroge Ndungu v Republic* [2021] eKLR, and *Gilbert Kipkoeb Cheluiyot v Republic* [2020] eKLR for the proposition that given that the complainant was



not injured during the alleged robbery incident, the items allegedly stolen being of modest value the death penalty imposed by the trial Court and upheld by the High Court was too harsh and excessive.

17. On its part, the respondent submitted that the two courts below rightly found that the evidence of the complainant was one of recognition and not identification of a stranger since the complainant had known the appellant before and given the lighting and considerable amount of time they spent together, his recognition could not have been mistaken. Contrary to the appellant's submissions that the prosecution did not prove its case against the appellant, it was submitted that the witnesses that were called and especially the complainant proved the offence beyond reasonable doubt. While relying on the case of *David Njoroge Macharia v Republic* [2011] eKLR the respondent submitted that the grounds raised in the memorandum of appeal were factual matters. This being a second appeal, it was submitted that we should only entertain points of law and eschew consideration of matters of fact or interfere with the concurrent findings of the two courts below.
18. Having carefully considered the record in light of the rival submissions set out above and the principles of law relied upon by the respective parties; the issues of law that fall for our determination are as raised in the supplementary grounds of appeal, whether the offence was proved to the required standard and excessive nature of the sentence imposed if at all.
19. 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.

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(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.”

20. From the above, it is clear that the offence of robbery with violence is committed when robbery is proved and further if any one of the following three ingredients are established:
 - i. The offender is armed with any dangerous or offensive weapon or instrument, or
 - ii. The offender is in the company of one or more other person or persons, or
 - iii. The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person.

These elements of the offence were set out by this Court in the case of *Oluoch v Republic* [1985] KLR 549. We hasten to add that any one of the above elements if proved, are sufficient to find a conviction. That is to say, the three elements of the offence are to be read disjunctively and not conjunctively. See *Dima Denge Dima & Others v Republic*, Criminal Appeal No. 300 of 2007. The appellant submits that the respondent did not demonstrate to the required standard that he was armed with a dangerous and offensive weapon or instrument and that he used violence on her. In the premises, the respondent did not satisfy the requisite ingredients of the offence.



21. From the evidence of PW3, the complainant had an injury on the leg which was inflicted by the appellant. The injury was confirmed by PW4 who testified that the complainant had bruises on her left knee and had been raped. The complainant also testified that the appellant was armed with a knife with which he threatened her. In the circumstances of this case, the knife was a dangerous and offensive weapon or instrument. The facts of the case are quite clear as laid out in the judgments of the two courts below. Using the knife, he violently robbed the complainant of her bag which contained money and other items and ran away. It is obvious that the ingredients of the offence were met. Further, the act of raping the complainant was in itself a violent act. Accordingly, the prosecution proved beyond reasonable doubt that; (i) the appellant was armed with a dangerous and offensive weapon being a knife and (ii) at or immediately before or immediately after the time of the robbery he wounded, beat, struck, rape or used other personal violence on the complainant.
22. The appellant seems to suggest that he was not properly identified or recognized during the commission of the offence. The importance of identification of an accused in any criminal case was reiterated by this Court in the case of *Suleiman Kamau Nyambura v Republic* [2015] eKLR thus: -
- “In addition, and what is crucial in a criminal trial is also the requirement to prove in addition to there being one of the set-out ingredients of robbery with violence is the need to positively identify the assailant/s in question.”
23. In the present case, the complainant informed the court that she recognized the appellant during the commission of the offence as he was a person she knew very well as he used to smoke cigarettes and share drinks with her husband, PW3 they would usually meet while going to work. She even knew the name of the appellant. In the recognition of the appellant, she was aided by the lights of the vehicles that were passing by. Further, during the commission of the offence and in particular after the first rape, the appellant chattered away with the complainant in close proximity for considerable period of time telling her how he had always wanted to sleep with her. This enabled her to even recognize the appellant by his voice.
24. It is trite that identification by recognition is more assuring than identification of a stranger as held by this Court in the case of *Anjononi & 2 Others v Republic* [1980] eKLR. The court stated that:
- “This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in *Siro Ole Giteya v Republic* (unreported).”
25. However, even in instances where identification is by way of recognition, it is still paramount that the court warns itself on the dangers of relying on visual identification or recognition. This Court in *Cleophas Otieno Wamunga v Republic* (KLR) 424 held that:
- “..where the only evidence against a defendant is evidence of 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 possibility of error before it can safely make it the basis of a conviction.”
26. We have looked at the evidence before the trial court and the High Court and given what we have stated above, we are satisfied that the concurrent findings by both courts that the appellant was recognized by the complainant at the scene of crime cannot be faulted. Both courts properly warned themselves of



the danger of relying on the evidence of a single identifying witness. We say so whilst being aware that from the record and the evidence by the complainant, there were no other factors that were present which the court was bound to consider but did not. This has been restated by this Court in the case of *Shadrack Shuatani Omwaka v Republic* [2020] eKLR where while discussing the identification of an assailant at night cited with approval the decision of the Supreme Court of Uganda in *Abdulla Nabulere and Another v Uganda* Criminal Appeal No. 9 of 1978 (unreported) where the court held as follows:

“....Apart from light during the incident, and familiarity of the assailant to the victim, other factors, such as distance between them, the length of time the victim had to observe and even the opportunity to hear the assailant are factors to look out for.

....

All these factors go to the quality of the identification evidence. If the quality is good the danger of mistaken identity is reduced but the poorer the quality the greater the danger. When the quality is good as for example, when the identification is made after a long period of observation, or in satisfactory conditions by a person who knew the accused before, a Court can safely convict even though there is no other evidence to support the identification evidence, provided the Court adequately warns itself of the special need for caution.”

27. As regards the sentence, the appellant was sentenced to death on Count I and 10 years imprisonment on Count II. These sentences were upheld by the High Court as being lawful given the circumstances. Death sentence is still lawful in Kenya and may be imposed where circumstances so deserve.
28. The appeal before us reveals that the complainant before being robbed was raped by the appellant and not once but twice. He used force and knife and injured the complainant on the knee. The appellant suggests that the fact that they were at the scene chatting meant that the complainant was commiserating with him and that given that what was stolen was of little value in the circumstances did not warrant death penalty. This case does not benefit from the celebrated case of *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR commonly known as Muruatetu 1 as on July 6, 2021 the Supreme Court in *Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 others (Amicus Curiae)* (2021) eKLR hereinafter “Muruatetu II” directed as follows:

“To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under section 40(3), robbery with violence under section 296(2), and attempted robbery with violence under section 297(2) of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases.”

29. Having said as much, we are not convinced that the appellant’s submissions on the sentence are noteworthy. We accordingly find nothing that can cause us to disturb the judgment of the 1st appellate court in its entirety. The appeal on both conviction and sentence is in the premises dismissed.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

S. OLE KANTAI

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

